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I. INTRODUCTION

According to Thomas Carothers in a widely cited paper, *The Rule of Law Revival*,[1] over the past two decades or so western nations and private donors have poured hundreds of millions of dollars into rule of law reform in Latin America, sub-Saharan Africa, Asia, and Central and Eastern Europe:

> 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. How can U.S. policy on China cut through the conundrum of balancing human rights against economic interests? Promoting the rule of law, some observers argue, advances both principles and profits. What will it take for Russia to move beyond Wild West capitalism to more orderly market economics? Developing the rule of law, many insist, is the key. How can Mexico negotiate its treacherous economic, political, and social transitions? Inside and outside Mexico, many answer: establish once and for all the rule of law. Indeed, whether it's Bosnia, Rwanda, Haiti, or elsewhere, the cure is the rule of law, of course .... 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.[2]

In this paper, we briefly review the recent experience with rule of law reform initiatives in Latin America, Africa, and Central and Eastern Europe, drawing on more detailed case studies by the authors.[3] We are currently working on a similar case study on rule of law reform experiences in Asia.

The claim that the robustness of a country's commitment to the rule of law is a critical determinant of its development trajectory rests upon both instrumental and deontological foundations.

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1. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFFAIRS 95 (1998).
2. *Id.* at 95.
3. Case studies available from the authors and on file with the editors of the MICH. J. INT'L L.

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 hence economic growth. These theories have been tested in recent years in a number of cross-country econometric studies. At first glance these studies provide compelling evidence in favor of the optimistic claims that law, institutions, and governance exert a significant and independent causal influence upon development outcomes.

Typically, the focus of these studies is upon exploring the extent to which various measures of institutional quality explain measures of economic development such as levels of per capita income, growth, and investment, and generally speaking the results support the optimistic perspective. These studies are now too numerous to survey individually, but we think that their overall tenor 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.[4]

The World Bank's governance 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,

4. DANIEL KAUFMANN ET AL., GOVERNANCE MATTERS (World Bank, Working Paper No. 2196, 1999), *available at* http://www.worldbank.org/research; *see also* DANIEL KAUFMANN, RETHINKING GOVERNANCE: EMPIRICAL LESSONS (CHALLENGE ORTHODOXY) (World Bank Discussion Draft, Mar. 11, 2003).

> 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 nonviolent crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts."[5]
>
> *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."[6]

Using sophisticated statistical techniques the authors of *Governance Matters* created indices that measure institutional quality along each of these six dimensions as well as a composite "governance" index designed to measure the overall quality of governance in a society. They then regressed these indices on three measures of development: per capita GDP, infant mortality, and adult literacy. They found strong correlations between their measures of development and their measures of institutional quality, i.e., both the composite governance index and the six sub-indices, hence their conclusion that "Governance Matters."

Other studies using fewer (and, sometimes, alternative) measures of institutional quality, and typically focusing exclusively upon measures of economic development, have produced similar results.[7] It now appears to be regarded as a truism that the "rule of law" is causally related to economic development. The evidence of a negative correlation between

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5. For a critique of rule of law indicators used in this and other studies, see Kevin Davis, *What Does the Rule of Law Variable Measure?*, 26 MICH. J. INT'L L. 141 (2005).

6. *Id.*

7. Important studies include: ROBERT J. BARRO, DETERMINANTS OF ECONOMIC GROWTH: A CROSS-COUNTRY EMPIRICAL STUDY (1997); Christopher Clague et al., *Institutions and Economic Performance: Property Rights and Contract Enforcement*, *in* INSTITUTIONS AND ECONOMIC DEVELOPMENT 67 (Christopher Clague ed., 1997); DANI RODNIK ET AL., INSTITUTIONS RULE: THE PRIMACY OF INSTITUTIONS OVER GEOGRAPHY AND INTEGRATION IN ECONOMIC DEVELOPMENT (Nat'l Bureau Econ. Res., Working Paper No. 9305, 2002).

residents' perceptions of judicial unpredictability and growth and investment is also robust,[8] and there is considerable evidence of a negative correlation between corruption and investment.[9] Finally, a recent study has found that the *de facto*—but not *de jure*—independence of a country's highest court is positively correlated with economic growth.[10] These findings are all favorable to optimistic perspectives on law and development.

It is worth noting, however, that proponents of constitutional democracy have received only limited empirical support. Studies of the relationship between the nature of political regimes and development, and in particular whether democracy is more conducive to development than other political regimes such as autocracy, have yielded mixed results. Some find that democracy has an insignificant effect on growth.[11] Others find evidence of a positive correlation between growth and various indices of political and economic freedoms.[12] One survey of these studies reports that eight studies found democracies more conducive to growth, eight found authoritarian regimes to be more conducive to growth, and five found no significant difference.[13] If development is defined in broader terms than economic growth, some studies find that more extensive civil liberties and political rights have a significant positive impact on infant mortality and adult literacy,[14] and democracy is

8. Aymo Brunetti et al., *Credibility of Rules and Economic Growth: Evidence from a Worldwide Survey of the Private Sector*, 12 WORLD BANK ECON. REV. 353 (1998).

9. *See* J. Edgardo Campos et al., *The Impact of Corruption on Investment: Predictability Matters*, 27 WORLD DEVELOPMENT 1059 (1999); Paolo Mauro, *The Effects of Corruption on Growth, Investment and Government Expenditure*, *in* CORRUPTION AND THE WORLD ECONOMY 83 (Kimberly Ann Elliott ed., 1997); Paolo Mauro, *Corruption and Growth*, 110 Q.J. ECON. GROWTH 681 (1995); Shang-Jin Wei, *How Taxing Is Corruption on International Investors?*, 82 REV. ECON. & STAT. 1 (2000).

10. LARS P. FELD & STEFAN VOIGT, ECONOMIC GROWTH AND JUDICIAL INDEPENDENCE: CROSS COUNTRY EVIDENCE USING A NEW SET OF INDICATORS (CESIFO, Working Paper No. 906, 2003), *available at* http://ssrn.com.

11. John F. Helliwell, *Empirical Linkages Between Democracy and Economic Growth*, 24 BRIT. J. POL. SCI. 225 (1994).

12. GERALD W. SCULLY, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH 183 (1992). Scully uses Gastil's indices of political, civil, and economic liberties. *See* RAYMOND D. GASTIL, FREEDOM IN THE WORLD (1987); *see also* KAUFMANN ET AL., *supra* note 4; Dani Rodrik, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, *at* 35 STUD. IN COMP. INT'L DEV. 3 (2000).

13. ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990 178 (2000) (concluding that "there is no trade-off between democracy and development, not even in poor countries"); Adam Przeworski & Fernando Limongi, *Political Regimes and Economic Growth*, 7 J. ECON. PERSP. 51, 60–61 (Summer 1993).

14. KAUFMANN ET AL., *supra* note 4.

more conducive than authoritarian regimes to the promotion of economic growth in ethnically fractionalized societies.[15]

From a deontological perspective, scholars such as Amartya Sen in his book, *Development as Freedom*,[16] argue that a full conception of development embraces more than simply income per capita or growth thereof but rather embraces a wide range of dimensions of human well-being that bear on the capabilities of individuals to live lives that they have reason to value, including various freedoms such as freedom of expression, freedom of political association, and freedom of political opposition and dissent. From this perspective, 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 these instrumental terms, although a commitment to protecting these freedoms may also coincidentally serve important instrumental functions.[17]

These differences in the normative rationales for the rule of law between instrumental and deontological perspectives engage a larger and long-standing debate in the legal literature on the content of the rule of law. One strand of this debate focuses on the procedural and institutional characteristics of a country's legal system. For example, adopting a minimalist content of the rule of law, Tamanaha argues that the minimum content of the rule of law includes ensuring: 1) that the government acts according to the rules produced in the political arena and respects the civil rights of its citizens; and 2) that there is a judicial party to resort to that embodies the ethic of treating all cases before it neutrally and fairly. Tamanaha argues that 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 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

15. Paul Collier, *The Political Economy of Ethnicity* (paper prepared for the Annual World Bank Conference on Development Economics Apr. 20–21 1998) *available at* http://www.bepress.com/cgi/viewcontent.cgi?article=1072&context=csae.

16. AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

17. *See* Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83 (2002); Amartya Sen, What is the Role of Legal and Judicial Reform in the Development Process?, Address before the World Bank Legal Conference (June 5, 2000) (transcript available at www1.worldbank.org/publicsector/legal/legalandjudicail.pdf).

> nurtured into maturity, rather than expending the bulk of their efforts in tearing this model down.[18]

To Tamanaha, the virtue of this minimalist conception of the rule of law is that it avoids or at least mitigates charges of cultural imperialism in transplanting vast bodies of substantive law, as well as universalistic conceptions of appropriate institutions and processes, to developing country contexts where distinctive social, cultural, and historical conditions may render such universalistic prescriptions inappropriate.[19]

In a similar vein, Carothers argues:

> The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.[20]

In a formal conception of the rule of law, a socio-political order can claim to be an adherent to the rule of law where it is in compliance with explicit, general, and validly enacted rules. This positivistic conception of the rule of law does not demand any particular substantive content or moral norms; rather, it measures the legal order against the presence or absence of observable criteria that have been decided beforehand. As noted, common criteria may include an independent and impartial judiciary, laws that are public and apply generally, the absence of retroactive laws, etc., but there is no fixed set of criteria which any given legal order must possess in order to fall under the rubric of the rule of law. Derogations from the rule of law so conceived are closely akin to what western administrative lawyers commonly refer to as the "denial of natural

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18. Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L LAW 470, 476, 484 (1995).

19. *See* Richard Shweder, *George W. Bush and the Missionary Position*, DAEDALUS 26 (Summer 2004); Richard A. Shweder, *Moral Maps, "First World" Conceits and the New Evangelists*, *in* CULTURE MATTERS 158 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

20. *See* Carothers, *supra* note 1, at 96.

justice" or constitutional lawyers contemplate as guarantees of "due process" in constitutionally entrenched bills of rights.

Several criticisms have been directed at this conception of the rule of law. In its emphasis on the form of the law, the formalistic conception risks the rule of law being removed from the real consequences of those laws as well as the actual state of the legal order. A substantive approach to the rule of law is one that measures the outcomes of a particular set of rules against standards such as justice or fairness. This approach is only concerned with formal rules insofar as they contribute to certain goals within the legal order. Unlike the positivistic version, which claims to separate morality from rules, the substantive conception requires that the law be grounded in a moral framework. In contrast, in its most stringent form, the formalist position may permit the ascription of the label "rule of law" to a legal system whose laws do not adhere to generally held substantive moral standards, such as apartheid South Africa or Nazi Germany.[21] On the other hand, the substantive approach to the rule of law largely entails equating the rule of law with a just legal system, hence implicating debates about the substantive fairness of vast bodies of substantive law from property law, contract law, family law, environmental law, tax law, labor law, human rights law, to social welfare law, etc. If the subjectivity inherent in the underlying normative conceptions of a just law gives rise to disagreements irreconcilable by consensus or justification, the resulting conflicts over what constitutes "good" law threaten the disintegration of the legal order.

These debates about the appropriate features of various bodies of substantive law are strongly evident in the recent law and development literature. Some scholars, such as those broadly subscribing to the New Institutional Economics school of development, favor substantive laws that provide strong protections of private property rights and alienability, as well as effective enforcement of long term contracts.[22] Other scholars emphasize the importance of constitutional reform, an entrenched bill of rights, and strong protection of human rights as necessary preconditions for development. Human rights considerations may implicate a wide variety of laws having discriminatory or disparate impact on different segments of the country's citizens. Yet other scholars focus on substantive reforms to a wide range of substantive bodies of law, e.g.,

21. For a discussion of different conceptions of the rule of law, see Matthew C. Stephenson, *A Trojan Horse Behind Chinese Walls? Problems and Prospects of U.S.-Sponsored Rule of Law Reform Projects in the People's Republic of China*, UCLA PAC. BASIN L.J. 64, 73–78 (2000).

22. *See, e.g.*, DOUGLAS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1 (1998).

commercial and corporate law, tax law, family law, environmental law, labor law, or social welfare law.

We make no claim in this paper to resolve, or even centrally address, these longstanding debates between procedural and substantive conceptions of the rule of law. For our purposes, it is sufficient to assert, along with Tamanaha, Carothers, and others, that a minimalist, procedurally oriented rule of law is a necessary, albeit not sufficient, condition for a just legal system. That is to say, whatever one's substantive conception of a just legal system or its component parts might be, it is difficult to imagine any normatively coherent or defensible substantive conception of a just legal system that is not predicated on the pre-existence of a procedurally just conception of the rule of law.

Even adopting, as we do for the purposes of this paper, a largely procedural conception of the rule of law, the evidence that we briefly review in this paper suggests that many developing countries and countries in transition from authoritarian, centrally planned societies to forms of democratic capitalism have often encountered formidable difficulties in implementing even this minimalist conception of the rule of law, let alone a more robust substantive conception of the rule of law.

For purposes of explication, we place the potential impediments that these countries may encounter in implementing a procedurally oriented conception of the rule of law 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 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 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 entail 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). Indeed, on the instrumental rationale for rule of law reform, governments lacking 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, and historical factors that have yielded a set of social values, norms, attitudes, or practices that are inhospitable to even a minimalist conception of the rule of law.[23] While deeply entrenched social values, attitudes, and practices are presumably amenable to change through time,[24] 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. Indeed, scholars such as Upham[25] argue that the relatively limited role played by formal legal institutions in post-war Japan, in contemporary China, and in other parts of Asia, have not been inconsistent with dramatic progress in economic development. In particular, the so-called China enigma—dramatic economic growth in a context of weak rule of law institutions—has attracted increasing scholarly attention that tends to identify the role of largely autonomous local governments and Town and Village Enterprises (TVE's) and the role of relational contracting in large ethnic Chinese business networks (*guanxi*) as mediating factors.[26] In any event, one might reasonably argue that this weak role for the rule of law has been inconsistent with broader or non-instrumental conceptions of development, such as Sen's conception of development as freedom, as reflected in the Tiananmen Square tragedy or other systematic human rights abuses in China.[27] Moreover, the skeptical view of the importance of the rule of law in development in Asia tends to discount unduly the fact that judiciaries, prosecutorial regimes, police, correctional systems, tax administrations, private bars, and legal education institutions already exist in all these countries: they have not been imposed by alien powers and presumably are intended to play some necessary or important domestic social function.

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23. *See* Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the Rule of Law*, 101 MICH. L. REV. 2275, 2322 (2003).

24. See various contributions in CULTURE MATTERS (Lawrence E. Harrison & Samuel P. Huntington eds., 2000).

25. FRANK UPHAM, MYTHMAKING IN THE RULE OF LAW ORTHODOXY (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project, Working Paper No. 30, 2002).

26. *See* Donald C. Clarke, *Economic Development and the Rights Hypothesis: The China Problem*, 51 AM. J. COMP. L. 89, 101–04 (2003); Graham Mayeda, *Appreciate the Difference: The Role of Domestic Norms in Law and Development Reform—Lessons from China and Japan* (2004) (unpublished research paper, University of Toronto Law School, on file with authors).

27. *See, e.g.*, Inoue Tatsuo, *Liberal Democracy and Asian Orientalism*, *in* THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS 27 (Joanne R. Bauer & Daniel A. Bell eds., 1999).

A third class of potential impediments to effective implementation of even a minimalist 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 the minimalist, procedurally oriented conception of the rule of law has many of the characteristics 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 channelled directly into the legislative or executive decision-making process. As well, one should not naïvely assume that all external constituencies are likely to benefit from rule of law reform. Indeed, those who derive benefits from corruption, cronyism, favoritism, etc., in existing institutional arrangements and legal processes are likely to resist such reforms.[28]

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, unless creative strategies can be devised for mitigating their opposition, such as the creation of competing or parallel institutions (e.g., alternative dispute settlement, private law schools, commercial arbitration, grandfathering, or buy-outs of incumbents).

Drawing on evidence from rule of law reform experience in Latin America, Africa, and Central and Eastern Europe, we conclude that while the first two classes of impediments to rule of law reform have some salience in particular contexts, the primary impediment to rule of law reform in most contexts is political economy considerations which, despite understandable efforts especially by external donors to depoliticize rule of law reform, require central engagement with the politics of rule of law reform in these contexts[29] and the development of

28. *See* THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 163–77 (1999); Karla Hoff & Joseph E. Stiglitz, *After the Big Bang?: Obstacles to the Emergence to the Rule of Law in Post-Communist Societies* (World Bank, Working Paper No. 9282, Oct. 2002); KAUFMANN, *supra* note 4.

29. *See* CAROTHERS, *supra* note 28; Carothers, *supra* note 1; HARRY BLAIR & GARY HANSEN, WEIGHING IN ON THE SCALES OF JUSTICE: STRATEGIC APPROACHES FOR DONOR-SUPPORTED RULE OF LAW PROGRAMS (USAID Program and Operations Assessment Report No. 7, Feb. 1994).

strategies to change the political dynamics surrounding particular rule of law reform initiatives—not necessarily a short-term, comfortable, or low-risk strategy for either domestic or external proponents of reform but without which major rule of law reform initiatives will likely be seriously compromised from the outset.

II. Elements of a Procedural Conception of the Rule of Law

In this section, we briefly discuss the character of optimal institutional arrangements implicated in the creation of a robust, albeit procedurally oriented, conception of the rule of law. This discussion is intended to animate examples from the case studies that follow, and, in particular, to provide a benchmark against which the extant rule of law arrangements can be evaluated.

A. *Judiciary*

Over the past decade or so, the judiciary has been the focal point of rule of law reform efforts in the developing world. This attention derives from the central role that an independent, effective, and non-corrupt judiciary plays in promotion of the rule of law in society. It also reflects the judiciary's role in ensuring the lawful exercise of public powers by members of the executive or legislative branches of government.[30] The United Nations Basic Principles on the Independence of the Judiciary (Basic Principles),[31] adopted by the General Assembly in 1985, sets out a number of different principles governing an effective and independent judiciary, including the need for appropriate resources, mandates, training, and selection processes. Provisions categorized under "Conditions of Service" in the Basic Principles provide a template for a desirable contractual arrangement (including compensation) between the public and members of the judiciary. The Basic Principles also seek to guarantee security of tenure of judges (whether appointed or elected) until the age of mandatory retirement or the end of their official term in office. Further, the Basic Principles require promotion to be based on objective factors. Professional secrecy and confidentiality are emphasized in the

30. Rafael La Porta et al., Judicial Checks and Balances (Nat'l Bureau Econ. Res. Working Paper No. 9775, 2003), *available at* http://papers.nber.org/papers/w9775.pdf.

31. The Basic Principles were adopted by the 7th UN Congress on the Prevention of Crime and Torture in Milan, Italy held from 26 August—6 September 1985 and were endorsed by the General Assembly on 29 November 1985. *See* G.A. Res 40/32, U.N. GA0R, 40th Sess., U.N. Doc. A/RES/40/32 (1985) [hereinafter Basic Principles].

Basic Principles, and judges are granted immunity from any civil suits arising out of performance of their functions.

Although judicial efficiency is not a traditional characteristic of the rule of law, it—like judicial independence—is grounded in the ideal of fairness. Protracted case processing times and overburdened administrative staff may lead to resource-privileged individuals dominating the court's time to the detriment of those who have fewer resources with which to exert influence. Those with limited access to justice may resort to extra-legal or illegal means of resolving conflict such as coercion or physical violence. Thus another function of the judiciary and the courts is to assist in the efficient and timely resolution of disputes.[32] Reforms in this area are largely of a technical sort and can be divided into two general categories—material assistance and procedural reform.[33] Material assistance consists of resource contributions ranging from management training to computer technology, and it forms a significant part of funding expenditures in judicial reform projects. Procedural reform is focused on the law itself and involves the rewriting of the rules of procedure in order to reduce or eliminate duplicative or otherwise inefficient rules and practices.[34] These types of reforms contribute to the overall quality and accessibility of the judiciary.

B. *Access to Justice*

Another component of rule of law reform is access to justice. It is not sufficient that good rule of law institutions exist in a society; they must also be accessible to all—both formally and functionally. At one level, this requires the creation of institutional arrangements that are capable of being accessed by a broad cross-section of the public. At another level, it requires the provision of targeted resources to those individuals who require legal representation when they come into contact with the legal system. For instance, Article 14(3)(d) of the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations in 1966, guarantees a person's right to legal representation when accused of a crime, regardless of the ability to pay.[35]

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32. MARIA DAKOLIAS, COURT PERFORMANCE AROUND THE WORLD: A COMPARATIVE PERSPECTIVE (World Bank Tech. Paper No. 430, 1999).

33. *See* Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 THE WORLD BANK RES. OBSERVER 117 (1999), *available at* www.worldbank.org/research/journals/wbro/obsfeb99/judicial.htm.

34. *See id.*

35. International Covenant on Civil and Political Rights, *opened for signature*, Dec. 16, 1966, art. 14, 999 U.N.T.S. 171, U.N. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) (entry into force Mar. 23, 1976).

C. *Prosecutors*

In 1999, the International Association of Prosecutors (IAP), an NGO composed of prosecutors from sixty-eight countries and several regions, implemented a set of standards with which members should comply and with which applicants from new member countries must demonstrate compliance.[36] The standards are composed of behavioral guidelines aimed at achieving the following goals: a high level of professional conduct, a prescribed role within criminal proceedings, impartiality, independence, cooperation, and empowerment. In its preamble, the code of standards refers to a set of guidelines on the role of prosecutors created by the United Nations in 1990.[37]

Prosecutors represent the public interest in holding perpetrators accountable for their actions. Maintaining the integrity and quality of the prosecutorial staff can occur through three possible means. The quality of prosecutorial conduct is enhanced through participation in continuing education programs, such as those aimed at improving awareness of human rights. The capacity of prosecutors to cope with legal challenges is improved through development of clear guidelines that, in conjunction with law enforcement officials, allow prosecutors to target specific areas

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36. *See* Egbert Myjer, The IAP Standards, A Unique and First Step, Address at the IAP 4th Annual Conference (Sept. 1999), *at* http://www.iap.nl.com/myjer.html.

37. The guidelines created by the United Nations address the following aspects of the prosecutor's duties: 1) qualifications, selection, and training; 2) status and condition of service; 3) freedom of expression and association; 4) role in criminal proceedings; 5) discretionary functions; 6) alternatives to prosecution; 7) relations with other government agencies or institutions; and 8) disciplinary proceedings. With respect to qualifications, selection, and training, the guidelines mandate that selection criteria for prosecutors be formulated such that they are free from discrimination and aim at procuring an appropriately trained staff. Provisions regarding the status of service require shielding the prosecutor's office from external interference, adequate remuneration, and merit-based promotion practices. The freedoms of expression and association, with specific reference to subject matters such as justice and human rights, are guaranteed for prosecutors. With respect to the prosecutor's role in criminal proceedings, the guidelines require the independence of the prosecutor's functions from that of the judiciary. The performance of their functions must be undertaken with impartiality, objectivity, and the public interest as the foremost consideration. Where the prosecutor's office has a certain amount of discretion, the laws and regulations must be formulated so as to provide guidelines that enhance fairness and consistency in discretionary functions. The prosecutor's discretionary powers are also relevant in considering alternatives to prosecution. Circumstances such as the negative consequences of conviction and imprisonment, as well as those particular to the accused such as age, are said to be appropriate considerations in determining whether alternatives to prosecution will be pursued. Cooperation with other legal institutions, such as police and public defenders, is emphasized. The final provision of the United Nations Guidelines requires that disciplinary proceedings directed at prosecutorial functions be undertaken in accordance with the law or lawful regulations. *Guidelines on the Role of Prosecutors, Eighth U.N. Congress on the Prevention of Crime and Treatment of Offenders*, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990).

of concern such as crimes against children[38] or corruption in public administration.[39] In addition, institutional mechanisms such as a complaints process or a contractual arrangement specifying annual review can serve as disincentives to prosecutorial misconduct. Media scrutiny of prosecutorial decisions can also serve to discourage corruption and increase public confidence in the prosecutor's office.

D. *Police and Other Law Enforcement Officials*

The conduct of law enforcement officials is closely related to the rule of law through the ideal of freedom from arbitrary treatment.[40] The United Nations Code of Conduct for Law Enforcement Officials, adopted by the General Assembly in 1979, provides a template for ideal law enforcement services.[41] Composed of eight articles, the code presents broad principles; if implemented, these principles would have significant ramifications for the practices of law enforcement officials in developing countries.[42] The term "law enforcement officials" is said to encompass all officials of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest and detention.

The principal function of the police is to maintain law and order through the provision of law enforcement services. The performance of this function in accordance with a procedural notion of the rule of law requires that police officials treat all citizens equally under the law. The introduction of mechanisms that counteract the incentives for bribe-taking and other forms of corruption, such as higher benefit and compensation levels, may motivate performance of the function. In

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38. *See* INT'L ASS'N OF PROSECUTORS, MODEL GUIDELINES FOR THE EFFECTIVE PROSECUTION OF CRIMES AGAINST CHILDREN, *available at* http://www.icclr.law.ubc.ca/Publications/Reports/Children2.pdf.

39. Corruption in public administration has been a focus of the activities of the IAP.

40. *See* J. ALDERSON, COUNCIL OF EUROPE, HUMAN RIGHTS AND THE POLICE (1984).

41. G.A. Res. 34/169, U.N. GAOR, 34th Sess., Supp. No. 46, at 186, U.N. Doc. A/34/46 (1979).

42. *Id.* Article 1 requires that law enforcement officials serve the community and fulfil the duties imposed upon them by law. Article 2 dictates that the performance of duties must occur in accordance with human rights. Article 3 applies the principles of necessity and proportionality to the use of force. The use of force is restricted to circumstances involving the prevention of crime and the effecting of or assisting in arrest. Article 4 requires that confidentiality be kept except in circumstances where disclosure is necessitated by the performance of duty or the demands of justice. Article 5 categorically prohibits torture and other cruel and unusual treatment of persons in custody—such treatment is said to be unjustifiable even under orders from a superior or during public emergencies such as war, internal political instability, and threats to national security. Article 6 requires that law enforcement officials ensure the health of persons in their custody and obtain medical attention if and when necessary. Article 7 mandates that law enforcement officials will not engage in any acts of corruption, and take active steps to oppose and combat corruption. Finally, Article 8 of the Code states that law enforcement officials will adhere to the law and the principles stated in the Code.

jurisdictions where organized crime has a strong presence, increased public confidence in the ability of the criminal justice system to convict and imprison the guilty would encourage police officers to risk their own security by enforcing the law. Finally, as an ex post monitoring mechanism, a complaints process administered by an external, nongovernmental organization may help reduce official abuses of power.

E. *Penal System*

Several international documents elucidate how the rights guaranteed to all persons by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights translate into specific standards for the treatment of prisoners.[43] The United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted by the U.N. Economic and Social Council in 1957, is the most comprehensive of these guidelines.[44] The Standard Minimum Rules sets detailed standards for the condition of food, clothing, housing, medical services, discipline and punishment practices, institutional arrangements, and other aspects of prison conditions.

In 1999, representatives from fifty countries across five continents met at the International Penal Reform Conference in order to consider new approaches to penal reform. The agenda for penal reform designed at the conference identified crucial elements of a well-functioning penal system. Some of these elements reflect broader principles applicable to other legal institutions and include the following:

- The need for all accused persons to have a fair trial under due process of law;
- Openness and accountability in all aspects of the operation of the criminal justice system;
- Equal access to justice for all people, especially the poor and the marginalized.

Elements specific to the penal system identified in the agenda included the creation of informal and local dispute resolution mechanisms as an

43. *See, e.g., Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611 (1957), Annex 1, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. No. 1, U.N. Doc. E/3048, *amended by* E.S.C. Res. 2076, 62 U.N. ESCOR Supp. No. 1, at 35, U.N. Doc. E/5988 (1977); *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, U.N. GAOR, 43rd Sess., Supp. No. 49, at 298, U.N. Doc. A/Res/43/173 (1988); *Basic Principles for the Treatment of Prisoners*, G.A. Res. 45/111, U.N. GAOR, 45th Sess., Supp. No. 49A, at 199, U.N. Doc. A/Res/45/49 (1990); *Standard Minimum Rules for the Administration of Juvenile Justice*, G.A. Res. 33, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/40/53 (1985).

44. *See Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 43.

adjunct to the formal criminal justice system, the treatment of drug abuse within the health or welfare system rather than the criminal justice system, and the development of alternative sentencing or diversion (e.g., community service) options.

The basic function of the penal system is to safely imprison individuals convicted by courts until they are released back into society. Safe imprisonment means that conditions in the prison system should, at a minimum, meet the basic requirements for human security. Toward this end, correctional services staff may require assessment and training programs that improve their awareness of human rights. Aspects of the contractual agreement between prison staff and funding institutions may require modification in order to reduce or eliminate incentives for prison staff to accept bribes in exchange for biased treatment.[45] In this context, where abuses of power and deprivation of basic rights tend to be relatively high in both developed and developing countries, a monitoring system is crucial. In December 2002, the United Nations General Assembly adopted a treaty establishing a subcommittee authorized to make periodic and ad hoc visits to prisons and detention centers in States that have signed the treaty.[46] Other bodies of the United Nations, government-led commissions, local human rights groups, and international NGOs are some of the organizations involved in monitoring efforts with a view to improving conditions in penal systems around the world.[47]

F. *Bar Associations*

Bar associations perform several functions within the legal system of a nation.[48] The primary function of bar associations is the regulation of the legal profession in the public interest. In collaboration with law schools, whose function is the training of law students, bar associations can affect the quality of the legal profession by the standards they set for law school accreditation, curriculum requirements, and professional

45. The possibility that there would be an improvement in prison conditions if compensation for staff were higher is suggested in a recent report by Human Rights Watch. *See* HUMAN RIGHTS WATCH, WORLD REPORT 2001: EVENTS OF 2000 499 (2000), *available at* http://www.hrw.org/wr2k1/special/prisons.html#monitoring.

46. *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. U.N. Doc. A/Res/57/199, U.N. GAOR, 57th Sess., (2003), *available at* http://www.ohchr.org/english/law/cat-one.htm.

47. For a list of international and national organizations that monitor prison conditions, see the list on the following Human Rights Watch webpage: http://www.hrw.org/advocacy/prisons/monitors.htm.

48. The relationship between different legal associations and the legal profession varies considerably according to jurisdiction; bar associations and law societies perform different functions in different countries. For the purposes of this paper, we are using the term "bar associations" in a general sense to refer to legal institutions that are involved in the governance of the legal profession.

licensing or certification and disciplinary regimes.[49] These measures establish quality standards for membership in the profession. In addition, bar associations are often key providers of continuing legal education for practicing lawyers.[50] In many developing countries, law school training continues to be inadequate and continuing legal education can be a crucial remedial measure.[51]

A commonality in codes of conduct for lawyers is the obligation to preserve their professional independence.[52] Ellis suggests that, although the importance of independence is emphasized in regulation, the perception of what external influences are significant varies according to the country.[53] With respect to the independence of bar associations themselves, external factors often limit bar association activities. These can include legal restrictions and obligations, state-imposed regulations, and limits imposed by constitutions. The International Bar Association has established a committee to investigate threats to the independence of bar associations.[54]

The legal profession plays a role in safeguarding liberties against incursions by the state, which may give rise to conflict between lawyers and members of the judicial and political branches. This potential for conflict partially explains the role played by bar associations in promoting an impartial and independent judiciary.[55] For example, the American Bar Association conducts non-political evaluations of candidates for the federal judiciary and provides a number of models to promote effective state judiciaries. Policies and models, circulated by the ABA and used by individual States, advise on how to strike a balance between judicial independence and accountability. In response to overt political pressures on members of the judiciary in certain U.S. states, state bar associations

49. MYRNA S. FELICIANO, CONTINUING LEGAL EDUCATION: TOWARDS SUSTAINABLE HUMAN DEVELOPMENT (paper presented to the United Nations Development Programme), *at* http://www1.worldbank.org/publicsector/legal/continuing.pdf.

50. Quintin Johnstone, *Bar Associations: Policies and Performance*, 15 YALE L. & POL'Y REV. 193, 206 (1996).

51. *See* Muna Ndulo, *Legal Education in Africa in the Era of Globalization and Structural Adjustment*, 20 PA. ST. INT'L L. REV. 487, 498 (2002).

52. Mark S. Ellis, *Developing a Global Program for Enhancing Accountability: Key Ethical Tenets for the Legal Profession in the 21st Century*, 54 S.C. L. REV. 1011, 1014 (2003).

53. *Id.*

54. *See* International Bar Association, *at* http://www.ibanet.org/About_IBA/cfm.

55. James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683, 687 (2002).

initiated campaigns that educated the public regarding the importance of an independent judiciary.[56]

G. *Tax Administration*

Most countries have created specialized law enforcement, administrative, and regulatory agencies in a wide range of legal contexts. As an example of such an agency we focus on tax administration which is a function common to all countries.

Many developing countries collect only a small fraction of taxes legally due, which undermines the government's ability to finance effective public services such as health care and education. It has been argued that complex tax systems are difficult to implement in developing countries due to resource constraints and that existing problems in tax administration may be partially due to the fact that these systems were modeled on those used in highly developed countries. This implies that an ideal tax system may differ from country to country, depending on the economic and cultural constraints faced by individual governments. Based on studies of tax administration reforms, Bird argues that reform efforts have been overly focused on information management systems while paying too little attention to designing institutional and individual incentives that encourage tax officials to use the relevant information.[57] These considerations imply that the ideal tax administration system needs to be both tailored carefully to the needs and constraints of a nation, as well as more focused than it has been on providing appropriate incentives to actors within the system.

H. *Legal Education*

Formal legal education supportive of a procedurally oriented conception of the rule of law cannot be devoted either to a purely formalist perspective on legal education, which primarily emphasizes uncritical rote learning of existing substantive and procedural legal rules or to a single ideological conception of the rule of law in society, especially an ideology that immunizes the incumbent political regime or elite from external scrutiny and accountability. Instead, an effective formal legal education is likely to be ideologically or normatively pluralistic and should foster critical perspectives on "law in action" or "law in society"

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56. D. Dudley Oldham & Seth S. Andersen, *Commentary: The Role of the Organized Bar in Promoting an Independent and Accountable Judiciary*, 64 OHIO ST. L.J. 341, 344 (2003).

57. Richard M. Bird, *Tax Administration and Tax Reform: Reflections on Experience*, *in* TAX POLICY IN DEVELOPING COUNTRIES 38, 40 (Javad Khalilzadeh-Shirazi & Anwar Shah eds., 1991).

through clinical legal education and interdisciplinary and empirical teaching and research.

In the Introduction to this paper, we identified both instrumental and deontological rationales for rule of law reform, the first focusing on protection of private property rights and enforcement of contracts as an important determinant of economic growth, the second on basic human freedoms as intrinsically valuable. The rule of law reforms reviewed in this paper have largely a public law focus and might be thought to discount the private law focus conventionally associated with property rights and contract law. We believe, however, that the line between private and public law is largely illusory; private law ultimately depends on public enforcement of its norms through the application of force or coercion, if necessary, by agencies of the State. Moreover, in poor developing countries the problem of judgment-proof violators of private property rights implies a larger role for the criminal justice system in protecting property rights. More generally, it seems implausible to us to imagine rule of law institutions that are seriously deficient in their public law functions but virtuous in their enforcement of private law. Moreover, to focus most rule of law reform efforts (as Posner advocates[58]) on property rights and contract enforcement is to engage a very narrow political constituency as proponents of reform and to forego the support of the much larger 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.[59]

III. Rule of Law Reform in Latin America, Africa, and Central and Eastern Europe

According to the World Bank's governance data on the status of the rule of law in many countries throughout the world (reproduced in the Appendix to this paper), only three out of eighteen 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 sub-Saharan Africa, only six out of forty-seven countries had positive rule of law ratings in 2002 (Botswana, Cape Verde, Mauritius, Namibia, the Seychelles, and South Africa), and many ratings again deteriorated between 1996 and 2002. In all twelve countries of the former

58. *See* Posner, *supra* note 22.
59. *See* Farber, *supra* note 17, at 97–98.

Soviet Union, ratings were negative in both years. The countries of Eastern Europe present a somewhat more positive picture. Asia (which is not a focus of this paper), with its huge diversity of countries, presents a much more mixed picture.

The recent experience with rule of law reform efforts in Latin America, Africa, and Central and Eastern Europe fully warrants Carothers' conclusion that the promise of rule of law reform is proving exceedingly difficult to fulfill.[60] According to Carothers:

> Rewriting constitutions, laws, and regulations is the easy part. Far-reaching institutional reform, also necessary, is arduous and slow. Judges, lawyers, and bureaucrats must be retrained, and fixtures like court systems, police forces and prisons must be restructured. Citizens must be brought into the process if conceptions of law and justice are to be truly transformed .... The primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law. Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure. Even the new generation of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control.[61]

Attempted reforms to the various classes of legal institutions identified above exemplify these challenges.

In the case of judicial reform, much effort has been expended on technical reforms designed to expedite court processes and improve judicial productivity through, e.g., installation of computers in court offices, case management systems, oral hearing procedures, and professional training programs for judges. The evidence does not suggest, however, that these forms of intervention dramatically enhance the quality of a country's legal system, standing alone, and even in their own terms seem to have had modest impacts on judicial productivity, in some cases being opposed by both members of the judiciary and members of the private bar who stand to benefit from existing inefficiencies and delays in the court system.[62]

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60. *See* Carothers, *supra* note 1, at 95, 104.
61. *See id.* at 95–96.
62. *See* CAROTHERS, *supra* note 28, at 163–77.

In terms of judicial independence, while a number of countries have attempted to institute judicial councils to screen judicial appointments, monitor for judicial incompetence or corruption, and institute disciplinary proceedings where warranted, these have often engendered severe opposition from the legislative and executive arms of government (as in Argentina, Bolivia, Peru, and Belarus) and senior members of the judiciary themselves who see such councils as an encroachment on the self-regulatory traditions of the judiciary with respect to judicial conduct (as in Argentina, El Salvador, and Bolivia). Judicial autonomy is asserted as a trump on any form of external accountability.[63]

The quality of judicial independence varies considerably across African nations, as reflected in independence in appointment, independence in tenure, and adequate funding for the judiciary including appropriate salaries. The judiciary in South Africa (at least in recent years) and in Botswana is seen by legal practitioners as being relatively free from political influence, but this is rarely the case with respect to most other African countries. As recently as the 1990s, judicial independence was perceived as something of a novelty in Africa. As Yash Vyas points out:

> During the colonial era, the judiciary was an integral branch of the executive rather than an institution for the administration of justice. The colonial administration was mainly interested in the maintenance of law and order. It had no respect for the independence of the judiciary or for the fundamental rights of the ruled. The judiciary was that part of the structure which enforced law and order. It was therefore identifiable as an upholder of colonial rule. To an average citizen, the judiciary, as an instrument of control of the executive power, lacked credibility and therefore enjoyed little respect.[64]

Under-staffed and under-resourced state courts in many African States are seldom in a position to compete with highly resilient, locally legitimate, and resource-independent informal community courts and modes of dispute resolution.[65] At the same time, however, the state-wide promotion of the rule of law and the proliferation of inter-community exchange and communication which accompanies the emergence of a

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63. On the tension between institutional autonomy and institutional accountability, see Michael Trebilcock, *What Makes Poor Countries Poor? The Role of Institutional Capital in Economic Development*, *in* THE LAW AND ECONOMICS OF DEVELOPMENT (Eduardo Buscaglia et al. eds., 1997).

64. Yash Vyas, *The Independence of the Judiciary: A Third World Perspective*, 1992 THIRD WORLD LEGAL STUD. 127, 131.

65. *See* Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 65 (2001).

stronger national government manifestly requires the strengthening and expansion of the state court system as more and more cases involve parties from different prefectures and cultural enclaves and cases beyond the experience and competence of local fora. In some cases, however, effective collaboration between state courts and local dispute resolution fora may reduce the time demands on, and resource costs of, state courts. In Botswana, for example, most land disputes, inheritance disputes, stock theft cases, and petty criminal matters are effectively and quickly resolved in neighborhood fora. On the other hand, in Uganda, for example, the inadequate recordkeeping and inconsistent norms of neighborhood fora have often required the state courts to hear a vast number of appeals.

In the case of Russia, courts were historically low-level appendages of and subservient to the Communist Party and despite atempts to secure greater judicial independence and accountability though Judicial Qualification Committee, financially desperate courts have become substantially dependent on local government authorities and private sources for financial support, which has severely compromised their independence.[66]

Stephenson finds in a recent paper that, both theoretically and empirically, judicial independence is largely dependent on long-term democratic stability, a competitive political system whose major parties reasonably anticipate alternate periods in government and in opposition, parties who are sufficiently risk-averse and forward-looking to accept mutual restraints (judicially enforced) on their actions, and judicial doctrine that is sufficiently moderate that it avoids the appearance of political partnership.[67]

With respect to prosecutorial functions, a number of countries in Latin America that have been previously afflicted with civil war or military dictatorships (i.e., Guatemala, El Salvador, and Chile) have had to grapple with the problem that prosecutorial functions were often seen as an extension of the incumbent political regime and hence became highly politicized; prosecutions were widely utilized to silence or suppress political opponents. Establishing a politically independent prosecutorial regime, staffed by competent, experienced, and non-corrupt public prosecutors, has proven a formidable challenge on which only modest progress has been made to date.

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66. Todd Foglesong, *The Dynamics of Judicial (In)dependence in Russia*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 62 (Peter Russell & David O'Brien eds., 2001).

67. Matthew C. Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003).

The crime rates in many African countries are among the highest in the world while the conviction rates are among the lowest. In the post-apartheid period in South Africa, formally separate prosecutorial systems were amalgamated into one system called the National Prosecuting Authority. Attempts to tailor hiring so they would be more inclusive of the marginalized black population resulted in experienced white prosecutors leaving their positions and inexperienced black prosecutors entering positions for which they were not prepared. External donors have sought to address the problem of inexperienced prosecutors through establishing a Justice College which offers training for aspiring and existing prosecutors. In addition, twenty-nine specialized courts have been set up to deal only with rape cases in response to the high number of such cases and low rate of convictions. Prosecutors in these courts are specially trained in the issues surrounding sexual assault and only work in this area. This form of judicial specialization appears to have been successful relative to traditional courts; the average time to trial is lower and the conviction rate is higher. The government plans to add more such courts in the immediate future.[68]

With respect to the prosecutorial function in Central and Eastern Europe, the Procuracy during the Soviet regime held broad powers of supervision over courts and administrative branches of the government, and members of the Procuracy were considered to be senior members of the local power elite and extensions of the Communist Party.[69] Again, establishing a prosecutorial regime independent of political influence and confined in its functions to prosecuting cases before the courts has proven a formidable challenge on which to date progress has been modest.

With respect to reform of police regimes, in a number of countries in Latin America (e.g., Argentina, Venezuela, El Salvador, Panama), the police historically have been closely linked with or intertwined with incumbent military regimes and were often major agents of political repression and abuses of civil and political rights.[70] Establishing police forces that are politically independent, competent, and non-corrupt has encountered similar problems to reforms of the prosecutorial functions.

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68. USAID Office of Democracy and Governance, *Achievements in Building and Maintaining the Rule of Law: MSI's Studies in LAC, E&E, AFR, and ANE* 144–45 (Occasional Paper Series, Nov. 2002), *available at* http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacr220.pdf.

69. Leon Aron, *Russia Reinvents the Rule of Law*, American Enterprise Institute Online (2002), *at* http://www.aei.org/publications/pubID.13781/pub_detail.asp; *see also* Stephen C. Thaman, *Reform of the Procuracy and the Bar*, 3 PARKER SCH. J.E. EUR. L. 1, 22 (1996).

70. MARK UNGAR, ELUSIVE REFORM: DEMOCRACY AND THE RULE OF LAW IN LATIN AMERICA 74–112 (2002).

In her comprehensive survey of policing reforms undertaken in Africa since the 1990s, Alice Hills argues that changes to policing have been largely superficial. The police, Hills generalizes bluntly, are still "notoriously corrupt."[71] Police forces formed from the remnants of post-conflict militaries subservient to their respective regimes during the African wave of democratization in the 1980s have not purged their military legacies. "Policing," she argues, "continues to be characteristically paramilitary .... Discipline and protocol tend to be military in character, though there often appears to be an unwillingness among all ranks to accept personal responsibility for actions."[72]

Nor, it seems, has the function of policing changed from its conventional purpose of protecting the regime in power: "African police generally focus on the protection of regimes from domestic security threats to a greater extent than police in many other regions; crime prevention and the protection of life, cultural or religious values, and property continue to be much less important."[73] This focus makes policing inherently subservient to the wills of the executive and legislative branches.

With respect to Central and Eastern Europe, police regimes were heavily intertwined with the Secret Service and the military and were again seen as an extension of the Communist Party and major agents in suppressing political dissent, often through flagrant abuses of civil and political rights, with broad police discretion in many contexts rendering them vulnerable to endemic corruption.

With respect to legal aid and access to justice, in most countries in Latin America, Africa, and central and Eastern Europe, public defender and related legal aid programs were and remain highly incomplete in their coverage, woefully under-resourced, and often quite ad hoc in nature, depending in many cases on private NGO-based initiatives or student-based clinical education. In South Africa, until recently, legal aid was provided principally though a judicare system where clients are referred to private practitioners who then bill the government agency that administers the legal aid program (the Legal Aid Board) for their services. The board has begun increasingly, however, to provide legal aid through salaried public defenders typically employed in a network of decentralized legal clinics. Other access-to-justice initiatives in Africa include the establishment of public legal education programs by NGOs, typically operating through university law schools.

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71. ALICE HILLS, POLICING AFRICA 15 (2000).
72. *Id.*
73. *Id.*

In a number of countries in Latin America initiatives designed to promote alternative dispute resolution mechanisms at the local level seem to have been quite successful. Progress has been made despite opposition in some cases from the judiciary which has seen them as a source of competition, even though, in fact, most of these informal, locally based ADR initiatives appear to be more complements to than substitutes for the formal judicial system in that they address grievances either local or small-scale in nature that, for the most part, have never made their way into the formal court system.[74]

With respect to correctional services, most countries reviewed in our three case studies commonly experience gross overcrowding of facilities, underutilization of alternative sentencing regimes to imprisonment, poorly trained personnel, and lack of attention to the legal rights of prisoners, contributing in combination to high levels of infectious diseases such as TB and AIDS[75] in the prison population and high rates of recidivism.[76] In a few African countries, such as Zimbabwe and Kenya, efforts to reduce prison overcrowding by developing community service programs seem to have been quite successful. Some NGOs, such as Penal Reform International (PRI), have undertaken several reform programs in sub-Saharan Africa, such as training of correctional personnel, developing community service programs, and providing paralegal advisory services to prisoners.

With respect to tax administration, which we use as an example of a specialized law enforcement agency among a spectrum of specialized administrative and regulatory agencies within or semi-independent of government, low levels of collection of taxes due as well as endemic inefficiencies and corruption in tax administration systems have characterized most countries in Latin America in the past. In this respect, some significant progress appears to have been made in several countries in establishing semi-autonomous tax administration agencies, simplified tax structures, simplified tax filing requirements, the utilization of banks as first-tier tax return processors and tax collectors, and enhanced compensation arrangements for personnel within these regimes, including performance-based forms of compensation that are contingent on taxes collected that offset incentives to forgive taxes due in return for bribes.[77]

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74. USAID Office of Democracy and Governance, *supra* note 68.

75. Kevin Krajick, *Russia's Prison Meltdown*, Ford Foundation Report (Summer 2001), *available at* http://www.fordfound.org/publications/ff_report/view_ff_report_detail.cfm?report_index=291.

76. For the South American experience, see International Centre for Prison Studies, *Projects: Central and Latin America*, *available at* http://www.kcl.ac.uk/depsta/rel/icps/latin_america.html.

77. Bird, *supra* note 57.

In several African countries semi-autonomous revenue authorities have been created which are not subject to the same resource constraints as other public service programs. The main motivation for creating tax administration bodies with more independence is to distance the body from political interference and to allow for personnel policies that are intended to reduce incentives for corrupt behavior, e.g., by allowing for higher remuneration than is usually provided to public sector employees and easier dismissal procedures. The results of these initiatives are mixed. Studies suggest that they initially led to an increase in revenue and a decrease in the perception of corruption, but recent evidence suggests declining tax revenues and an increase in perceived levels of corruption.[78]

In the case of Central and Eastern Europe, given the absence of a private sector in the Communist era with revenues being raised largely from state-owned enterprises, the challenge in the post-Communist era has been to establish tax regimes essentially for the first time, focusing mostly on large tax payer units.[79] A number of these initiatives seem to have registered significant successes (e.g., Latvia, Poland, Hungary, and Bulgaria), while in other cases the initiatives are too recent to permit effective evaluation.[80] Perhaps more than in most areas of rule of law reform, politicians have strong material incentives to promote more efficient collection of taxes due and enhanced public revenues, whether their motivation is to expand their political support through popular social expenditure programs or simply to appropriate the revenue for themselves.

With respect to bar associations, throughout Latin America these have generally been a weak force for rule of law reform, in part because these associations entail voluntary membership and are often small, local, and fragmented.[81] Thus, they have little ability to set and enforce standards for entry into the profession or to discipline members for breaches of professional responsibility or ethics and are largely confined to providing modest forms of continuing professional education services. Indeed, in some cases, bar associations have opposed reforms to judicial

78. Odd-Helge Fjeldstad et al., Autonomy, Incentives and Patronage: A Study of Corruption in the Tanzania and Uganda Revenue Authorities (Chr. Michelsen Institute, R. 2003:9, 2003), *available at* http://www.cmi.no/publications/publication.cfm?pubid=1688.

79. Jorge Martinez-Vazquez & Robert McNab, *The Tax Reform Experiment in Transitional Countries* 3 (Jan. 1, 2000), *available at* http://isp-aysps.gsu.edu/papers/ispwp0001.pdf.

80. KATHERINE BAER ET AL., IMPROVING LARGE TAZPAYERS' COMPLIANCE: A REVIEW OF COUNTRY EXPERIENCE 24–28 (2002).

81. See the Inter-American Bar Association (IABA) contact page at http://www.iaba.org for contact information of all IABA members; see the Hieros Gamos website, http://www.hg.org, for contact information for a limited number of international, including Latin American, bar associations.

processes where members have benefited from the inefficient and protracted nature of these processes.

The role played by bar associations and law societies and other organizations representing the legal profession varies dramatically from country to country in Africa, including whether or not membership in a bar association or like organization is required for practicing law. In many countries, the principal focus of bar associations and like organizations is providing continuing education services to their members. Some law societies have taken a more activist role, including the Law Society of Kenya which has adopted a major advocacy and legal assistance program with respect to economic reform, human rights, and public interest litigation. It has also been a severe and effective critic of judicial corruption. In a few cases, bar associations and law societies have sponsored legal aid programs by providing basic legal information to the public on a variety of matters ranging from rights upon arrest to wrongful dismissal.

In the case of Central and Eastern Europe, bar associations barely existed in the Communist era and comprised small voluntary local groupings of lawyers.[82] Useful reform efforts appear to have been initiated to promote bar associations in a number of these countries, but their functions for the most part at present are confined to providing continuing professional education services. Thus they do not play a major role in setting professional entry standards or disciplining the conduct of their members post-entry or in providing a major check and balance in the general administration of the justice system.

Finally, with respect to legal education, in most Latin American countries, admission to law schools (mostly public) appears to be open to large numbers of students, against very relaxed standards and subject to payment of minimal fees. Many of these students study part-time and many law professors in turn view their professorial appointments as part-time commitments that are combined with private professional or consulting practices. The form of education appears to have emphasized formal presentations by professors of doctrine and rote note-taking and learning by students. The development of clinical education initiatives in a number of countries has sought, with some success, to introduce a "law in action" perspective into legal education, as well as facilitating access to various justice initiatives for disadvantaged members of the communities in which these clinics operate. Efforts to broaden and render more rigorous and demanding the intellectual perspectives on legal education,

82. William D. Meyer, *Facing the Post-Communist Reality: Lawyers in Private Practice in Central and Eastern Europe and the Republics of the Former Soviet Union*, 26 LAW & POL'Y INT'L BUS. 1019, 1037 (1995).

however, through, e.g., interdisciplinary and empirical study and research, seem to have made much more modest progress.[83]

Legal education through domestic institutions was almost universally unavailable in English-speaking African countries until independence of the various countries from their respective colonial rulers. Legal training in most African countries today is said to be overly formalistic and rule-based so that students do not receive the opportunity to cultivate flexibility and creativity in legal thinking, thus arguably limiting their ability to address the legal problems that arise as a result of the interaction between local and foreign contexts.[84] One positive change in African law schools is that education in international human rights subjects is receiving more attention, and clinical education is becoming a more important part of a law school education. In many African nations, there exist informal mechanisms of dispute resolution, such as traditional community-based mechanisms, where those overseeing disputes have no formal legal training. In a few countries, initiatives have been undertaken to provide basic legal training to those performing adjudicative roles in these community-based mechanisms, including incorporating constitutional and human rights into their informal decision-making processes.[85]

In the case of Central and Eastern Europe, law schools have overwhelmingly been public institutions subject to heavy, uniform, central political control, with prescribed curricula heavily emphasizing the essential identity of law and politics and the ideological foundations of law in effectuating Communist ideology.[86] A high percentage of students in Russia study by correspondence. To date, very little progress appears to have been made in transforming legal education in many of the countries of the former Soviet Union to reflect the centrality of rule of law values in legal education. In both regions, legal education is an undergraduate degree, further attenuating the interdisciplinary basis on which legal teaching and research can build.

In light of this rather sobering reprise, what does the future hold for rule of law reforms in these countries?

First, it seems clear to us that technical impediments to serious rule of law reform are of second-order importance, and assume falsely in many cases that all relevant actors share a commitment to realizing a common vision of the rule of law within existing or potential resource constraints.

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83. Monica Pinto, *Developments in Latin American Legal Education*, 21 PA. ST. INT'L L. REV. 61 (2002).

84. Ndulo, *supra* note 51, at 490–95.

85. USAID Office of Democracy and Governance, *supra* note 68, at 135.

86. George E. Glos, *Soviet Law and Soviet Legal Education in an Historical Context: An Interpretation*, 15 REV. SOCIALIST L. 227, 259 (1989).

Second, social, cultural, and historical impediments are clearly more important, especially in post-conflict societies afflicted with deeply entrenched ethnic or religious factionalism or in post-authoritarian societies, in disentangling legal institutions from repressive political regimes in which they have been embedded and for which they have often been active agents.[87] In the case of Latin America, however, the heavily compromised role of these institutions does not seem to reflect deep-seated, longstanding cultural or social values that render most citizens indifferent to rule of law abuses (as reflected in subsequent widespread public denunciation and renunciation of these abuses). The evidence from Africa tentatively points in the same direction. In the case of Central and Eastern Europe, at least in the countries of the former Soviet Union, Communist Party ideology pervaded all aspects of economic, social, and political life, and hence ideological values, beliefs, and practices that are strongly antithetical to the rule of law are clearly more deeply and widely entrenched. Optimistic views that the moment of extraordinary politics surrounding regime change would provide an opportunity for sweeping adoption of rule of law reform have largely proved unfounded.[88]

Third, in Latin America, Africa, and many countries in Central and Eastern Europe, the evidence suggests that political economy factors are the principal impediment to reform.[89] This in turn suggests a need to substantially re-think reform strategies on the part of both domestic and external proponents of reform in changing the political dynamics of rule of law reform on both the demand and supply sides of the political equation.

IV. Rethinking Rule of Law Reform Strategies

In considering appropriate strategies to address the political economy barriers to rule of law reform, we believe that rule of law advocates ought to have regard to the following principles and priorities.

1) The need for meaningful, independent, and transparent monitoring of the performance of domestic rule of law institutions:

One of the most significant obstacles to effective rule of law reform is the lack of accurate data surrounding the performance of rule of law institutions. Much of the data concerning the rule of law performance of a given country is highly abstract and does not afford precise assessment of the performance of the various institutions that are implicated in the

87. *See* Brooks, *supra* note 23.
88. Bruce Ackerman, The Future of Liberal Revolution (1992).
89. *See* Carothers, *supra* note 28; Kaufmann, *supra* note 4.

enterprise of rule of law building. It is undoubtedly true that if each of a country's constituent rule of law institutions (judiciary, police, prosecution, legal profession, etc.) are operating in an efficient, non-corrupt, and accountable manner, then it is likely that the overall impression that observers have of the country's rule of law performance will be favorable. On the other hand, if, as is often the case, the record of institutional performance in a given country is much more mixed (particularly when the performance of subnational rule of law actors is also considered), then there is a need for more concrete and precise data to guide the interventions of internal and external rule of law proponents. Specifically, reformers will need to know which domestic institutions are failing, in which dimensions, and why, so that nuanced reform measures can be adopted. To the extent that institutional failure is the product of technical constraints, then domestic and external rule of law advocates will be able to focus on providing the resources and expertise necessary to improve institutional performance. But if institutional failure reflects the resistance of salient domestic interests either inside or outside of the affected institutions, it is important that evidence of this resistance be publicly disclosed so as to create reputational costs for these actors. Although private rule of law monitors currently exist, we believe that effective and meaningful monitoring and assessment of rule of law institutions is likely to be politically contentious; therefore, there is a need to create a credible, non-partisan multilateral institution, perhaps consisting of eminent retired jurists and lawyers (with appropriate staff support), whose collective reputation would be able to withstand criticism from various interests whose conduct is impugned by the monitors. Although the World Bank is a possible candidate for such a monitoring role, we are concerned that restrictions in its charter on involvement in member countries' internal politics would limit the capacity of the institution to discharge this role. In disseminating such information widely and turning a multitude of citizens into potential auditors, an independent media can play a critical role.[90]

2) The need to harness the political pressure that can be exerted by certain domestic and foreign interest groups in favor of good and durable rule of law reform:

Accurate and meaningful information is a necessary prerequisite for effective intervention by sundry rule of law advocates. Once this exists, then it is necessary for reform proponents to identify prospective allies in the reform enterprise and to consider how they can be best deployed in championing the necessary reforms. As we have argued, given that rule

90. *See* KAUFMANN, *supra* note 4.

of law reform is not a technocratic exercise but rather an inherently political enterprise that is intended to constrain those wielding public power, it can be predicted that certain vested interest groups will work strenuously to thwart desired change. In some cases, those resisting reform will be officials located within the very institutions that are subject to reform, and who are currently receiving significant personal benefits from the arbitrary exercise of their power. In this context, any effort to constrain or regulate the exercise of their discretion implies a loss of available rents and will thus elicit a strong reaction against reform. In other cases, those resisting reform will be found in the executive and/or legislative branches of government. These individuals will rationally fear that more effective rule of law institutions will constrain their capacity to exploit the public weal for their own ends. And yet in other cases, those resisting reform will be formally outside of government but are the beneficiaries of certain policies or institutional arrangements that serve their narrow interests at the expense of the broad public interest; for example, private interest groups that are insulated from responsibility for occupational health and safety or environmental abuses by virtue of express governmental edict or who benefit from corrupt allocation of government contracts, licences, or corrupt judicial decisionmaking.

Against this backdrop of highly concentrated losses inflicted on certain interest groups, the question is whether the beneficiaries of reform will be able to overcome the resistance of these groups to the proposed changes and be able to insist on welfare-enhancing changes from political decisionmakers. In addressing this question, it is important to acknowledge the many barriers that operate against the reformers. Even though the proposed changes are almost certainly welfare-enhancing, those championing rule of law reforms are hindered by the public goods character of rule of law institutions and by the collective action problems that arise in securing the necessary resources to mount a successful political campaign when the beneficiaries of reform have relatively small individual stakes in the creation of rule of law institutions (at least in comparison to other more targeted benefits that may be obtained directly from the executive or legislative branches of government) and are widely dispersed. Further exacerbating the bleak prospects for effective political demand for rule of law reform are the high upfront costs that will be borne by reformers (which are unlikely to be fully recovered if the reforms are successfully adopted). As in any democracy, those advocating rule of law reforms will have to bear non-trivial political lobbying costs (including the cost of persuading both fellow citizens and politicians of the merits of their request). In some developing countries, however, the costs of lobbying are increased substantially because of the risk that en-

trenched elites will respond to rule of law advocates with violence and/or arbitrary arrest.

Given this relatively dismal assessment of the prospects of mounting a successful rule of law campaign at the political level, several implications follow. First, there is a clear role for foreign citizens and groups (e.g., NGOs, foundations, foreign bar associations, foreign investors, bilateral and multilateral donors) to play in supporting nascent domestic demands for procedural rule of law reform in developing countries. As we have argued, domestic rule of law reform is likely to be grossly under-supplied because of endemic collective action problems on the demand side, and if foreigners do not support rule of law reform, it will be difficult for domestic interests alone to secure socially desired changes. Further, in contrast to other domestic policy issues where the merits of desired reforms are more complex, the case for a procedurally oriented conception of the rule of law is normatively relatively uncontroversial and is of universal application and thus does not raise vexing issues regarding the legitimacy of foreign influence in the domestic political arena. Second, despite the difficulties entailed in coordinating political reform activity, domestic reform advocates must invest time and energy in cobbling together political coalitions that are committed to rule of law reform. We do not believe that the level of political lobbying activity will, for the reasons discussed above, be fully commensurate with the benefits at stake, but this does not mean that no lobbying will take place at all. Although for many actors, rule of law reform is an abstract, remote ideal, there will always be some domestic interest groups who share a more intense interest in rule of law reform, including entrepreneurs, minority groups, citizen groups, NGOs, and domestic investors; and the key is to mobilize these groups in favor of a shared agenda that is predicated on the adoption of rule of law reforms. Finally, in considering rule of law reform, it is important to bear in mind the prospects of both exit and voice in forcing institutional change. While it is important that some interest groups exercise their voice directly in the political process in favor of rule of law reform, the fact that other groups and individuals are "exiting" the political arena by, for instance, declining to invest in countries with weak rule of law records will constitute another important pressure point on domestic politicians. Indeed, it may even be worth considering how the international community can bolster the prospects for domestic rule of law reform by limiting the capacity of developing countries to discriminate among different investor groups, thereby increasing the political pressure brought by exit.[91]

91. *See* Ronald J. Daniels, *Defecting on Development: Bilateral Investment Treaties and the Subversion of the Rule of Law in the Developing World* (forthcoming).

3) The need for foreign governments and international organizations to bolster pressure brought by domestic reformers by conditioning other types of desired benefits on meaningful rule of law reform:

Building on the discussion above, we believe that there is a need for foreign governments and international institutions to play a more vigorous role in supporting the adoption of procedurally oriented rule of law arrangements in developing countries by, for instance, insisting on the achievement of specified rule of law objectives as a condition precedent for the receipt of certain coveted benefits from the industrialized countries. Currently, the requirement that newly liberalizing states wishing to accede to the European Community strengthen the performance of rule of law institutions and endorse the European Human Rights Convention constitutes one very effective type of conditionality. Essentially, developing States are deprived of the benefits of access to markets, regional assistance programs, and investment unless their rule of law institutions are sufficiently robust. To be sure, the case for ensuring the achievement of high rule of law standards reflects in part a concern over the negative externalities that Member States will experience were weak rule of law countries permitted to accede to the Community. Similarly, accession negotiations to the WTO or regional trading blocs or trade preferences for developing countries can be used as leverage on prospective members to promote rule of law reform, at least in targeted areas. And access to financial assistance from the World Bank, the IMF, regional development banks, or bilateral donors can be made similarly conditional.

We believe that any moral squeamishness with using conditionality in other contexts where concerns over external intrusions into domestic political sovereignty are salient is more than offset by the universal character of the procedural conception of the rule of law we have invoked. Accordingly, we would urge foreign governments and international institutions to consider ways in which conditionality could be used to fortify domestic champions of the rule of law. We would also recommend against the provision of technical rule of law support to those States that lack the necessary political will and commitment to develop robust rule of law arrangements. The extension of this support is not only likely to be ineffective, but, even more fundamentally, will unwittingly provide normative cover to domestic elites who are under pressure from certain groups to provide meaningful changes.

4) The need for persistent, clear, and pervasive international reinforcement of the normative value of good rule of law institutions:

It is easy to become cynical about the prospects for rule of law reform in the developing world and to see the only scope for reform as emanating from naked political pressure. We do not wish to minimize the salutary role that such pressure can play in provoking meaningful reform. Yet nor are we anxious to treat political reform as being the sole byproduct of lobbying activity by affected individuals and groups. Rather, we believe that ideas do matter in the domestic political process, and, in particular, the intrinsic and universalistic appeal of the rule of law will reinforce the lobbying efforts of certain pro-reform lobby groups. It is here that the international community can play an important role in declaring clearly and persistently its commitment to the moral force of the rule of law in promoting a range of vaunted goals. By expressing this commitment in international conventions, treaties, and other instruments, additional pressure can be brought to bear on recalcitrant domestic interest groups.

5) The need to devise creative measures that will mitigate the resistance of vested interest groups against rule of law reform:

So far, most of our discussion has focused on ways of supporting (or, in fact, inducing) demand for rule of law reform in developing countries. An equally important focus, however, is on the existing suppliers of rule of law services. If the many actors who are currently involved in a country's rule of law institutions legitimately fear that they will be summarily displaced or the illegitimate perquisites of public office eliminated when new institutions are created, then their resistance to reform is likely to be all the more intense. That is, if what is at risk for them is not merely the ability to extract bribes and other perquisites in exchange for their support, but also their basic livelihood as well, then they can be expected to intensify their opposition to the proposed changes. Of course, in many cases, the rapid removal of corrupt rule of law actors is essential to the basic rehabilitation of these institutions and to the revival of the rule of law ideal, and there is no scope for their continued tenure. Yet in other contexts, where existing rule of law actors are inexperienced, ill-trained, or have engaged in low levels of petty corruption, rule of law advocates ought to consider whether these individuals can be retained, and their performance improved through a combination of training, increased compensation, and the imposition of clearer accountability mechanisms. If so, it is possible that their resistance to reform can be muted. Alternatively, where existing rule of law actors are ineffective but have not operated in a patently bad manner, it may be prudent to think about offering transitional assistance (e.g., buy-outs, early retirement benefits,

relocation, and job training subsidies) that will mitigate their resistance to the adoption of new institutional arrangements.

In the end, there is no gainsaying Carother's conclusion[92] that serious rule of law reform in many developing countries is likely to be a long-term and daunting project, demanding both patience and long-term commitment by rule of law proponents. Recent empirical evidence suggests scant progress worldwide in recent years in improving rule of law and governance, in controlling corruption, and in improving institutional quality.[93] More particularly, it is an illusion to suppose that even procedurally oriented rule of law reform is largely a technical internal or bureaucratic exercise.[94] In fact, it is a profoundly political enterprise with all the perils and uncertainties for both domestic and foreign rule of law reform proponents that such an enterprise entails.

92. Carothers, *supra* note 1.
93. KAUFMANN, RETHINKING GOVERNANCE, *supra* note 4.
94. *Id.*

APPENDIX
RULE OF LAW INDICATORS FOR SELECTED COUNTRIES, 1996 AND 2002

Country/Territory	1996		2002	
	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
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
Cote D'ivoire	-0.65	27.1	-1.21	8.8
Equatorial Guinea	N/A	N/A	-1.19	9.3

Country/Territory	1996		2002	
	Point Estimate	Percentile Rank	Point Estimate	Percentile Rank
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
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
Sao Tome and Principe	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

Country/Territory	1996		2002	
	Point Estimate	Percentile Rank	Point Estimate	Percentile Rank
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
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 & 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

Country/Territory	1996		2002	
	Point Estimate	Percentile Rank	Point Estimate	Percentile Rank
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
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
West Asia				
Bahrain	0.70	77.7	0.92	79.4
Iran	-0.73	21.7	-0.58	33.5
Iraq	-1.48	2.4	-1.70	1.5
Israel	1.11	85.5	0.97	81.4
Jordan	0.19	63.3	0.33	62.9
Kuwait	0.61	74.7	0.81	75.3

Country/Territory	1996		2002	
	Point Estimate	Percentile Rank	Point Estimate	Percentile Rank
Lebanon	-0.26	45.2	-0.27	51
Oman	1.06	84.9	0.83	76.3
Qatar	0.90	83.7	0.84	77.3
Saudi Arabia	0.71	78.9	0.44	66.5
Syria	-0.50	32.5	-0.41	43.8
United Arab Emirates	0.74	80.1	0.95	80.4
West Bank/Gaza	N/A	N/A	-0.31	49.5
Yemen	-0.99	13.3	-1.23	7.7
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
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 et al., Governance Matters III: Governance Indicators for 1996–2002 (June 30, 2003, draft for comment, *available at* http://www.worldbank.org/wbi/governance/pdf/govmatters3.pdf; The World Bank Group, *GRICS: Governance Research Indicator Country Snapshot*, *available at* http://info.worldbank.org/governance/kkz2002/mc_region.asp). Only the data for 1996 and 2002 is selected in this table for the purpose of this paper.

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.

3. For the purpose of this paper, 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."