

Literature Review on the Rule of Law

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I. Purpose of the Paper

The purpose of this paper is to provide IDRC with an introduction to some of the existing definitions, theories, evidence and researchable questions suggested in the contemporary literature on the rule of law. The review does not attempt to be exhaustive, and draws heavily on a small number of key works, including in particular those by Trebilcock, Daniels, Davis, O'Donnell and Dam, all of them English language sources. The idea is to add some substance to discussions on a topic that is both ubiquitous in current development debates, yet surprisingly elastic in terms of definition. Given that the review focuses narrowly on outlining certain questions surrounding the rule of law, a whole host of sub-issues have not been addressed, such as policing or corruption to name two.

A separate literature search undertaken by IDRC's Research and Information Management Services Division (RIMSD) has revealed that the vast majority of research and commentary on the rule of law in the peer-reviewed literature is dominated by Western legal scholars, with the concept itself having been conceived of in Western Europe. However, the search also revealed a substantial amount of case study literature from developing country scholars.²

II. Defining the Rule of Law: An Introduction

"The phrase, 'rule of law' itself is attributable to the British jurist Albert Venn Dicey, whose 1885 Introduction to the Study of Law of the Constitution describes the rule of law as a 'feature' of the political institutions of England, apprehensible in two different ways: 'that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law...and that every man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the

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² Several interesting initiatives are also underway that involve developing country researchers, including the Open Society Initiatives for Southern and West Africa, funded by the Soros Foundation, which have produced various publication undertaken by African scholars on rule of law issues. A thorough literature search was conducted by Andrew Hubbertz of IDRC's Research Information Management Services Division which contains several of these Open Society Initiative publications. The literature search is available upon request.

jurisdiction of the ordinary tribunals” (Trebilcock and Daniels, 2008, Pg 15).

While numerous scholars write on the rule of law, the variety of definitions that exist across the literature is striking. O'Donnell (2004) argues that as a literal concept, the term is in some ways false, as, "...strictly speaking there is no 'rule of law' or 'rule by laws, not men.' All there is, sometimes, is individuals in various capacities interpreting rules which, according to some pre-established criteria, meet the condition of being generally considered law" (O'Donnell, 2004, Pg 33). While definitions differ, there are some generally accepted principles by which the rule of law can be held up to. Raz (1977) puts forth the following principles:

- All laws should be prospective, open, and clear and relatively stable;
- The making of particular laws...must be guided by open, stable, clear, and general rules;
- The independence of the judiciary must be guaranteed;
- The principles of natural justice must be observed (i.e. open and fair hearing, absence of bias);
- The courts should have review powers...to ensure conformity to the rule of law, and should be easily accessible; and
- The discretion of crime preventing agencies should not be allowed to pervert the law (Raz, 1977, Pg 198).

While the above are generally accepted principles for rule of law, other scholars have raised questions around what constitutes law itself. For example, is the realm of law bound to official legal bodies or can it "bleed into" established norms. Berman (2005) draws attention to the myriad of non-legal institutions that may at various times "exert tremendous power over our actions even though they are not part of an 'official' state-based system..." such as "...ethnic groups, religious institutions, trade organizations, unions ..." (Berman, 2005, Pg 507). Scholarship on legal consciousness, which signifies "the ways in which people imbibe, transform, and resist legal norms over time" (Berman, 2005, Pg 493) looks at how law is experienced in everyday life. As noted by Kahn (1999), "long before we ever think about going to a courtroom, we encounter landlords and tenants, husbands and wives, barkeeps and hotel guests – roles that already embed a variety of juridical notions" (quoted in Berman, 2005, P 494).

Just as not all law (conceived widely) is generated by official bodies, it is conversely not desirable that all rights be held to formal legal enforcement, which Sen describes below:

"A human right can be effectively invoked in contexts even where its legal enforcement would appear to be most inappropriate. The moral right of a wife to participate fully, as an equal, in serious family decisions – no matter how chauvinist her husband is – may be acknowledged by many who would nevertheless not want this requirement to be legalized and enforced by the policy. The 'right to respect' is another example in which the legalization and attempted enforcement would be problematic, even

bewildering. Indeed, it is best to see human rights as a set of ethical claims, which must not be identified with legislated legal rights” (Sen, 1999, Pg 229).

With the existence of several interpretations of law, it is not surprising that definitions of rule of law range from minimalist to comprehensive, and exist along a wide continuum that can be institutional, procedural or aspirational in nature. A central debate in the literature surrounds whether the rule of law is an end in itself or a tool with which to attain greater goals. Kleinfeld (1995) divides definitions of the rule of law into two categories: (1) those that emphasize the ends that the rule of law is intended to serve within society (such as upholding law and order, or providing predictable and efficient judgments), and (2) those that highlight the institutional attributes believed necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies) (Kleinfeld, 1995, Pg 3).

A minimalist definition of the rule of law makes no reference to rights, democracy, equality or justice: “It consists of the enforcement of laws that have been publicly promulgated and passed in a preestablished manner; are prospective, general, stable, clear and hierarchically ordered (the more particular norms conform to the more general ones); and are applied to particular cases by courts independent from the political rulers and open to all, whose decisions respond to procedural requirements, and that establish guilt through the ordinary trial process” (Maravall, 2003, Pg 261). Or, as O’Donnell describes, “that whatever law exists is written down and publicly promulgated by an appropriate authority before the events meant to be regulated by it, and is fairly applied by relevant state institutions including the judiciary (though other state institutions can be involved as well)” (O’Donnell, 2004, Pg 33).

Similarly, Trebilcock and Daniels (2008) sort definitions into categories described as thick or thin. Much like those described as minimalist, “thin” or formalistic definitions of the rule of law are “...limited to those few spare features common to most, though not all, legal systems” that exist because “rational people need a predictable system to guide their behaviour and organize their lives in a way that minimizes unproductive conflict with other agents” (Trebilcock and Daniels, 2008, Pg 20). Thin definitions therefore have no bearing on whether the laws imposed are just, or on how the laws themselves are arrived at.

On the other hand, “thick” conceptions of the rule of law tend to link the concept to freedom or egalitarianism, and can be prescriptive in nature. In some cases, thick definitions of the rule of law have gone so far as to represent a “comprehensive political morality” (Trebilcock and Daniels, 2008, Pg 17). For example, O’Donnell defines the rule of law to include democratic principles, including that, “1) [i]t upholds the political rights, freedoms, and guarantees of a democratic regime; 2) it upholds the civil rights of the whole population; and 3) it establishes networks of responsibility and accountability which entail that all public and private agents, including the highest state officials, are subject to appropriate, legally established controls on the lawfulness of their acts”

(O'Donnell, 2004, Pg 32). Some authors caution that there are risks in associating the rule of law with concepts like justice or other highly subjective terms, and note that by "treating any particular conception of justice as universal and self-evident, one may actually be doing violence to democracy" (Trebilcock and Daniels, 2008, Pg 19).

Trebilcock and Daniels (2008) fail to find either thick or thin options appealing, and hence draw on a "thinner" conception of the rule of law, which sees "the rule of law as both a set of ideals and an institutional framework... 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 with the axiological purpose of providing such functions as social and economic coordination" (Trebilcock and Daniels, 2008, Pg 25). Notably, they tie their definition to wider developmental goals:

"Our procedural definition of the rule of law consists in an enumeration...of normative benchmarks for key legal institutions [e.g. the judiciary, prosecutors, police, penal systems, specialized law enforcement agencies, legal aid, bar associations, and legal education], 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..." (Trebilcock and Daniels, 2008, Pg 25).

Other definitions of the rule of law approach the issue from a slightly different angle. For example, Tamanaha (1995) suggests that it requires "...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" (Tamanaha, 1995). Finn's (2004) definition centres around power and accountability:

"Most understandings of the rule of law, at whatever level of normative abstraction, have at their center a concern with the accountability and principled exercise of government power. The rule of law...is less about the imposition of limits on power than developing the sense that any exercise of public power must be defensible against a set of stable, knowable, and public norms...It is best to understand the rule of law as a commitment to a particular kind of governance, one based on the principles of accountability, stability, and uniformity, as a regime fundamentally concerned with preventing the arbitrary exercise of power" (Finn, 2004, Pg 12).

And still slightly different, the World Bank's "Governance Matters" measures rule of law against the extent to which there is confidence in and respect of a set of rules: "...perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence" (Kaufman, et al, 2007, Pg 4).

Similar to questions on when a country can declare itself an “official democracy,” similar queries arise as to whether there are benchmarks to gauge the strength of rule of law. For example, just how much judicial independence is necessary to secure the rule of law? Finn (2004) argues that this is difficult to discern given that,

“In no democratic regime are judges completely independent; nor would we want them to be, whether as a matter of democratic theory or of constitutional theory...Stable democracies seek instead elaborate and complex systems of interdependence, so what we desire when we construct the rule of law is some indeterminate and unknowable amount of judicial independence. Too little and we forfeit the capacity of judges to hold rulers to account. Too much and we sacrifice basic principles of democratic accountability. What we want is a judiciary that is ‘relatively autonomous’ of the regime by capable of distancing itself from and sometimes overriding the policy preferences of the regime” (Finn, 2004, Pg 16).

The definitions cited above have related overwhelmingly to rule of law within a national framework. But where domestic laws lack the appropriate values and teeth, international laws can fill the vacuum to enforce the rule of law in a given context. Similar to arguments that law need not be confined to legal or governmental entities, lines of analysis have emerged around how “trans-governmental networks have formed to develop strategies for regulatory cooperation in response to deepening economic and financial integration...” (Berman, 2005, Pg 502). In response to these and other forms of global governance, the field of ‘global administrative law’ (GAL), as defined by NYU’s Global Administrative Law Project, has been formed to ensure a set of global administrative bodies meet “adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make” (NYU [GAL Project website](http://www.iilj.org/GAL/default.asp)).

The GAL field sees law as active not in a strictly international space, but instead where, “administrative functions are performed in complex relations between officials and institutions not organized in a single hierarchy” and where there exists an “...enmeshment of national and intergovernmental regulation.” In this space, “exercises of public power...are increasingly channeled, and controlled, by mechanisms of an administrative law type. These include rules requiring greater transparency, adoption of notice-and-comment procedures in rule-making, and the opening of new or strengthened avenues of judicial and administrative review.”³ Global administrative law raises the important role that other institutions, beyond domestic courts, work to advance the rule of law. Specialized agencies, such as human rights commissions, also play important roles in advancing the rule of law.

3. NYU Global Administrative Law Website: <http://www.iilj.org/GAL/default.asp>: “GAL Working Definition.”

Given that the majority of commentators on rule of law are Western legal scholars, a more fundamental point is that the rule of law doctrine may mean very different things across varying legal traditions (e.g. common, civil and Islamic law). Mednicoff (2006) presents an interesting analysis of the points in common and contention when considering the rule of law from the perspective of the Middle East. He notes that, "...due to the influence of Islamic legal ideals and development, the rule of law exists as a political touchstone in Arab societies in a manner similar to its status in the United States. Yet particular differences in the socio political history of the Middle East and North America shape local understandings and implementation of the rule of law in significant ways" (Mednicoff, 2006, Pg 256). While he argues that there is no obvious reason why the fundamental underpinnings of the rule of law as constraining governmental abuse and providing procedural fairness would not be relevant in the Arab world, he does recognize that the differences that do exist based on historical influences has created cynicism throughout this region as to governments' and outsiders' use of the term.

Frank Bogel (2000) explains the problematic nature of using the phrase 'rule of law' in the context of Saudi Arabia, given that a 'code' or 'statute' does not exist in that context: "The legal system rejects *qanun* ['code' or 'statute'] entirely, refusing to codify even its basic civil laws. It uses the term '*nizam*', or regulation, for the limited number of man-made laws it does have" (Bogel, 2000, Pg 129). Besides verbal differences in the rule of law paradigm that are not easily translated from English, Bogel argues that there are even wider cultural and legal differences. There are also unique concepts in Islamic law that present chasms with Western secular systems: "The ideal of law in Saudi Arabia, and in numerous Islamic legal systems in the centuries before it, is that God rules directly, through his literal words conveyed in the Qur'an" (Bogel, 2000, Pg 4).

The challenge to better understanding and learning from different legal systems thus lies in finding,

"...a comparative framework for discussion between the two legal cultures which, without being vanishingly vague, can represent the many ideal and functional parallels between the legal systems or, rather, between these groups of legal systems, since each contains systems with its own character" (Bogel, 2000, Pg 129).

Ren (1997) similarly points out the failure of much of the comparative legal scholarship in sorting out what is and is not relevant for comparison: "...comparative legal studies of the Chinese system of law have not yet established a clear theoretical pigeonhole, legal presuppositions, and a reliable legal vocabulary for sorting out its relevance from irrelevance. For instance, in discussing the individual's right to privacy, we must first justify the conceptual relevance of privacy, which is at the heart of Western civilization but has literally no legal status in Chinese traditional law" (Ren, 1997, Pg 7).

The differences that exist across common and civil law traditions also have implications for how the rule of law is implemented. Genty (2008) points to the significant practical differences that exist across the two systems, especially in terms of roles for legal actors:

“The most obvious [differences] are the respective roles of judges and lawyers. As noted above, judges are the primary ‘law makers’ in the common law system. However, paradoxically, they play a mostly reactive role in litigation. It is the lawyers who make the important choices and control the litigation process. Judges respond to what is brought to them - motions, discovery disputes, etc. – but because most civil litigation is resolved through settlement, a judge may actually have relatively little to do with the conduct or outcome of a typical case. In contrast, judges in the civil law system are in control from the beginning. Under the inquisitorial method that is used in civil law jurisdictions, judges, not lawyers, decide what evidence is necessary and from whom. They dictate the timing and flow of a case, including which witnesses should be examined. A typical trial, civil or criminal, will consist of a series of examinations conducted by the judge, with the role of the lawyers limited to suggesting additional questions for the judge to ask of each witness” (Genty, 2008, Pg 142).

All of these differences must be recognized in order to understand the landscape of legal traditions and definitions in which the ‘rule of law’ is embedded.

III. The Rule of Law and Development – What Relationship?

While Davis and Trebilcock (2008) cite the recent resurgence of academic interest in the rule of law and development, they are struck by the lack of consensus about what role the rule of law plays in promoting development. This section of the paper provides an overview of how the rule of law might influence development, and what evidence exists.

a. Three Moments in Time – History of Rule of Law and Development

Trubek and Santos (2006) write about the evolution of law and development theory, and how arguments have changed to support the relevance of considering rule of law issues within the context of international development. In particular, they point to “three moments in time” where different theories emerged.

The **first moment** began with 1950s and 1960s development policy that saw the state as central in managing the economy and social development. During this time, law was seen as a “tool for economic management and a lever for social change...an instrument for effective state intervention in the economy” (Trubek and Santos, 2006, Pg 5). More specifically, effective law was required “to create the framework for operation of an efficient governmental bureaucracy and the

governance of public sector corporations. Legal rules are needed to manage complex exchange controls and import regulations” (Trubek and Santos, 2006, Pg 5). In other words, law could influence social behaviour in a way that encouraged development. Extending from this theory were development schemes that included transplanting regulatory laws from the developed world, and modernizing the legal profession. As Davis and Trebilcock describe it, “...such a conception of law as an instrument of, and not merely a response to development, as well as the view of the lawyer as a ‘social engineer,’ was entirely in line with the ‘perceived need for rapid, directed change’ underlying the modernization school’s notion of development” (Davis and Trebilcock, 2008, pg 900).

Moving along a parallel track with development theory, the 1980s marked Trubek and Santos’ **second moment**, where neoliberal market theory took precedence in scholarly debates. During this second moment, law shifted from being an instrument of state policy to an instrument of market relations and a limit on the state, with the purpose of, “...protecting business against the intrusions of the government...The vision of law in the Second Moment was as an instrument to foster private transactions...the independent judiciary was a means to provide fidelity to the law and predictability” (Trubek and Santos, 2006, Pg 5). Just as relevant, during the second moment, the law was not seen as a guarantor of political and civil rights or as protector of the weak or disadvantaged.

Between the second and third moments, development theory shifted once again, with emerging critiques that there are limits to what markets can do for development, and related, the expansion of the definition of development beyond economic growth. Thus, the **third moment** – from the 1990s through to current day – sees law as more than just a tool to ensure economic predictability. While not letting go of the instrumental rationale associated with the rule of law, the third moment thinkers “also see legal institutions as part of what is meant by development, so that legal reform is now justified whether or not it can be tied directly to growth” (Trubek and Santos, 2006, Pg 9). Thus, the current approach to rule of law and development espouses not only principles of law leading to more efficient markets, but also as a means to, “...curb market excess, support the social, and provide direct relief to the poor” (Trubek and Santos, 2006, Pg 8). With this change also comes a more prescriptive role for judges, where they “...not only have to protect property rights and be sure contracts are enforced; they also have to be sure they interpret regulatory law correctly, protect a wider range of human rights, and contribute to poverty reduction...And since the judiciary is now linked to poverty reduction and the social, it is important to provide access to justice for those most in need” (Trubek and Santos, 2006, Pg 9).

Another important theoretical shift during the third moment is the connection between two groups: the human rights movement and those promoting legal reform. The concept of the rule of law came from, “the recognition that purely international approaches to human rights protection were insufficient without strong counterparts in domestic law. The human rights movement began to look

at domestic institutions, championing the creation of constitutional guarantees, judicial review, greater judicial independence, and ‘access to justice.’ This path naturally led to ideas about the construction of the ‘rule of law’” (Trubek and Santos, 2006, Pg 84). Thus, the rule of law became a concept that could be supported by those promoting democracy, human rights, and growth.

Interestingly, at least a portion of the reform agenda that came along with this third moment reverted back to the mistakes of the first – namely the transplantation of models from north to south, and a typically top-down approach:

“[T]here was...a strong belief in the possibility of legal transplantation, a willingness to...conduct reforms at once in all parts and levels of the legal order, and a view that there was one model of ‘the rule of law’ that made sense for all countries. Further, there was a faith that the needed reforms could be imposed from the top, and would be quickly and easily accepted” (Trubek and Santos, 2006, Pg 86).

Recent work from the *Commission on Legal Empowerment of the Poor*⁴ deserves mentioning in terms of third moment thinking. Its June 2008 report, “Making the law work for everyone” stated that 4 billion people in the world are excluded from the rule of law.⁵ The commission underlined a strong relationship between poverty and the rule of law, noting that poverty can only be eliminated with a shift of focus toward removing the barriers that hold the poor back and on building a framework of laws and institutions that provide genuine protection and opportunity for all. In short, they recommend four areas of concentration for improvement, including: 1) *access to justice* through improved identity registration systems, affordable dispute resolution and improved legal literacy; 2) *property rights* through the promotion of an inclusive system and making property and credit markets accessible to the poor; 3) *labour rights* through the strengthening of voice, representation, regulation, and rights for informal workers; and 4) *business rights*, through the streamlining of administrative procedures, the

⁴ The commission, hosted by UNDP, was launched in 2005 by a group of developing and industrialized countries: Canada, Denmark, Egypt, Finland, Guatemala, Iceland, India, Norway, Sweden, South Africa, Tanzania and United Kingdom. The co-chairs of the commission were Madeleine Albright, former U.S. Secretary of State and, Hernando de Soto, Peruvian economist and founder of the Institute for Liberty and Democracy. During the course of the three years, 22 national consultation processes were conducted with representatives from local government, academia, civil society, and grassroots movements. Additionally, five technical working groups were established and submitted specialized reports. More information can be found here: <http://www.undp.org/legalempowerment/>

⁵ The Commission’s report bases this figure on the following data: “In studies conducted on the ground in 20 countries since 1998...the Institute for Liberty and Democracy (ILD) conservatively estimated that between 70 percent and 90 percent of the urban and rural population were extralegal. Applying these results to 179 developing and former Soviet nations, according to the degree of development of their institutional framework, it was found that 85 percent of the population lived in extralegal areas. Given a population of 4.9 billion in these 179 countries, it was concluded that at least 4.1 billion live in extralegal areas. Studies by a number of other organisations confirm this figure. The International Labour Organisation, in the 2002 edition of *Key Indicators of the Labour Market* estimated that ‘more than 70 percent of the workforce in developing countries operates in the informal economy.’ Taking into account the dependents of these workers, this means that at least 4.3 billion people in these countries rely on informal activities for their day-to-day subsistence. The World Bank Institute, using conventional definitions of under-employment and poverty, has come up with similar estimates” <http://www.undp.org/legalempowerment/report/index.html>.

broadening of access to financial services and inclusive rule-setting (Commission on the Legal Empowerment of the Poor, 2008).

b. Arguments and Evidence on Rule of Law and Development

While there is some documented evidence on how the rule of law interacts with development, Davis & Trebilcock (2008) cite that, “A good deal of the debate around law and development is about how to go about it, rather than whether it has the potential to promote development” (Davis & Trebilcock, 2008, Pg 917). They also argue that while there has been a great deal of academic interest in recent years, and while several volumes⁶ written “...reflect decades of both practical experience with and scholarly reflection upon legal reforms in developing countries, at the end of the day they are remarkably inconclusive” (Davis & Trebilcock, 2008, Pg 897).

Because of this, these same authors appear somewhat surprised as a result of the bold claims of the *New Institutional Economics* make about the potential impact of legal reforms for (economic) development, such as Hernando De Soto:⁷

“The legal system may be the main explanation in the difference in development that exists between industrialized countries and those that are not industrialized.”

“Development is possible only if efficient legal institutions are available to all citizens.”

“The law is the most useful and deliberate instrument of change available to people” (De Soto, quoted in Davis in Trebilcock, 2008, Pg 903).

Of the main evidence that exists to support the connection between rule of law and development, the most extensive is that related to economic growth and institutional development.

The Rule of Law and Economic Growth

The basic theoretical arguments that connect law to economic development are summarized by Haggard, MacIntyre and Tiede (2007) in the following excerpt:

“The core theoretical insight linking law to economic development runs through two distinct but closely related channels: the effects of property rights on investment and the effects of contract enforcement on trade. References to the role of the state as an enforcer of property rights and

⁶ Including Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*; Kenneth Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development*, and David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal*.

⁷ Hernando De Soto, *The Other Path: The Invisible Revolution In The Third World* 185, 1989.

contracts can be found in classical political economy. But it was not until the 1960s that work by Coase (1960), etc...laid the groundwork of the new institutional economics, of which property rights and the contract design and enforcement constituted a core component. These innovations were followed by important applications in the new economic history, of which North was the most influential proponent (North & Thomas 1973; North 1981; 1990). In North's accounts, secure rights in property were the key to sustained economic growth. These ideas enjoyed yet another revival with the strand of the new growth theory that focused on institutions" (Haggard et al, 2007, Pg 206).

Institutions categorized under the rule of law⁸ are included in the above mentioned work on institutions and economic development, thus a good deal of evidence exists to support its connection to economic growth. One such influential study conducted by the Kaufmann, Kraay and Zoido-Lobaton of the World Bank, called *Governance Matters*⁹, found "strong correlations (they assert causation) between each of their sub-indices of institutional quality, including the rule of law index..." (Davis and Trebilcock, 2008, Pg 939). Kaufman's "Governance Redux: the Empirical Challenge" (2004) states that,

"...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 counties in the former Soviet Union), to the much higher level in Slovenia or Spain, would further multiply this income per capita increase" (Trebilcock and Daniels, 2008, Pg 8, quoting from Kaufmann, 2004).

Several other papers provide econometric evidence of the positive link between rule of law and growth (Butkiewicz and Yanikkaya 2006; Rigobon and Rodrik 2005; Rodrik, Subramanian and Trebbi 2004). These papers use composite indicators to measure the quality of rule of law, which is then compared to income. All three papers conclude that there is a robust positive relationship between rule of law and growth – Butkiewicz and Yanikkaya state that their findings support the "apparent consensus of the empirical growth literature [...] that the maintenance of rule of law is important for economic growth" (Butkiewicz and Yanikkaya, 2006, Pg 649).

Dam (2005) – while admittedly not contributing substantial new [econometric] evidence – puts forth compelling reasons why for policy makers, three aspects of

⁸ While the discussion below addresses how economic development may be affected by a formal rule of law, Dixit (2004) puts forward analysis on how (in the absence of state law) alternative arrangements (i.e. non-governmental) perform the same functions (Dixit, 2004, Pg 8). Examples include self-enforcing governance through repeated interaction and the prospect of long-term relationships as well as private government (i.e. payment for services). Haggard, et al (2008) also treat this issue.

⁹ Daniel Kaufmann et al., *Governance Matters*, (1999) World Bank Policy Research Working Papers No. 2196 (available for download on [http:// www.worldbank.org/research](http://www.worldbank.org/research)).

the rule of law are particularly important to address for a country's economic development, namely: i) the judiciary, ii) equity markets; and iii) credit markets. First, Dam argues that the judiciary is of significant concern for developing countries because "enforcement is usually more important than the details of substantive law in creating the conditions for economic development" (Dam, 2005, Pg 24). He outlines three potential areas of focus when considering how to improve a judiciary: 1) to investigate the operational details of the court system, 2) the quality of the judiciary, and 3) the relation of the judiciary to the rest of the government. He argues that while "[m]ost bilateral and international economic assistance programs have focused on the first perspective – the operational aspects...the problems facing the judiciary in many developing countries go much deeper, which leads to the second perspective: the quality of the judiciary and, not least, the judges themselves" (Dam, 2005, Pg 228).

Second, Dam suggests that a strong corporate sector is vital to development, but that in many developing countries, the problem of concentrated shareholding stunts the opportunity for attracting financial and managerial resources needed for large-scale economic activity. This problem of corporate governance – which he asserts could be fixed by improving corporate law and strengthening enforcement through an independent judiciary – presents a "tailor-made formula for expropriation of the value of minority shareholdings." This, he argues, creates a situation where "the ability of the economy to mobilize capital through broad-based equity markets is inevitably limited and the role of the corporate sector in spurring economic development is correspondingly limited" (Dam, 2005, Pg 229).

Third, Dam concludes that endemic problems associated with credit markets – especially given their size and centrality for economic development in developing countries – can be addressed by law reform and prudent regulation. He points to three kinds of lending that contribute to poor credit markets: "directed lending, in which governments and powerful politicians use their influence to direct bank loans to favoured sectors and companies; crony capitalism, in which a bank's controlling shareholders and executives – often the same people – may lend to politicians or others who can protect and promote the bank; and related lending, in which banks lend to enterprises owned by the bank or its executives" (Dam, 2005, Pg 229).

However, while admitting that a great deal of literature exists to link property rights, contracts and rule-of-law institutions to positive economic growth, Haggard et al caution that the fundamental problem is not about "getting the law right", but instead the reality of "...a complex causal chain that includes a variety of complementary institutions and political bargains – with respect to security, appropriate checks on private capture of the state, institutional checks on state power, and the more discrete features of the judicial and legal system. In simplest form: Property rights and contracting rest upon institutions, but these in turn rest upon deep coalitions of consenting interests" (Haggard et al, 2007).

Evidence also exists that counters the assertion of a strong link between the nature of a country's rule of law and its economic development. This is what

Davis and Trebilcock call the “informed alternative” camp, which argues, “...there is virtually no connection between the nature of a society’s legal system and its development prospects...development is not necessarily associated with a legal system, and thus the state of the legal system should not be used as a benchmark for development” (David and Trebilcock, 2008, Pg 933). Concerns have been raised about the data used to connect the rule of law and economic development, which Trebilcock and Daniels note are often subjective assessments. They point out that:

“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....countries that score well on rule of law indices that are based at least in part upon rates of compliance with the rule of law may be scoring highly for reasons that have little to do with the ‘strength’ of their legal system” (Trebilcock and Daniels, 2008, Pg 10).

Glaeser et al. (2004) provide econometric evidence that counters an “apparent consensus” of the causality between rule of law and economic growth. In particular, the paper studies several of the institutions used as indicators for rule of law (e.g. the risk of expropriation by the government, constraints on the executive, and government effectiveness). Glaeser et al. find flaw with the indicators and instrumental variable techniques used in other econometric studies. The results of this research support the hypothesis that the direction of causality espoused by the law-growth optimists is incorrect, and that institutions (and the rule of law) are in fact improved by economic growth, not vice-versa.

Other opposition is outlined by Jensen (2003) and Davis and Trebilcock (2008) in citing the good economic records of countries like China, which have poor records on the rule of law:

“China, for example, has enjoyed high levels of foreign direct investment and growth; and Brazil has a growing credit market based on the dense information available through new technologies and databases, both of which tend to substitute for strong legal institutions. At the same time, actors in India are pursuing international capitalization by adhering to more rigorous international standards of corporate governance – even more rigorous than their domestic laws would require” (Jensen, 2003, Pg 342).

“Upham...forcefully points out that Japan’s most impressive period of economic development coincided with a period in which the Japanese government deliberately limited the role that the legal system played in Japanese society by, among other things, drastically limiting the number of qualified lawyers.” (Davis and Trebilcock, 2008, Pg 936).

“Capitalism in East Asia...is characterized by networks of relationships, both between economic agents and between economic agents and the

state, which operate largely outside the formal legal system. In this brand of capitalism, the legal system plays a marginal role and so substantial investments in legal reform are of dubious value” (Davis and Trebilcock, 2008, Pg 933).

Haggard et al (2007) also caution against overemphasizing the role of formal institutions: “...property rights and contracts rest on institutions, which themselves rest on coalitions of interests. Formal institutions are important, but, particularly in developing countries, informal institutional arrangements play a significant part as well” (Haggard, et al, 2007, Pg 205).

Rule of Law, Equality and Social Change

Another positive argument exists that supports the rule of law as intrinsically worthwhile, as it contributes to a country’s social equality and fairness – i.e. it can be seen as part of the development process. This argument is summarized by Trebilcock and Daniels (2008) below:

“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 the 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” (Trebilcock and Daniels, 2008, Pg 5).

On a similar line, constitutional guarantees of rights are sometimes argued to be, “...ends in themselves [and] manifestations of a society’s moral commitments” (Davis and Trebilcock, 2008, Pg 905).

Another argument concerns the ability of the judiciary to incite positive social change linked with development gains. While the traditional roles of protecting the rights and liberties of the people, interpreting legal and constitutional provisions, and resolving disputes among different litigants has been widely explored, the role of judicial activism, or the advocacy of new laws by the judiciary, could be explored further. In India, a 1979 news item published in the *Indian Express* described the plight of prisoners held under trial who had been languishing for periods longer than the maximum punishment prescribed, led an advocate to file a petition in the Supreme Court. The judiciary took up the issue, which may be considered the birth of judicial activism in India. Issues that followed included the right to information (which led to a Freedom of Information Bill in 2002); gender jurisprudence; Dalit jurisprudence; health and child protection. However, the rise of judicial activism can lead to tensions between elected bodies and the judiciary, both vying for influence, which evokes questions of jurisdiction between the two camps.

Sherif (2000), sights the Egyptian case as one where the Supreme Constitutional Court has played a fundamental role in advancing constitutional guarantees and human rights, and points to knock-on effects that the Egyptian judiciary has had beyond its borders: "...its rulings have been quite progressive in defining the rights accorded to all Egyptian citizens under the Constitution and under current notions of human rights. The rulings of the court are not only binding in Egypt and followed by all its courts, but are closely observed by judicial systems and governments throughout the Arab World" (Sherif, 2000, Pg 1).

Jensen (2003) cites the widely-held perception that activist courts somehow push the envelope and lead to social change. Contrary to this conventional wisdom is evidence from a US study that demonstrates that the supreme court (at least in the United States) "generally lags behind social movements" and yet "the image of an activist court prevails" (Jensen, 2003, Pg 344).

The Rule of Law and International Governance

As mentioned above, the Global Administrative Law project at NYU seeks to, "systematize studies in diverse national, transnational, and international settings that relate to the administrative law of global governance" (Kingsbury et al, 2005, Pg 15). In particular, the project focuses on five main types of administrative regulation:¹⁰

- *International Administration* by formal international organizations (such as United Nations Security Council individual sanctions programs, or UN administration of territory);
- *Network Administration* based on collective action by transnational networks of cooperative arrangements between national regulatory officials (such as the Basel Committee of national bank regulators);
- *Distributed Administration* conducted by national regulators under treaty, network, or other cooperative regimes (such as the Basel Convention on transboundary movement of hazardous wastes);
- *Hybrid Administration*, by hybrid intergovernmental-private arrangements (such as ICANN, the Internet Corporation for Assigned Names and Numbers); and
- *Private Administration*, by private institutions with regulatory functions (such as the ISO, the International Organization for Standardization).

In considering these globalized forms of administration, the project asks how principles related to domestic administrative law might be applied to an international setting. First, in terms of ensuring transparency, accountability and the rights of affected parties to have their concerns heard in advance of decision making, Kingsbury et al (2005) note that to date in the international setting of rule-making and regulatory decisions, "participation rights in rulemaking have been afforded in only a limited number of instances and areas" (Kingsbury et al,

¹⁰ GAL Website, "Working Definition": <http://www.iilj.org/GAL/GALworkingdefinition.asp>.

Pg 38). They also note that developments on this front have to date been generally voluntary in nature.

Second, the principle of applying reasons for administrative decisions including responses to the major arguments made by the parties or commenters, is another area for consideration. In the area of global rulemaking, however, they outline that this principle has rarely been extended, “though some organizations provide them in order to strengthen the acceptability of their actions to affected interests. The Basle Committee, for example, has established a web-based dialogic process in developing its new capital adequacy requirements for banks; drafts are posted, comments are invited, and reasons are given by the Committee in connection with new and revised drafts” (Kingsbury, et al, Pg 39).

The entitlement to have an administrative decision reviewed by a court or an independent tribunal is – to some extent – mirrored in global administration: “[a]cceptance of the importance of review is reflected in the establishment of the World Bank Inspection Panel, and also in the right of appeal to the Court of Arbitration for Sport from doping decisions” (Kingsbury et al, Pg 39).

Other important domestic principles from administration law for consideration in the global realm include the application of substantive standards (i.e. proportionality, rational relation between means and ends, use of less restrictive means, or legitimate expectations), immunities (i.e. the immunity of foreign states) and exceptions due to security interests or decisions made by central banks (Kingsbury et al, Pg 42). The authors contest that more research should be conducted to understand when the above have been applied and where or how they might be appropriate in the international context.

IV. The Rule of Law and Democracy – Necessarily Reinforcing?

As is widely recognized, there are many different ways to define democracy, and similar to the rule of law, definitions can range from thick to thin. Narrow definitions may say nothing of the rule of law (e.g. electoral democracy), while wider definitions often include rule of law as one of democracy’s main components. Foweraker and Krznaric (2008) note that over time, liberal democracy has come to include “...the main institutional and legal means for achieving and defending the principles of liberty and equality...” (Foweraker and Krznaric, 2008, Pg 31). Sen (1999) proclaims that democracy “requires the protection of liberties and freedoms, respect for legal entitlements, and the guaranteeing of free discussion and uncensored distribution of news and fair comment” (Sen, 1999, Pg 9).

Guillermo O’Donnell puts forward a similar, but expanded idea that democracy be based on the following main ideas: a) the individual has inherent rights; b) society is organized in a way that guarantees the exercise of these rights and promotes the expansion of citizenship; and c) free and competitive elections,

together with the rule of law, are necessary but not sufficient conditions for democracy (UNDP, 2004, Pg 30).

Even if the rule of law is not defined as part of democracy, it is certainly seen as a factor that advances democracy across much of the literature. Finn (2004) argues that,

“...the rule of law complements principles of democratic accountability by prohibiting the exercise of arbitrary power....The rule of law may also contribute to democratization by increasing the capacity of newly democratic regimes to govern...Related, and no less important, the rule of law can contribute to democratic stability and maintenance by shaping civic society, by reinforcing citizens’ commitment to democracy itself. At the most basic level this can occur by persuading citizens that the rule of law and democratic regimes actually do promote effective governance – that such regimes can govern effectively and materially improve the quality of their citizens’ lives” (Finn, 2004, Pg 12).

As an example, Mehta (2007) notes that while Public Interest Litigation (PIL)¹¹ in India has had no conclusive impact on poverty or correcting injustice, “...the provision of a forum to which citizens marginalized by the corruptions of routine politics can turn has arguably given serious moral and psychological reinforcement to the legitimacy of the democratic system” (Mehta, 2007, Pg 71). Maravall (2003) argues that the rule of law and (electoral) democracy are highly intertwined in terms of the two instruments that citizens have at their disposal to protect them: “...to throw the rulers out of office at election time; [and]...to enforce, through institutions, legal limits to the political discretion of incumbents between elections. The first protection is provided by democracy; the second by the rule of law” (Maravall, 2003, Pg 261).

Despite this closeness in definition and an oft-cited complementarity, many tensions between democracy and the rule of law exist. Ferejohn and Pasquino’s (2003) arguments respond to why the rule of law should not necessarily be wrapped up in the definition of democracy, at least at the institutional level. They argue that the two operate quite separately from each other in practice, which may have implications for any causal relationship assumed:

“...democracy and the rule of law are embodied in distinct institutional systems. Democracy principally concerns electoral institutions, governments, and legislatures. Law operates through courts, police, and lawyers. To be sure, there is an intersection – the legislature, and

¹¹ In PIL cases, the Court relaxes the normal legal requirements of “standing” and “pleading,” which require that litigation be pressed by a directly affected party or parties, and instead allows anyone to approach it seeking correction of an alleged evil or injustice. Such cases also typically involve the abandonment of adversarial fact-finding in favor of Court-appointed investigative and monitoring commissions. Finally, in PIL matters the Court has expanded its own powers to the point that it sometimes takes control over the operations of executive agencies (Mehta, 2007, Pg 71).

perhaps the jury trial – where democracy and law come into close contact. But this contact is brief, and, for the most part, law takes on a life of its own once it issues from the legislative process” (Ferejohn & Pasquino, 2003, Pg 243).

Going farther, Mehta (2007) notes that in India, parliament and the judiciary have been and are likely to remain competitors when it comes to interpreting the constitution (Mehta, 2007). He notes a trend toward what he calls ‘post-democracy’ where nonelected decision making is gaining power over institutions made up of elected representatives, for which he ponders the relevance:

“The democrat in all of us is rightly suspicious when a few people (mostly older and mostly male, as it happens) assume such broad powers over our destiny without much accountability. At least, we ruminate, we can throw the politicians out once in a while, but judges are mostly shielded from accountability. And yet our impatience with a debilitating political process whose usual results are inaction or unsatisfying compromises makes us thankful for an assertive judiciary” (Mehta, 2007, Pgs 79-80).

Similarly, Ferejohn and Pasquino (2003) highlight that over the past seventy years, courts have become much more active in expanding the list of civil rights that “places severe limits on the policies governments can undertake and the way permissible projects may be pursued.” They go on to say that in Europe at least, “both national and supranational courts have begun to play a much more active and important role in deciding important and controversial social questions, questions traditionally decided by governments and parliaments” (Ferejohn & Pasquino, 2003, Pg 249).

Maravall (2003) echoes this strain between representative and judicial bodies, and describes how democracy and rule of law interact in a way that can be conflictual: “[p]erhaps democracy demands that the range of choice open to government be broad and not constricted by externally imposed restraints (such as legal protections for minorities).” While on the other hand, “...perhaps, democracy requires that the people be regularly and genuinely consulted on fundamental legal changes so that institutions or practices of deliberation and consultation are in place and functioning” (Maravall, 2003, Pg 242). While both of these intentions (i.e. that policies reflect the views of the electorate and that the judiciary be independent) are independently desirable, this example shows that the two interact in a way that creates tension, and requires constant negotiation.

With these thoughts in mind, two scenarios are considered below: democracy without the rule of law; and the rule of law without democracy.

Democracy without the rule of law?

Research from Latin America has shown that “...despite the rapid dissemination of competitive electoral politics across the new democracies, civil and minority

rights are still fragile, suggesting that the citizens of these democracies remain unprotected and vulnerable” (Foweraker & Krznaric, 2002, Pg 32). The same study points to oligarchic political power (supported by clientelist politics) and military prerogatives (i.e. that armed forces and police remain largely unaccountable to elected civilian government) as plausible explanations.

O’Donnell (2004) also elaborates on why it might be the case (again, in the Latin American context) that the rule of law is compromised while at the same time national-level democracy exists. He cites flaws in existing laws as one of these reasons, where despite progress, “there still exist laws, judicial criteria, and administrative regulations that discriminate against women, members of indigenous peoples, and various other minorities, and which often force defendants, detainees, and prison inmates to endure conditions that are repugnant to any sense of fair process” (O’Donnell, 2004, Pg 39).

Other flaws exist in the application of the law, and in access to the judiciary and fair process. First, in the application of law, this is where the privileged manage to exempt themselves from the law, or as he puts it, “[t]here is an old Latin American tradition of ignoring or twisting the law in order to favor the strong and repress the weak” (O’Donnell, 2004, Pg 40). Second, with respect to access, he argues that

“[a]cross most of Latin America, the judiciary is too distant, cumbersome, expensive, and slow for the poor and vulnerable even to attempt to access it. And if they do manage to obtain judicial access, the available evidence often points to severe and systematic discrimination. Criminal procedures in particular often tend to disregard the rights of the accused before, during, and after trial” (O’Donnell, 2004, Pg 40).

Sheer lawlessness, caused by the limited reach of the legal state in poor peri-urban areas or in districts distant from the capital, renders any formal rule of law ineffective and can result in the existence of a subnational system of power, as explained below:

“...intermittent law is encompassed by the informal law enacted by the privatized-patrimonial, sultanistic, or simply gangsterlike-powers that actually rule those places. This leads to complex situations involving a continuous renegotiation of the boundaries between formal and informal legalities, situations in which it is vital to understand the interplay between both kinds of law and the uneven power relations that develop. The resulting informal legal system, punctuated by temporary reintroductions of the formal one, supports a world of extreme violence, as abundant data from both rural and urban regions show. These "brown areas" are subnational systems of power that have a territorial basis and an informal but quite effective legal system, yet they coexist with a regime that, at least at the national political center, is democratic” (O’Donnell, 2004, Pg 40).

O'Donnell argues that this problem has in fact grown during periods of democratization, which he attributes to antistatist economic policies emerging from financial crises, as well as corruption within the political system.

On a different track, yet also contributing to the scenario of democracy without the law, Peruzzotti and Smulovitz (2006) argue that the literature on legal accountability shows citizens face many problems when trying to subject the actions of their leaders and public officials to the rule of law. This includes challenges in mobilizing citizens to punish disobeyers of the law, as well as a lack of an independent judiciary that can call rulers to account.

The rule of law without democracy?

On the other side of the spectrum, is it counterintuitive to consider whether rule of law can exist under an undemocratic regime? If the rule of law is conceived in a thick way, then yes, as the law in cases of dictatorship likely fail the test of application equally and without preference across society. That said, the fact that the law can be used as a means for oppression is important to keep in mind. Sachs and Pistor make an important distinction between the rule of law and the rule through law, the latter of which is where law is simply an administrative device, as opposed to a concept where a set of rules bind state officials. Thus, “[t]he rule through law can entrench autocracy in law” (Kleinfeld Belton, 2005, pg 34). O'Donnell, supports this notion with the following:

“[A]t times the rule of law (or at any rate, the rhetoric of the rule of law) has been employed in the service of authoritarian ideologies. In earlier times, in countries riven by severe inequality as so many in Latin America have been (and too often still are), practices associated with the law were not used in the service of fairness, but rather to entrench sharp inequalities and the manifold social ills associated with them” (O'Donnell, Pg 40).

Similarly Carothers (2009) puts forward that in Russia and China, “...stronghand rulers have found that the rule of law works well as an alternative objective to democratization, not one that complements it but rather one that will help preserve authoritarian or semi-authoritarian rule” (Carothers, 2009, Pg 54).

Various case studies as well, including that of Barros (2003) who examines the rule of law under Pinochet's Chile, show that a version of the rule of law can exist under autocracy, where the autocrats and the military are subject to a set of laws (Barros, 2003, Pg 197). Singapore is a case where a well-established judicial framework exists in tandem with an insufficient separation of powers, and a lack of fundamental freedoms and democratic rights. Despite the fact that Singapore's judiciary lacks independence,¹² in 2005 Singapore placed second in a world ranking of legal frameworks published by the Institute for Management Development's World Competitiveness Yearbook (Yew, 2008).

¹² Democracy Web: Comparative Studies in Freedom. <http://www.democracyweb.org/rule/singapore.php>

V. Researchable Questions: Suggestions from the Literature

Carothers summarizes the knowledge gap on the rule of law by identifying a number of serious obstacles to the accumulation of knowledge on the topic. Two of these obstacles are, first, that “aid organizations have proven themselves to be ill-adept at the task of generating and accumulating the sort of knowledge that would help fill the [research] gap” (Carothers, 2006, Pg 26), and second, that neither political science departments nor law schools are funding such research either (Carothers, 2006, Pg 27). The following is a summary of some of the researchable questions suggested in the literature.

a. Institutional Design

Put simply, while there has been a multitude of work on rule of law promotion and reform, little research exists that points to ***what the right institutional make-up of a functioning rule of law actually consists of***. David & Trebilcock summarize this problem with the following:

“While there appears to be an increasingly firm, empirically grounded consensus that institutions are an important determinant of economic development (and probably other aspects of development), there is much less consensus on which *legal* institutions are important, given the existence of informal substitutes, what an optimal set of legal institutions might look like for any given developing country, or for those developing countries lacking optimal legal institutions (however defined) what form a feasible and effective reform process might take and the respective roles of “insiders” and “outsiders” in that process (Davis and Trebilcock, 2008, Pg 945).

The ***utility of oversight mechanisms*** also appears to suffer from an empirical vacuum. Peruzzotti and Smulovitz (2006) note that in the last decade, national, regional, provincial and municipal ombudsman offices have been created in Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Peru, and Venezuela. While these have apparently “contributed to the increase in the judicial oversight of rights and of administrative actions... their effectiveness still needs to be systematically studied” (Peruzzotti & Smulovitz, 2006, Pg 21).

b. Comparative Legal Systems

Consideration must also be given to the fact that lessons from well-functioning legal systems in one situation cannot be necessarily transplanted to another, due in part to the significant differences that exist across different legal traditions – civil, common and Islamic. Thus, the challenge to better understanding and learning from different legal systems lies in finding the right comparative framework. Research that draws on a wide range of legal traditions would

undoubtedly improve policy debates on the right institutional design for achieving the rule of law, which Bogel summarizes well below:

“With such a framework in place, we will be able to ***share understanding of problems which are common across the legal cultures, including the many functional problems the rule of law should redress***, such as how to ensure the independence of judges, how to suppress abusive police practices like torture to secure confessions, or how to prevent arbitrary or corrupt executive action” (Bogel, 2000, Pg 129).

Questions also exist around ***the role of the rule of law across religious and secular societies*** which could be further explored in the context of comparative law. According to Lau (2000), is the case of Islamic Law in Pakistan, outcomes remain ambiguous:

“The role of Islam in the maintenance of the rule of law continues to be an ambiguous one. On the one hand, Islam has been used by Pakistan’s higher judiciary to widen the ambit of constitutionally-guaranteed fundamental rights, and on the other the Government resorts to Islam as a means of weakening these very same rights. Common to both, however, is the indigenization of the political and legal discourse in Pakistan which is gradually moving away from common-law precedents. Islam and Islamic law have been firmly established on Pakistan’s legal landscape, capable of both supporting and undermining the rule of law” (Lau, 2000, Pg 162).

Yamani (2000) argues that a distinction must be carefully made between the role of Islamic law and the (at times contradictory) interpretations of Islam that are used for political reasons. For example, “while women are encouraged by the Government and general patriarchal system to be mothers and stay at home, those who are educated have become aware that Islamic law recognizes the financial and civil rights of women in relation to men, thus allowing women a measure of independence” (Yamani, 2000, Pg 137-8).

b. Dynamics of Rule of Law Reform

Aside from debates as to how the rule of law interacts with development and democracy, the question remains ***why it is so seemingly difficult to establish or strengthen legal systems*** in developing countries. Trebilcock and Daniels (2008) cite several possible reasons. Each on its own, or the balance of the three factors, could easily serve as areas for further research:

- *Technical or resource-related issues*: countries lack the financial, technological or specialized human capital resources to implement good institutions generally, including legal institutions.
- *Social-cultural-historical factors*: A set of social values, norms, attitudes, or practices that are inhospitable to the rule of law.

- *Political economy-based impediments*: lack of effective political demand for reforms and on the other hand supply-side vested interests that render reforms difficult to realize (Trebilcock & Daniels, 2008, Pg 38).

Political economy-based impediments are suggested as the most promising for study, as "...empirical evidence suggests that various forms of power structures often represent root-cause impediments to the rule of law" (Trebilcock & Daniels, 2008, Pg 339). Carothers (2006) also points to several researchable questions that remain unanswered in the area of rule of law reform, including:

- How does will to reform develop?
- Can it be generated and if so, how?
- Should we assume that institutions change through gradualist reform processes willed by persons inside the system?
- Does public pressure play a major role?
- What about abrupt, drastic change provoked by persons outside the institutions who are dissatisfied with their function or who have their own goals about what institutions to have? (Carothers, 2006, Pg 22).

Another question could be added to this list as to whether sequencing of institutional reforms plays any role in sustaining the rule of law, which builds on existing literature in the democracy field that explores similar questions.¹³

Even taking Carothers' questions in mind, Clark (1999) provides a sobering reminder that "...the emergence of the rule of law has a history bound up with a prolonged political struggle and that it took a long time to be established, and in the history of government it is a recent and a rare accomplishment" (Clark, 1999, Pg 30).

How civil society plays a role in ensuring the rule of law is accessible and meaningful to society is another area ripe for research. Peruzzotti and Smulovitz (2006) explain social accountability as ensuring governments are legally accountable to the public, with mechanisms that, "...entail a diverse group of civil society initiatives and media exposés organized around demands for the rule of law and due process. By exposing and denouncing cases of governmental wrongdoing, activating horizontal agencies of control, and monitoring the operation of those agencies, mechanisms of social accountability make a crucial contribution to the enforcement of the rule of law" (Peruzzotti & Smulovitz, 2006, Pg 10). For example, in Argentina and Brazil, a series of unrelated incidences of police violence led to the organization of local social movements and the establishment of permanent society-based monitoring associations.

¹³ See Carothers, "The 'Sequencing' Fallacy." *Journal of Democracy*. Volume 18, Number 1, January 2007 for a summary of the debate.

A host of issues ripe for research exists on how civil society interacts with the rule of law through social accountability measures. O'Donnell (2006) suggests several questions that could be addressed in future research, including:

- Which social accountability actions are heard, and which are not?
- What role do balancing and appointed agencies play?
- Which social accountability actions lead to some sort of state response activity but finally fail because they do not follow a complete institutional and decisional path?
- To what extent do personal / organizational resources (time, information, media access, capacity of public and/or interpersonal communication, and money) affect the extent to which social accountability can be achieved?

It is clear from the literature that more research is needed on the role of ***international assistance in supporting the rule of law***. As Carothers (2006) sums up, "...there is a surprising amount of uncertainty about the basic rationale for rule-of-law promotion" (Carothers, 2006, Pg 17). Many commentators have called for modest expectations of what external promotion efforts will produce, and especially the extent to which Western models will be of any use to recipients. Haggard et al (2007) note that "The initial enthusiasm about the gains from improving legal institutions has been followed by a wave of skepticism, much of it focused implicitly on problems of endogeneity. If the efficacy of legal institutions depends on complementary features of the broader political system, apparently simple reforms may be well beyond the capacity of outsiders to effect" (Haggard et al, 2007, Pg 206).

Jensen (2003) cautions that, "...the goals and expectations articulated in rule of law projects often diverge dramatically from their activities and accomplishments. Expectations tend to be bloated ...they aim at broad substantive goals like strengthening individual rights and political institutions, and stabilizing the economy. To the extent that these reform programs succeed, however, that success is often at the 'thin' level of the rule of law: improvements in the procedures and the efficiency of legal processes" (Jensen, 2003, Pg 339). O'Donnell (2004) goes farther in suggesting that current promotion efforts targeted at domestic and international commercial law, some aspects of civil law, and the more purely repressive aspects of criminal law may in fact "...produce a dualistic development of the justice system...For societies that are profoundly unequal, these trends may reinforce the exclusion of many from the rule of law, while further exaggerating the advantages that the privileged enjoy by means of laws and courts favoring their interests" (O'Donnell, 2004, Pg 42).

c. The Changing Nature of Law-Making

When one considers claims that ***90 percent or more of the law-related problems that the poor face are handled outside the courts*** in much of the developing world (Golub, 2006, Pg 118), it follows that more research could be

done to understand traditional, customary and informal rule of law mechanisms. One interesting case of an alternative system – though not without flaws – can be found in India’s Lok Adalats. In response to staggering statistics that “...in 2002 there were 23 million pending court cases – 20,000 in the Supreme Court, 3.2 million in the High Courts and 20 million in lower or subordinate courts” (Galanter & Krishnan, 2003), a system of courts that exist independent of the official law was created. These “rival” systems deserve more careful analysis, as according to some commentators, they have the double flaws of diluting “...the efficacy of the state as adjudicator and enforcer of norms in everyday life” and “...sadly hold little promise for delivering effective legal services to those most in need” (Galanter & Krishnan, 2003, Pg 126).

The changing role of the judiciary is another issue that could be further explored, and particularly ***the role of judicial activism*** and rising tensions between elected bodies and the judiciary, both vying for influence and jurisdiction. In terms of the role of the judiciary in upholding the rights of the people, Mehta (2007) observes that while “[d]efenders of the judiciary often focus on the few success stories that result from judicial decisions...there is a glaring lack of concrete, empirical data on the effects of court interventions. Courts can proclaim new rights as much as they want, but the proclamation of rights by itself does not produce results” (Mehta, 2007, Pg 81). In India, he argues that the judiciary has been effective in stewarding education as a constitutional right, but on the right to health, judicial declarations have had little effect. More research is required to better understand this issue.

New issues have also arisen with the ***rise of globalization and the creation of trans-national networks that make rules and shape regulatory policy***. The Global Administrative Law project at NYU has raised issues concerning how domestic administrative law might be applied to international settings to ensure transparency, accountability, and the right of affected parties to have their views considered before a decision is taken. Kingsbury et al (2005) put forward the following recommendations:

“With a wide set of case studies of practice in particular areas, coupled with efforts to develop comparative and synthetic conceptual structures and normative theories, questions about the design of and need for mechanisms of transparency, participation, review, and legality in global administration may be more fully addressed. Moreover, a deeper analysis of doctrinal features and divergences will be possible, and hypotheses of positive political theory can be developed and tested. Work on the normative issues is likely both to deepen transnational and global democratic theory and to raise challenging questions about its application to specific administrative structures and to the whole project of global administrative law. Normative inquiries will also enrich operational understandings of the place of diversity, equality, and equity in global administrative law. The need for alternative approaches to the currently dominant models of global governance and of administrative law is pressing but is just beginning to be addressed” (Kingsbury et al, Pg 61).

d. Economic Implications of the Rule of Law

Haggard et al (2007) argue that the research program surrounding democracy, the rule of law, and growth is by no means finished. Several opportunities to build on previous work exist. Particularly, Dam advocates for gathering more empirical evidence on how **economic growth is affected by the following three areas**: 1) **the judiciary** – in particular to investigate the operational details of the court system, the quality of the judiciary, and the relation of the judiciary to the rest of the government; 2) problems associated with **equity markets**, with emphasis on the problem of concentrated shareholding, which stunts the opportunity for attracting financial and managerial resources need for large-scale economic activity; and 3) and **poor credit markets**, caused mainly by directed lending (in which governments and powerful politicians use their influence to direct bank loans to favoured sectors and companies), crony capitalism (where a bank's controlling shareholders and executives – often the same people – may lend to politicians or others who can protect and promote the bank) and related lending (in which banks lend to enterprises owned by the bank or its executives).

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¹⁴ As mentioned in the introduction, a much more extensive literature search was conducted by IDRC's Research Information Management Services Division. This literature search is available upon request.

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