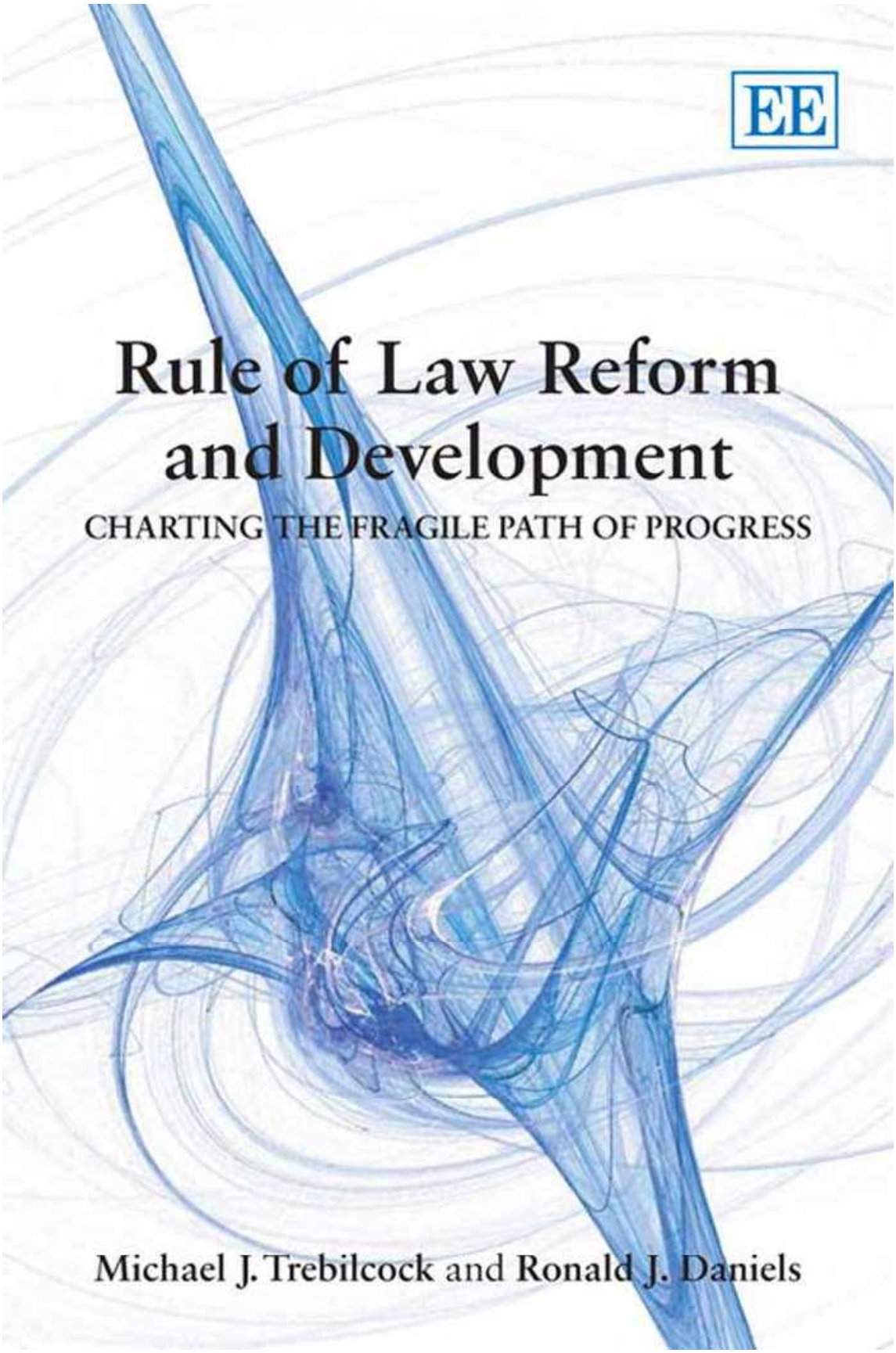
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Rule of Law Reform and Development
CHARTING THE FRAGILE PATH OF PROGRESS
Michael J. Trebilcock and Ronald J. Daniels

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Charting the Fragile Path of Progress

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1. The relationship of the rule of law to development

I. THE RULE OF LAW AND DEVELOPMENT

According to Thomas Carothers,

> One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles. The concept is suddenly everywhere – a venerable part of western political philosophy enjoying a new run as a rising imperative of the era of globalization. Unquestionably, it is important to life in peaceful, free, and prosperous societies. Yet its sudden elevation as a panacea for the ills of countries in transition from dictatorships or statist economies should make both patients and prescribers wary. The rule of law promises to move countries past the first, relatively easy phase of political and economic liberalization to a deeper level of reform. But that promise is proving difficult to fulfill.[1]

In a similar vein, Yves Dezalay and Bryant Garth claim that "the rule of law has become a new rallying cry for global missionaries. Money doctors selling competing economic expertises continue to be very active on the global plain but the 1990s also witnessed a tremendous growth in rule doctors armed with their own competing prescriptions for legal reforms and new legal institutions at the national and transnational level ... So far the rule of law industry cannot claim too many successes in the latest campaign."[2]

According to Brian Tamanaha,

> For all but the most sanguine observers, the triumphalist confidence of the 1990s has dissolved ... Amidst this host of new uncertainties there appears to be widespread agreement, traversing all fault lines, on one point, and one point only: that the "rule of law" is good for everyone ... This apparent unanimity in support of the rule of law is a feat unparalleled in history. No other single political ideal has ever achieved global endorsement ... Notwithstanding its quick and remarkable ascendance as a global ideal, however, the rule of law is an exceedingly elusive notion ...

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[1] Thomas Carothers, "The Rule of Law Revival" (1998) 77 *Foreign Affairs* 95.

[2] Yves Dezalay and Bryant Garth (eds), *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (Ann Arbor, MI: University of Michigan Press, 2002) Introduction.

> If it is not already firmly in place, the rule of law appears mysteriously difficult to establish.[3]

Reflecting this new orthodoxy, in the 1990s there was a massive surge in development assistance for law reform projects in developing and transition economies involving investments of many billions of dollars. The World Bank alone reports that it has supported 330 "rule of law" projects and spent $2.9 billion on this sector since 1990.[4]

This book addresses a number of key issues regarding the relationship between the rule of law and development. First, whom do we include in our universe of developing countries? The World Bank classifies countries as low income, lower-middle income, upper-middle income, and high income countries by reference to per capital gross national income. More than 100 countries with populations in excess of 30,000 fall into the first three categories. Other classifications are obviously possible. For example, beginning in 1990 the United Nations Development Program (UNDP) has published an annual Human Development Index (HDI) that classifies countries according to their level of human development, which includes variables relating to per capita income, health, and educational status, and in many cases yields significantly different ratings or rankings than classification systems that focus exclusively on per capita gross national income.[5]

Todaro and Smith, in a widely respected economic development treatise (now in its ninth edition),[6] rightly caution against over-generalizations in assuming a common set of characteristics of developing countries, noting that developing countries exhibit marked diversity along at least the following dimensions:

1. the size of the country (geographic area, population, and national income)
2. its historical and colonial background
3. its endowment of physical and human resources
4. its ethnic and religious composition
5. the relative importance of its public and private sectors (and informal sectors)

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[3] Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge and New York: Cambridge University Press, 2004) at 1, 3, 4.

[4] See David Trubek, "The Rule of Law in Development Assistance: Past, Present and Future," in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge and New York: Cambridge University Press, 2006) at 74.

[5] See Michael Todaro and Stephen Smith, *Economic Development* (Boston, MA and Toronto: Addison Wesley, 9th edn, 2006) at 57–63.

[6] *Op. cit.* at 37–46.

6. the nature of its industrial structure
7. its degree of dependence on external economic and political forces
8. the distribution of power in the institutional and political structure within the nation.

While recognizing the importance of this caveat against over-generalization, again drawing principally on Todaro and Smith,[7] certain characteristics are common to many developing countries. First, for many developing countries, very low income levels and high levels of absolute poverty are often common. Over 80% of the world's total income is produced in the economically developed countries by about 15% of the world's people. The collective per capita incomes of the low and middle-income countries average less than one-twentieth of per capita incomes of rich nations. The average income in the richest 20 countries is 37 times the average of the poorest 20 – a gap that has doubled in the past 40 years.[8] Of the world's 6 billion people, 2.8 billion – almost half – live on less than two dollars a day, and 1.2 billion – a fifth – live on less than one dollar a day. While the proportion of the population in developing countries living in absolute poverty has declined significantly in recent years, population growth has meant that the estimated number of absolutely poor people has remained largely unchanged. With respect to health, life expectancy for the least developed countries at the end of the 1990s, despite improvements, still averages only 48 years compared to 63 years in other developing countries, and 75 years in developed countries. Infant mortality rates (the number of children who die before their first birthday out of 1,000 live births) average about 96 in the least developed countries, compared to approximately 64 in other developing countries, and eight in developed countries. Specific health problems have also had a dramatically disproportionate impact on developing countries. For example, with respect to HIV/AIDS, of the 36 million who have contracted HIV/AIDS, 90% live in developing countries, almost 20 million in sub-Saharan Africa. With respect to education, among the least developed countries, literacy rates average only 45% of the population compared to 64% in other developing countries and 99% in developed countries. The vast majority of people in most developing countries live and work in rural areas. Sixty-two percent of the labour force in developing countries is engaged in agriculture compared to only 7% in developed countries. While since 1972 the number of (nominal) democracies in the world has increased from about 40 to over 100, a number of these are fragile, shallow or corrupt: Carothers

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[7] Todaro and Smith, *op. cit.*, 46–57.

[8] See World Bank, *Attacking Poverty*, World Development Report 2001, at p. 3.

judges that fewer than 20 of these countries are clearly en route to becoming successful, well-functioning democracies.[9]

These highly selective statistics are sufficient to provide a sense of the challenges facing individuals, communities, public and private sector institutions (for profit and non-profit), and the international community in mitigating the devastating economic and social consequences of these disparities in human well-being.

Second, what do we mean by "development"? In the early post-war decades, international economic institutions such as the World Bank and the International Monetary Fund, and many bilateral aid agencies, tended to focus exclusively or predominantly on economic measures of development such as GDP per capita and growth thereof. These measures of development have attracted increasing criticism from many quarters. For example, Amartya Sen, in his book, *Development as Freedom*,[10] argues that a full conception of development embraces a wide range of dimensions of human well-being that bear on the capabilities of individuals to live lives they have reason to value, including (1) political freedoms; (2) economic facilities; (3) social opportunities; (4) transparency guarantees; and (5) protective security. The United Nations Human Development Index, noted above, has attempted to address some of these criticisms by developing an index that includes not only economic measures of development but measures of health and educational status. More recently (1999), the former President of the World Bank, James Wolfensohn, proposed a Comprehensive Development Framework that incorporated a wide range of economic and social indicators of human well-being.

Third, what is the role of the rule of law in development? As we elaborate in the next section of this chapter, the claim that the robustness of a country's commitment to the rule of law is an important determinant of its development trajectory rests upon both instrumental foundations and on intrinsic or deontological foundations.[11] The instrumental perspective is strongly represented in the writings and research of economists associated with the school of so-called New Institutional Economics, which emphasizes that the protection of private property rights and the facilitation and enforcement of long-term contracts are essential to raising levels of investment and rates of economic growth.[12] In the end, this is an empirical claim, which is not uncontentious, with skeptics point-

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[9] Thomas Carothers, "The End of the Transition Paradigm," (2002) 13 *Journal of Democracy* 5–21.

[10] Amartya Sen, *Development as Freedom* (New York: Knopf, 1999).

[11] See Alvaro Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development," in Trubek and Santos (eds), *op. cit.* at 256–66.

[12] See e.g. Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1992); Kenneth Dam, *The Law-Growth Nexus:*

ing to the economic success of China and other high-performing Asian economies with weak rule of law traditions.[13] However, it needs to be added that protection of private property and contractual and tortious rights can also be supported on deontological, e.g., corrective justice, grounds.[14] From a deontological perspective, such as that adopted by Sen, where freedom, in its various dimensions, is both the end and means of development, various freedoms, such as freedom from torture and other abuses of civil liberties by tyrannical rulers, freedom of expression, freedom of political association, freedom of political opposition and dissent, are defining normative characteristics of development; the rule of law, to the extent that it guarantees these freedoms, has an intrinsic value, independent of its effect on various other measures of development and does not need to be justified solely in instrumental terms, although a commitment to protecting these freedoms may also coincidentally serve important instrumental functions.[15]

Just as the normative conception of development has evolved from narrow economic measures of development to embrace a wide range of economic and social indicators of human well-being, a parallel process of evolution has occurred in many development circles as to effective development strategies and the role of institutions, both domestic and international, in the formulation and effectuation of these strategies.[16] Early post-war development strategies emphasized the importance of the capital investment process in promoting development and often assumed a catalytic role for the state in developing countries in facilitating or even undertaking in many circumstances the capital investment function. As Pranah Bardhan remarks, in these theories of development "the state was often left floating in a behavioural and institutional

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The Rule of Law and Economic Development (Boston: Brookings Institution Press, 2006).

[13] See e.g. Tom Ginsburg, "Does Law Matter for Economic Development? Evidence from East Asia" (2000) 34 *Law and Society Review* 829; Graham Mayeda, "Appreciate the Difference: Different Domestic Norms in Law and Development Reform: Lessons from China and Japan" (2006) 51 *McGill Law Journal* 547; Randall Peerenboom (ed.), *Asian Discourses of Rule of Law* (London: Routledge, 2004); Michael Trebilcock and Jing Leng, "The Role of Formal Contract Law and Enforcement in Economic Development" (2006) *Virginia Law Review* 1517.

[14] See Ernest Weinrib, "The Intelligibility of the Rule of Law," in Allan Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1986).

[15] See Amartya Sen, "What is the Role of Legal and Judicial Reform in the World Development Process?," World Bank Legal Conference, Washington, DC, June 5, 2000.

[16] Todaro and Smith, *op. cit.*, chap. 4; William Easterly, *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics* (Cambridge, MA: MIT Press, 2001).

vacuum."[17] A sharply divergent perspective on development strategies was adopted in some developing countries in response to the disappointments and failures of immediate post-war development strategies, loosely grouped under the rubric of dependency theories, which assigned an even more prominent, indeed even more heroic, role to the state than did early development theories, and in many cases adopted socialist forms of central planning, a heavy reliance on state ownership and state regulation of the economy, and relative insulation from the international economy through import substitution policies and extensive restrictions on foreign investment. Partly in reaction to the disappointments or failures of state-led growth development strategies, in the 1980s official development circles embraced a much more limited role for the state, reflecting economic liberalization policies then enjoying wide currency in many developed countries. On this perspective, the state, in many developing countries, was not the solution to the challenges of development, but in many respects the problem. Hence, an emphasis on prudent macroeconomic policies, domestic deregulation, and international economic liberalization with respect to trade and foreign investment policies (the so-called Washington Consensus).

Beginning in the early 1990s, the focus on development strategies has shifted, in important respects, to issues of domestic governance. Implicitly rejecting both the expansive role for the state in development propounded by early development theorists and the minimalist role for the state in development espoused by many proponents of the so-called Washington Consensus, proponents of the relationship between governance and development accept that in developing countries (as in developed countries) even on a limited view of the role of the state, the state is indispensable in formulating and implementing a wide range of economic and social policies that bear on human well-being, and that failures of governance in many developing countries are an important explanation for many of the characteristics of low levels of development cited above.[18]

The overall tenor of this perspective can be captured by examining one particularly influential study entitled, "Governance Matters." This study was undertaken by Kaufmann, Kraay, and Zoido-Lobatón, all of whom are affiliated with the World Bank, as part of the World Bank's ongoing research on governance, which has been updated on a regular basis.[19] The World Bank's Governance

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[17] Pranah Bardhan, "Introduction to the Symposium Issue of the State and Economic Development" (1990) 4 *Journal of Economic Perspectives* 3.

[18] For historical perspectives on the role of the state in development, see contributions by David Trubek and David Kennedy in David Trubek and Alvaro Santos (eds), *op. cit.*

[19] Daniel Kaufmann, Aart Kraay, and Pablo Zoido-Lobatón, "Governance Matters" (1999) *World Bank Policy Research Working Papers No. 2196* (available for download

project involves compiling a large number of subjective measures of institutional quality – meaning data obtained from either polls of country experts or surveys of residents – and grouping them into six clusters: "voice and accountability," "political stability," "government effectiveness," "regulatory quality," "rule of law," and "control of corruption." They describe these clusters as follows:

- *Voice and accountability*: Measures the extent to which citizens of a country are able to participate in the selection of governments and combines indicators measuring "various aspects of the political process, civil liberties, political rights" and "the independence of the media."
- *Political stability*: Measures "perceptions of the likelihood that the government in power will be destabilized or overthrown by possibly unconstitutional and/or violent means."
- *Government effectiveness*: Measures the inputs required for the government to be able to produce and implement good policies. Combines "perceptions of the quality of public service provision, the quality of the bureaucracy, the competence of civil servants, the independence of the civil service from political pressures, and the credibility of the government's commitment to policies."
- *Regulatory quality*: Includes "measures of the incidence of market-unfriendly policies such as price controls or inadequate bank supervision as well as perceptions of the burdens imposed by excessive regulation in areas such as foreign trade and business development."
- *Rule of law*: Includes measures of "the extent to which agents have confidence in and abide by the rules of society. These include perceptions of the incidence of both violent and non-violent crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts."
- *Control of corruption*: Measures perceptions of corruption, ranging from the frequency of "additional payments to get things done" to the effects of corruption on the business environment. Corruption is defined as "the exercise of public power for private gain."

The authors of "Governance Matters" created indexes that measure institutional quality along each of these six dimensions as well as a composite

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on http://www.worldbank.org/research); "Rethinking Governance: Empirical Lessons Challenge Orthodoxy," World Bank, Discussion Draft, March 11, 2002, see also Kaufmann, Kraay, and Massimo Mastruzzi, "Governance Matters IV: Governance Indicators for 1996–2004" (World Bank, May 2005); "Governance Redux: The Empirical Challenge," in Xavier Sala-i-Martin et al. (eds) *The Global Competitiveness Report 2003–2004, World Economic Forum & Harvard University* (New York: Oxford University Press, 2004); "Governance Indicators for 1996–2006" (World Bank, May 2007).

"governance" index designed to measure the overall quality of governance in a society. They then regressed these three measures of development: per capita GDP, infant mortality and adult literacy on these indices. They found strong correlations and indeed causation between each of their sub-indices of institutional quality, including the rule of law index, as well as a composite governance index, and their measures of development; hence their conclusion that "Governance Matters." In a more recent iteration of this work, Kaufmann reports:

> The effects of improved governance on income in the long run are found to be very large, with an estimated 400 percent improvement in per capita income associated with an improvement in governance by one standard deviation, and similar improvements in reducing child mortality and illiteracy. To illustrate, an improvement in rule of law by one standard deviation from the current levels in Ukraine to those "middling" levels prevailing in South Africa would lead to a fourfold increase in per capita income in the long run. A larger increase in the quality of the rule of law (by two standard deviations) in Ukraine (or in other countries in the former Soviet Union), to the much higher level in Slovenia or Spain, would further multiply this income per capita increase. Similar results emerge from other governance dimensions: a mere one standard deviation improvement in voice and accountability from the low level of Venezuela to that of South Korea, or in control of corruption from the low level of Indonesia to the middling level of Mexico, or from the level of Mexico to that of Costa Rica, would also be associated with an estimated fourfold increase in per capita incomes, as well as similar improvements in reducing child mortality by 75 percent and major gains in literacy.[20]

Drawing on the Kaufmann *et al.* data, Rodrik, Subramanian and Trebbi, in a recent paper, "Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development,"[21] estimate the respective contributions of institutions, geography, and international trade in determining income levels around the world. The authors find that the quality of institutions "trumps" everything else. Once institutions are controlled for, conventional measures of geography have at best weak direct effects on income, although they have a strong indirect effect by influencing the quality of institutions. Similarly, once institutions are controlled for, trade is almost always insignificant except for indirect effects on institutions. In their study, the authors use a number of elements that capture the protection afforded to property rights as well as the strength of the rule of law. To convey a flavour of the striking nature of their

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[20] Daniel Kaufmann, "Governance Redux: The Empirical Challenge" (Washington DC: World Bank, 2004) at 14.

[21] Dani Rodrik, Arvind Subramanian, and Francesco Trebbi, "Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development" (2004) 9 *Journal of Economic Growth* 131.

findings, the authors find that an increase in institutional quality of one standard deviation, corresponding roughly to the difference between measured institutional quality in Bolivia and South Korea, produces a two log points rise in per capita incomes, or a 6.4-fold difference – which, not coincidentally, is also roughly the income difference between the two countries.

In another recent paper,[22] Fukuyama, in a brief review of some of the empirical literature on determinants of economic development, concludes: "I believe that the institutionalists have won this argument hands down."

However, this said, there are several reasons why these cross-country statistical analyses should be interpreted with some caution. To begin with, even taking their results at face value, these studies reveal only imperfect correlations between legal and development-related variables. Even studies that find strong and statistically significant correlations between the rule of law and measures of development typically find that there are a number of countries whose level of development lies quite some distance – in either direction – away from the level that would be predicted by its rule of law score. The amount of unexplained variation in these studies leaves one to wonder about the importance of legal variables as opposed to other explanatory variables. It is also worth noting that many of these cross-country studies adopt narrow readily quantified measures of development, leaving themselves open to charges of placing undue emphasis upon economic conceptions of development as opposed, for example, to conceptions that place more emphasis upon factors such as freedom or environmental quality.

There are also reasons not to take the results of these studies at face value. Serious concerns have been raised about the reliability of the legal data upon which these studies rely, especially since it typically consists of subjective assessments, by either experts or selected members of society, of the quality of legal systems. One potential problem with these assessments is that they may be tainted by the assessors' knowledge of the development performance of the surrounding society. This raises the distinct possibility that positive perceptions of legal systems may be the consequence rather than the cause of development. There is also concern that subjective assessments may be unreliable in the sense of failing to have a consistent meaning across countries and over time. This sort of reliability is difficult to ensure when one relies upon surveys of people who have information on only one legal system at a particular point in time. Relying upon assessments by experts charged with evaluating a number of legal systems over time may be a way of avoiding this concern, but this approach raises concerns about the quality of the information possessed by the experts.

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[22] Francis Fukuyama, "Development and the Limits of Institutional Design," Global Development Network, St Petersburg, Russia, January 20, 2006 at 3.

Perhaps even more important than the question of reliability, however, is the question of the *validity* of the legal data being used in these cross-country studies. There is reason to doubt whether the data being used in many of these studies measures the characteristics of legal rather than non-legal features of the societies in question. Take, for example, the rule of law variables that many studies have found to be positively correlated with various indicia of development. The typical inference is that the quality of legal institutions causally influences development by determining the degree of respect for the rule of law. But what exactly does the rule of law variable measure? In most studies the rule of law appears to be measured in part by reference to the characteristics of legal institutions and in part by reference to the extent of compliance with the law. Ideally, however, these measures would be distinguished because levels of compliance with the law in any given society need not be connected to characteristics of the society's legal system. Widespread compliance with the law might signify that a society possesses potent legal norms, but it might also signify that the society possesses potent informal mechanisms that facilitate the enforcement of legal norms or potent non-legal norms whose content happens to overlap with that of legal norms or the absence of social or economic factors that tend to induce lawbreaking. For example, low rates of violent crime in a given society might reflect the existence of harsh criminal laws; or a large police force; or a population that is particularly willing to report crimes, appear as witnesses in legal proceedings or shun offenders; or an unusually dedicated police force; or, the fact that a large proportion of the population has deep ethical commitments to non-violence; or, the absence of economic inequality; or geographical circumstances that are unfavourable to the production or transshipment of illegal narcotics. As it stands, therefore, countries that score well on rule of law indices that are based at least in part upon rates of compliance with the law may be scoring highly for reasons that have little to do with the "strength" of their legal system.

Moreover, the coarse-grained nature of the data employed in these cross-country statistical studies provides very little traction on which design features of given classes of institutions that are causally related to particular development outcomes are of particular importance. For example, Fukuyama, in the paper noted above, where he concludes that institutionalists have won the argument hands down with non-institutionalists on determinant of developments, also notes that public administration is not a science susceptible to formalization under a set of universal rules and principles[23] and that macro-political institutions also are not susceptible to characterization in terms of optimal formal

[23] See also Francis Fukuyama, *State-Building: Governance and World Order in the 21st Century* (Ithaca, NY: Cornell University Press, 2004).

political arrangements. Rather, the full specification of a good set of institutions will be highly context-dependent, will change over time, and will interact with the informal norms, values and traditions of the society in which they are embedded.

Similarly, Rodrik, Subramanian and Trebbi, in the paper cited above, despite its perhaps triumphalist title, actually reach rather salutary, perhaps even sobering, conclusions:[24]

> How much guidance do our results provide the policy-makers who want to improve the performance of their economies? Not much at all. Sure, it is helpful to know that geography is not destiny, or that focusing on increasing the economy's links with world markets is unlikely to yield convergence. But the operational guidance that our central result on the primacy of institutional quality yields is extremely meager ...
>
> We illustrate the difficulty of extracting policy – relevant information from our findings – using the example of property rights. Obviously, the presence of clear property rights for investors is a key, if not *the* key, element in the institutional environment that shapes economic performance. Our findings indicate that when investors believe their property rights are protected, the economy ends up richer. But nothing is implied about the actual form that property rights should take. We cannot even necessarily deduce that enacting a private property rights regime would produce superior results compared to alternative forms of property rights ...
>
> There is growing evidence that desirable institutional arrangements have a large element of context specificity, arising from differences in historical trajectories, geography, political economy, or other initial conditions ... This could help explain why successful developing countries – China, South Korea, and Taiwan among others – have almost always combined unorthodox elements with orthodox policies. It could also account for why important institutional differences persist among the advanced countries of North America, Western Europe and Japan – the role of the public sector, the nature of the legal systems, corporate governance, financial markets, labour markets, and social insurance mechanisms among others ...
>
> Consequently, there is much to be learned about what improving institutional quality means on the ground. This, we would like to suggest, is a wide open area of research. Cross-national studies are at present just a beginning that point us in the right direction.

Finally, in a similar vein, in a recent paper, "Institutions and Development: A View from Below,"[25] Rohini Pande and Christopher Udry state:

> Recent years have seen a remarkable and exciting revival of interest in the empirical analysis of how a broad set of institutions affects growth. The focus of the recent

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[24] Rodrik *et al.*, *supra* note 21 at 157–8.

[25] Rohini Pande and Christopher Udry, "Institutions and Development: A View from Below," Economic Growth Center, Yale University, November 18, 2005 at 1–3, available at http://ssrn.com/abstract=864044.

> outpouring of research is on exploiting cross-country variation in "institutional quality" to identify whether a causal effect runs from institutions to growth. These papers conclude that institutional quality is a significant determinant of a country's growth performance.
>
> These findings are of fundamental importance for development economists and policy practitioners in that they suggest that institutional quality may cause poor countries and people to stay poor. However, the economic interpretation and policy implications of these findings depend on understanding the specific channels through which institutions affect growth, and the reasons for institutional change or the lack thereof ... However, we argue that this literature has served its purpose and is essentially complete. The number of variables available as instrumental variables is limited, and their coarseness prevents close analysis of particular causal mechanisms from institutions to growth ... This suggests that the research agenda identified by the institutions and growth literature is best furthered by the analysis of much more micro-data than has typically been the norm in this literature.

The authors go on to illustrate the importance of this micro-perspective by describing property rights in land in four African countries (Gambia, the Democratic Republic of Congo, Ghana and Côte d'Ivoire), emphasizing the importance of the distinction between *de jure* and *de facto* land rights, the importance of customary law, the heterogeneity of land rights even within countries, and the intertwining of political and contractual institutions.

Thus, while empirically there appears to be an increasingly firm consensus that institutions, including legal institutions, are an important determinant of economic development (and probably other aspects of development), there is much less consensus on what an optimal set of institutions might look like. Optimal institutions generally, including legal institutions in particular, will often be importantly shaped by factors specific to given societies, including history, culture, political traditions and institutional culture. This in turn implies some degree of modesty on the part of the external community in promoting rule of law or other legal reforms in developing countries and correspondingly a larger role for "insiders" with detailed local knowledge.[26]

II. DEFINING THE RULE OF LAW

Even if the rule of law is a key factor in development, a key threshold question must be addressed: what is it that we mean by "rule of law"? In the development context, even those writers who purport to find near universal support for the "rule of law," acknowledge great uncertainty about what it is, precisely,

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[26] For an eloquent and persuasive articulation of the importance of local knowledge, see James C. Scott, *Seeing like a State* (New Haven, CT: Yale University Press, 2002).

that is universally supported.[27] For example, Rachel Kleinfeld, in a recent essay,[28] states: "Read any set of articles discussing the rule of law, and the concept emerges looking like the proverbial blind man's elephant – a trunk to one person, a tail to another. In fact, the phrase is commonly used today to imply at least five separate meanings or end goals." She identifies these as: (1) Government bound by law; (2) Equality before the law; (3) Law and order; (4) Predictable efficient justice; (5) Lack of state violation of human rights. She goes on to argue that conceptual confusion has further arisen because practitioners working to build the rule of law abroad have developed an entirely different way of looking at the concept, based not on end goals but on institutions to be reformed.

Matthew Stephenson, in an essay in the same volume, on the rule of law in China,[29] notes that one academic China law expert put the point bluntly: "'Rule of law has no meaning. Everyone uses the phrase because everyone can get behind it and it might make it easier to get funding.' Another scholar states: 'The rule of law means whatever one wants it to mean. It is an empty vessel that everyone can fill up with their own vision.' This ambiguity serves a very clear political purpose, stated explicitly by one State Department official: 'The beauty of the rule of law is that it's neutral. No one – the human rights community, the business community, the Chinese leadership – objects to it.'"[30]

According to Tamanaha, in a recent insightful intellectual history of the rule of law:

> Some believe that the rule of law includes protection of individual rights. Some believe that democracy is part of the rule of law. Some believe that the rule of law is purely formal in nature requiring only that laws be set out in advance in general, clear terms, and be applied equally to all. Others assert that the rule of law encompasses "the social, economic, educational, and cultural conditions under which man's legitimate aspirations and dignity may be realized" ... "There are almost as many conceptions of the rule of law as there are people defending it."[31]

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[27] Adam Bouloukos and Brett Dakin, "Toward a Universal Declaration of the Rule of Law: Implications for Criminal Justice and Sustainable Development" (2001) 42 *International Journal of Comparative Sociology* 145 at 157–8, 146. See also Richard H. Fallon Jr., "The Rule of Law as a Concept in Constitutional Discourse" (1997) 97 *Columbia Law Review* 1–56.

[28] Rachel Kleinfeld, "Competing Definitions of the Rule of Law," in Thomas Carothers (ed.), *Promoting the Rule of Law: In Search of Knowledge* (Carnegie Endowment for International Peace, 2006) at 32.

[29] Matthew Stephenson, "A Trojan Horse in China," in Carothers (ed.), *op. cit.* at 196.

[30] See also Randall Peerenboom, "Varieties of Rule of Law," in Peerenboom (ed.), *Asian Discourses of Rule of Law* (London: Routledge, 2004).

[31] Tamanaha, *On the Rule of Law*, *supra* note 3, at p. 3.

In this book, we employ and defend what we have termed a *procedural definition* of the rule of law in terms of optimal institutional arrangements. In order to understand what is distinctive about this definition, it is helpful to begin by situating it in the broader literature on the rule of law, and by contrasting our definition with other plausible alternatives that have been proposed. We will begin with a brief discussion of the emergence of the rule of law as a discrete subject of political thought. We will then identify, and critique, what we will call the "thick" and "thin" approaches to theorizing the rule of law. These critiques will serve to inaugurate a defence of a "thinner" (though not merely "thin") approach to the rule of law from a modern liberal perspective, and prefigure the elaboration of our "procedural" definition in greater detail.

A. The Rule of Law as a Subject of Political Thought

As Raz suggests, the idiom of the "rule of law" itself is a simple one, meaning precisely what it says: "that people should obey the law and be ruled by it."[32] As he goes on to point out, "in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it. ... Actions not authorized by law cannot be the actions of the government as a government."[33]

It is interesting, however, to note that the political philosophers of the French and English Enlightenments did not treat the rule of law and the nature of government as discrete issues. In Hobbes's *Leviathan*, for instance, the law is nothing less than the very embodiment of the will of the Sovereign – and hence inseparable from questions of government. According to Locke, law is both those rules to which we bind ourselves through the social contract and those rules formulated by the sovereign in accordance with that contract. The origin of the law and the origin of the state are one and the same. For Montesquieu, the law is a vast and protean category, comprising not only the positive law but also the principle of justice preceding man-made law, as well as natural laws governing the relations between human beings and states. His theory does not sensibly distinguish between principles of government and principles of law. While it is customary to speak of these theorists' conceptions of the "rule of law," this is largely a term of art, applied retrospectively. In fact, many, if not most, of the most influential figures in political thought from Machiavelli to Burke held legal theory inseparable from personal and political ethics, as well as from the rules of skilled statecraft.

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[32] Joseph Raz, *The Authority of Law, Essays on Law and Morality* "The Rule of Law and its Virtue," (Clarendon Press: Oxford, 1979) p. 212.

[33] *Id.*

One of the first and most influential theorists to contest the omnipotence of the Sovereign was Rousseau, who assumed, as basic to a good political system, the abolition of the monarchy and its replacement with a populist parliamentary system of government.[34] Essential to this system was a set of overriding conventions for the translation of legislative pronouncements into executive action: laws binding on parliamentary government, or what we might latterly call a constitution. Rousseau asserted that only the "legal state,"[35] one predicated on the supremacy of made law, could assure justice and liberty in the context of delegated authority. Henceforth, populist democracy became closely associated with the stipulation that made law have a certain irrevocable authority ("rule") over government, an association seized upon by Payne, Hamilton and Madison and enshrined in the constitutions of post-revolutionary America and France. As Posner points out, the sense of the rule of law important to "the struggle of the English and later the Americans against royal tyranny, is that the officials in a society, the 'rulers,' are subject to law, rather than having unfettered discretionary power."[36]

The phrase "rule of law" itself is attributable to the British jurist Albert Venn Dicey, whose 1885 *Introduction to the Study of the Law of the Constitution* describes the rule of law as a "feature" of the political institutions of England, apprehensible in two different ways: "[T]hat no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before ordinary courts of the land;"[37] and "that ... every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[38] Though Dicey's definition of the rule of law is principally an attempt to describe certain actual characteristics of the British political system, it has provoked grand speculation about the prospects of the rule of law as a universal value.

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[34] Bob Fine, *Democracy and the Rule of Law* (Caldwell, NJ: Blackburn Press 2002) p. 10. Fine describes the emergence of the study of law as a subject in its own right as the consequence of a complex series of philosophical transformations taking place towards the end of the nineteenth century.

[35] *Id.*, p. 32

[36] Richard Posner, "Constitutional Law From a Pragmatic Perspective" (2005) 55 *University of Toronto Law Journal* 299.

[37] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (London: Macmillan, 1960) p. 187.

[38] *Id.*

B. "Thick" Conceptions of the Rule of Law

Liberals, inspired by the egalitarian and anti-authoritarian properties of the rule of law as articulated by Rousseau, Dicey and others, have been among its most enthusiastic exponents. The association of the rule of law with democracy and liberty has been given radical interpretations by some, often stretching the concept far beyond Dicey's descriptive account and out into strongly prescriptive territory.

Hayek, for instance, favours a "thick" conception comprising certain "universal moral principles,"[39] inherently liberal in character. He links the rule of law to freedom, stating (with little in the way of further argumentation) that "it will readily be seen that whatever form it takes, any ... recognized limitations on the powers of legislation imply the recognition of the inalienable right of the individual, inviolable rights of man."[40] His *The Constitution of Liberty* associates the rule of law not only with America's greatness as one of the first constitutional democracies but, indeed, with freedom itself:

> [W]hen we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. ... Because the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it, the law is not arbitrary.[41]

Even equality, he considers, owes tribute to the rule of law:

> The true contrast to a reign of status is the reign of general and equal laws, of the rules which are the same for all, or, we might say, of the rule of *leges* in the original meaning of the Latin word for laws – *leges*, that is, as opposed to the *privi-leges*.[42]

Of more recent vintage, Sunstein's conception of the rule of law tends towards thickness by advocating the inextricability of the rule of a particular kind of constitutional law from deliberative democracy. On Sunstein's view, not only is the rule of law an inseparable part of the internal morality of deliberative democracy, but this internal morality actually spells out much of the necessary content of the law properly so-called: "constitutional protection of many individual rights, including the right of free expression, the right to vote, the right to political equality, and even the right to private property, for people cannot be

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[39] Michael Neumann, *The Rule of Law* (Burlington, VT: Ashgate, 2002) p. 3.

[40] Friedrich Hayek, *The Road to Serfdom* (London: Routledge and Kegan Paul, 1944) p. 63.

[41] Friedrich Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960) p. 153.

[42] *Id.*, p. 154.

independent citizens if their holdings are subject to unlimited government readjustment."[43]

Even thicker still is Sunstein's stipulation that a democratic constitution must be hostile towards "traditions *as such* ... A democratic constitution makes it more likely that people will look behind traditions in order to see what can be said on their behalf."[44] In such statements, it seems that the rule of law-*qua*-constitution is relied upon to produce not only limited government and a positive program of democratic rights, but also to inure its citizens with one of the tenets of what Barry has called "the liberal outlook;" *viz.*, "the belief that every doctrine should be open to critical scrutiny and that no view should be held unless it has in fact withstood critical scrutiny."[45]

Many contemporary theorists, however, are highly critical of what Raz calls "the promiscuous use made in recent years of the expression 'the rule of law'"[46] to mean, as Hayek, Sunstein and others do, a comprehensive political morality. Shklar, for instance, decries the scourge of "legalism," by which she means "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules."[47] Shklar is critical of legalism's treatment by the legal profession as "the only morality among men," [48] and its transformation into what she calls a "grand or total ideolog[y]."[49]

There is a danger, Shklar argues, in investing legalism – the rule of law – with responsibility for democratic liberalism's other moral values, such as equality and a regime of rights.[50] There is no reason, she maintains, to expect that the rule of law alone will promote "the rule of reason throughout society, or even the legal rule of rights."[51] It is not that the rule of law does not have a place in securing rights and equality. At its very best, its structural solidity makes it a good bulwark against the violation of substantive rights; at the least, it is "quite

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[43] Cass Sunstein, *Democracy's Constitution* (New York: Oxford University Press, 2001) p. 7.

[44] *Id.*

[45] Brian Barry, "How Not to Defend Liberal Institutions," in *Liberty and Justice: Essays in Political Theory 2* (Oxford: Clarendon Press, 1991) p. 24.

[46] Raz, *supra* note 32, p. 211.

[47] Judith Shklar, *Legalism* (Cambridge, MA: Harvard University Press, 1964) p. 1.

[48] *Id.*, p. 2.

[49] *Id.*, p. 4.

[50] For a further discussion of Raz and Shklar on the rule of law in relation to liberalism, see Thom Ringer, "Legalism and its Virtue" (http://users.ox.ac.uk/~ball1843/legalism.pdf).

[51] Judith Shklar, "Political Theory and the Rule of Law," in A. Hutchinson and P. Monahan (eds), *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987) p. 16.

compatible with a strong theory of individual rights."[52] It is, however, misguided to view the law as the source of these values, or as inherently more hospitable to them than to terror and oppression.

Raz frames his critique in similar terms:

> The rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.[53]

As Raz elaborates:

> If the rule of law is the rule of good law, then to explain its nature is to propound a complete social philosophy. But if so, the term lacks any social function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.[54]

At bottom, as Craig notes, the most persuasive claim in Raz's critique is that "the adoption of a fully substantive conception of the rule of law has the consequence of robbing the concept of any function which is independent of the theory of justice which imbues such an account of law."[55] In other words, in claiming that the rule of law consists in the rule of *just* law, the theoretical burden of explaining what is worthwhile about the rule of law is simply shifted from the clause "rule of law" to the qualifier "just;" that is, to the concept of justice.

The dangers of vesting the rule of law with a substantive conception of justice have been considered by numerous commentators. Critics of liberal neutrality, like Barry and Sandel, have noted that it is difficult not to assume too much about what "justice" requires, and even more difficult to resist the surreptitious

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[52] *Id.*, p. 5.

[53] Raz, *supra* note 32, at p. 211.

[54] Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 *Law Quarterly Review* 195 at 195–6.

[55] Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) 16 *Public Law* 16, 487.

insertion of moral content under the guise of the neutral-sounding guise of "justice."[56] As Miller further points out, justice is a radically subjective concept, and amenable to manifold idiosyncratic and sometimes arbitrary interpretations.[57] Thus, by treating any particular conception of justice as universal and self-evident, one may actually be doing violence to democracy.

Waldron has still other reasons for resisting the "thick" conception of the rule of law. He is sceptical of the tendency of the "thick" model's proponents to treat the courts as the best (and sometimes the only) forum for settling highly divisive questions of principle and moral importance. As Sunstein's account shows, "thick" legalism is often embedded in a particular view of the role of the constitution, and the courts charged with protecting it, as "backstops" on, or borders for, democratic debate. In a vein characteristic of this attitude, Dworkin argues that "[t]here would be no point in the boast that we respect individual rights unless that involved some sacrifice, and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from overriding these rights when they prove inconvenient."[58]

For both Dworkin and Sunstein, this "sacrifice" seems to mandate a bill of positive rights, defended by an able and empowered judiciary, and limitative of the scope and depth of democratic debate, effectively blocking certain majoritarian decisions from the outset. Indeed, for Sunstein, it seems that "designing democracy" is in large part a question of constitutional draftsmanship. For Beatty, judicial review under an entrenched bill of rights is designed to constrain majoritarian encroachments on minority rights through the application of a principle of proportionality designed to ensure minimal impairment of these rights.[59] Yet Waldron warns that this reliance on constitutional backstops and judicial review is not without noxious consequences for democratic deliberation:

> [W]e allow majority voting by judges without regard to their comparative wisdom. What is the justification for denying the benefit of a similar decision procedure to the mass of others who may have thought as honestly and as high-mindedly about the issues as the judges have? ... A concern for the fairness and integrity of the process

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[56] Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge and New York: Cambridge University Press, 1998); Barry, *supra* note 45; see also S. Mulhall and A. Swift, "Political Liberalism: For and Against," in *Liberals and Communitarians* (Oxford: Blackwell, 1992).

[57] David Miller, *Principles of Social Justice* (Cambridge, MA: Harvard University Press 1999).

[58] Ronald Dworkin, "Taking Rights Seriously," *Taking Rights Seriously* (London: Duckworth, 1977).

[59] David Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

> [of democratic deliberation] is something that [the free, self-aware but other-respecting] citizen will exhibit along with everything else. He does not need a judge to do it for him.[60]

It need not be assumed, Waldron claims, that justice is a matter for the courts alone. Though this seems a basic assumption of the "rule of law as the rule of *just* law" school, it is not uncontroversial.

C. "Thin" Conceptions of the Rule of Law

As against the "thick" conception of the rule of law problematized above, a number of theorists have retreated to a formalistic definition of the rule of law limited to those few spare features common to most, though not all, legal systems. On Rawls's view, for instance, the rule of law is, as Neumann puts it, "simply the conception of formal justice applied to a legal order or system."[61] Formal justice, in turn, is a thin, non-moral principle of reason "addressed to rational persons for the purpose of regulating their conduct and providing the framework for their cooperation."[62] Thus, Rawls concludes, "because these precepts guarantee only the impartial and regular administration of rules, whatever these are, they are compatible with injustice."[63]

The rule of law, in Rawls's view, stands merely for the principle that rational people need a predictable system to guide their behaviour and organize their lives in a way that minimizes unproductive conflict with other agents. If that system be predictable but brutal ("Yield to merging traffic or you will be tortured") or predictable but otherwise unfair ("All red-haired persons shall be consigned to a life of hard labour"), so be it. These matters are not germane to the question of whether or not such a system is a legal system properly so called. For Rawls, the rule of law means, and only means, the rule of a system of rationally comprehensible rules bearing some instrumental relationship to the function of social coordination.

Raz, like Rawls, invokes the social coordinative function of the law as the basis for his minimalist conception:

> This is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behaviour of its subjects. It is evident that this conception of the law is a formal one. It says nothing about how the law is to be made: by

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[60] Jeremy Waldron, "Rights and majorities: Rousseau Revisited," *Liberal Rights* (New York: Cambridge University Press, 1993) pp. 417–18.

[61] Neumann, *supra* note 39.

[62] John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971) p. 235.

[63] *Id.*

> tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice ... Racial, religious, and all manner of discrimination are not only compatible [*sic*] but often institutionalized by general rules.[64]

Raz then goes on to suggest an itemized outline of the concept of the rule of law, each item of which correlates to the law's coordinative function:

(1) All laws should be prospective, open, and clear.
(2) Laws should be relatively stable.
(3) The making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules.
(4) The independence of the judiciary must be guaranteed.
(5) The principles of natural justice must be observed.
(6) The courts should have review powers over the implementation of the other principles.
(7) The courts should be easily accessible.
(8) The discretion of the crime-preventing agencies should not be allowed to pervert the law.[65]

Thus, Raz attempts to distill a definition of the rule of law abstracted from any positive moral content and hence normatively unobjectionable.

In similar vein, in one of his most famous works, first published in 1963, Fuller identified eight distinct desiderata in the design of a legal system. Stated in summary form those desiderata were that laws should: (1) be of general application, (2) be publicized or at least made available to affected parties beforehand, (3) be prospective in application, (4) be understandable, (5) be coherent (i.e. not contradictory), (6) not require conduct beyond the powers of the affected party, (7) not be subject to frequent changes, and (8) reflect congruence between rules as announced and their actual administration. Somewhat controversially, Fuller argued that a legal system that failed to satisfy these desiderata would not merely be bad, but could not properly be called a legal system at all.[66] He seemed to take the position that a legal system that failed along some or all of these dimensions would not be capable of serving any useful social purpose (partly because it would be unlikely to elicit citizens' voluntary cooperation) and that the social purposes performed by law are crucial.[67]

Again, William Whitford in a review of alternative conceptions of the rule of law argues for what he calls a minimalist conception of the rule of law: "The accountability of transparent government decisions (including judicial responses

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[64] Raz, *supra* note 32, pp. 211–14.

[65] Raz elaborates on his suggested items in *ibid.*, at 214–18.

[66] See *e.g.* Lon L. Fuller, *The Morality of Law*, rev. edn (New Haven: Yale University Press, 1969) at 39.

[67] *Ibid.*, especially at 200–24.

to private laws) to predetermined standards applied by an independent body, probably a court, through a procedure that can be practically utilized by the aggrieved."[68]

Neumann, however, is sceptical of the claim of Raz, Rawls, Fuller and other rule of law "minimalists" that they manage to divest the concept of law of all but its most minimal moral content, suggesting rather that both end up "thickening" their definitions by smuggling in quasi-moral principles. As he points out, for instance, there is nothing about the social coordinative function of the law that requires it to be "fair." That is, while both Rawls and Raz justify the minimum stipulation of an independent, non-bribable judiciary in relation to the minimalist virtue of predictability, "there is really no reason to suppose that fairness and independence add more predictability to the legal system than quite a wide range of unfair and dependent alternatives."[69] In fact, he adds, "even fair trials can be unpredictable in the extreme ... because fair procedure may nevertheless allow for a wide range of interpretative strategies."[70] Much as "thickeners" come under criticism for investing "justice" with dense moral content in their conception of "rule of law as the rule of *just* law," Rawls and Raz can plausibly be accused of doing the same thing with "fairness" when they give their approval to the rule of law as the rule of *fairly implemented* law.

To make his point, Neumann takes the "thin" conception to a radical extreme, construing law as, and merely as, social coordination. His conclusion is that without a background of normative expectations, there is nothing to make tractable our expectation that the law be fair, even when fairness is construed, rather uncontroversially, in terms of basic axioms like "equality before the law" or "the like treatment of like cases:"

> It is not against the rule of law if a nobleman's testimony counts twice as much as a peasant's. These inequalities will be factored into citizen's (*sic*) assessment of their chances at breaking the law just as equalities are factored in, or "acceptable" inequalities like giving less weight to the testimony of children or more to the testimony of likeable college professors. We know that life is not fair and we plan our lives accordingly. From the standpoint of the rule of law, it matters not at all whether this unfairness is found inside or outside the courtroom, so long as it is predictable unfairness.
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> ...
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> "Like" cases need not be universal; not *all* cases of murder by *anyone* need get the same sort of treatment. As far as the demands of predictability are concerned, it is quite all right if the law treats cases of murder by nobles differently from cases of murder by peasants: if each *type* of case is treated consistently, if peasant murderers

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[68] William Whitford, "The Rule of Law" (2000) *Wisconsin Law Review* 723 at 726.

[69] *Id.*, p. 11.

[70] *Id.*

> and noble murderers both know what to expect, we will all know our places and can all get on with our lives accordingly. Things will go as they are expected to go, things will be according to the bad and unfair laws of our land, and that is all the rule of law requires, at least in its narrowest conception.[71]

Neumann's critique serves to show that a concept of the rule of law justified only in terms of its relationship to predictable social coordination may not contain even core values such as equality before the law and the like treatment of like cases. Indeed, Neumann himself thinks that his exploration of the margins of rule of law minimalism is among the best arguments *in favour* of a normatively invested definition of the rule of law.

D. Towards a "Thinner" Conception of the Rule of Law

The foregoing discussions of "thick" and "thin" conceptions of the rule of law manage to identify some problematic tendencies characteristic of such theories in general. Thick conceptions are apt to mistake the rule of law *simpliciter* with the rule of just law; to mistake the rule of law with respect for individual rights and freedoms; to invest laws and legal institutions with responsibility for the creation and maintenance of a just society; and to charge the courts with settling principled debates in which ordinary citizens might be thought to have a crucial deliberative stake.

For their part, as we have just seen, "thin" conceptions are susceptible to two compelling criticisms. The first, and most obvious, is that they are not so thin after all, hiding a thicker mantle of moral content under the cover of a less controversial concept such as "fairness." The second, and more subtle, is that, in retreating to the boundary line of minimalism, and accepting only that which is logically (as opposed to morally) necessary to a functional definition of the law, they may end up surrendering crucial territory – even much of what makes the rule of law an appealing ideal in the first place, such as equality before the law and the like treatment of like cases.

Consequently, neither a totally "thin" nor "thick" conception is appealing. Instead, we favour what might be called a "thinner" conception of the rule of law, a nomenclature intended to demarcate our model from both alternative extremes of "thick" and "thin."

A "thinner" model should see the rule of law as both a set of ideals and an institutional framework. Our model will thus comprise elements of both of what Summers calls "formal" and "substantive" theories of the rule of law.[72] It is

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[71] *Id.*, pp. 45–9.

[72] Robert S. Summers, "A Formal Theory of the Rule of Law" (July 1993) 6 *Ratio Juris* 2, p. 127.

formal to the extent that it is preoccupied with conceptual, institutional and axiological components. That is, it is concerned first and foremost with both the conceptual soundness and institutional protection of "rules, ... interpretive and applicational methodologies, and ... processes of judicial and other enforcement,"[73] with the axiological purpose of providing such functions as social and economic coordination, "certainty and predictability of governmental action; private autonomy [and] actual equality of legal treatment at the hands of the government."[74]

Indeed, initiating a discussion of "rule of law *reform*," as we have set out to do in this book, implies the existence of a background of normative expectations, *viz.*, some standard by which "reform" is to be evaluated, and to which reform efforts should aspire. Moreover, we are seeking a definition of the rule of law which coheres with the goals of development, a normatively driven project *par excellence*. A definition of the rule of law *for* development can scarcely be indifferent towards the values inherent *in* development.

Summers objects to a model imbued with even this level of substantive content, preferring a purely formal system on the basis of the popular legitimacy he believes it is more likely to enjoy:

> The more the theory of the rule of law is "de-substantivized" to embrace only those institutional forms that as such serve values associated with a formal rule of law, the more likely it is that the formal rule of law will receive its due. On such a politically neutral conception, far more people from all segments of the political spectrum can be enlisted to support the rule of law and to criticize departures from it.
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> On the other hand, if the rule of law is taken in general discourse within the society to mean not just governance through rules (and facilitative institutional features) but also capitalism (or socialism), a Bill of Rights (or no Bill of Rights), general democracy (or limited democracy), etc., then the formal rule of law is not so likely to command the range of *neutral* support it merits (and requires), for then the rule of law cannot be so readily seen to be a set of institutionalized forms and values worthy of the support of all officials and citizens, regardless of political allegiances.[75]

Though sensitive to his argument, we do not share Summers's skepticism about the prospects of a limited substantive conception of the rule of law for broad popular support. Nor do we agree with Summers's purely speculative counterfactual, *viz.*, that in politically pluralistic contexts (e.g., those found in many developed and developing nations), a completely formal, minimalist theory is any less likely to be polarizing and controversial. Brooks, for instance, considers that there is "little evidence" for the assumption that the establishment

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[73] *Id.*, p. 129.
[74] *Id.*, p. 131.
[75] *Id.*, p. 137.

of the formal dimensions of the rule of law "will lead reliably and predictably to the emergence of a robust societal commitment to the more substantive aspects of the rule of law."[76] If nothing else, it seems plausible that interested parties are at least as likely to be aggrieved by what is *left out* by a formalistic approach as by what is *brought in* by a more substantive one.

While imperfect, and outlined only in a tentative way here, we believe that a procedural approach to the rule of law stands a good chance of yielding institutions that are both strong and worthy of popular legitimacy, and conducive to the broader goals of development. Our procedural definition of the rule of law consists in an enumeration (by no means comprehensive) of normative benchmarks for key legal institutions, running the gamut from the judiciary to the legal education system. These normative benchmarks, in turn, are to be justified in terms of the contribution they make to human development. It will become apparent that these normative benchmarks, if taken seriously, correlate with a minimal constellation of civil and political rights, and a basic arrangement of economic facilities related to the protection of property and contractual rights. Simply put, *our definition focuses on what is necessary,* in each of these sets of institutions and in a legal state more generally, *to assure maximum compatibility with the most widely acceptable, minimal goals of development.*

The capability-building approach to development propounded by Sen identifies the expansion of freedom as both "(1) the *primary end* and (2) the *principal means* of development."[77] "Capability," in turn, is a type of freedom, *viz.*, "the freedom to achieve various lifestyles"[78] which a person may have reason to value. A person's capabilities may be understood as either her realized functions (what she is actually able to do) or as the set of alternatives she has (her "real opportunities"[79]). The "capability" view of freedom emphasizes that freedom consists in both pursuing what one has chosen, as well as in the simple fact of having a choice to do or not do a number of things, and from those choices, to construct one's way of life. By taking a capability view, as Sen points out, "[i]t is possible to attach importance to having opportunities that are not taken up,"[80] and hence to take a more holistic view of freedom.

One of the attractions of a capability perspective (as contrasted with utilitarian, libertarian or Rawlsian "primary goods"-based evaluative systems) is its intrinsic pluralism. By emphasizing freedom as opposed to the adduction of specific qualities (wealth; education; health) as the goal of development, the

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[76] Rosa Ehrenreich Brooks, "The New Imperialism: Violence, Norms, and the Rule of Law" (2003) 101 *Michigan Law Review* 2275 at 2284.

[77] Sen, *supra* note 10, at p. 36 (emphasis in original).

[78] *Id.*, p. 75.

[79] *Id.*

[80] *Id.*, p. 76.

capability perspective is able to circumvent disagreements about particular qualities and their contestable normative valuations and act as a neutral basis for collaboration. The principle is disarmingly simple: as long as it can be agreed upon that freedom matters to any conception of the good life, we might be persuaded to at least assent to a program of development that takes the maximization of freedom as its principal end. Moreover, the capability perspective's pluralism extends to means as well as *ends*. Since there are many ways of expanding freedom, and since freedom must be, to a certain extent, understood contextually, no one set of limited instruments will be suitable to its maximization.

What does such a vision of freedom require of legal institutions? At a minimum, Sen suggests, "the general preeminence of basic political and liberal rights."[81] Political and liberal rights correlate to development as capability building in three different ways, in terms of:

1) their *direct* importance in human living associated with basic capabilities (including that of political and social participation)
2) their *instrumental* role in enhancing the hearing that people get in expressing and supporting their claims to political attention ...
3) their *constructive* role in the conceptualization of "needs" (including the understanding of "economic needs" in a social context)[82]

The basic function of a legal system suggested by the capability approach is to secure those elementary civil and political rights conducive to basic capabilities, and even to their economic preconditions. The capabilities approach rejects the view of rights as, in Ignatieff's turn of phrase, "lapidary bourgeois luxur[ies]"[83] secondary to economic development, and emphasizes instead the interconnectedness of rights and prosperity as different facets of freedom.

It is important at this juncture to emphasize that Sen's vision of development presupposes no particular legal system. Whilst preoccupied with the veneration of certain rights, nowhere does Sen argue, for instance, that these rights must take the form of a constitutionally enshrined bill of rights under the purview of a supreme court, as is the case in many extant and emerging democracies. He does, however, accord civil and political rights a high degree of importance and priority over other principles of government. Though we are extrapolating here from Sen, it seems that legal arrangements unconstrained by consideration for civil and political rights are a serious detriment to the project of capability building.

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[81] *Id.*, p. 148.

[82] *Id.*

[83] Michael Ignatieff, *Human Rights as Idolatry*, *Human Rights as Politics and Idolatry* (Princeton, NJ: University Press, 2001) p. 90.

Thus, at a minimum, a conception of the rule of law compatible with the capability approach to development as advocated by Sen must accord intrinsic respect to at least the most basic "instrumental freedoms:" (1) political freedoms ("opportunities of political dialogue, dissent and critique as well as voting rights and participatory selection of legislators and executives"[84]); (2) economic facilities ("the opportunities that individuals respectively enjoy to utilize economic resources for the purpose of consumption, or production, or exchange;"[85] in other words, some measure of market freedom); and (3) transparency guarantees ("the freedom to deal with one another under guarantees of disclosure and lucidity"[86]). The precise ways in which these instrumental freedoms are vindicated will vary by context. However, it would seem that a rule of law framework which does not, in most of its institutional structures, accord these freedoms at least *prima facie* consideration, will not be compatible with the capability approach to development. Though merely a tentative surmise from Sen's work, which does not itself specifically address legal reform in relation to development, we consider it a modest one. We note here that an emphasis on civil and political rights, rather than on economic and social rights (as defined by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) – and on civil more than political rights – is most compatible with a procedural rather than substantive conception of the rule of law.

In contrast to the capabilities approach, the New Institutional Economists construe development in economic terms. They argue that the hallmarks of developed modern economies (e.g., "formal contracts, bonding of participants, guarantees, brand names, elaborate monitoring systems, and effective enforcement mechanisms"[87]) are in fact corollaries of "well-specified and well-enforced property rights,"[88] rights which many developing economies lack. The establishment and entrenchment of such a set of rights, argues Douglass North, are "only possible as the result, first, of the development of a third party to exchanges, namely government, which specifies property rights and enforces contracts; and second of the existence of norms of behavior to constrain the parties in interaction."[89]

The expansion of government, however, can mean "unequal distribution of coercive power,"[90] as individuals of superior power tend to gain the ability to

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[84] Sen, *supra* note 10, at p. 38.

[85] *Id.*, pp. 38–9.

[86] *Id.*, p. 39.

[87] Douglass C. North, "Institutions and Economic Growth: An Historical Introduction" (1989) 17 *World Development* 9, p. 1320.

[88] *Id.*

[89] *Id.*

[90] *Id.*, p. 1321.

"enforce the rules to their advantage, regardless of their effects on efficiency,"[91] thus reducing the extent to which everyone benefits from economic growth and the complex interdependence facilitated by a structure of property rights in the first place. Poorly designed and monitored institutions can lead to economic stagnation and decline, as selective enforcement and other forms of corruption reduce investor confidence, raise the transaction costs of conducting trade, and discourage people from engaging in the forms of bargaining which are constitutive of commerce. As Nabli and Nugent summarize:

> [B]y affecting transaction costs and coordination possibilities, institutions can have the effect of either facilitating or retarding economic growth. The choice of appropriate political institutions, rules and policies enhances economic growth. Moreover, by affecting resource mobility and the incentives for innovation and accumulation, institutions may induce or hinder economic efficiency in the allocation of resources and growth. Institutions affect growth also through their effects on expectations, social norms and preferences.[92]

On a New Institutional Economics (NIE) view, the function of the rule of law is to craft optimal institutions for the clarification and enforcement of property and contract rights. However, this largely abstracts from substantive issues of how such rights should be defined and in the case of property rights distributed, and what institutional arrangements (formal and informal) in particular contexts best fulfil these functions.[93] Cognizant that the institutional needs of economies change as different norms become habituated and the appearance of new transactional behaviours necessitates new mechanisms of enforcement, NIE's proponents emphasize the importance of managed change. "[S]ince a basic and valuable characteristic of institutions is predictability and the preservation of expectations," argue Nabli and Nugent, "if such transitions are either too rapid or too frequent, they can undermine predictability and thereby impose social losses."[94]

Extrapolating from the conclusions of NIE, there are some helpful abstractions about the rule of law. In particular, NIE underscores the social coordinative function of institutions, including legal ones, flowing from their ability to create

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[91] *Id.*

[92] Mustapha K. Nabli, and Jeffrey B. Nugent, "The New Institutional Economics and its Applicability to Development" (1989) 17 *World Development* 9, p. 1342.

[93] See *e.g.* Rodrik *et al.*, *supra* note 21, "Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development" (2004) *J. of Economic Growth* at p. 157; Rohini Pande and Christopher Udry, "Institutions and Development: A View from Below" (Yale University Economic Growth Center, Discussion Paper No. 928, 2005); Trebilcock and Leng, *op. cit.*

[94] *Op. cit.* at p. 1343.

and manage expectations and the conditions of predictability. The rule of law over institutions, on an NIE view, *should consist in norms of rule-making and rule-implementation subordinate to the principle of stabilized change,* thus avoiding abrupt institutional changes which threaten to disrupt social coordination, and the predictability on which it depends. In this emphasis on social coordination, the NIE-based conception of the rule of law hearkens back to the "thin" tradition discussed earlier. However, its emphasis primarily on property rights and contract enforcement is too thin a conception of the rule of law. To focus most rule of law reform efforts on property rights and contract enforcement (as Richard Posner advocates)[95] is to engage a very narrow political constituency as proponents of reform and to forego the support of the much larger potential political constituencies to whom formal property rights and formal contract enforcement are of little immediate salience (and in some cases a source of potential antipathy), but to whom protection against abuses of basic civil and political rights is of general concern. In these respects, private and public law should be seen as necessary functional and political complements.[96]

III. THE ELEMENTS OF A PROCEDURAL DEFINITION OF THE RULE OF LAW

We do not wish to endorse any particular conception of development theory. Rather, in selecting for our analysis two divergent theories of development, we seek to extrapolate a cluster of features which a definition of the rule of law, *minimally* compatible with at least both theories, must to a certain extent reflect. That is, given the different *teleogical* (ends-oriented) objectives of these conceptions of development, we wish to discern what conception of the rule of law might be minimally compatible with the *means* allowable to both conceptions of development. The cluster of features we enumerate as follows:

A. Process Values

A procedurally oriented conception of the rule of law would in part focus on process characteristics of the legal system such as (a) *Transparency* in law-making and adjudicative functions. By transparency we mean that law, decrees,

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[95] See Richard A. Posner, "Creating a Legal Framework for Economic Development," (1998) 13 *World Bank Research Observer* 1, 1.

[96] See Daniel A. Farber, "Rights as Signals," (2002) 31 *Journal of Legal Studies* 83, 84–5; Amartya Sen, "What is the Role of Legal and Judicial Reform in the Development Process?," Address Before the World Bank Legal Conference 1–2 (June 5, 2000), available at http://ww1.worldbank.org/publicsector/legal/legalandjudicial.pdf.

ordinances, and regulations, once made, are publicly promulgated and widely accessible to the citizenry at large. By transparency, we also mean that the law-making process at these various levels of government is non-secretive and open to public scrutiny and participation in that affected citizens receive notice of lawmaking initiatives and opportunities for involvement in consultative or deliberative processes before these initiatives result in binding laws. Transparency for us would include open court proceedings and publicly accessible reasons for ensuing decisions; (b) *Predictability*, by which we mean that laws, once enacted or adopted, will be enforced in a predictable and consistent way, relatively free from the exercise of arbitrary discretion influenced by factors extraneous to the ostensible objectives of the law, such as corruption, cronyism, patronage, or discrimination related to ascriptive factors such as race, religion or gender; (c) *Stability*, by which we mean that laws that are intended or are likely to induce major reliance interests are not subject to frequent, convulsive, and sudden changes; and (d) *Enforceability*, by which we mean that laws that are adopted are effectively enforced by government and/or are effectively enforceable through the courts or other agencies of the state by private parties. We believe that these normative characteristics of a formal legal system (largely "due process" or "natural justice" values as Western constitutional and administrative lawyers might characterize them) are likely to be widely endorsed in most societies, for without them it is difficult to think of social purposes that a formal legal system could usefully serve as distinct from private purposes that the absence of one or more of these features might advance. While undoubtedly they do not capture all elements of a just legal system on a thick conception of the rule of law, they are surely a necessary, albeit not sufficient condition for the realization of almost any defensible conception of the rule of law.

B. Institutional Values

Many of the major classes of the legal institutions that we review in subsequent chapters, such as the judiciary, prosecutors, the police, the penal system, specialized law enforcement or administrative agencies (such as tax administration), legal aid agencies, and legal education institutions, raise complex issues of independence and accountability – two critically important dyadic institutional values that require difficult balances to be struck with respect to each class of institution. Neither "independence" nor "accountability" are straightforward concepts, and indeed each is highly contested terrain in both the theoretical literature and jurisdiction-specific experience. "Independence" poses the question: Independent from whom, with respect to what? Likewise, "accountability" poses the question: Accountable to whom, with respect to what? Absolute independence is a chimera and it is neither attainable nor desirable and would entail unaccountable mini autocracies. Equally, unconstrained forms of political ac-

countability, however, may fundamentally undermine neutral and objective administration of the law, especially when the government or its officials or supporters have interests directly at stake.

With respect to "independence," it is easier to describe the characteristics of independent decision-making, or its correlate dependent decision-making, than to prescribe institutional safeguards for independent decision-making, where conventions vary widely from one country to another, even amongst those countries who are regarded as having strong rule of law traditions. For example, in the case of the judiciary, we would view judicial decisions as "independent" if they are reached on the factual and legal merits of the issues before the court, uninfluenced by considerations that are extraneous to those merits, such as personal relations between the judge and one of the parties, corruption, cronyism, political interference or coercion in particular decisions, especially those affecting the government of the day or its officials. Yet mechanisms to ensure judicial independence vary widely. For example, in the US, most state court judges are directly elected, and promotions to higher levels of the state court system are also often subject to direct election. With respect to federal court appointees, including the US Supreme Court, judicial appointees are nominated by the President, but are subject to a Senate confirmation process. The US also widely uses juries in both criminal and civil proceedings, where jury selection is determined in part by a random process (in effect, by lottery), subject to various grounds for challenge. In other jurisdictions, with a strong rule of law tradition, judicial appointments are typically made by the executive arm of government (sometimes pursuant to a specifically designed judicial training and career-track), rather than by direct election, and without a legislative confirmation process, and juries play a much more limited role.

In the case of law enforcement officials, such as prosecutors and the police, in some US states, district attorneys and police commissioners run for political office through direct election. In most other jurisdictions with strong rule of law traditions, these officials are appointed pursuant to more general public service appointment processes and are not overtly subject to a directly political validation process. Officials administering specialized law enforcement agencies or the penal system are typically subject to similar appointment processes.

In order to protect professional independence, in many jurisdictions bar associations are delegated extensive self-regulatory authority over criteria for admission to the legal profession and compliance therewith, as well as disciplinary powers over members, while in other jurisdictions with strong rule of law traditions the legal profession is often supervised directly by the courts of the jurisdiction.

With respect to legal education institutions, to the extent that they are part of a university system, they will claim a high measure of independence in

setting curricula, and allowing faculty and students broad academic freedom in terms of what is taught, learned, and researched, but again practices vary widely even in developed countries on both the relative roles of public and private legal education institutions and the role of the state in financing and regulating them.

With respect to the correlative value of "accountability", while a high degree of independence in decision-making by personnel in these legal institutions may be valued, it is equally true that some mechanisms of accountability are typically required.[97] For example, decisions of judges in lower courts are typically subject to a judicial appeal process to higher courts. Gross dereliction of duty, abuse of office, and other flagrant forms of judicial misconduct are typically subject to some form of judicial disciplinary process, which may be administered by the courts themselves or by a semi-independent body representing a diverse range of relevant stakeholders. Operational accountability in the efficient and appropriate expenditure of public monies is often ensured through various budgetary allocation processes and public audit mechanisms, although mechanisms for management of the court system vary widely.

With respect to law enforcement officials, such as prosecutors and the police, in some cases quasi-independent oversight bodies are constituted to receive and evaluate citizens' complaints relating to abuse of office or other forms of misconduct. For officials involved in other law enforcement activities, such as specialized law enforcement agencies or the penal system, in some jurisdictions special complaints mechanisms are constituted, or to the extent that these officials are part of a broader public service regime they are subject to disciplinary mechanisms that pertain to public servants more generally.

With respect to bar associations exercising delegated, self-regulatory powers over members of the legal profession, many of their decisions may be subject to judicial review, and regulation-making powers pertaining to, e.g., admission standards or codes of professional conduct may be subject to some form of political oversight, in part as a safeguard against professional protectionism.

With respect to legal education institutions, bar associations may be delegated some degree of authority to regulate curricula offerings, through accreditation requirements, while other aspects of the academic programs undertaken by these institutions are typically subject to internal governance mechanisms relating to law school and university administration involving representation by affected stakeholders. Fiscal accountability for the prudent expenditure of public monies

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[97] See Dennis Galligan, "Principal Institutions and Mechanisms of Accountability," in Rudolph van Puymbroeck (ed.), *Comprehensive Legal and Judicial Developments: Toward an Agenda for a Just and Equitable Society* (Washington, DC: World Bank, 2001).

may in part be ensured through these internal accountability mechanisms, but may also be subject to external scrutiny through budget allocation and public audit processes.

In succeeding chapters, we review, with respect to each major class of legal institution, mechanisms for striking an appropriate balance between "independence" and "accountability" in more detail. It is sufficient, for the moment, to emphasize that there is no single agreed blueprint, even amongst countries with strong rule of law traditions, on how this balance should be struck with respect to any of these classes of institutions, underscoring the importance of sensitivity to local historical, social, and political variables. That is to say, even amongst developed countries with strong rule of law traditions, there are obviously many different institutional routes to promoting the relevant institutional values of "independence" and "accountability," and it should not be assumed that amongst developing countries with a commitment to strong rule of law values such diversity of instrumental approaches will be any less marked.

C. Legitimacy Values

The concept of legitimacy is as much contested terrain as the concepts of independence and accountability. Toharia calls "social" legitimacy "the level of *auctoritas* enjoyed by ... institutions; that is, their capacity to engender the belief that they deserve obedience and respect."[98] Danner views legitimacy as the "justification for the exercise of authority."[99] Lindseth describes it as "a broad,

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[98] Jose Juan Toharia, "Evaluating Systems of Justice Through Public Opinion: Why, What, Who, How, and What For?," in Erik G. Jensen and Thomas C. Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford, CA: Stanford University Press, 2003) at 24. There are many subtle variations of the term "legitimacy" in the literature, which we will discuss in greater depth below. Toharia views social legitimacy as "a purely sociological phenomenon, a state of the collective mind that is not tied to legal and political technicalities: it is – or is not – granted by the public and, as such, can vary substantially over time" (p.55). Our own view of legitimacy is more closely tied to the design of the institution itself and its capacity to both deliver justice in an effective, efficient, and impartial manner while inspiring and maintaining moral authority with the public on which legal institutions often ultimately depend for their long-term viability. See also Barry R. Weingast, "The Political Foundations of Democracy and the Rule of Law" (June 1997) 91 *The American Political Science Review* 2, 262. Weingast notes that "[t]o survive, the rule of law requires that limits on political officials be self-enforcing ... [S]elf-enforcement of limits depends on the complementary combinations of attitudes and reactions of citizens *as well as* institutional restrictions."

[99] Allison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court" (July, 2003) 97 *American Journal of International Law* 510, 535.

empirically determined societal acceptance of the system."[100] According to Huntington,[101] "legitimacy is a mushy concept that political analysts do well to avoid." He notes that in the past, tradition, religion, the divine right of kings, and social deference provided legitimation for non-democratic rule and in modern times authoritarianism has been justified by nationalism and by ideology. In the case of democratic regimes, laws and policies promulgated by these regimes typically derive their legitimacy from notions of direct or delegated consent by members of the polity.[102]

While evidence suggests that in many societies appropriate attention to procedural values and to institutional values that strike an appropriate balance between independence and accountability may ensure high levels of social legitimacy for legal institutions,[103] this will not invariably be the case. For example, even a relatively thin conception of the rule of law may rule out certain social norms or practices that are deeply entrenched in the community, for example, denial of basic human rights on the basis of gender or ethnicity. Similarly, even legal institutions that conform to a relatively thin conception of the rule of law may still be in tension with traditional religious or community-based forms of dispute resolution, which may not conform well with even procedural rule of law norms. The avoidance of a thick substantive conception of the rule of law can mitigate these tensions, but not eliminate them.

A number of scholars have critiqued the legitimacy of even limited conceptions of the rule of law as applied to developing countries on the grounds of inconsistency with prevailing and deeply entrenched social norms. For example, Trubek and Galanter, in a widely cited paper,[104] critique what they call the model of liberal legalism on these grounds:

> The ethnocentric quality of liberal legalism's model of law in society is apparent. Empirically, the model assumes social and political pluralism, while in most of the Third World we find social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems. The model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The

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[100] Peter L. Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Union" (April 1999) 99 *Columbia Law Review* 628, 645.

[101] Samuel P. Huntington, *The Third Wave: Democratization in the Late 20th Century* (Norman, OK: University of Oklahoma Press, 1991).

[102] *Op. cit.*, p. 46.

[103] See Tom Tyler, *Why People Obey the Law* (New Haven, CT: Yale University Press, 1990).

[104] David Trubek and Marc Galanter, "Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) 4 *Wisconsin Law Review* 1062.

> model assumes that rules both reflect the interests of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently honoured more in the breach than in the observance. The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important.[105]

Similarly, in a more recent paper, in part drawing on recent experience in Kosovo, Brooks argues that the rule of law model has failed in many developing countries[106] Brooks writes:

> In his recent book, *Aiding Democracy Abroad* Tom Carothers of the U.S. Institute for Peace even offers (by no means uncritically) what he refers to as the "Rule of Law Assistance Standard Menu." It includes "reforming institutions" (judicial reform, strengthening legislatures, police and prison reform, etc.), "[r]ewriting laws" (modernizing criminal, civil, and commercial laws), "[u]pgrading the legal profession through support for stronger bar associations and law schools," and "[i]ncreasing legal access and advocacy" through the support of legal-advocacy NGOs, law-school clinics, and so on.
>
> This model simply does not work. What this type of formalistic approach fails fully to recognize or acknowledge is that creating the rule of law is most fundamentally an issue of norm creation. The rule of law is not something that exists "beyond culture" and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes. In its substantive sense, the rule of law *is* a culture, yet the human-rights-law and foreign-policy communities know very little – and manifest little curiosity – about the complex processes by which cultures are created and changed.[107]

In another recent paper, Berkowitz, Pistor, and Richard argue that the way a law was initially transplanted and received in a country is an important determinant of effective legal institutions (legality), measuring legality in terms of survey data on the effectiveness of the judiciary, rule of law, the absence of corruption, low risk of contract repudiation and low risk of government expropriation.[108] Using data from 49 countries, they show that countries that have developed legal orders internally, adapted the transplanted law and/or had a population that was already familiar with basic principles of the transplanted

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105 *Op. cit.* at 1080, 1081.

106 Brooks, *supra* note 76, at p. 2275.

107 *Op. cit.* at 2284, 2285.

108 Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, "Economic Development, Legality, and the Transplant Effect" (2003) 47 *European Economic Review* 165–95; see also Robert Seidman, "Administrative Law and Legitimacy in Anglophonic Africa: A Problem in the Reception of Foreign Law" (1970) 5 *Law and Society Review* 161–204.

law had more effective legality than countries that received foreign law without any similar predispositions.

This line of critique of the relevance of even a relatively thin conception of the rule of law to many developing countries has in turn attracted criticism. For example, Tamanaha,[109] in a critique (*inter alia*) of the paper by Trubek and Galanter points out:

> One of the major sources of oppression and rapaciousness in developing countries today is authoritarian governments. The central premise of the liberal rule-of-law system is the protection of individuals from the tyranny of the government. Law-and-development theorists should be striving to devise ways in which the rule-of-law model can be adapted to local circumstances and nurtured into maturity, rather than expending the bulk of their efforts in tearing this model down.
>
> Informative though it was, the legal liberal paradigm elucidated by Trubek and Galanter was seriously misleading insofar as it implied that all the elements described were prerequisite to a rule-of-law system. Even the United States, as they observed, did not satisfy the description. Operating around the world today are many variations of the rule of law, coexisting with individualist-oriented as well as with communitarian-oriented cultures. It has always consisted more of a bundle of ideals than a specific or necessary set of institutional arrangements.
>
> A minimalist account of the rule of law would require only that the government abide by the rules promulgated by the political authority and treat its citizens with basic human dignity, and that there be access to a fair and neutral (to the extent achievable) decision maker or judiciary to hear claims or resolve disputes. These basic elements are compatible with many social-cultural arrangements and, notwithstanding the potential conflicts, they have much to offer to developing countries.[110]

Tamanaha also points out that the critique of liberal legalism developed by Trubek and Galanter (and other scholars) often leads to a "state law bad, folk law good" attitude, when in fact often "folk law is the culprit" in sanctifying various basic human rights abuses of, e.g., women and ethnic or religious minorities.[111] In this respect, it is worth noting that in recent work on the relationship between formal law and informal social norms, scholars such as McAdams have argued that formal law and legal institutions have the potential to shape and modify social norms over time.[112] That is to say, social or cultural norms and practices should not necessarily be viewed as a timeless given.

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[109] Brian Tamanaha, "The Lessons of Law and Development Studies" (1995) 89 *Journal of International Law* 470–86.

[110] *Op. cit.* at 476.

[111] *Op. cit.* at 481, 484.

[112] See Richard McAdams, "The Origin, Development and Regulation of Norms" (1997) 96 *Michigan Law Review* 338; McAdams, "The Legal Construction of Norms: A Focal Point Theory of Expressive Law" (2000) 86 *Virginia Law Review* 1649.

In similar spirit to Tamanaha, Holmes, in a discussion of concepts of legitimacy in France after the Revolution[113] concludes:

> The relation between legality and legitimacy is an extremely difficult one to sort out. We normally assume, at any rate, that it is quite meaningful and not at all redundant to ask about the legitimacy of laws. That is to say, most of us would agree that we cannot reasonably answer the question, "Why obey these laws?" with a simple reaffirmation that they *are* laws. Something else is needed and this something else is a claim about the legitimacy of the laws in question. Thus, although legitimacy and legality may be closely affiliated with one another, they cannot be identified, even by liberals.
>
> To this sort of objection, if it is an objection, I would respond in two ways. First I would reiterate that a government which obeys its own laws is something and not nothing. Governments which approach this standard of purely formal legality are historically rare, and valuable at the very least because they allow individuals to make plans despite the contingency of the future. While I believe this answer is relevant to the objection, I also admit that it is somewhat evasive. It skirts the questions: What sort of laws do you mean? What if a country had atrocious laws and obeyed them to the letter?
>
> At this point I would take a second, slightly different tack, a quite predictable one given the basic argument of this article. I would retreat to a distinction between two incongruous ways of conceiving the obligation to obey the law. On the one hand, we can call a regime or legal system legitimate only if it corresponds to an official or orthodox view of the human good; on the other hand, we can attribute legitimacy to a regime simply because it provides the necessary conditions for a variety of heterodox and nonofficial conceptions of the good to be lived out side by side. In the first case, society is regimented according to the principles of a political regime. In the second case, the government adapts itself to a plurality of institutions and beliefs already existing in society.[114]

IV. IMPEDIMENTS TO RULE OF LAW REFORM

Despite the claimed instrumental and intrinsic importance of the rule of law to development, and despite the fact that over the past 20 years external donors have invested billions of dollars in rule of law reform initiatives in many developing countries, rule of law deficiencies in many developing countries are both serious and persistent. According to the World Bank's Governance data on the status of the rule of law in many countries throughout the world (reproduced in Table 1A.1 in the Appendix to this chapter), only three out of 18 Latin American countries had positive rule of law ratings in 2002 (Chile, Costa Rica and Uruguay), and between 1996 and 2002 in many cases ratings deteriorated. In

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[113] Stephen Holmes, "Two Concepts of Legitimacy: France After the Revolution" (1982) 10 *Political Theory* 165–83.

[114] *Op. cit.* at 181, 182.

sub-Saharan Africa, only six out of 47 countries had positive rule of law ratings in 2002 (Botswana, Cape Verde, Mauritius, Namibia, Seychelles and South Africa), and many ratings again deteriorated between 1996 and 2002. In all 12 countries of the former Soviet Union, ratings were negative in both years. The countries of Eastern Europe present a far more positive picture. Asia, with its huge diversity of countries, varying enormously in size, colonial history, legal heritage, political ideology and religious complexion, presents a much more mixed picture, defying ready generalizations, although rule of law ratings are generally low, with notable exceptions such as Singapore and Hong Kong. While we accept that the rule of law measures used by the World Bank in its Governance data base are susceptible to various methodological criticisms,[115] we doubt that any defensible recasting of the variables is likely to seriously undermine the general conclusion that many developing countries face serious and persistent deficits in the quality of their rule of law institutions and processes. On a conception of the rule of law as encompassing the protection of various civil and political rights (as Sen's conception of development as freedom would encompass), many developing countries perform poorly, as reflected in Table 1A.2 from Freedom House appended to this chapter; similarly, in the case of corruption, defined as the abuse of public office (often legal offices) for private gain (Table 1A.3). As will be evident, ratings on the rule of law, freedom, and corruption indices are often highly correlated.

The central puzzle posed by the serious and persistent deficiencies in the rule of law in many developing countries, as reflected in these data, is as follows: if a strong commitment to the rule of law is an unequivocally important instrumental and intrinsic dimension of development, why is it that so many developing countries are either unwilling or unable to adopt strong rule of law institutions and processes or, in Mancur Olson's terms, why do these countries persistently leave big bills on the sidewalk?[116]

We hypothesize that the potential impediments that countries may encounter in implementing even a limited, procedural conception of the rule of law fall into three crude (and often overlapping) categories. First, these impediments may be what one might broadly describe as of a technical or resource-related character, where despite the political will on the part of their leadership and citizens poor countries simply lack the financial, technological, or specialized human capital resources to implement good institutions generally, including legal institutions, thus impairing their development prospects (whatever one's

[115] See Kevin Davis, "What Can the Rule of Law Variables Tell Us About Rule of Law Reforms?" (2004) 26 *Michigan Journal of International Law* 141.

[116] Mancur Olson, "Big Bills Left on the Sidewalk: Why Some Nations are Rich and Others Poor" (1996) 10 *Journal of Economic Perspectives* 3–24.

conception of development), in turn making them poorer (in some relevant normative sense) and in turn further diminishing their ability to implement good institutions, hence a vicious downward spiral. With respect to impediments to rule of law reform of this character, presumably the general orientation of reform prescriptions entails either more effective or efficient deployment of existing resources devoted to a country's legal system, a re-ordering of a country's domestic priorities and reallocation of resources from other areas of expenditure to the legal system, or the infusion of resources from external donors (in the form of financial assistance, technological assistance, or technical advice and training, etc.). Indeed, on the narrowly instrumental economic rationale for rule of law reform, governments lacking the necessary resources should be prepared to borrow the money required to finance rule of law reforms and finance borrowing costs from future economic growth and increased tax revenues.

Another category of explanation for impediments faced by developing countries to rule of law reform relates to a variety of factors that might loosely be placed under the rubric of social-cultural-historical factors that have yielded a set of social values, norms, attitudes, or practices that are inhospitable to even a limited procedural conception of the rule of law.[117] While, as we and others have noted, deeply entrenched social values, attitudes, and practices are presumably not immutable,[118] the policy prescriptions entailed in overcoming this class of impediment are not nearly as obvious as in the case of technical or resource-related impediments nor is any impact likely to be immediate or dramatic.

A third class of potential impediments to effective implementation of even a limited conception of the rule of law might be loosely characterized as political economy-based impediments, where lack of effective political demand for reforms, on the one hand, and vested supply-side interests, on the other, render these reforms politically difficult to realize even if (by assumption) they would render most citizens better off in terms of their own values. On the demand side, because a procedurally-oriented conception of the rule of law has many of the attributes of a public good, diffuse citizen commitment to the rule of law is unlikely to translate into effective political mobilization for reforms. Instead, more particularized citizen grievances are likely to be channeled directly into the legislative or executive decision-making process. As well, one should not naively assume that all external constituencies are likely to benefit from rule of law reform. Indeed, those who derive benefits from corruption, cronyism, favouritism, etc., in existing institutional arrangements and legal processes are

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[117] See Rosa Ehrenreich Brooks, *supra* note 76.

[118] See various contributions in Lawrence Harrison and Samuel Huntington (eds), *Culture Matters* (New York: Basic Books, 2000).

likely to resist such reforms.[119] On the supply side, vested or incumbent interests in institutions or processes that do not comport even with a minimalist, procedurally-oriented conception of the rule of law, e.g., a corrupt or incompetent judiciary, public prosecution, police, correctional system, tax administration or other specialized law enforcement, administrative or regulatory agencies, members of the private bar and legal education institutions, are likely to resist such reforms.

The critical relationship between the rule of law and issues of political economy (which we emphasize throughout this book) is insightfully articulated by Maravall and Przeworski:[120]

> To develop a positive conception of the rule of law one must start with political forces, their goals, their organization and their context. It is not stability that distinguishes the rule of law but the distribution of power. When power is monopolized, the law is at most an instrument of the rule of someone. Only if conflicting political actors seek to resolve their conflicts by recourse to law does law rule. Rule of law emerges when self-interested rulers willingly restrain themselves and make their behaviour predictable in order to obtain sustained, voluntary cooperation of well-organized groups commanding valuable resources. In exchange for such cooperation, rulers will protect the interests of these groups by legal means ...
>
> The difference between rule by law and rule of law lies in the distribution of power, the dispersion of material resources, the multiplication of organized interests; in societies that approximate the rule of law, no group becomes so strong as to dominate the others, and law, rather than reflect the interests of a single group, is used by the many. The rule of law is conceivable only if institutions tame or transform brute power. As organized interests multiply, a society will come closer to the rule of law, power will not be monopolized, and the law will not be used by the few against the many.

Holmes similarly argues:

> Why do people with power accept limits to their power? An even more pointed formulation is: why do people with guns obey people without guns? An economic twist is: why would the rich even voluntarily part with a portion of their wealth? In legal theory, the parallel question runs: why do politicians sometimes hand power to judges? Why do politicians allow judges, who control neither purse nor sword, to overturn and obstruct their decisions and sometimes even to send office-holders to

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[119] See Daniel Kaufmann, "Rethinking Governance," The World Bank, discussion draft, March 2003; Joel Hellman and Daniel Kaufmann, "The Inequality of Influence," The World Bank Institute: preliminary draft, December 2002; Karla Hoff and Joseph Stiglitz, "After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies" (2004) 94 *American Economic Review* 753–63.

[120] José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge and New York: Cambridge University Press, 2003), Introduction at 2–4.

> jail? ... Societies may approximate the rule of law if they consist of a large number of power-wielding groups, comprising a majority of the population, and if none of them become so strong as to be able thoroughly to dominate the others. We may be able to loosen the grip of a few organized interests on power by forcing them to share political leverage with a variety of other groups. This is polyarchy; it is also rough justice, the only kind human beings will ever experience. Formulated differently, the balancing of many partialities is the closest we can come to impartiality. This may not sound particularly ideal, but it is nevertheless historically quite rare and very difficult to achieve.[121]

In the following eight chapters, we specify the characteristics associated with a procedural conception of the rule of law more precisely with respect to various classes of legal institutions: the judiciary, prosecutors, police, penal systems, specialized law enforcement agencies, legal aid, bar associations, and legal education, drawing whenever possible on benchmarks reflected in international covenants, codes, agreements and guidelines that have attracted broad consensus amongst both developed and developing countries so as to minimize concerns over ethnocentric or normative imperialism, and against these benchmarks review selective recent rule of law reform experiences in Latin America, Africa, Central and Eastern Europe, and Asia. Our choice of countries and examples of rule of law reform initiatives are largely governed by pragmatic considerations of publicly available information on such initiatives. Where similar initiatives have been undertaken by several countries in a region, we typically only describe one such representative initiative in detail. We conclude each chapter with a brief assessment of the relevance of each of our three hypothesized impediments to rule of law reform to the experience reviewed. In the light of these impediments to rule of law reform in developing countries, Chapter 10 concludes the book by drawing from these empirical reviews the central implications for the role of the international community in promoting or supporting future rule of law reform efforts in developing countries.

In adopting this institutional focus, we largely reject the position of Kleinfeld[122] who argues that in much of the contemporary promotion of the rule of law abroad, institutions have been transmuted from means to ends in themselves. She argues that reforms to single institutions do not necessarily achieve any rule of law ends because each requires reforms across multiple institutions. According to Kleinfeld, defining the rule of law by its institutions also slants practitioners towards overly technocratic models of reform. The rule of law is as much a cultural and political model as a technocratic or even legal institution. An institutional attributes-type of definition also fails to ask why institutions

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[121] Stephen Holmes, "Lineages of the Rule of Law," in Maravall and Przeworski (eds), *id.*

[122] Kleinfeld, *op. cit.*

are so bad – and whose interests are served through weak rule of law institutions. Another problem that arises from such institutional modeling is that reformers tend to waste time and scarce legal resources within developing countries in efforts to make laws and institutions look like those in their own systems.

However, in our view, Kleinfeld's preferred focus on ends-based conceptions of the rule of law conduces to largely sterile debates over normative abstractions, detached from their institutional instantiations, which, at the end of the day, is what is likely to matter most to a country's citizens. Moreover, eschewing extended abstract debates and focusing instead on what concrete procedural and institutional arrangements are likely to meet a given society's minimum conception of the rule of law reduces the risks of perfectionism. That is to say, while the characteristics of perfect procedural and institutional arrangements may be difficult to specify and defend from a rule of law perspective, either in the abstract or in particular contexts, it may be much easier to forge a social consensus around seriously dysfunctional characteristics that are broadly unacceptable. That is to say, it may be much easier to agree on what is ruled out, rather than what is ruled in.

APPENDIX

Table 1A.1 World Bank: rule of law indicators for selected countries, 1996 and 2002

	1996		2002	
Country/Territory	Point Estimate	Percentile Rank	Point Estimate	Percentile Rank
Latin America				
Argentina	0.27	65.7	–0.73	27.8
Bolivia	–0.62	29.5	–0.60	32.5
Brazil	–0.24	46.4	–0.30	50
Chile	1.19	86.7	1.30	87.1
Columbia	–0.44	36.1	–0.75	26.8
Costa Rica	0.61	74.1	0.67	72.2
Dominican Republic	–0.49	33.7	–0.43	42.8
Ecuador	–0.38	38.6	–0.60	33
El Salvador	–0.45	35.5	–0.46	39.7
Guatemala	–0.61	30.1	–0.84	21.6
Honduras	–0.81	18.7	–0.79	23.7
Mexico	–0.11	55.4	–0.22	52.1

Table 1A.1 continued

Country/Territory	1996 Point Estimate	1996 Percentile Rank	2002 Point Estimate	2002 Percentile Rank
Nicaragua	–0.66	25.9	–0.63	32
Panama	0.25	65.1	0.00	55.7
Paraguay	–0.48	34.3	–1.12	11.9
Peru	–0.33	40.4	–0.44	40.7
Uruguay	0.49	72.3	0.56	69.1
Venezuela	–0.62	28.9	–1.04	13.4
Sub-Saharan Africa				
Angola	–1.36	3.6	–1.56	3.1
Benin	–0.01	57.2	–0.42	43.3
Botswana	0.76	81.3	0.72	72.7
Burkina Faso	–0.71	23.5	–0.55	34
Burundi	–0.18	49.4	–1.49	3.6
Cameroon	–1.12	12	–1.28	6.2
Cape Verde	0.08	60.2	0.19	60.3
Central African Republic	–0.18	49.4	–0.88	19.6
Chad	–0.18	49.4	–0.93	17
Comoros	N/A	N/A	–0.84	20.6
Congo	–1.20	6	–1.22	8.2
Congo, Dem. Rep.	–1.73	0.6	–1.79	0.5
Côte d'Ivoire	–0.65	27.1	–1.21	8.8
Equatorial Guinea	N/A	N/A	–1.19	9.3
Eritrea	–0.18	49.4	–0.51	36.1
Ethiopia	–0.26	45.8	–0.44	41.2
Gabon	–0.29	42.8	–0.27	50.5
Gambia	0.23	64.5	–0.50	37.1
Ghana	–0.11	54.2	–0.15	53.6
Guinea	–1.02	12.7	–0.75	27.3
Guinea-Bissau	–1.50	1.8	–1.00	15.5
Kenya	–0.73	22.9	–1.04	13.9
Lesotho	–0.29	43.4	–0.01	54.6
Liberia	–2.04	0	–1.42	4.1
Madagascar	–0.80	19.3	–0.19	53.1
Malawi	–0.19	48.2	–0.34	46.4
Mali	–0.73	22.3	–0.54	34.5

Table 1A.1 continued

Country/Territory	1996 Point Estimate	1996 Percentile Rank	2002 Point Estimate	2002 Percentile Rank
Mauritania	–0.58	31.3	–0.33	47.4
Mauritius	0.68	77.1	0.89	78.4
Mozambique	–1.17	7.2	–0.65	29.9
Namibia	0.34	68.7	0.45	67
Niger	–1.19	6.6	–0.78	25.8
Nigeria	–1.14	9	–1.35	5.2
Rwanda	–0.18	49.4	–1.01	14.4
São Tomé and Príncipe	N/A	N/A	–0.45	40.2
Senegal	–0.16	53	–0.20	52.6
Seychelles	N/A	N/A	0.52	68.6
Sierra Leone	–0.97	15.1	–1.25	7.2
Somalia	–1.60	1.2	–2.05	0
South Africa	0.34	67.5	0.19	59.8
Sudan	–1.38	3	–1.36	4.6
Swaziland	0.38	69.3	–0.67	29.4
Tanzania	–0.66	25.3	–0.49	38.7
Togo	–1.17	7.8	–0.67	28.9
Uganda	–0.83	17.5	–0.84	21.1
Zambia	–0.33	41	–0.52	35.6
Zimbabwe	–0.22	47	–1.33	5.7
Former Soviet Union				
Armenia	–0.44	36.7	–0.44	41.8
Azerbaijan	–0.81	18.1	–0.79	24.2
Belarus	–0.96	15.7	–1.12	11.3
Georgia	–0.80	20.5	–1.17	9.8
Kazakhstan	–0.69	24.7	–0.90	18.6
Kyrgyz Republic	–0.65	26.5	–0.83	22.2
Moldova	–0.19	48.8	–0.49	39.2
Russia	–0.80	19.9	–0.78	25.3
Tajikistan	–1.34	4.2	–1.27	6.7
Turkmenistan	–1.13	10.2	–1.16	10.8
Ukraine	–0.64	28.3	–0.79	24.7
Uzbekistan	–0.97	14.5	–1.16	10.3

Table 1A.1 continued

Country/Territory	1996 Point Estimate	1996 Percentile Rank	2002 Point Estimate	2002 Percentile Rank
Eastern Europe				
Albania	–0.30	42.2	–0.92	17.5
Bosnia-Herzegovina	–0.18	49.4	–0.88	19.1
Bulgaria	–0.09	56	0.05	56.7
Croatia	–0.50	33.1	0.11	58.8
Czech Republic	0.61	73.5	0.74	73.2
Estonia	0.33	66.9	0.80	74.7
Hungary	0.62	75.3	0.90	78.9
Latvia	0.18	62	0.46	67.5
Lithuania	–0.14	53.6	0.48	68
Macedonia	–0.53	31.9	–0.41	44.3
Poland	0.44	69.9	0.65	70.6
Romania	–0.27	44	–0.12	54.1
Slovak Republic	0.11	61.4	0.40	65.5
Slovenia	0.49	71.7	1.09	83.5
Turkey	0.02	58.4	0.00	55.2
Yugoslavia	–1.14	9.6	–0.95	16
East and Southeast Asia				
Brunei	0.67	76.5	0.64	70.1
Cambodia	–0.86	16.9	–0.86	20.1
China	–0.43	37.3	–0.22	51.5
Fiji	0.09	60.8	–0.39	45.4
Hong Kong	1.62	90.4	1.30	86.6
Indonesia	–0.34	39.8	–0.80	23.2
Kiribati	N/A	N/A	–0.32	47.9
Korea, North	–0.98	13.9	–1.00	14.9
Korea, South	0.77	81.9	0.88	77.8
Laos	–1.29	4.8	–1.05	12.9
Macao	N/A	N/A	0.75	73.7
Malaysia	0.80	82.5	0.58	69.6
Marshall Islands	N/A	N/A	–0.32	47.9
Micronesia	N/A	N/A	–0.64	30.4
Mongolia	0.45	70.5	0.36	64.9
Myanmar	–1.25	5.4	–1.62	2.1

Table 1A.1 continued

Country/Territory	1996 Point Estimate	1996 Percentile Rank	2002 Point Estimate	2002 Percentile Rank
Nauru	N/A	N/A	N/A	N/A
Papua New Guinea	–0.32	41.6	–0.82	22.7
Philippines	–0.11	54.8	–0.50	38.1
Samoa	N/A	N/A	0.94	79.9
Singapore	2.01	99.4	1.75	93.3
Solomon Islands	N/A	N/A	–0.64	30.4
Taiwan	0.96	84.3	0.95	80.9
Thailand	0.46	71.1	0.30	62.4
Timor, East	N/A	N/A	–1.11	12.4
Tonga	N/A	N/A	–0.64	30.4
Tuvalu	N/A	N/A	N/A	N/A
Vanuatu	N/A	N/A	–0.32	47.9
Vietnam	–0.47	34.9	–0.39	44.8
South Asia				
Afghanistan	–1.13	10.8	–1.61	2.6
Bangladesh	–0.65	27.7	–0.78	26.3
Bhutan	–1.13	10.8	0.10	58.2
India	–0.01	56.6	0.07	57.2
Maldives	N/A	N/A	0.44	66
Nepal	–0.34	39.2	–0.50	37.6
Pakistan	–0.41	38	–0.70	28.4
Sri Lanka	0.27	66.3	0.23	60.8
OECD				
Andorra	N/A	N/A	1.55	90.2
Australia	1.79	93.4	1.85	95.4
Austria	1.88	95.8	1.91	95.9
Belgium	1.57	89.2	1.45	89.7
Canada	1.77	92.8	1.79	93.8
Cyprus	0.58	72.9	0.83	76.8
Denmark	1.92	97	1.97	97.9
Finland	1.97	97.6	1.99	98.5
France	1.56	88.6	1.33	87.6
Germany	1.79	94	1.73	92.8
Greece	0.74	79.5	0.79	74.2

Table 1A.1 concluded

Country/Territory	1996		2002	
	Point Estimate	Percentile Rank	Point Estimate	Percentile Rank
Iceland	1.61	89.8	2.00	99.5
Ireland	1.67	91	1.72	92.3
Italy	0.84	83.1	0.82	75.8
Japan	1.51	88	1.41	88.7
Liechtenstein	N/A	N/A	1.55	90.2
Luxembourg	1.69	91.6	2.00	99
Monaco	N/A	N/A	N/A	N/A
Netherlands	1.84	95.2	1.83	94.8
New Zealand	1.97	98.2	1.91	96.4
Norway	1.99	98.8	1.96	97.4
Portugal	1.28	87.3	1.30	86.1
San Marino	N/A	N/A	N/A	N/A
Spain	1.16	86.1	1.15	84.5
Sweden	1.92	96.4	1.92	96.9
Switzerland	2.05	100	2.03	100
United Kingdom	1.84	94.6	1.81	94.3
United States	1.70	92.2	1.70	91.8

Notes:

1. The sources of this table are Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, "Governance Matters III: Governance Indicators for 1996–2002," World Bank Discussion Draft, June 30, 2003 (available at http://www.worldbank.org/wbi/governance/pdf/govmatters3.pdf); World Bank, GRICS: Governance Research Indicator Country Snapshot (available at http://info.worldbank.org/governance/kkz2002/mc_region.asp). Only the data for 1996 and 2002 are selected in this table for the purpose of this chapter.
2. According to the compilers of the World Bank governance data, which is constructed on the basis of a number of polls of country experts and surveys of residents, the primary aggregate indicator for rule of law is countries' point estimates ranging from –2.5 to +2.5. Countries' percentile ranks ranging from 0 to 100 are also provided at the World Bank GRICS website and included in this table. Because countries' relative positions on the aggregate indicators are subject to margins of error, precise country rankings cannot be inferred from the World Bank data. It is indicated that the average standard error of the rule of law indicator is 0.26 for 1996 and 0.19 for 2002 (Kaufmann *et al.*, "Governance Matters III: Governance Indicators for 1996–2002," World Bank Discussion Draft, June 30, 2003).
3. For the purpose of this chapter, countries and territories in five regions/categories are included in this table: Latin America, sub-Saharan Africa, the former Soviet Union and Eastern Europe, Asia (minus Japan and the former Soviet Union republics in Central Asia), and OECD. Following the world classification by the compilers of the World Bank governance indicators, Australia and New Zealand are listed under OECD in this table.
4. N/A in this table stands for "not available."

Table 1A.2 Freedom House: freedom ratings, 2004

Trend Arrow	Country	PR	CL	Freedom Rating
	Afghanistan	6	6	Not Free
	Albania	3	3	Partly Free
	Algeria	6	5	Not Free
	Andorra	1	1	Free
	Angola	6	5	Not Free
	Antigua and Barbuda	4	2	Partly Free
	Argentina	2 ▲	2 ▲	Free
↓	Armenia	4	4	Partly Free
	Australia	1	1	Free
	Austria	1	1	Free
	Azerbaijan	6	5	Not Free
	Bahamas	1	1	Free
	Bahrain	5	5	Partly Free
	Bangladesh	4	4	Partly Free
	Barbados	1	1	Free
↓	Belarus	6	6	Not Free
	Belgium	1	1	Free
	Belize	1	2	Free
	Benin	2 ▲	2	Free
	Bhutan	6	5	Not Free
	Bolivia	3 ▼	3	Partly Free
↑	Bosnia-Herzegovina	4	4	Partly Free
	Botswana	2	2	Free
	Brazil	2	3	Free
	Brunei	6	5	Not Free
	Bulgaria	1	2	Free
	Burkina Faso	4	4	Partly Free
	Burma	7	7	Not Free
	Burundi	5 ▲	5	Partly Free
	Cambodia	6	5	Not Free
↓	Cameroon	6	6	Not Free
	Canada	1	1	Free
	Cape Verde	1	1 ▲	Free
	Central African Republic	7 ▼	5	Not Free
	Chad	6	5	Not Free
	Chile	1 ▲	1	Free
	China (PRC)	7	6	Not Free

Table 1A.2 continued

Trend Arrow	Country	PR	CL	Freedom Rating
	Colombia	4	4	Partly Free
	Comoros	5	4	Partly Free
	Congo (Brazzaville)	5 ▲	4	Partly Free
↑	Congo (Kinshasa)	6	6	Not Free
	Costa Rica	1	2	Free
	Côte d'Ivoire	6	5 ▲	Not Free
	Croatia	2	2	Free
	Cuba	7	7	Not Free
	Cyprus (G)	1	1	Free
	Czech Republic	1	2	Free
	Denmark	1	1	Free
	Djibouti	5 ▼	5	Partly Free
	Dominica	1	1	Free
	Dominican Republic	3 ▼	2	Free
	East Timor	3	3	Partly Free
↑	Ecuador	3	3	Partly Free
	Egypt	6	6	Not Free
↓	El Salvador	2	3	Free
	Equatorial Guinea	7	6	Not Free
	Eritrea	7	6	Not Free
	Estonia	1	2	Free
	Ethiopia	5	5	Partly Free
↓	Fiji	4	3	Partly Free
	Finland	1	1	Free
	France	1	1	Free
↓	Gabon	5	4	Partly Free
	The Gambia	4	4	Partly Free
	Georgia	4	4	Partly Free
	Germany	1	1	Free
	Ghana	2	2 ▲	Free
	Greece	1	2	Free
	Grenada	1	2	Free
↓	Guatemala	4	4	Partly Free
	Guinea	6	5	Not Free
	Guinea-Bissau	6 ▼	4 ▲	Partly Free
	Guyana	2	2	Free
↓	Haiti	6	6	Not Free

Table 1A.2 continued

Trend Arrow	Country	PR	CL	Freedom Rating
↓	Honduras	3	3	Partly Free
	Hungary	1	2	Free
	Iceland	1	1	Free
	India	2	3	Free
	Indonesia	3	4	Partly Free
	Iran	6	6	Not Free
	Iraq	7	5 ▲	Not Free
	Ireland	1	1	Free
	Israel	1	3	Free
	Italy	1	1	Free
↓	Jamaica	2	3	Free
	Japan	1	2	Free
	Jordan	5 ▲	5	Partly Free
	Kazakhstan	6	5	Not Free
	Kenya	3 ▲	3 ▲	Partly Free
	Kiribati	1	1	Free
	Kuwait	4	5	Partly Free
	Kyrgyzstan	6	5	Not Free
	Laos	7	6	Not Free
	Latvia	1	2	Free
	Lebanon	6	5	Not Free
	Lesotho	2	3	Free
↑	Liberia	6	6	Not Free
	Libya	7	7	Not Free
	Liechtenstein	1	1	Free
	Lithuania	1	2	Free
	Luxembourg	1	1	Free
↑	Macedonia	3	3	Partly Free
	Madagascar	3	3 ▲	Partly Free
	Malawi	3 ▲	4	Partly Free
	Malaysia	5	4 ▲	Partly Free
	Maldives	6	5	Not Free
	Mali	2	2 ▲	Free
	Malta	1	1	Free
	Marshall Islands	1	1	Free
	Mauritania	6 ▼	5	Not Free
	Mauritius	1	2	Free

Table 1A.2 continued

Trend Arrow	Country	PR	CL	Freedom Rating
	Mexico	2	2	Free
	Micronesia	1	1 ▲	Free
	Moldova	3	4	Partly Free
	Monaco	2	1	Free
	Mongolia	2	2	Free
	Morocco	5	5	Partly Free
	Mozambique	3	4	Partly Free
	Namibia	2	3	Free
	Nauru	1	1 ▲	Free
	Nepal	5 ▼	4	Partly Free
	Netherlands	1	1	Free
	New Zealand	1	1	Free
↓	Nicaragua	3	3	Partly Free
	Niger	4	4	Partly Free
	Nigeria	4	4 ▲	Partly Free
	North Korea	7	7	Not Free
	Norway	1	1	Free
	Oman	6	5	Not Free
	Pakistan	6	5	Not Free
	Palau	1	1 ▲	Free
	Panama	1	2	Free
	Papua New Guinea	3 ▼	3	Partly Free
	Paraguay	3 ▲	3	Partly Free
	Peru	2	3	Free
	Philippines	2	3	Free
	Poland	1	2	Free
	Portugal	1	1	Free
↑	Qatar	6	6	Not Free
	Romania	2	2	Free
↓	Russia	5	5	Partly Free
	Rwanda	6 ▲	5	Not Free
	Saint Kitts and Nevis	1	2	Free
	Saint Lucia	1	2	Free
	Saint Vincent and the Grenadines	2	1	Free
	Samoa	2	2	Free
	San Marino	1	1	Free

Table 1A.2 continued

Trend Arrow	Country	PR	CL	Freedom Rating
	São Tomé and Príncipe	2 ▼	2	Free
	Saudi Arabia	7	7	Not Free
	Senegal	2	3	Free
↓	Serbia and Montenegro	3	2	Free
	Seychelles	3	3	Partly Free
	Sierra Leone	4	3 ▲	Partly Free
	Singapore	5	4	Partly Free
	Slovakia	1	2	Free
	Slovenia	1	1	Free
	Solomon Islands	3	3	Partly Free
	Somalia	6	7	Not Free
	South Africa	1	2	Free
	South Korea	2	2	Free
	Spain	1	1	Free
	Sri Lanka	3	3 ▲	Partly Free
	Sudan	7	7	Not Free
	Suriname	1	2	Free
	Swaziland	7 ▼	5	Not Free
	Sweden	1	1	Free
	Switzerland	1	1	Free
	Syria	7	7	Not Free
	Taiwan (Rep. of China)	2	2	Free
	Tajikistan	6	5	Not Free
	Tanzania	4	3	Partly Free
	Thailand	2	3	Free
	Togo	6	5	Not Free
↓	Tonga	5	3	Partly Free
	Trinidad and Tobago	3	3	Partly Free
	Tunisia	6	5	Not Free
	Turkey	3	4	Partly Free
	Turkmenistan	7	7	Not Free
	Tuvalu	1	1	Free
	Uganda	5 ▲	4	Partly Free
	Ukraine	4	4	Partly Free
	United Arab Emirates	6	6 ▼	Not Free
	United Kingdom†	1	1	Free
	United States	1	1	Free

Table 1A.2 concluded

Trend Arrow	Country	PR	CL	Freedom Rating
	Uruguay	1	1	Free
	Uzbekistan	7	6	Not Free
	Vanuatu	2 ▼	2	Free
↓	Venezuela	3	4	Partly Free
	Vietnam	7	6	Not Free
	Yemen	5 ▲	5	Partly Free
↑	Zambia	4	4	Partly Free
↓	Zimbabwe	6	6	Not Free

Notes:
The ratings in this table reflect global events from January 1, 2003, through November 30, 2003.
PR and CL stand for Political Rights and Civil Liberties.
1 represents the most free and 7 the least free rating.
↑↓ up or down indicates a general trend in freedom.
▲▼ up or down indicates a change in Political Rights or Civil Liberties since the last survey.
† excluding Northern Ireland.
The freedom ratings reflect an overall judgment based on survey results.

Source: Freedom House, *Freedom in the World 2004: The Annual Survey of Political Rights and Civil Liberties* (Lanham, MD: Rowman and Littlefield, 2004).

Table 1A.3 Transparency International: corruption perceptions index, 2004

Country rank	Country	2004 CPI Score*	Confidence Range**	Surveys Used***
1	Finland	9.7	9.5–9.8	9
2	New Zealand	9.6	9.4–9.6	9
3	Denmark	9.5	9.3–9.7	10
	Iceland	9.5	9.4–9.7	8
5	Singapore	9.3	9.2–9.4	13
6	Sweden	9.2	9.1–9.3	11
7	Switzerland	9.1	8.9–9.2	10
8	Norway	8.9	8.6–9.1	9
9	Australia	8.8	8.4–9.1	15
10	Netherlands	8.7	8.5–8.9	10
11	United Kingdom	8.6	8.4–8.8	12
12	Canada	8.5	8.1–8.9	12
13	Austria	8.4	8.1–8.8	10

Table 1A.3 continued

Country rank	Country	2004 CPI Score*	Confidence Range**	Surveys Used***
	Luxembourg	8.4	8.0–8.9	7
15	Germany	8.2	8.0–8.5	11
16	Hong Kong	8.0	7.1–8.5	13
17	Belgium	7.5	7.1–8.0	10
	Ireland	7.5	7.2–7.9	10
	USA	7.5	6.9–8.0	14
20	Chile	7.4	7.0–7.8	11
21	Barbados	7.3	6.6–7.6	3
22	France	7.1	6.6–7.6	12
23	Spain	7.1	6.7–7.4	11
24	Japan	6.9	6.2–7.4	15
25	Malta	6.8	5.3–8.2	4
26	Israel	6.4	5.6–7.1	10
27	Portugal	6.3	5.8–6.8	9
28	Uruguay	6.2	5.9–6.7	6
29	Oman	6.1	5.1–6.8	5
	United Arab Emirates	6.1	5.1–7.1	5
31	Botswana	6.0	5.3–6.8	7
	Estonia	6.0	5.6–6.7	12
	Slovenia	6.0	5.6–6.6	12
34	Bahrain	5.8	5.5–6.2	5
35	Taiwan	5.6	5.2–6.1	15
36	Cyprus	5.4	5.0–5.8	4
37	Jordan	5.3	4.6–5.9	9
38	Qatar	5.2	4.6–5.6	4
39	Malaysia	5.0	4.5–5.6	15
40	Tunisia	5.0	4.5–5.6	7
41	Costa Rica	4.9	4.2–5.8	8
42	Hungary	4.8	4.6–5.0	12
	Italy	4.8	4.4–5.1	10
44	Kuwait	4.6	3.8–5.3	5
	Lithuania	4.6	4.0–5.4	9
	South Africa	4.6	4.2–5.0	11
47	South Korea	4.5	4.0–4.9	14
48	Seychelles	4.4	3.7–5.0	3
49	Greece	4.3	4.0–4.8	9
	Suriname	4.3	2.1–5.8	3

Table 1A.3 continued

Country rank	Country	2004 CPI Score*	Confidence Range**	Surveys Used***
51	Czech Republic	4.2	3.7–4.9	11
	El Salvador	4.2	3.3–5.1	7
	Trinidad/Tobago	4.2	3.6–5.2	6
54	Bulgaria	4.1	3.7–4.6	10
	Mauritius	4.1	3.2–4.8	5
	Namibia	4.1	3.5–4.6	7
57	Latvia	4.0	3.8–4.3	8
	Slovakia	4.0	3.6–4.5	11
59	Brazil	3.9	3.7–4.1	11
60	Belize	3.8	3.4–4.1	3
	Colombia	3.8	3.4–4.1	10
62	Cuba	3.7	2.2–4.7	4
	Panama	3.7	3.4–4.2	7
64	Ghana	3.6	3.1–4.1	7
	Mexico	3.6	3.3–3.8	11
	Thailand	3.6	3.3–3.9	14
67	Croatia	3.5	3.3–3.8	9
	Peru	3.5	3.3–3.7	8
	Poland	3.5	3.1–3.9	13
	Sri Lanka	3.5	3.1–3.9	8
71	China	3.4	3.0–3.8	16
	Saudi Arabia	3.4	2.7–4.0	5
	Syria	3.4	2.8–4.1	5
74	Belarus	3.3	1.9–4.8	5
	Gabon	3.3	2.1–3.7	3
	Jamaica	3.3	2.8–3.7	6
77	Benin	3.2	2.0–4.3	3
	Egypt	3.2	2.7–3.8	8
	Mali	3.2	2.2–4.2	5
	Morocco	3.2	2.9–3.5	7
	Turkey	3.2	2.8–3.7	13
82	Armenia	3.1	2.4–3.7	5
	Bosnia and Herzegovina	3.1	2.7–3.5	7
	Madagascar	3.1	1.8–4.4	4
85	Mongolia	3.0	2.6–3.2	3
	Senegal	3.0	2.5–3.5	6
87	Dominican Republic	2.9	2.4–3.3	6

Table 1A.3 continued

Country rank	Country	2004 CPI Score*	Confidence Range**	Surveys Used***
	Iran	2.9	2.2–3.4	5
	Romania	2.9	2.5–3.4	12
90	Gambia	2.8	2.2–3.4	5
	India	2.8	2.6–3.0	15
	Malawi	2.8	2.2–3.7	5
	Mozambique	2.8	2.4–3.1	7
	Nepal	2.8	1.6–3.4	3
	Russia	2.8	2.5–3.1	15
	Tanzania	2.8	2.4–3.2	7
97	Algeria	2.7	2.3–3.0	6
	Lebanon	2.7	2.1–3.2	5
	Macedonia	2.7	2.3–3.2	7
	Nicaragua	2.7	2.5–3.0	7
	Serbia and Montenegro	2.7	2.3–3.0	7
102	Eritrea	2.6	1.6–3.4	3
	Papua New Guinea	2.6	1.9–3.4	4
	Philippines	2.6	2.4–2.9	14
	Uganda	2.6	2.1–3.1	7
	Vietnam	2.6	2.3–2.9	11
	Zambia	2.6	2.3–2.9	6
108	Albania	2.5	2.0–3.0	4
	Argentina	2.5	2.2–2.8	11
	Libya	2.5	1.9–3.0	4
	Palestinian Authority	2.5	2.0–2.7	3
112	Ecuador	2.4	2.3–2.5	7
	Yemen	2.4	1.9–2.9	5
114	Congo, Republic of	2.3	2.0–2.7	4
	Ethiopia	2.3	1.9–2.9	6
	Honduras	2.3	2.0–2.6	7
	Moldova	2.3	2.0–2.8	5
	Sierra Leone	2.3	2.0–2.7	3
	Uzbekistan	2.3	2.1–2.4	6
	Venezuela	2.3	2.2–2.5	11
	Zimbabwe	2.3	1.9–2.7	7
122	Bolivia	2.2	2.1–2.3	6
	Guatemala	2.2	2.0–2.4	7
	Kazakhstan	2.2	1.8–2.7	7

Table 1A.3 concluded

Country rank	Country	2004 CPI Score*	Confidence Range**	Surveys Used***
	Kyrgyzstan	2.2	2.0–2.5	5
	Niger	2.2	2.0–2.5	3
	Sudan	2.2	2.0–2.3	5
	Ukraine	2.2	2.0–2.4	10
	Cameroon	2.1	1.9–2.3	5
129	Iraq	2.1	1.3–2.8	4
	Kenya	2.1	1.9–2.4	7
	Pakistan	2.1	1.6–2.6	7
133	Angola	2.0	1.7–2.1	5
	Congo, Democratic Rep.	2.0	1.5–2.2	3
	Côte d'Ivoire	2.0	1.7–2.2	5
	Georgia	2.0	1.6–2.3	7
	Indonesia	2.0	1.7–2.2	14
	Tajikistan	2.0	1.7–2.4	4
	Turkmenistan	2.0	1.6–2.3	3
140	Azerbaijan	1.9	1.8–2.0	7
	Paraguay	1.9	1.7–2.2	7
142	Chad	1.7	1.1–2.3	4
	Myanmar	1.7	1.5–2.0	4
144	Nigeria	1.6	1.4–1.8	9
145	Bangladesh	1.5	1.1–1.9	8
	Haiti	1.5	1.2–1.9	5

Notes:
This table was compiled at the University of Passau on behalf of Transparency International. For information on data and methodology, please consult the frequently asked questions and framework document at http://www.transparency/org/surveys/#cpi.

* CPI Score relates to perceptions of the degree of corruption as seen by business people and country analysts and ranges between 10 (highly clean) and 0 (highly corrupt).

** Confidence range provides a range of possible values of the CPI score. This reflects how a country's score may vary, depending on measurement precision. Normally, with 5% probability the score is above this range and with another 5% it is below. However, particularly when only few sources (n) are available an unbiased estimate of the mean coverage probability is lower than the nominal value of 90%.

*** Surveys used refers to the number of surveys that assessed a country's performance. Eighteen surveys and expert assessments were used and at least three were required for a country to be included in the CPI.

Source: http://www.transparency.org/cpi/2004/cpi2004.en.html.