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# The Lure of Law in Development

Stephen Humphreys\*

## *Abstract*

Since the Cold War ended, the world's principal financial and development institutions have focused extensive attention on 'rule of law assistance' or 'promotion' in poor and developing countries. This body of work generally treats law in some isolation from broader social and political questions, presented as a technical exercise, recalibrating law in pursuit of undisputed universal goals, such as eradicating poverty or fulfilling human rights. In this article, I undertake a close reading of the literature of two major rule of law funders in the field of market-building—as distinct from, albeit related to, the state-building work also undertaken under this rubric at the UN and elsewhere. My aim is to show how this body of work promotes a thoroughgoing vision of a particular social and political order. Noting that the techniques of rule-of-law promotion align poorly with fundamental principles generally attributed to the rule of law, and that there is little or no evidence that this vision does—or even can—achieve its stated aims, I redescribe rule of law promotion as a kind of rhetorical intervention, a morality play concerned with the universalisation and naturalisation of certain ideas about society, polity and economy. In this essentially pedagogical role, rule of law promotion can claim some modest success.

*Keywords:* rule of law, World Bank, USAID, Habermas, Hayek, Weber, corruption, privatisation, civil society.

## **1. A Theatre of the Rule of Law**

Over two decades of 'promoting the rule of law' an immense literature has been generated by the public and private 'donor' agencies who commission, guide, implement and explain this expansive field of

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activity. Often presented as mere ‘technical assistance’, a close examination of this literature reveals a quite complete vision of what society is and how it should work, including detailed prescription on the activities appropriate to the state, the role of civil society, the correct approach to the economy, and the optimal construction of legal and judicial institutions. In each ‘beneficiary’ country, the literature proposes essentially the same stylised drama, peopled by familiar actors performing from a limited and, by now, well-known repertory. This article examines the themes and *dramatis personae* that habitually reappear on the rule of law stage, with the aim of describing what might be termed the ‘latent theory’ of rule of law promotion.

I will argue that rule of law assistance not only presupposes a certain vision of society, it proactively sets about making it flesh. It does so by funding, ‘nurturing’ and training whole sections of society—judiciaries, police, soldiers and civil servants, of course, but also nongovernmental organisations, the media, ‘civil society’ itself. The goal of ‘rule of law programs’ is not simply to construct or reform ‘institutions’, it is actively to reform the way people in general in host countries behave, public and private persons alike. The aim is, apparently, to normalise and universalise very specific ideas about state, society and their inter-relation.

Ambitious though the program literature—to which I will turn for detailed accounts of the field—is, it rarely expresses the full implications of its own presuppositions. These larger claims, hopes and intentions are rarely openly acknowledged or proclaimed, indeed, they are perhaps not always fully appreciated. And yet, as I will show, they are pervasive. They are indicated by, and necessary to, a consistent narrative which is thoroughly embedded in the body of programs wherever performed. They are *staged* rather than stated. Furthermore, the extraordinary scale of ambition behind this work is, unsurprisingly, not generally met in practice—indeed it is difficult to see how it could be. Yet, perhaps because the larger premise is so rarely articulated, the literature evinces recurrent surprise and disappointment at the failure to achieve its stated aims, as though these more modest objectives could somehow be uncoupled from the wider transformation rule of law programs mutely expect.

I will suggest that it is most appropriate to characterise the world of rule of law promotion as a kind of theatre or performance—as the staging of a certain story or morality tale about the good life; about state and society, about law and economy, about the appropriate way to set priorities, about the appropriate priorities to set. As pedagogical. Rule of law promotion is theatrical in its mode of persuasion: it does not attempt to *demonstrate* the rightness of its propositions through empirical evidence (there is little), nor through the discipline of reasoned competitive discourse in the public sphere (it is not itself open for debate), nor through the clarity of historical analogy (no analogy seems appropriate). Rather, the field

bases its appeal on the force of repeated narrative itself, and on the consistent reproduction of a cast of strangely inscrutable terms that follow a similar choreography regardless of context. These comprise, on one hand, a set of immutable themes (governance, corruption, privatisation, transparency, accountability, impunity, judicial independence) and, on the other, a group of recurrent morally-tagged actors (civil society, the judiciary, ‘the poor’, ‘the elite’, the media, public officials, ‘reform-minded constituencies’).

The plotlines too are simple, bold, familiar and repeated. Governments tend to tyranny. Independent courts protect the rights of ordinary people. Corruption obstructs ‘governance’ and constitutes a tax on the poor. Privatised services are more efficient than public. An ‘enabling environment’ for investment is a prerequisite of ‘development’. ‘Integration’ in the global economy is good for everyone, local and global alike. ‘The poor’ are essentially entrepreneurial, waiting for the right environment to step forward and contribute to (and benefit from) wealth generation. The ‘right environment’ is a matter of incentives.

The background motif that consistently figures, implicitly or explicitly, in this drama is modernisation. This provides an immediate, intuitive, distinctive and enduring base-note: we are concerned with two sets of countries bound together by a particularly contemporary form of transaction—aid donors and recipients. Their relationship is premised on the reproduction in the latter of certain structural conditions that already exist in the former. The action takes place in the host country, dramatising the complementary, if contrasting, obligations of public and private actors, each of whom must learn and internalise irreducible difference: the former must be bound in order that the latter might be free. The plot thematises austerity: public officers are subjected to rituals of hygiene (anti-corruption), self-discipline (governance) and abnegation (privatisation).<sup>1</sup> The accompanying narrative, however, prioritises freedom: public restraint, it turns out, is the price and condition of private freedom.

In practice, much of the action centres on mediating figures—the judiciary, ‘civil society’ and the media—characters expected, in different ways, to reinforce and refine the public-private divide. A ‘reform constituency’ in the host country is a key stock character without whom the action cannot progress. Complex character development is expected of another central figure: ‘the poor’, the nominal beneficiaries, passive, awaiting the right incentives to awaken. The drama’s projected ending looks forward to the recipient state’s ‘integration’ in a global community.

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<sup>1</sup> In this the rule of law narrative retraces Weber’s account of bureaucracy. See Max Weber, *Economy and Society* (first published 1922) (2 vols, University of California Press: Oakland, CA, 1978) at 956–58. There are echoes of a more ancient secular theology in the subjection of government to poverty (privatisation), chastity (anti-corruption) and obedience (governance).

These themes and actors are so basic to the rule of law narrative that their appearance here may seem banal to those familiar with the field. Still, by revisiting them in a spirit of naiveté, my aim in this article is to allow them to serve as windows onto the heart of contemporary rule of law promotion. Throughout I will rely on a broad body of materials gathered from donors, in particular the two earliest and most vigorous actors in this domain, the World Bank and the US Agency for International Development (USAID). Following their own proclivities in their project and strategic literature, I will treat the ‘rule of law’ theme in combination with the closely related themes of ‘governance’, corruption and privatisation.

Although I am not attempting in what follows to fix a definition of ‘rule of law’—a complicated task for a term which owes its prominence largely to its plasticity—it is nevertheless striking that the modes of practice of rule of law assistance deviate sharply from the procedural rigour and conservative caution with which the term is generally associated.<sup>2</sup> However, my interest here is rather to investigate certain concrete activities undertaken by a particular group of actors mobilising the *rhetoric* of ‘rule of law’ in ways that are often familiar, sometimes innovative. The point is to identify how that rhetoric aligns with a practice (hence ‘latent theory’), to show what can be justified ‘in the name of’ the rule of law, and to reconstruct the sort of world imagined by those who support this kind of activity. While I liken rule of law promotion to ‘theatre’ in the sense of *staging* (a morality tale, spectacle or drama), I also have in mind the sense of a ‘theatre of war’—something projected from one place into another, a notionally bounded space of activity ‘over there’, in which undertakings follow an existing playbook or strategy, even if the ultimate outcome remains unknown.

## 2. The Guiding Motif: Modernisation

Although rule of law project documents regularly introduce modernisation as a motivating premise, the term is not defined in the literature: rather its rhetorical function is to provide an intuitive rationale for systemic interventions.<sup>3</sup> That rationale hinges on three notions of modernisation: political, historical and technological.

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<sup>2</sup> I provide fuller discussion of this point in the prologue and first three chapters of Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press, 2010).

<sup>3</sup> As of January 2014, the project database on the World Bank website lists 879 ‘rule of law’-themed projects, and 7,131 projects dealing with ‘public administration, law and justice’. ‘Modernisation’ is tagged as a key word for over 1,000 projects, 50 of which involve ‘legal institutions for a market economy’, 19 on ‘judicial and other dispute resolution institutions’, and 34 ‘law reform’ projects, among others. The list includes ‘Judicial Modernisation’

Politically, the notion of modernisation counterposes ‘state of the art’ laws and institutions with those that are or have become ‘outdated’ along with the regimes or ideologies that spawned them. A project in Russia, for example, claims to address something ‘universally recognised as among the most pressing problems in transition countries: the incomplete, out of date, and contradictory legal framework’.<sup>4</sup> Kazakhstan, according to one USAID project document, has had ‘no experience with ... the modern rule of law’.<sup>5</sup> A key constraint to Zambia’s ‘long term development program’, on the Bank’s assessment, is the country’s ‘outdated policies and legal framework’.<sup>6</sup> The implication is that much of the apparatus of the state in target countries was made for a different—colonial or communist—reality and is not suited to the post- present. With the recession of a colonial/communist apparatus, state laws and institutions need to be ‘overhauled’ to suit a new configuration. So reflexive is this approach that it is even applied in many Latin American countries where, despite the remoteness of the colonial era,<sup>7</sup> USAID observes that decades of dictatorial and authoritarian leadership allowed the inherited colonial judicial system to fall into disrepair.<sup>8</sup> More broadly, the legal framework of any ‘transition’ economy is likely to contain outmoded elements and need updating in the post-1989 era, whether ‘transiting’ from dictatorship, communism or colonialism.

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projects in countries such as Azerbaijan, Georgia, Mexico and El Salvador and ‘Public Sector Modernisation’ projects in Kosovo, Jamaica, Argentina, Armenia, Honduras and elsewhere.

<sup>4</sup> World Bank, *Implementation Completion Report on a Loan in the Amount of US\$58 Million to the Russian Federation for a Legal Reform Project* (2006) at 4.

<sup>5</sup> Chemonics International, *Strengthening the Rule of Law in Kazakhstan: Kazakhstan Judicial Assistance Project Phase I, Final Report* (USAID, 2007) at 3.

<sup>6</sup> International Development Association, *Country Assistance Strategy for the Republic of Zambia* (World Bank, 2008) at 46. See also World Bank, *Implementation Completion Report (TF-26063 TF-23757) on a Credit in the Amount of US\$2.49 Million to the West Bank and Gaza for a Legal Development Project, Report No: 29066* (June 9, 2004) at 2; World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 6.80 Million (US\$10.15 Million Equivalent) to the Republic of Armenia for a Public Sector Modernization Project, Report No: 27563-AM* (April 8, 2004) at 53.

<sup>7</sup> See Malcom Rowat, Waleed H. Malik and Maria Dakolias (eds), ‘Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference’, World Bank Technical Paper Number 280 (World Bank, 1995), especially contributions to Part VIII. Assessments on these lines were already common during the ‘law and development’ wave of the 1960s/1970s; see, for example, Keith S. Rosenn, ‘The Jeito: Brazil’s Institutional Bypass of the Formal Legal System and its Developmental Implications’, 19 *American Journal of Comparative Law* (1971) 514–49.

<sup>8</sup> ‘In the LAC [*sic*: Latin American and Caribbean] region ... the civil code system had generally failed to modernize; codes had largely become antiquated and anachronistic; and abuses stemming from the opacity of the inquisitorial system had been allowed to develop.’ Management Systems International (MSI), *Achievements in Building and Maintaining the Rule of Law: MSI’s Studies in LAC, E&E, AFR, and ANE*, USAID Occasional Papers Series (USAID, 2002) at 4 (also at 3, 58, 66, 77). See too Thomas Carothers, *In the Name of Democracy: US Policy towards Latin America in the Reagan Years* (University of California Press: Oakland, CA, 1991); Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996); on El Salvador, Robert Orr, ‘Paradigm Lost? United States Approaches to Democracy Promotion in Developing Countries’, PhD thesis, Princeton University (1996).

By foregrounding modernisation, donors effectively distance themselves from their colonial or communist forerunners, and invite partner governments to do likewise. Specificity of historical circumstance is easily elided in the common failure of different countries to achieve rule of law.<sup>9</sup> In practice, the implications differ somewhat for postcolonial and post-communist countries. In the former, the fact that laws and courts are ‘outdated’ is associated with a lack of investment and/or under-utilisation of the formal machinery of justice.<sup>10</sup> A common implication, as the World Bank concluded in a pivotal 1989 report on sub-Saharan Africa—a report that is sometimes credited with sparking the turn to the ‘rule of law’<sup>11</sup>—is that post-independence governments are to blame where once-functional laws and institutions have fallen into desuetude or disrepair or have become dysfunctional due to incoherent policies and legislation or corruption in the intervening years.<sup>12</sup> Post-colonial countries drifted into a ‘suffocating’ developmentalism: an overweening state itself breeds corruption and stifles creativity. For post-communist countries, on the other hand, the laws and institutions were never really acceptable even when first instituted. There, overhaul was always needed, but is only now possible.

Everywhere, though, the implication is that while *the world*, or *society*, has moved inexorably forward—has progressed, politically—this particular *state* has failed to keep up. It is the state’s job now to meet the more sophisticated needs of a contemporary national/global/cosmopolitan society. Even while it assails the government, in short, such a language is designed to appeal to ‘modernisers’ within government, a ‘reform constituency’ framed as representing the ‘progressive’ sectors of ‘public opinion’: to pull the country forward out of the ‘backwardness’ of the past.<sup>13</sup>

<sup>9</sup> See, for example, MSI, *USAID in LAC, E&E, AFR, and ANE*, *supra* note 8, at 25, noting that, despite, their differences, Bangladesh, Egypt, the Philippines, Mongolia and Nepal ‘share the common experience of dominance by authoritarian, repressive regimes [who] systematically weakened the courts and marginalised the rule of law’.

<sup>10</sup> In Guinea Bissau, ‘the legal system is antiquated and constraining, as most of the legislation in force today dates back to the early colonial period.’ World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 21.0 Million (US\$26.0 Million Equivalent) to the Republic of Guinea-Bissau for a Private sector Rehabilitation and Development Project* (February 28, 2002) at 8. See also World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 12 Million (US\$15 Million Equivalent) to the Republic of the Gambia for a Capacity Building for Economic Management Project*, Report No. 22516 GM (July 6, 2001) at 3.

<sup>11</sup> See World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth. A Long-Term Perspective Study* (World Bank, 1989) and for discussion of its influence, Ibrahim Shihata, ‘The World Bank and “Governance” Issues in Its Borrowing Members’, in Ibrahim Shihata, *The World Bank in a Changing World: Selected Essays*, F. Tschofen and A. Parra (eds) (Martinus Nijhoff: Leiden, 1991) at 53-96. A full account of the World Bank’s turn to the rule of law is provided in Humphreys, *Theatre of the Rule of Law*, *supra* note 2 at ch. 4.

<sup>12</sup> Thus in Ghana, ‘The intractable land problems and disputes ... cannot be resolved without the streamlining and harmonisation of the prevailing contradictory policies and legislation and reforming the non-collaborating and inefficient public sector land agencies.’ World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 15.1 Million to the Republic of Ghana for a Land Administration Project* (2003) at 15.

<sup>13</sup> ‘Backwardness’ can apply as easily to communist or socialist post-independent structures as to precolonial polities. See, for a rich example, the World Bank, *World Development Report 1991: The Challenge of Development*

Modernisation is, second, a cultural concern in that ‘modern’ states are distinct from *traditional*, rural, or customary ones. To give but one example: in Yemen, one World Bank report found that despite ‘substantial military and technical assistance ... its governance remained traditional in character, and the size of its public sector was small... Many of the institutions of modern governance were absent’.<sup>14</sup> Modern in this sense refers not to the modernism of a particular moment in time, but the modernism of a particular regional tradition or culture. Mapping roughly onto the UN usage of ‘developed country’, this is the ‘modern’ of Max Weber’s *modern state*, by which is meant the ideal type of a particular European tradition; a state, no matter its geographical location, that shares certain basic structures and premises with this tradition.<sup>15</sup> The Weberian state is famously one in which the sovereign commands unrivalled dominance throughout its territory; but it is also, in its Habermasian reworking, a state that has surpassed the parochialism of the community, and replaced it with a pluralist ‘tolerance’ among strangers who need not share the same backgrounds and belief systems.<sup>16</sup> The ‘traditional’, by contrast, retains just these elements—communal, shared (ethnic or religious) belief systems, parochialism, and a continued jostling over authority. Since such a system cannot perform statehood, it survives under the wing of a protecting state or remains residually dominant where the supposedly authentic state is absent, weak, or illegitimate. A predominance of ‘traditional’ justice sectors outside the ‘formal’ structures of the state is, then, *prima facie* evidence of weak rule of law. Afghanistan’s ‘traditional’ justice mechanisms have, for example, attracted intense donor interest since efforts commenced, after the 2001 invasion, to establish the rule of law there.

The ‘informal justice sector’ or ‘customary law sector’ covers a wide variety of clusters of norms and practices, often uncodified and orally transmitted, usually combined together in varying mixes. This includes customary law ... local understanding of Islamic legal traditions ... and even some modern laws .... The only thing these methods have in common is that they reflect a level of fairness and justice broadly accepted by the majority of the population and they are all outside the scope of the formal state justice system. Whereas the authoritative purveyors of this decision making and

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(World Bank, 1990) (‘A consensus is forming in favour of a “market-friendly” approach to development’) at 1, 19, 33.

<sup>14</sup> World Bank, *World Bank Independent Evaluation Group, Project Performance Assessment Report, Republic of Yemen, Institutional Development for Public Administration Project, Legal and Judicial Development Project, Public Sector Management Adjustment Credit, Country Evaluation and Regional Relations* (October 16, 2008) at para. 1.1.

<sup>15</sup> Weber, *Economy and Society*, *supra* note 1, at 880–892.

<sup>16</sup> Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press: Cambridge, UK, 1998) at 448; Michael Oakeshott, *On History and other Essays* (Liberty Fund: Indianapolis, IN, 1999); for a World Bank view, Shihata, ‘The World Bank and “Governance” Issues’, *supra* note 11, at 85.



dispute resolution system may enjoy some degree of state endorsement ... the sources of their authority are invariably based in their communities and in local power structures.<sup>17</sup>

In this context, reference to the ‘modern’ activates and accentuates the difference between donor and recipient countries primarily in terms of the relative capacity of the state. Of particular importance in post-conflict settings—but of insidious significance wherever the capacity of the state is at issue—it sets up a quasi-paternal relation, in which the donor is the bearer of a knowledge and expertise that the recipient cannot be expected to match. Both colonial and communist states were ‘modernising’ in this sense; both characterised the ‘traditional’ as ‘backward’, ‘primitive’ or ‘childlike’ and sought to develop it.<sup>18</sup> In the colonial context this involved a paternalist modernisation, nurturing and shaping rather than merely rejecting or overruling the ‘traditional’.<sup>19</sup> Legal intervention during the colonial era had, among its objectives, the cultivation of ‘native courts’ to capitalise upon and reshape ‘customary’ law to fit modern ends.<sup>20</sup> Contemporary rule of law reform too retains gentler overtones in the traditional context than in the post-communist setting, speaking of ‘formalising’ or ‘clarifying’ land tenure systems, not replacing them outright,<sup>21</sup> and of ‘integrating’ traditional or customary legal systems into the ‘formal’ system to ensure they are in line with constitutional or ‘international human rights’ norms.<sup>22</sup> As with colonial ‘repugnancy’ clauses, it is the subordination of ‘traditional authorities’ to the state’s overarching authority—not their

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<sup>17</sup> Checchi and Company Consulting, Inc., *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies* (USAID, 2005) at 3–4. See also United Nations Development Program, *Afghanistan Human Development Report, Bridging Modernity and Tradition: Rule of Law and the Search for Justice* (UNDP, 2005); United States Institute for Peace, ‘Establishing the Rule of Law in Afghanistan’, USIP Special Report 117 (United States Institute for Peace, 2003); Thomas Barfield, ‘Afghan Customary Law and Its Relationship to Formal Judicial Institutions’ (United States Institute for Peace, 2003); Thomas Barfield, Neamat Nojumi and Alexander Thier, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan* (United States Institute of Peace, 2007).

<sup>18</sup> See, for example, Beatrice Wede, ‘Legal Systems and Economic Performance: The Empirical Evidence’, in Rowat, Malik and Dakolias (eds), ‘Judicial Reform in Latin America’, *supra* note 7, 21–27 at 21; Leila Chirayath, Caroline Sage and Michael Woolcock, ‘Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems’, prepared as a background paper for the World Bank, *World Development Report 2006: Equity and Development* (World Bank, undated 2005) at 4.

<sup>19</sup> Humphreys, *Theatre of the Rule of Law*, *supra* note 2, at 109–22; Stephen Humphreys, ‘Laboratories of Statehood: Legal Intervention in Colonial Africa and Today’, 75(4) *Modern Law Review* (2012) 475–510.

<sup>20</sup> See, for example, Frederick Lugard, *The Dual Mandate in British Tropical Africa* (William Blackwood & Sons: Edinburgh, London, 1926) at 547–549.

<sup>21</sup> For example, World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 15.1 Million to the Republic of Ghana for a Land Administration Project* (World Bank, 2003).

<sup>22</sup> For example, World Bank Legal Vice Presidency, *The World Bank, Initiatives in Legal and Judicial Reform* (World Bank, 2004) at 13.

elimination—that is desired.<sup>23</sup> In this sense of ‘modernisation’, then, contemporary rule of law reform is recognisably descended from, if not identical with, its colonial forebear.

Finally, ‘modernisation’ is about technology. Modern here refers back to its Enlightenment signification, the reliance on science to dispel myth and superstition and to engender progress. Technology has always constituted evidence of that progress: in any given environment, access to and application of technologies that replace labour, increase efficiency and productivity, and track, monitor and order reality are a sign of the achievement of modernity. In project documents, ‘modernisation’ translates into numerous technological objectives; whatever else they achieve, rule of law projects consistently bring technology.<sup>24</sup> Furthermore, the transmission of *technē*, the know-how, of modern policing, prison, and judicial systems is a recurrent theme. The earliest US-funded administration of justice projects in Latin America brought training in forensic techniques for government investigators, who were using ‘long outdated methods’.<sup>25</sup> Electronic databases featured in USAID projects throughout the 1990s.<sup>26</sup> In addition to hard staples—computers, fax machines and photocopiers—projects put video recording equipment in courtrooms and new weapons in the hands of police, introduced ‘automated’ case-management, workflow and ‘enforcement service management’ systems, installed databases of legislation and case law, software for land registries and case-tracking, and so forth.<sup>27</sup> Projects even funded the building of ‘state of the art’ prisons and courthouses.

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<sup>23</sup> Chirayath, Sage and Woolcock, ‘Customary Law and Policy Reform’, *supra* note 18; World Bank, *World Development Report 1996: From Plan to Market* (World Bank, 1995). On ‘repugnancy’ clauses, with which colonial authorities circumscribed the application of ‘native customary law’ in colonial contexts, see Humphreys, *Theatre of the Rule of Law*, *supra* note 2, at 117–118. The broader discussion in Mahmood Mamdani, *Citizen and Subject* (Princeton University Press, 1996) is invaluable.

<sup>24</sup> For example, World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 14.8 Million to the Republic of Azerbaijan for a Judicial Modernization Project* (2006) at 1–2; Heike Gramckow, *Mongolia Judicial Reform Program: Annual Report 2007* (USAID Mongolia & National Center for State Courts, 2008) at 12–13; 20; 33–34.

<sup>25</sup> Harry Blair and Garry Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs* (USAID, 1994) at 10; 47.

<sup>26</sup> See the extensive ‘grant program status report’ provided in Annex C of Chemonics International Inc., *Central Asian Republics Rule of Law, Final Report* (USAID, 2007).

<sup>27</sup> See, for prominent examples, Frederick G. Yeager and Booz Allen Hamilton, *Final Report: Croatia Commercial Law Reform Project* (USAID, 2004); World Bank, *Project Appraisal Document on a Proposed Learning and Innovation Loan in the amount of US\$5 Million to the Republic of Colombia for a Judicial Conflict Resolution Improvement Project* (2001); World Bank, *Implementation Completion Report (IDA-33270) on a Credit in the Amount of SDR 6.6 Million (US\$9.0 Million Equivalent) to Albania for a Legal and Judicial Reform Project* (June 12, 2006); World Bank, *Implementation Completion Report (SCL-45630) on a Loan in the Amount of US\$5.3 Million to the Kingdom of Morocco for a Legal and Judicial Development Project* (December 30, 2004); World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 21.0 Million to the Republic of Guinea-Bissau*, *supra* note 10; World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of*

Hardware interventions are sometimes dismissed by observers as of minor consequence compared with the loftier questions of justice and the public good that rule of law reform raises. Nevertheless, hard technologies alter the physical and psychological context of judicial work and engender soft technological complements. They require training programs (generally provided through the projects) in which future users familiarise themselves with and adjust to their new technological environment, join socially with their peers as the acolytes of a new enterprise, and acquire fresh habits of thought and practice.<sup>28</sup> The extent to which judges, lawyers, police, prison officers, civil servants and others become ‘users’ of technology steers them away from old unproductive mindsets and into the new ‘communities of practice’ growing up alongside the technologies, which are themselves transnational. So, for example, in Kazakhstan after the trial introduction of video cameras in courts, USAID claims, ‘Judges and lawyers ... reported that all trial participants were generally better prepared for trial—and acted more appropriately during trial—when they knew the video recording system would be used’.<sup>29</sup>

Technological standardisation has other advantages for donors, in that it permits cross-national comparisons, such as aligning the tracking of cases—and indeed of individuals—between states. This is especially relevant to criminal justice projects. A USAID-financed project in Mongolia, for example, ‘automated’ 14 prosecutor’s offices with 117 computers, and photocopiers, telephones and faxes, as well as introducing ‘automated fingerprinting identification systems’, an ‘automated mugshot system’ and fully automated case management software, to allow easier exchange between offices and with other agents, including presumably for international collaboration when needed.<sup>30</sup>

What are we to make of the rule of law fixation on modernisation? The rule of law has consistently been associated with the ‘modern state’—in a tradition running through Albert Venn Dicey, Max Weber, Michael Oakeshott, Jürgen Habermas and many others.<sup>31</sup> But nowhere is it suggested that modernity per se can be produced merely by introducing its attributes, legal or otherwise. On most accounts, the ‘modern state’ is a state subjected to the control of a given society,<sup>32</sup> arrived at through a form of self-

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*SDR 30.35 Million (USD 45.65 Million Equivalent) Islamic Republic of Pakistan for a Punjab Land Records Management and Information Systems. Report No: 36450-PK (December 21, 2006).*

<sup>28</sup> See, e.g., World Bank, *Implementation Completion and Results Report on a Credit Amount of SDR 8.6 Million to Republic of Armenia for a Judicial Reform Project* (2007) at 14.

<sup>29</sup> Chemonics International, *Strengthening the Rule of Law in Kazakhstan*, *supra* note 5, at 6.

<sup>30</sup> Gramckow, *USAID Mongolia Judicial Reform Program*, *supra* note 24, at 12–13; 20; 33–34.

<sup>31</sup> Albert Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885) (10th edn, Liberty Fund: Indianapolis, IN, 1962); Weber, *Economy and Society*, *supra* note 1; Oakeshott, *On History*, *supra* note 16; Habermas, *Between Facts and Norms*, *supra* note 16. See Humphreys, *Theatre of the Rule of Law*, *supra* note 2, at ch. 1.

<sup>32</sup> Jürgen Habermas, *Structural Transformation of the Public Sphere* (first published 1962) (Polity Press: Cambridge, UK, 1994) and Habermas, *Between Facts and Norms*, *supra* note 16.

reflection (or ‘self-reflexivity’, to use Anthony Giddens’ term): rational inquiry into social and political processes—Kant’s public use of reason (Giddens describes this as the ‘quintessential modern trait’).<sup>33</sup>

Clearly, ‘modernisation’ in rule of law programming describes a very different process, substituting the epiphenomena of modernity—a smorgasbord of laws and technologies, and an insistent pressure on the ‘traditional’—for the social processes that, in earlier accounts, *produce* these phenomena. No theoretical account is offered in the rule of law literature as to why such reverse engineering might be expected to work. Of course there are well-known historical precedents for what we might call ‘forced modernisation’ under both colonial and communist rule. It is a technique contemporary rule of law promotion appears to have borrowed, despite its meticulous self-distancing from these earlier experiments.

### 3. Lead Roles: Public and Private

Rule of law literature does not offer a theoretical account of the public-private distinction, yet both terms recur with the regularity of a muezzin: we hear much about public accountability and private development, public policy and private incentives; the public and private *sectors* are each supported in different ways. The distinction is treated as natural—it is assumed rather than explained—and the private is consistently privileged over the public, often implicitly: a primary role of the public is to facilitate the freedom of the private. The law, in rule of law literature, sharpens the distinction even if it rarely articulates it: public and private sectors are each addressed in their own registers and relations between the two are subject to a specific form of regulation.

For context, it might be helpful to provide some background to this critical conceptual divide. Perhaps the most thorough, and certainly the most influential, account of the emergence of the public-private distinction is Jürgen Habermas’s description of the rise of what he called the ‘public sphere’ in Europe during the eighteenth and nineteenth centuries. Habermas characterised the public sphere ‘as the sphere of private people come together as a public’ to exercise control over the state ‘in the public interest’.<sup>34</sup> Habermas showed how the principal constitutional guarantees that arose across 19<sup>th</sup> century Europe were premised on preserving the integrity of the ‘public sphere’ and its autonomy from the ‘public realm’ of government. The passage is worth quoting in some detail:

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<sup>33</sup> Anthony Giddens, *Modernity and Self-Identity* (Polity Press: Cambridge, UK, 1991); Immanuel Kant, ‘An Answer to the Question: What is Enlightenment?’, in Kant, *Perpetual Peace and Other Essays* (first published 1784) (Hackett Publishing Company: Indianapolis, IN, 1983), 41-48 at 42.

<sup>34</sup> Habermas, *Structural Transformation*, *supra* note 32, at 27.

A set of basic rights concerned the sphere of the public engaged in a rational-critical debate (freedom of opinion and speech, freedom of press, freedom of assembly and association, etc.) and the political function of private people in this public sphere (right of petition, equality of vote, etc.). A second set of basic rights concerned the individual's status as a free human being, grounded in the intimate sphere of the patriarchal conjugal family (personal freedom, inviolability of the home, etc.). The third set of basic rights concerned the transactions of the private owners of property in the sphere of civil society (equality before the law, protection of private property, etc.). The basic rights guaranteed: the spheres of the public realm and of the private (with the intimate sphere at its core); the institutions and instruments of the public sphere, on the one hand (press, parties) and the foundation of private autonomy (family and property), on the other; finally, the functions of the private people, both their political ones as citizens and their economic ones as owners of commodities.<sup>35</sup>

This idea or ideal of the public sphere flourished under a particular set of historical circumstances. One necessary condition was the cultural and social development of technologies, notably communication technologies (printing presses, newspapers), supportive of concrete and differentiable public and private activities. On Habermas's account, a consolidating notion of 'privacy' applying to individuals 'in their own homes'—accessing information, 'culture' and 'news' in private—soon extended to the economic independence of the bourgeoisie (from community or family) and this in turn provided individuals with a basis for stepping forward into a notional public sphere. There, as members of civil society—in debating halls and coffee salons, at public events and in the pages of newspapers and journals—private individuals debated among themselves with a view to determining the public interest—eventually transmitted (as 'public opinion') to a state that was increasingly constrained (through constitutional safeguards) to deliver it.<sup>36</sup> The public/private divide, in this idealised form, is thus perhaps better conceived as a *tripartite* distinction between (i) private persons as such (the private or family sphere), (ii) a public sphere, comprised of private persons and economic actors ('civil society'), and (iii) a public sector, the state.<sup>37</sup>

Contemporary rule of law programs do not advert to this theoretical underpinning; nor do they problematise the world wherein they act. Nevertheless, Habermas's presumptions run through the project literature in the manner of an *a priori* premise. The work tends to assume the desirability of this set of structural conditions in countries of implementation and aims to ignite, develop or reinforce them. Rule of law and associated language—governance, corruption, privatisation, civil society, judicial

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<sup>35</sup> *Ibid.*, at 83.

<sup>36</sup> Humphreys, *Theatre of the Rule of Law*, *supra* note 2, at 45–55.

<sup>37</sup> This tripartite distinction picks up the Hegelian description of the polity composed of family, civil society and state. See Humphreys, *Theatre of the Rule of Law*, *supra* note 2, at 49–50.

independence— provide a conceptual armoury and interdependent framework for nurturing the public-private distinction. They do so in part by emphasising the non-identity of public and private (as a matter of principle) and insisting upon the desirability of achieving their complete separation (as a matter of practice). And they proceed by assuming that the relevant constituencies already exist in target countries, but have become submerged or displaced; they must be helped to re-emerge and equipped to take their proper place in a recognisably ‘modern’ theatre of public life. There is an apparent paradox here: much as these actors are ‘activated’ from without, the process is conceived of as *self*-actualising as though the various roles already exist in latent form within the polity, simply awaiting ignition.<sup>38</sup> So whereas the *public*—that is, the new, surviving, or residual state—is to be shaped, disciplined and pruned, the private is to be coaxed, seduced and incentivised. The assumption that appropriate incentives will simply call forth private and civil society sectors appears much less presumptuous when it is remembered that these actors do, in fact, already exist *transnationally*—ready to mobilise, in the form of multinational companies, international investors and a global civil society.

As a next step, I will examine these themes through the deployment of certain keywords in the project and strategy-level documentation of the World Bank, USAID and the UN: governance, corruption, and privatisation—and the activating medium of a ‘reform constituency’.

### 3.1. The Reform Constituency

An arresting theme that recurs throughout rule of law project documentation is the conviction that in order to ‘push through’ reform, donors will need to work with a small ‘reform-minded’ minority in government, sometimes in disregard of the formal legislative process. ‘Without reform-minded and active leadership in the Government of Egypt’, one project report notes, ‘USAID ... efforts would have been futile. This point cannot be overemphasised’.<sup>39</sup> The importance of working through a ‘reform constituency’ was flagged early on in rule of law work: the first of four ‘essential needs’, according to a 1994 evaluation of USAID’s rule of law work, is ‘host country political leadership in support of ROL [*sic*] reforms’.<sup>40</sup> If this support is lacking, ‘donors will need to support constituency and coalition building strategies to

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<sup>38</sup> A similar paradox is captured in Nikolas Rose’s description of a cognate phenomenon, ‘government through community’. According to Rose, in this model of government, the community ‘is to be achieved, yet the achievement is nothing more than the birth-to-presence of a form of being which pre-exists.’ Cited in Tania Murray Li, ‘Neo-Liberal Strategies of Government through Community: The Social Development Program of the World Bank in Indonesia’, NYU Institute for International Law and Justice Working Paper 2006/2 (2006) at 4.

<sup>39</sup> Nathan Associates Inc., *Assistance for Trade Reform, Final Report* (USAID, 2006) at vi.

<sup>40</sup> Blair and Hansen, *USAID Scales of Justice*, *supra* note 25, at 3.

strengthen political and public pressure for reform.’ One project document puts it thus: ‘Skills training not only develops skills but also develops a cadre of change agents’.<sup>41</sup> In practice, donors frequently rely on close links with key figures in government to accelerate reform processes and avoid lengthy public or parliamentary debate. USAID, for example, explains the advantages of grantmaking over loans in these terms:

Even highly concessional loans typically require ratification by the legislature, whereas grants can be implemented by the executive branch. The process of legislative approval can stretch the gap between initial project agreement and the start of implementation into months or years. In the meantime conditions may change—a dedicated minister is replaced by one less committed to reform, or the conditions necessary for the passage of a key law or regulation are no longer in place. USAID’s grant funding helps avoid this problem.<sup>42</sup>

The World Bank observes that, in practice, successful reforms often avoid the ‘process of legislative approval’ altogether:

Macroeconomic reforms are often carried out in times of crisis by a stroke of the pen—achieved by administrative decree and a few key actors. The benefits are usually immediate, visible, and spread across the population, with losers or potential losers often too dispersed or too small in number to be of political importance.<sup>43</sup>

Project documents are replete with references to key legislative hooks introduced by decree, which often turn out to be instrumental in allowing relevant projects to take place at all.<sup>44</sup> Indeed, these begin with the shaping of constitutions, an area where USAID was extremely active in the early 1990s in former communist countries.<sup>45</sup> Delivery of the appropriate legislative environment is typically a core project output; the process through which it is achieved remains secondary. Donors not only ‘assist’ in drafting

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<sup>41</sup> Yeager, *Final Report: USAID Croatia Commercial Law Reform*, *supra* note 27, at 6.

<sup>42</sup> USAID, *Economic Growth Strategy: Securing the Future* (prepublication edition, 2008) at 12.

<sup>43</sup> Sunita Kikeri, Thomas Kenyon and Vincent Palmadem, ‘Reforming the Investment Climate: Lessons for Practitioners’, World Bank Policy Research Working Paper 3986 (World Bank, 2006) at 2.

<sup>44</sup> See, for example, World Bank, *Azerbaijan Judicial Modernization Project*, *supra* note 24 at 1; World Bank, *Project Appraisal Document on a Proposed Loan in the Amount of US\$17.1 million to the Republic of Indonesia for a Private Provision of Infrastructure Technical Assistance Loan*, Report No: 25820 (April 25, 2003) at 8.

<sup>45</sup> MSI, *USAID in LAC, E&E, AFR, and ANE*, *supra* note 8, at 12 recounts USAID aid in drafting the constitutions of Albania, Armenia, Bulgaria, Georgia, Russia, and Ukraine.

legislation, they frequently pre-draft it, sometimes without even visiting the country in question.<sup>46</sup> Indeed, even where the work remains local, donor influence is often very hands-on. Here, for example, is the description provided by a USAID consultant on inserting WTO-friendly language into Tajikistan's Civil Procedure Code:

Specifically, the project carefully and successfully guided the development of the draft [Code] so that [it] now contains preliminary relief provisions as required for WTO accession ... We argued most loudly for these provisions ... and were not successful until the eleventh hour, when [project staff] met the Minister of Justice and urged [their] inclusion. The project helped draft the necessary language, translated it into Tajik, and worked with the Minister and his colleagues on the reasons for which the provisions were important for Tajikistan's future.<sup>47</sup>

An implicit assumption in much of the literature, as the above citations indicate, is that the beneficiaries of reform are not necessarily apprised of their own best interests—which in turn increases the value of the reform constituency. If they lose ground, projects can suffer or be abandoned.<sup>48</sup> There is thus a constant concern in rule of law reform circles with 'political will', its presence or absence, its inducement and encouragement:

How can the political will to bring about basic, systemic reform be generated? Such political will is generated from three directions: from below, from within, and from outside. Organised pressure from below, in civil society, plays an essential role in persuading ruling elites of the need for institutional reforms to improve governance. There may also be some reform-minded elements within the government and the ruling party or coalition who, whether for pragmatic or normative reasons, have come to see the need for reform but are reluctant to act in isolation. Finally, external actors in the

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<sup>46</sup> For example, Booz Allen Hamilton, *Final Report for Cape Verde WTO Accession Project under The Doha Project for WTO Accession and Participation* (USAID, 2005).

<sup>47</sup> ARD Inc. and Checchi & Co. Consulting, *Assistance in Establishing the Legal and Institutional Framework Necessary to Support a Market-Based Economy (LIME 2) Kyrgyzstan and Tajikistan. Final Report* (USAID, 2006) at 45.

<sup>48</sup> Thus the World Bank withdrew support for a follow-up to its 'legal and judicial development project' in Yemen after '[t]he implementation of the Judicial Development Component, in particular, was compromised in mid-2001 by the replacement of a reform-minded minister with a significantly more conservative minister' which 'sent a message that modernization of the judiciary was not a priority', World Bank, *Implementation Completion Report on a Credit in the Amount of SDR1.8 Million Equivalent to the Republic of Yemen for a Legal and Judicial Development Project* (2003) at 6.



international community often tip the balance through persuasive engagement with the rulers and the society and by extending tangible rewards for better governance and penalties for recalcitrance.<sup>49</sup>

The reform constituency is not, however, to be confused with ‘the elite’. The latter term, which likewise appears regularly throughout rule of law literature, carries the consistently negative connotation of status quo power-brokers with the most to lose from reform.<sup>50</sup> Corrupt and collusive, the elite—defined as ‘any economic, political, ethnic, social or other group trying to promote their interests at the expense of the interests of non-elite members’<sup>51</sup>—are often assumed to have ‘captured’ the state.<sup>52</sup> Reformers are thus pitted against the elites, aided by the internal divisions within, and popular suspicion regarding, the incumbents:

The champions of reform are many but varied, and they tend to lack the resources commanded by those who benefit from the status quo. However [two] elements ... bode well for reform. The first is that those elites with vested interests in the informal networks of patronage are increasingly divided ... Secondly, the increasing demands placed upon the political elite by the population means that the frailties of the existing political system have become raw and exposed, and threaten to cast the political order into conflict and turmoil.<sup>53</sup>

On this account, the true protagonists in the rule of law narrative are the ‘population’ against the ‘elite’, with the ‘reformers’ valiantly standing up on behalf of the general interest. Since the elite can manipulate

<sup>49</sup> USAID, *Foreign Aid in the National Interest: Promoting Freedom, Security and Opportunity* (USAID, 2002) at 48.

<sup>50</sup> An early USAID paper put it thus: ‘In developing countries, elite segments of society (which often include the civil service) may use the state as an instrument to pursue their own narrow interests, setting aside the legitimate needs and aspirations of the majority’. USAID, *Policy, Democracy and Governance* (1991) at 9.

<sup>51</sup> Klaus Decker, Caroline Sage and Milena Stefanova, *Law or Justice: Building Equitable Legal Institutions*, prepared as a background paper for World Bank, *World Development Report 2006: Equity and Development* (World Bank, 2005) at 4.

<sup>52</sup> ‘Elite capture’ is a term of art in Bank literature, extending to the judiciary (‘Corruption and elite capture within judicial systems are among the obstacles to development to overcome through legal and judicial reform’): Robert Danino, ‘Reforming Legal and Judicial Systems’ in Ruth Kagia (ed.), *Balancing the Development Agenda: The Transformation of the World Bank Under James D. Wolfensohn, 1995–2005* (World Bank, 2005), 62-67 at 66. See also Joel Hellman, G. Jones and Daniel Kaufmann, ‘Seize the State, Seize the Day: State Capture and Influence in Transition Economies’, 31 *Journal of Comparative Economics* (2003) 751-773.

<sup>53</sup> ARD Inc., *Democracy and Governance Assessment of Nigeria* (USAID, December 2006) at v. See also Management Systems International (MSI), *Corruption Assessment Senegal, Contracted under USAID Contract No. DFD-I-00-03-00144-00, Task Order 1* (USAID, August 31, 2007); Paul J. Bonicelli [USAID Assistant Administrator for Latin America and the Caribbean], ‘Assessing the State of Democracy in the Hemisphere’ (Council of the Americas, November 8, 2007).

the resources at their disposal, including the media, to capture popular acquiescence, reformers must struggle against popular reticence or misunderstanding. Reform is thus frequently presented as a heroic endeavour, pursued in the face of populist opposition, by a handful of far-sighted and selfless reform-minded politicians or bureaucrats, idealistic civil society agitators, the ‘business community’, often mobilised in chambers of commerce (who play frequent cameos in rule of law project scripts) and other ‘stakeholders’.<sup>54</sup> Moreover, less obviously, perhaps, ‘stakeholders’ may also include non-nationals. Thus a World Bank project in Georgia cites among its target audiences ‘international investors’ and adds ‘the international business community should be aware of the efforts undertaken in Georgia to set in place a competent and fair judiciary and ensure the rule of law’.<sup>55</sup>

### 3.2. Governance

Governments determine how well, or how poorly, markets function. This simple truth explains the current concern with ‘governance’ as the world shifts toward an overwhelming endorsement of markets as the base of economic activity.<sup>56</sup>

‘Governance’ has come, over time, to define the boundaries and scope of the public sector in rule of law literature. The International Development Association (IDA)—the World Bank’s grant arm for the poorest countries—defines it as ‘the way the state acquires and exercises the authority to provide and manage public goods and services—including both public capacities and public accountabilities’, further broken down to encompass protections of property, budget management, efficient resource mobilisation and public administration, transparency and accountability, notably in procurement processes.<sup>57</sup>

At root, these principles of a functional bureaucracy—similar to those identified by Weber—supply a disciplinary category, the boundaries that circumscribe the activities of public officials. They are the

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<sup>54</sup> See, for example, International Development Association, *Country Assistance Strategy for the Republic of Zambia* (World Bank, 2008) at 2.

<sup>55</sup> World Bank, *Project Appraisal Document on a Proposed Credit in the Amount of SDR 9.9 Million to Georgia for a Judicial Reform Project* (1999) at 25.

<sup>56</sup> Deborah Brautigam, ‘Governance and Economy: A Review’, Policy Research Working Papers 815 (World Bank, 1991) at 1. See also Brian Van Arkadie, ‘The Role of Institutions in Development’, in World Bank, *Proceedings of the World Bank Annual Conference on Development Economics 1989* (World Bank, 1990), 153-193; World Bank, *Governance and Development* (World Bank, 1992); James Anderson and Cheryl Gray, *Transforming Judicial Systems in Europe and Central Asia* (World Bank, 2007).

<sup>57</sup> International Development Association, *IDA’s Performance-Based Allocation System: A Review of the Governance Factor, International Development Association Resource Mobilization* (World Bank, 2006) at 1, 6. Nine definitions of ‘governance’ are supplied in Navin Girishankar et al., ‘Governance’, in World Bank, *Poverty Reduction Strategy Sourcebook* (World Bank, 2002).

‘economic governance’ functions of the state.<sup>58</sup> In the latter interventions, the ‘international community’ acts as ‘mentor’ to a generation of responsible public officials, demonstrating the correct activation and deployment of the coercive machinery of the state. However, once control of that coercive machinery is in the hands of local officials, they have an incentive to ‘free-ride’ by using their coercive levers to steal from the public wealth. ‘Governance’ thus describes the parameters of *legitimate* state coercive activity. Its disciplinary character is reinforced by donors (including the IDA) who measure it as a basis for dispensing funds.<sup>59</sup> To assess ‘governance’ is to determine whether the public sector has deviated from its core function (creating an ‘enabling environment’ for investment), and to take punitive steps if so.

### 3.3. Corruption

Corruption is the flipside of governance: its absence or infringement. Usually defined as ‘the abuse of public office for private gain’, the term focuses on the boundary between public and private and provides criteria for policing that boundary.<sup>60</sup> The ‘private gain’ in question may refer to the private interest of *others* in transaction with the public official, but more precisely refers to the public official’s *own* private interest, which is strictly illegitimate. Wherever the boundary between public and private (even, or especially, as that boundary exists within a specific person—that is, within any given ‘office’) is transgressed, ignored or misperceived, the result is ‘corruption’:

[U]naccountable and nontransparent public governance can lead to a blurring of the lines between the public and private sectors and to ... excessive government interference, corrupt capital market or utility regulation, or government ‘capture’ by private interests, as in ‘crony capitalism’.<sup>61</sup>

<sup>58</sup> See Humphreys, *Theatre of the Rule of Law*, *supra* note 2 at ch. 5.

<sup>59</sup> IDA, *A Review of the Governance Factor*, *supra* note 57. See also the Millennium Challenge Account: Millennium Challenge Corporation, *Fiscal Year 2007 Guidance for Compact-Eligible Countries* (MCC, 2006); Millennium Challenge Corporation, *Guide to the MCC Indicators and the Selection Process Fiscal Year 2008* (MCC, 2007).

<sup>60</sup> For example, World Bank, *Implementation Plan for Strengthening World Bank Group Engagement on Governance and Anticorruption* (World Bank, 2007) at para. 3; USAID, *A Handbook on Fighting Corruption* (USAID, 1999).

<sup>61</sup> World Bank ‘Reforming Public Institutions and Strengthening Governance: A World Bank Strategy’, Public Sector Group, Poverty Reduction and Economic Management (PREM) Network (World Bank, 2000) at 14.

Corruption is thus effectively twinned with ‘governance’ as its other—the confusion of public and private realms is to be criminalised.<sup>62</sup> The problematisation of corruption is an occasion for intensive scrutiny of the appropriate boundaries between public and private—as witness the United Nations Convention Against Corruption, with its meticulous and sometimes tortuous refinement of the relevant actors in each listed instance of possible corruption.<sup>63</sup> Steps to address corruption further explicate and reinforce these roles, by creating private pressures and public obligations. Thus there has been, on one hand, a significant (and largely privately funded) push to create an ‘anti-corruption movement’ by replicating human rights techniques of civil society monitoring and ‘naming and shaming’. On the other, the repeat *source* of information on corruption is the private sector. By soliciting the perceptions—rather than monitoring the behaviour—of private actors, corruption indicators such as Transparency International’s well known Corruption Perceptions Index effectively assume the latter as members of the ‘movement’.

So while privately-funded anti-corruption work responsabilises the public *sphere*—mobilised to police the boundaries—Bank work places the burden of correction on the public (rather than private) *sector*. At project level, anti-corruption work involves the inculcation of criteria for recognising and activating the boundary between public and private—codes of ethics; reporting and other transparency procedures; public information campaigns—intended to encourage (or initiate) exposure to public scrutiny. In principle, then, the achievement of governance necessarily involves the elimination of corruption, so the latter goal appears to add merely rhetorical (and moral) weight to the former.

### 3.4. Privatisation

The tremendous enthusiasm for the self-abnegation of the state—the obligatory ritual of renouncement that constitutes privatisation—at the Bank, within USAID, and elsewhere, was (and is) driven in part by the clarity it introduces between the private and public sectors, attentive to their differing roles (entrepreneurship, on one hand, governance, on the other).<sup>64</sup> On one hand, the massive transfer of assets from nominally public to private hands, with the number of annual privatisations growing apace since

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<sup>62</sup> See in this context, Arts. 15–42, UN Convention against Corruption, 31 October 2003, in force 14 December 2005, 2349 UNTS 41 (UNCAC).

<sup>63</sup> See, for example, *ibid.*, Article 2(a).

<sup>64</sup> The World Bank’s privatisation database records over 1,800 privatisations valued at over US\$ 1 million each between 2000 and 2008 (the database end date), < [go.worldbank.org/W1ET8RG1Q0](http://go.worldbank.org/W1ET8RG1Q0) > (visited 10 March 2015).

1989, clearly signals the central importance of their mutual differentiation and relative privileging.<sup>65</sup> On the other, a perhaps more crucial effect is the *clarification* of control over assets—with the assumption that ownership is in fact more sharply defined as well as more efficiently allocated in private than in public hands. For example, a World Bank project in Romania was ‘geared to strengthening financial discipline in the state enterprise sector, liquidating nonviable loss-making enterprises, privatising most remaining state enterprises and cutting overall losses and subsidies in the state enterprise sector by 22 percent’.<sup>66</sup> According to a fiercely defended discourse, privatisation of state-run enterprises permits the costs of inefficiencies and the rewards of efficiencies to be properly allocated to, and so felt by, the responsible individuals, rather than being absorbed into an amorphous and unaccountable leviathan.<sup>67</sup>

There is thus a clear ideational linkage between ‘governance’, ‘corruption’ and ‘privatisation’. Privatisation is championed for reducing the scope for corruption (an informal tax on the private sector), not only by altering incentive structures, but also by merely recategorising revenues.<sup>68</sup> Thus ‘corrupt’ payments to a public official for a public service reappear as profit to a service provider once the service is privatised: but in the process, income from the service is formalised and rationalised, the ‘profit’ moved from a public gatekeeper to a private owner—who, much as they might reinvest it ‘more efficiently’, might also simply expatriate it.

The extensive theoretical baggage that aligns privatisation, governance and anti-corruption with economic growth all moves in and around the edges of the ordinary rule of law penumbra as it has come down to us in association with the discipline of economics. As a limitation of public interference with private rights (or assets), a strong associative presumption links privatisation and the rule of law in Bank and other literature. On any account, as we have seen, the rule of law assumes a clear distinction between public and private and reinforces the boundary between them; accounts differ, however, on where precisely the boundary should be drawn. But a strong association with privatisation, such as that adopted by the Bank,

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<sup>65</sup> The value of privatisations peaked in 2007 at US\$133 billion, ‘a record in nominal terms’. Sunita Kikeri and Verena Phipps, ‘Privatization Trends: A Record Year in 2006’, *Public Policy for the Private Sector*, Note No. 317 (World Bank, 2008) at 1 and Sunita Kikeri and Verena Phipps, ‘Privatization Trends: A Record Year for Initial Public Offerings in 2007’, *Public Policy for the Private Sector*, Note No. 321 (World Bank, 2008) at 1.

<sup>66</sup> World Bank, *Implementation Completion Report on a Loan in the Amount of US\$25 Million to Romania for a Private Sector Institution Building Project* (2005) at 5: ‘These objectives were all met and this component can be rated as satisfactory’.

<sup>67</sup> See generally: Friedrich Hayek, *The Road to Serfdom* (first published 1944) (University of Chicago Press, 1994); Ronald Coase, ‘The Problem of Social Cost’, 3 (1) *Journal of Law and Economics* (1960), 1-44; Anne Krueger, ‘Aid in the Development Process’, 1 (57) *Research Observer* (January 1986), 57-78.

<sup>68</sup> The point was made early on: ‘Privatization, or the reduction of government controls and regulations and the sale of public enterprises to the private sector, has potential to increase transparency and reduce corruption abuses.’ Brautigam, ‘Governance and Economy’, *supra* note 56, at 24.

USAID and others, will tend to redirect rule of law language toward the most parsimonious delineation. And this assumption is easily compatible with most accounts of the rule of law in the Hayekian and the new post-1989 tradition, even if it has little traction with its classical normative scope.<sup>69</sup>

### 3.5. A Public Sphere of Private... Investors?

It should already be clear that this account of the public sphere differs from Habermas's in some crucial respects. Whereas both privilege private over public, the contemporary account does so in a manner that is at the same time narrower and broader than the Habermasian ideal. It is narrower in that it consistently privileges a mere slice of private activity—commercial entrepreneurship—above all others: the private sector, and even more, the private investor, are fetishised to the point that they occupy almost the entire space of 'the private' in rule of law literature. 'Civil society', the principal agent of the political theory of an earlier era, appears in this account not only secondary in importance to, but ultimately parasitic upon, the private sector. Characterised in the diminished guise of advocacy-oriented NGOs—rather than as the cumulative product of rational exchange in the public domain—civil society is (as we shall see in more detail below) expected to turn to private funding for sponsorship, and to launch 'public awareness' campaigns to jostle and compete in the media with commercial advertising.<sup>70</sup>

The scope of the private in rule of law activity is also *broader* than usually conceived, however, in that it abandons the implicit rootedness of the private realm within the bounds of the nation-state. Private investors, and the private sector, are transnational from the outset, with no necessary relation to a given 'public sector', except as incidental (and fundamentally interchangeable) locus of protection/regulation. The same is true of civil society and the media, both of which are conceived of as *essentially* transnational, even if nationally-inflected in a given context. Much as specific projects focus on national actors, the beneficiaries are also always transnational. The public sphere and public sector no longer map onto one another in the associative form assumed in the Habermasian model: an implicit symmetry between public and private, or state and society, that underpins relevant models from Kant through Weber is discarded in contemporary rule of law discourse. The 'society' that is to 'control' the state turns out itself to be trans-statal.

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<sup>69</sup> Hayek, *Road to Serfdom*, *supra* note 67, and Friedrich Hayek, *The Constitution of Liberty* (first published 1960) (Routledge: London, 2006).

<sup>70</sup> See Preeti Shroff-Mehta, *Romania Civil Society Strengthening Program, Final Report* (USAID & World Learning, March 31, 2008). See also Part Two of Habermas, *Structural Transformation*, *supra* note 32.

And yet, both ‘public’ and ‘private’ are imagined throughout this literature in a highly attenuated and idealised manner. On one hand, the selfless civil servant or functionary, efficient and productive, and differing from the Weberian bureaucrat only in his special regard for the market economy. On the other, the private individual in one of two guises: as latent entrepreneur ready to ‘unleash market forces’ or as active member of ‘civil society’.

#### **4. Supporting Roles**

If ‘governance’ describes the proper limited role of a public sector clearly separated from the private realm and ‘corruption’ describes a condition whereby these spheres or the boundaries between them become blurred or confused, the rule of law is introduced as a means to hold public and private apart. This role of the rule of law is so deeply embedded in the literature’s self-representation—so self-evident—that it is easily overlooked. The rule of law comprises basic civil controls over the public realm, thus *presupposing* two distinct realms; the corollary, evidenced in contemporary reform, is that the rule of law and the public/private distinction are mutually constitutive. In states where the rule of law is said to be weak or absent, it is, in effect, the distinction between public and private itself that is weak, blurred, collapsed, or underdeveloped. To ‘strengthen the rule of law’ in such circumstances means to provide clarity and definition between distinct public and private realms, to supply mechanisms for negotiation between them, and to reinforce each in its own role. Rule of law culture relies on (at least) three such mechanisms: the disinterested figure of the judge, the interested figure of the private citizen (civil society), and the passive beneficiary (‘the poor’).

##### **4.1. The Judiciary: Autonomy and Prestige**

In the ideal rule of law configuration, the judiciary is the key guarantor of the divide between public and private, but only insofar as it is independent of both.<sup>71</sup> Its multifold remit is well captured in an \$11 million Armenian ‘Judicial Modernisation’ project:

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<sup>71</sup> Edgardo Buscaglia and Maria Dakolias, ‘An Analysis of the Causes of Corruption in the Judiciary’, The World Bank, Legal and Judicial Reform Unit (World Bank, 1999).

Both domestic and foreign investors were expected to benefit from an efficient, independent and impartial judiciary thus promoting private sector development and economic growth in Armenia. Judges and court personnel were expected to benefit in terms of enhanced professional training, administrative independence and security, improved working conditions and better access to legal information. The general public and legal professionals would benefit from improved access to the courts and legal information, and impartial and professional functioning of the judiciary.<sup>72</sup>

I will return to the second and third beneficiaries cited here in a moment (the ‘general public’ and ‘legal professionals’). As to the first, however, the notion that ‘foreign and domestic investors’ are viewed as personifying, or at least representing, the general interest will come as a surprise to many. Yet that implicit claim is a staple of contemporary project literature.<sup>73</sup> What appears to have happened is that the literature has identified the public interest with ‘investors’ and the rule of law itself—the guardianship of the law—with the courts. I will take these two themes in order.

First, as to the location of the public interest, the implicit claim is that an independent and impartial judge disentangles the ‘public interest’ from the ‘public sector’ and (re)associates it with the private realm.<sup>74</sup> In this context, project documents on former socialist countries speak disparagingly of ‘telephone justice’, or judicial responsiveness to communications from their ‘political masters’.<sup>75</sup> A properly independent judiciary will instead ratify public recognition of the legitimacy and authority of *private* interests as the proper content of the public sphere. In project literature, the identification of the public interest with private interests is justified largely on economic grounds—but it fits well with a wholesale vocabulary of individual freedoms and human rights that usually accompanies rule of law reform. By the same token, no particular private actor is to be privileged. Where a fuzzy or bloated public realm had previously provided

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<sup>72</sup> World Bank, *Armenia Judicial Reform Project*, *supra* note 28, at 3. The project included the objective of a constitutional amendment to improve judicial independence, which, according to the project report, ‘was a challenging task for the authorities. After the first unsuccessful attempt in 2003, the government was able to secure a successful outcome in November 2005.’ World Bank, *Armenia Judicial Reform Project*, *supra* note 28, at 8. See too USAID, *A Global Guide to Judicial Independence* (USAID, 2001).

<sup>73</sup> For example, the World Bank claims for one project that it ‘would benefit the entire population of Georgia, and in particular, the business community and foreign investors through the establishment of an independent and competent judicial system, leading to the enforcement of more secure property rights and contractual obligations and an environment conducive to the establishment of the rule of law’. World Bank, *Implementation Completion and Results Report on a Credit in the Amount of SDR 9.87 Million to Georgia for Judicial Reform Project* (2007) at 3.

<sup>74</sup> World Bank, ‘The Law and Economics of Judicial Systems’, Preliminary Notes No. 26 (World Bank, 1999); Buscaglia and Dakolias, ‘Corruption in the Judiciary’, *supra* note 71.

<sup>75</sup> Examples: Chemonics International, *Strengthening the Rule of Law in Kazakhstan*, *supra* note 5, at 3; World Bank, *Project Appraisal Document on a Proposed Loan in the Amount of US\$50 Million to the Russian Federation for a Judicial Reform Support Project* (January 19, 2007) at 2; World Bank, *Project Appraisal Document on a Proposed Loan in the Amount of Euro 110.0 Million (US\$130.0 Million Equivalent) to Romania for a Judicial Reform Project* (November 22, 2005) at 27; MSI, *USAID in LAC, E&E, AFR, and ANE*, *supra* note 8, at 119.



special protection to government and select private interests—think ‘crony capitalism’—a rule of law culture instead treats all equally.

There are two further implicit claims here. One is that in Armenia (and other rule of law recipient countries), foreign investors were previously discriminated against, by means of subsidies, tariffs, taxes, regulations and other forms of economic nationalism. By lifting that discrimination, equality under law is returned, and development furthered.<sup>76</sup> This claim further supports, and is supported by, the consistent rule of law preference for trade liberalisation and push for the internalisation of WTO principles into national law (about which more below). The second claim is that investors are in some way *particularly* representative of the public interest. This claim is indissociable from a familiar economic view, with roots traceable to Mandeville and Smith, later expressed most clearly, perhaps, in Hayek and de Soto—that by reallocating resources to where they will be most efficient, investors perform the ultimate public good.<sup>77</sup> In rule of law literature, this notion gains the force of proven fact; and so it appears self-evident that a truly independent judiciary will understand the importance of investment generally, and respect the autonomy of foreign investors in particular, in a national economy, all else being equal.

Second, as to the role of the courts, the assumption appears to be that if law is to rule, its priests and guardians must be tended. An important background theme in rule of law projects has been to increase the prestige of the judiciary.<sup>78</sup> Judicial independence derives from many sources, mostly structural.<sup>79</sup> Among these, the literature agrees that good remuneration and working conditions are essential.<sup>80</sup> Prestige further depends upon the inculcation among legal actors of professional pride in their unique guardianship of the

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<sup>76</sup> For example, Chirayath, Sage and Woolcock, ‘Customary Law and Policy Reform’, *supra* note 18, at 95; *National Security Strategy of the United States of America 2006* (White House, 2006) at 27: ‘While most of the world affirms in principle the appeal of economic liberty, in practice too many nations hold fast to the false comforts of subsidies and trade barriers. Such distortions of the market stifle growth in developed countries, and slow the escape from poverty in developing countries. Against these short-sighted impulses, the United States promotes the enduring vision of a global economy that welcomes all participants and encourages the voluntary exchange of goods and services based on mutual benefit, not favouritism.’

<sup>77</sup> See Humphreys, *Theatre of the Rule of Law*, *supra* note 2, at ch. 1.

<sup>78</sup> MSI reports on USAID’s support for judicial associations in Eastern Europe that ‘the need for such professional associations has been particularly important in post-communist societies because their judiciaries have typically been accorded less power, prestige, and resources than their western counterparts. USAID has made a very important contribution in helping develop judicial associations throughout the region.’ MSI, *USAID in LAC, E&E, AFR, and ANE*, *supra* note 8, at 16.

<sup>79</sup> For an overview of the ingredients of judicial independence, see USAID, *Guidance for Promoting Judicial Independence and Impartiality* (USAID, 2002) at 12–41. Among the priority areas identified are: selection processes, security of tenure, length of tenure, and structure of the judiciary (including budgets). For increasing ‘judicial capacity’, recommendations include training programs, access to legal materials, codes of ethics, increasing the status of judges, and creating judicial associations.

<sup>80</sup> *Ibid.*, at 31: ‘The question is: How to increase the self-respect of judges? ... In terms of affecting the attitude of the judges themselves, salaries and benefits are key factors.’

rule of law. Project literature is full of examples of demoralised, underpaid and unprofessional judicial actors. In Georgia, one project notes: ‘Judges received poor remuneration, and held little if any prestige. For these reasons, the judiciary was staffed with individuals who were often unwilling or incapable of providing independent, professional judicial decisions’.<sup>81</sup> Courthouse rehabilitation, new computers, better wages, professional training: according to project documents, all of these elements help build the prestige of the judiciary. The World Bank thus describes two lessons derived from its ‘depth of experience in the reform and development of legal and judicial institutions, particularly in transition countries’:

The first is that judicial independence relies as much on the constitutional empowerment of the judiciary to self-governance as it does on the capacity of the judiciary to manage and administer its own resources—human, financial, informational, technical and physical. The latter [is] sometimes called operational independence. ... The second lesson is that the effectiveness of a judiciary lies in its ability to deliver efficient services to the public as much as in its role as a check and balance on the executive. As such, developing effective service delivery mechanisms through IT systems, courthouse modernization, training, and public education are essential corollaries to strengthening independence.<sup>82</sup>

Funding judicial associations and supporting conferences on ‘the role of judges in society’ or ‘the importance of the rule of law’ address these shortcomings, nurture professional pride, and sensitise the courts to their public role.<sup>83</sup> If legal professionals and judges are themselves persuaded of the importance of their calling, the logic goes, they will better serve as impartial arbitrators. In a virtuous cycle, this will lead to greater ‘societal respect’, which will in turn boost their capacity to apply the law independently.<sup>84</sup> If the judge is gently prodded in the appropriate direction, other good things follow.<sup>85</sup>

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<sup>81</sup> World Bank, *Georgia Judicial Reform Project*, *supra* note 55, at 3. See also World Bank, *Russia Judicial Reform Support Project*, *supra* note 75, at 10; World Bank Legal Vice Presidency, *The World Bank, Ethiopia: Legal and Judicial Sector Assessment* (World Bank, 2004) at 20.

<sup>82</sup> World Bank, *World Bank Report No: 38361-AM, Project Appraisal Document on a Proposed Credit in the Amount of SDR 15.2 million (US\$22.5 Million Equivalent) for a Second Judicial Reform Project, Republic of Armenia* (February 9, 2007) at 2.

<sup>83</sup> See for example, USAID, *The Vermont-Karelia Rule of Law Project, Final Report*, January 1, 1997-December 31, 1997 (USAID, 1998); American Bar Association, *Program of the 2<sup>nd</sup> Annual IBA Bar Leader’s Conference, 16–17 May 2007, Zagreb, Croatia* (American Bar Association, 2007): ‘How Can Bar Associations Promote the Rule of Law ... Promoting the rule of law [involves] “public education”. More often than not, it is a country’s government itself which is most in need of education. However, educated support for the rule of law among the population at large is essential if the rule of law is to become embedded in a society.’

<sup>84</sup> For example, USAID, *Promoting Judicial Independence*, *supra* note 79, at 36, under the header ‘Promoting Societal Respect for the Role of an Impartial Judiciary’ and referring to ‘the most important factor affecting judicial

In the ideal horizon, judicial integrity would be entirely governed by internal disciplinary mechanisms, such that neither public imperatives nor private incentives can claim the allegiance of the judge. Allegiance is instead transferred to a body of norms characterised as ‘the rule of law’, the source of which is removed from ordinary politics and returned, in theory, to the discipline of legal practice itself, now universalised. Just as judicial independence affirms the independence of the law itself, so a prestigious judiciary brings dignity to the law. In rule of law culture, then, a primary role of the courts and the figure of the judge is iconic—to *symbolise* the gravity, stolidity, prestige of law; its capacity to rule and its fittedness to do so. The judge evokes and advertises the autonomy of law—a role she can play even if that autonomy itself is in fact ultimately untraceable or illusory, and even if her own role in doing so derives primarily from a series of funded initiatives hailing from a handful of institutions mostly based in Washington, D.C.

#### 4.2. Civil Society

The public sphere as such generally appears in project literature in the guise of ‘civil society’. In project documentation, civil society today is freighted with an attenuated reconstruction of its role in the classical public sphere. Where for Habermas civil society signified the collective and active body of private individuals acting in the public interest,<sup>86</sup> in today’s rule of law world it is synonymous with CSOs (civil society organisations) or NGOs (‘non-profit’ as well as non-governmental)—specific niche mediators between public and private realms. NGOs have three main roles in rule of law projects. They are, first, representatives of the general public; a relevant audience or constituency for project outputs, who are counted on to activate the project’s wider goals.<sup>87</sup>

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independence: the expectations of society. If a society expects and demands an honest judiciary, it will probably get one. If expectations are low, the likelihood that the judiciary will operate fairly is equally low.’

<sup>85</sup> So, for example, MSI, *USAID in LAC, E&E, AFR, and ANE*, *supra* note 8, at 58: ‘[In the Dominican Republic] USAID facilitated a dialogue that led to placing the role of the judiciary in the proper perspective. For the first time, objectives for fair and efficient court performance were established. These included a Supreme Court mission statement, which informs judges and court administrators what is expected of them by the public. Court staff and judges were made aware that court performance and judges’ and administrators’ actions should facilitate access to justice, expeditious procedures, impartiality and integrity, political independence, accountability, and public confidence in the judicial system.’

<sup>86</sup> Habermas, *Structural Transformation*, *supra* note 32, at 73–79.

<sup>87</sup> Here is an example from a World Bank ‘judicial reform support project’ in the Philippines. *Improvements in information provided to the public and greater collaboration with civil society*. The public has little understanding of how the courts operate and what their rights are under the law. This has profound implications for access to justice, especially by the poor. It also contributes to a situation where the courts are extremely vulnerable to graft and corruption and political pressures. There is a need to improve public information and collaboration with civil

Second, CSOs are themselves a vehicle for project activities—project funding is channelled through them to ‘monitor’ the public sector and ‘hold it accountable’. Third, as a constituent part of a modern polity, rule of law projects aim themselves to build and nurture civil society.<sup>88</sup> In the rule of law vision, civil society actors effectively constitute the public sphere; as private citizens, they monitor and pressure the public sector to act in the public interest. They are not themselves subject to the discipline of ‘governance’; rather they police its boundaries. A sharpened public/private distinction does not therefore need to result in mutual isolation of these two spheres; rather it provides a platform for interchange between them, which in turn provides the basis for ‘public policy in the private interest’ (the title of a Bank publication). Once properly distinct, contact between public and private spheres is encouraged through ‘civil society consultation’ and ‘public-private dialogue’.<sup>89</sup>

The consciously constructed nature of ‘civil society’ in this vision is well outlined in the following activities of a USAID ‘civil society strengthening’ project undertaken in Romania. It is worth quoting at length:

Organizational and financial sustainability grants [were] provided [to] watchdog and public policy NGOs with specific opportunities to develop products and systems that made them potentially more attractive to donors and to their members, supporters and constituents while providing opportunities to develop local funding bases. ... NGOs established and put into operation realistic business plans ... and introduced new mechanisms for revenue generation; staff training and appropriate systems of remuneration were introduced so as to retain staff ... and finally, they tapped increasing volunteerism and expanded their volunteer base to enjoy the benefits of this human resource. ... Financial sustainability was enhanced by the NGOs’ better documentation of the impact that their advocacy activities had for marketing purposes and for increasing the credibility of the watchdog and public policy NGO sub-sector; citizen and organizational

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society, organised groups, the legal profession and media, in order to improve access, improve the utilisation of judicial services, and enhance accountability of judicial personnel.’ (World Bank, *Project Appraisal Document on a Proposed Loan in the Amount of US\$21.9 Million to the Republic of the Philippines for a Judicial Reform Support Project* (2003) at 6).

<sup>88</sup> For example, the ‘Romania Civil Society Strengthening Program’ was implemented between September 2005 and December 2007, involving a USAID grant of US\$4.8 million, of which US\$2.4 million was allocated as grant support for Romanian NGOs that agreed to partner with USAID’s contractor, World Learning for International Development (WLID). Preeti Shroff-Mehta, *Romania Civil Society Strengthening Program*, *supra* note 70.

<sup>89</sup> Many projects include mechanisms for public-private and civil society dialogue. On public-private dialogue, see USAID, *Final Report, Assessment of the Bulgarian Enterprise, Growth and Investment Project (EGIP) (Formerly the Policy Reform and Advocacy Strengthening Project), Funded by USAID/Bulgaria, Conducted by Stephen C. Silcox, Kristin Lobron, Neal Nathanson* (February 22, 2005) and World Bank, *Project Appraisal Document on a Proposed Grant in the Amount of SDR 10 Million (US\$15 Million Equivalent) to the Republic of Malawi for a Business Environment Strengthening Technical Assistance Project (BESTAP), Report No: 39633-MW* (April 27, 2007). On civil society consultation, Preeti Shroff-Mehta, *Romania Civil Society Strengthening Program*, *supra* note 70 and World Bank, *Philippines Judicial Reform Support Project*, *supra* note 87.

membership schemes were developed to assist in creating identifiable constituencies as well as to enhance local fundraising strategies...<sup>90</sup>

Indeed civil society, in this construction, faces both ways—not only do CSOs monitor and pressure the government (the public *sector*), they also monitor and pressure the public *sphere*, albeit in the vein of agitation rather than accusation. As CSOs agitate for reform and to mobilise the public, they must rely upon a functional media. ‘Public information’ and ‘public awareness’ are of immense significance to rule of law projects.<sup>91</sup>

Another favourite area of ‘awareness raising’ concerns rights—the injunction to ‘know your rights’ repeatedly arises as a vehicle of public mobilisation, and a concretisation of the public/private separation, with ‘human’ or ‘civil’ rights both held against the state and enforced through it. In one fascinating case in Armenia, a TV program funded by the World Bank as part of a justice sector reform project, *My Right*, became the most popular show on Armenian television:

*Public Awareness and Education.* The image of the judiciary, as an open, fair and accessible institution, was improved as a result of several project activities. The main output of the Public Awareness component was the “My Right” television show, which was developed and broadcasted on Armenian Public Television starting September 2004. By 2006 the show had been rated number one by the Public Television of Armenia for two consecutive years making it a real success. The show also has an official website that provides useful legal information and opportunities for the public to ask questions. In response to the large number of citizens requests for legal information, the MOJ organised a number of free consulting sessions where the “My Right” TV judge and Ministry legal experts provided advice. Some activities of this component, such as journalism training and publication of brochures were dropped due to the Government’s view that they were relatively ineffective and the availability of other donor resources for such activities.<sup>92</sup>

This example succinctly illustrates the dislocation between the classical public/private distinction (as it appears in the writings of Habermas and others), and the contemporary distinction promoted through rule of law projects. The show popularises a primary theme of the public sphere according to the rule of law—enforceable rights held against the state—and no doubt increases and mobilises faith in the capacity of

<sup>90</sup> Preeti Shroff-Mehta, *Romania Civil Society Strengthening Program*, *supra* note 69, at 2–3.

<sup>91</sup> USAID, *The Role of Media in Democracy: A Strategic Approach* (USAID, 1999).

<sup>92</sup> World Bank, *Armenia Judicial Reform Project*, *supra* note 28, at 17.

that public sphere to self-mobilise. And yet, while it appears to instantiate a Habermas-like collective of private interests, it is in fact wholly a creature of the public sector itself; the product of an agreement between the World Bank and the government, implemented with public funding and projected into the public sphere to help in the latter's self-consolidation or emergence, in a process that not only relies upon government support for its success but defers to government suggestion in its execution. The secret paradox disclosed by this remarkably controlled projection of the rule of law—its managed consolidation of a public/private distinction so attenuated as to have effectively vanished—is the inescapability of the public in the construction of the private; precisely the reverse of the ideal type process described by Habermas.<sup>93</sup> We might call the production of these pseudo-adversarial public and private figures, a pedagogy of the rule of law.<sup>94</sup>

#### 4.3. 'The Poor': Investors in Waiting

Ostensibly, the principal 'stakeholder' of rule of law reform is 'the poor'. This amorphous group-noun recurs with extraordinary frequency in the documentation of the Bank in particular—whose oft-cited mission is to 'eradicate poverty'. The vocabulary of poverty does enormous work for the Bank. First, in aid-recipient countries, 'the poor' generally comprise the majority of the population—they are therefore the relevant 'public' who are to benefit from reform; moreover, their prioritisation feels substantively democratic. However, second, 'the poor' are not really represented as a 'public' at all, in that they do not possess the attributes of a public sphere—indeed, insofar as 'poverty' aims to indicate that the conditions of autonomy (security of health, food and education, political participation, and so on) are weak or lacking, the aggregate 'poor' of the Third World are defined in opposition to the notion of a 'public sphere'.<sup>95</sup> By corollary, 'the poor' as such do not comprise 'civil society'. Although 'grassroots' and 'social' movements may be of immense political significance, the poor *per se*, defined merely by the

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<sup>93</sup> Habermas does not claim this to be an actual historical process: the notion that the public sphere takes command of the state is rather an ideal, or ideological, explanation of the relationship between state and society. See Jürgen Habermas, 'Further Reflections on the Public Sphere', in Craig Calhoun (ed.), *Habermas and the Public Sphere* (MIT Press: Cambridge, 1992) at 422; Habermas, *Structural Transformation*, *supra* note 32, at xvii, 83 and 88; Humphreys, *Theatre of the Rule of Law*, *supra* note 2, at 44, 50–52.

<sup>94</sup> A Philippines project provides a literal example: to develop 'community outreach programs ... for children in primary schools to inculcate an understanding of the rule of law and the role of judges, in partnership with the department of education'. World Bank, *Philippines Judicial Reform Support Project*, *supra* note 87, at 36.

<sup>95</sup> This is not, of course, to claim that the condition of poverty is a bar to being a 'private person'. It is merely to recall the obvious point that the condition of 'privacy' is not a simple natural attribute, but a historical and conceptual one. The point is that where the term 'poor' is used in the abstract as a categorical term, it denies or assumes the absence of the attributes of private personhood *per se*.

absence of wealth, form neither an ‘interest’ in themselves nor a forum wherein a shared (public) interest might be identified and promoted. Nevertheless, third, the poor appear to donors as a natural ‘constituency for reform’, since the quality that defines them—the absence of wealth—itsself constitutes the undesirability of the status quo; the poor are the *raison d’être* of reform and development. Fourth, as such—a constituency for reform that does not in itself constitute a public—the poor need protection or representation. As their home elites, in rule-of-law deficient countries, do not protect or represent them adequately, the role is left to others. The Bank supplies this representation; Bank documents on every topic reflexively note the benefits for ‘the poor’ of recommended measures. Here are some examples:

- *Crime*: Increasing the rule of law, by reducing crime, benefits the poor as ‘the poor suffer more from crime, the impact of crime on their livelihood is greater, and they are less able to access the justice systems’.<sup>96</sup>
- *Trade*: Reducing trade protection ‘generally promotes exports and raises the incomes of the poor by supporting labor-intensive activities’.<sup>97</sup>
- *Finance*: ‘Improving access to financial services such as savings, credit, insurance, and remittances is vital to enabling the poor to take advantage of economic opportunities and guard against uncertainty’.<sup>98</sup>
- *Governance*: The World Bank focus on governance and corruption ‘is based on its mandate to reduce poverty [since] a capable and accountable state creates opportunities for the poor’.<sup>99</sup>
- *Corruption*: ‘Corrupt bureaucracies and biased enforcement of contract and property rights inhibits the poor from making investments in physical and human capital that could raise their

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<sup>96</sup> Kirsti Samuels, ‘Rule of Law Reform in Post-Conflict Countries Operational Initiatives and Lessons Learnt’, World Bank Conflict Prevention and Reconstruction Paper No. 37 (World Bank, 2006) at 3.

<sup>97</sup> World Bank, *World Development Report 1991*, *supra* note 13, at 10.

<sup>98</sup> World Bank, *The World Bank Annual Report 2006* (World Bank, 2006) at 21.

<sup>99</sup> Ksenia Yudaevam (ed.), *Beyond Transition* (World Bank, 2007) at 2.

incomes’;<sup>100</sup> ‘Corruption is an especially regressive tax, with the poor hit hardest by even small demands for bribes or fees when they want public services.’<sup>101</sup>

A recurrent motif that runs through many of the above quotes and through a preponderant section of the Bank’s voluminous writing on poverty associates its relief with ‘opportunities’ in a liberated economy, and pairs ‘the poor’ with ‘small and medium enterprises’.<sup>102</sup> The recurrent interest in micro-business and micro-financing evinces a similar conviction that an enabling environment for private sector development suits ‘the poor’ just as well as the foreign investor precisely because the poor are themselves, essentially, investors-in-waiting. The poor are the ordinary folk of rule of law literature, a collection of *tabulae rasae* upon which is quickly drawn the outline of *homo economicus*. And, since the ‘poor’ are neither a public nor a lobby group, who is to object?

One source of objection turned out to be the Bank itself, in a rare display of dissenting research.<sup>103</sup> A large Bank survey into the conditions for ‘the poor’ in 23 countries reported that most of the tens of thousands interviewed, far from uncovering new opportunities and investments, were instead struggling in deteriorating circumstances, and attributed their new hardships to the measures the Bank had claimed should help.<sup>104</sup> In general, the report found that ‘households are crumbling under the stresses of poverty’ and the ‘social fabric, poor people’s only “insurance”, is unraveling’.<sup>105</sup> Despite its 1,000-page length, the study does not investigate the underlying causes of the malaise it describes—the authors explain that the report ‘was not designed to disentangle and evaluate the effects of specific economic policies or trends on the lives of poor people’, but merely to ‘present the analyses of those who are currently poor, who recount the negative impact that certain economic policies and market changes have had on them and on their

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<sup>100</sup> World Bank, *2004 Annual Review of Development Effectiveness: The World Bank’s Contributions to Poverty Reduction* (World Bank, 2005) at 40.

<sup>101</sup> World Bank, *World Development Report 2002: Building Institutions for Markets* (World Bank, 2001) at 5. This common refrain, supported by scant evidence, is counter-intuitive. Since bribes, unlike for example, VAT, are often modulated to match individual capacity to pay, it seems more likely that corruption would constitute a progressive tax. See also USAID, *A Handbook on Fighting Corruption* (USAID, 1999).

<sup>102</sup> Thus, for example, Yudaevam (ed.), *Beyond Transition*, *supra* note 98 at 2: ‘the abolishment of such barriers [to banking] and financial development disproportionately benefit the poor and small businesses.’

<sup>103</sup> There are, of course, other available descriptions of the effects of what has come to be known as ‘neoliberalism’, but it seems most appropriate in the present context to use the Bank’s own account.

<sup>104</sup> Deepa Narayan and Patti Petesch (eds), *Voices of the Poor: From Many Lands* (World Bank, 2002). For the response within the Bank to these findings, see *ibid.*, at 8.

<sup>105</sup> Deepa Narayan, *Can Anyone Hear Us? Voices From 47 Countries, Voices of the Poor Volume 1* (World Bank, 1999) at 6-7. See also Deepa Narayan, Robert Chambers, Meera K. Shah and Patti Petesch, *Voices of the Poor: Crying Out for Change* (Oxford University Press, 2000). Together these three volumes comprise the full study.



households and communities'.<sup>106</sup> The result is a litany of accounts of misfortune and misery, striking in their near uniformity across the world's different regions, recounting the hardship experienced by 'the poor' everywhere as public services recede and/or are privatised, labour protections vanish, living standards drop, and medical services deteriorate.<sup>107</sup> A number of examples are worth recounting:

Poor people from several countries expressed deep concern over the economic upheavals and policy changes that are buffeting their lives. . . . Depending on the country, poor people mentioned privatization, factory closures, the opening of domestic markets, currency devaluation, inflation, reductions in social services, and other related changes as having depleted their assets and increased their insecurity.

Cynicism and anger over this abandonment [of public services] are evident everywhere but are especially prominent in countries of the former Soviet Union, where people once experienced effective delivery of basic services and now face both high state capture and widespread corruption.

In the wake of the transition to market economies in the four countries visited in Eastern Europe and Central Asia, people reported steep drops in living standards. Especially hard hit were the "one-company towns" and villages that once revolved around large state farms.

In all countries visited in this region, poor people connected extensive unemployment and underemployment to the dismantling of the state before functioning markets were in place.

In all four countries of Latin America and the Caribbean, people described the economic and social devastation of their communities in the wake of macroeconomic crises and policy reforms.

Poor men and women in the four European and Central Asian countries described the wrenching effects created by the elimination of free medical services. Participants related frightening experiences of going without needed medical services and medications and of receiving surgery without anesthesia.

Despite these observations, *Voices of the Poor* concludes that the key 'challenges' for the Bank concern the relative weakness of national-level institutions. Institutional state failures, the report says, create and exacerbate problems for the poor: corruption; clientelism and patronage; lawlessness, crime, and conflict; discriminatory behaviour.<sup>108</sup> In response, the report urges tweaks on existing orthodoxy: 'pro-poor'

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<sup>106</sup> Narayan and Pretesch, *From Many Lands*, *supra* note 104, at 471.

<sup>107</sup> *Ibid.*, 471–6.

<sup>108</sup> Narayan and Petesch (eds), *From Many Lands*, *supra* note 104, at 477–80.

economic policies; ‘investing in poor peoples’ assets’; supporting partnerships with poor people; addressing ‘gender inequities’; and protecting poor peoples’ rights.<sup>109</sup>

It would appear, then, that faced with the spectre of ‘social chaos’ the choice has been to soldier on. In response to the apparent dissonance, at the Bank and elsewhere, between the rhetoric of ‘pro-poor growth’ and the observed experience, in much of the world, of the reverse, a new term was added to the rule of law lexicon: ‘legal empowerment’. In its initial formulation, this term signified a shift in process and focus, rather than in the content, of rule of law work. Still frankly instrumental, law reform would abandon some of the formal pretensions of a ‘rule of law orthodoxy’ while nevertheless remaining broadly within the field’s mainstream themes.<sup>110</sup> Legal empowerment meant using the law to alleviate poverty; although it would be ‘rights-based’ and concerned with enforcing existing protections already ‘on the books’, the initial focus on ‘paralegals’ (that is, legal help from trained non-lawyers) and using law to address poverty indicated an apparently substantivist orientation.<sup>111</sup>

When a ‘Commission on Legal Empowerment of the Poor’ was created in 2005, however, the focus soon shifted towards more, rather than less, formalism. The Commission’s 2008 report opens with the astonishing claim that ‘four billion people around the world are robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law’.<sup>112</sup> The central premise of the report is that poverty is in part due to and exacerbated by exclusion from the (formal) legal system *per se*—and that inclusion in some form is thus, in itself, a step to curing poverty. The Commission’s response is to call for the formalisation of labour, property, and ‘business’ rights, and to ensure greater ‘access to justice’ and court processes.<sup>113</sup> The assumption implicit in many Bank materials that ‘the poor’ are in fact embryonic entrepreneurs awaiting only a formally secure system to incentivise them to creativity is embraced by the Commission:

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<sup>109</sup> *Ibid.*, at 487–93.

<sup>110</sup> Frank Upham, ‘Mythmaking in the Rule of Law Orthodoxy’, in Thomas Carothers (ed.) *Promoting the Rule of Law Abroad: In Search of Knowledge* (Carnegie Endowment for International Peace: Washington, D.C., 2006) at 75–104.

<sup>111</sup> Stephen Golub, ‘The Legal Empowerment Alternative’, in *ibid.*, 161–190 at 161–65.

<sup>112</sup> Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (UNDP, 2008), vol. I at 1. ‘At best’, the report adds, ‘they live with very modest, unprotected assets that cannot be leveraged in the market due to cumulative mechanisms of exclusion.’ *Ibid.*, at 19.

<sup>113</sup> With regard to property rights, see Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (UNDP, 2008), vol. II at 75. For relevant background, Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books: New York, 2000). According to the report: “‘Business rights’ need not yet be regarded as a new term in law, but rather as derived from existing rights related to doing business of the individual, newly bundled together under this term on the basis of their vital instrumentality in the livelihoods of the poor.’ Empowerment Commission, *Making the Law Work*, vol. II, *supra* note 113, at 5.

For all these people, protection of their assets is fundamental. But protection of what they have is not enough, for they are poor and their possessions meagre. They deserve a chance to make their business operations, no matter how small or even micro they are, more productive, and they are entitled to decent working conditions. Reforms of the institutions they relate to are essential for their empowerment. Only through such systemic change will the poorest be able to take advantage of new opportunities and be attracted to joining the formal economy.<sup>114</sup>

It is not clear here or elsewhere whether the authors are aware that formalising the ‘property rights’ of the poor may open the way to dispossession as much as to investment;<sup>115</sup> that ‘business rights’ can be mobilised by well-resourced actors against poorer ones; or that ‘labour rights’, if reduced to ‘job opportunities’ with ‘social protection’ languishing as a mere aspiration, need not provide more security for workers than the informal market (which can also be, for example, kin or clan based). By assimilating ‘the poor’ to proto-investors, the Commission’s authors appear to miss the possibility that, absent strong and specific protections of a kind they do not suggest, poor people stand to lose at least as much as they gain from a formal legal system, or that gains might need to be weighed against losses—or, most pertinently, that a functional legal framework may actually facilitate loss.

Such impoverished analysis is facilitated by the report’s frankly ideological embrace of the entire edifice of rule of law economics, now washed in a newly utopian abstraction:

The law is the platform on which rests the vital institutions of society. No modern market economy can function without law, and to be legitimate, power itself must submit to the law. A thriving and inclusive market can provide the fiscal space that allows national governments to better fulfil their own responsibilities. The relationship between society, the state and the market is symbiotic. For example, the market not only reflects basic freedoms such as association and movement, but also generates resources to provide, uphold, and enforce the full array of human rights. It is processes such as these, in which the poor realise their rights and reap the benefits of new opportunities, which enable the fruition of citizenship – in short, legal empowerment.<sup>116</sup>

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<sup>114</sup> Empowerment Commission, *Making the Law Work*, vol. I, *supra* note 112, at 20. See also *ibid.*, at 8, [WHICH TEXT DOES *ibid.* REFER TO? – SH IT REFERS TO THE FOREGOING REF IN THIS SAME FN]

<sup>115</sup> The relevant passage (Empowerment Commission, *Making the Law Work*, vol. I, *supra* note 112, at 7) is ambiguous. The principal point receives little support in the working group study upon which it is based: Empowerment Commission, *Making the Law Work*, vol. II, *supra* note 113, at 85.

<sup>116</sup> Empowerment Commission, *Making the Law Work*, vol. I, *supra* note 112, at 3.

In this passage, and in the report from which it is taken, the rule of law *subject* finally appears in all her glory: as a market-citizen for whom fundamental rights are market rights, in a state dedicated to upholding those rights.

## 5. Dénouement: Global Integration

Rule of law literature speaks often of ‘global integration’, holding out the promise to poorer countries to ‘join the club’. While the expression usually arises in reference to trade liberalisation, there are other relevant rule of law modes of ‘integration’ too, notably the growing transnational security network constructed through the efforts to promote rule of law as part of the recent ‘war on terror’. The latter involves shared judicial and criminal methodologies, shared information gathering and disseminating techniques, and a shared narrative of conflict (previously centred on narcotics).<sup>117</sup> The former aims, in the language of a Bush-administration era National Security Strategy, to ‘ignite a new era of global economic growth through free markets and free trade’.<sup>118</sup> This translates into USAID policy commitments to pursue ‘bilateral investment treaties that open new markets, support job creation in the United States, and provide important protections to U.S. investors’ as well as ‘state-of-the-art free trade agreements that open new markets for U.S. agriculture, goods, and services and extend strong U.S. investment, transparency, and intellectual property protections abroad.’<sup>119</sup> The World Bank shares these goals: ‘trade and integration’ has long been one of three Bank ‘metathemes’. In the literature of both the Bank and the US government, free trade benefits everyone, but it is particularly good for poorer countries—and, within them, for their poorest members. ‘As the world moves into the twenty-first century’, an early Bank strategy document on Africa proclaimed, ‘the consensus is greater than ever that markets, private initiative and integration into the global marketplace are the cornerstones of economic success’.<sup>120</sup> USAID’s 2008 ‘economic growth

<sup>117</sup> See Humphreys, *Theatre of the Rule of Law*, *supra* note 2, at ch. 5.

<sup>118</sup> *US National Security Strategy 2006*, *supra* note 76, at 25–30. The themes of trade and security blend in the US National Security Strategies of 2002 and 2006. The latter, having discussed the importance of the rule of law in contributing to peace and security turns to trade, under the header ‘Opening markets and integrating developing countries’: ‘We will continue to work with countries such as Russia, Ukraine, Kazakhstan, and Vietnam on the market reforms needed to join the WTO. Participation in the WTO brings opportunities as well as obligations—to strengthen the rule of law and honour the intellectual property rights that sustain the modern knowledge economy, and to remove tariffs, subsidies, and other trade barriers that distort global markets and harm the world’s poor’ (*ibid.*, at 28).

<sup>119</sup> See USAID, *Policy Framework for Bilateral Foreign Aid: Implementing Transformational Diplomacy Through Development* (USAID, 2006) at 11, 27–28. US Department of State, *Congressional Budget Justification, Foreign Assistance, Fiscal Year 2009* (Department of State, undated [2008]) at 120.

<sup>120</sup> World Bank, *Africa Can Compete! A Framework For World Bank Group Support For Private Sector Development in Sub-Saharan Africa* (World Bank, 1998) at vii.

strategy' claims that 'the current world trading system provides the greatest opportunity for global integration and poverty reduction the world has ever seen'.<sup>121</sup>

The rule of law lies at the heart of these visions in a two-way relation. On one hand, rule of law is considered a necessary precursor for a country's integration into the global economy; on the other, joining free trade regimes itself helps entrench the rule of law in signatory states. Reformers therefore promote accession to international trade mechanisms and use accession processes to further rule of law goals.<sup>122</sup> To encourage 'integration'—touted as a repository of investment and employment opportunities, and of heightened productivity standards, as well as a harbinger of pluralism and tolerance in recipient countries—certain groundrules must be in place. Foreign investors must be reasonably confident about what to expect.<sup>123</sup> Barriers to trade, both direct and indirect, must not only be removed but their removal must be enforced.<sup>124</sup> Judicial independence in this light also involves freedom from nationalist pressures and protectionist bias. The courts must understand and respect private and commercial rights and interests in host countries, and must be familiar with the relevant international law. Global integration requires that a host state's legal institutions are in synch with outside markets; that a shared procedural framework governs the handling of goods and processes; that partners on both sides of a given transaction are acquainted with the procedures; and that they can be reasonably confident that transactions will follow expectations.<sup>125</sup> These 'rules of the game' reflect the World Bank's earliest definition of the rule of law:

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<sup>121</sup> USAID, *Economic Growth Strategy: Securing the Future* (prepublication edition, 2008) at 9.

<sup>122</sup> For illustration, the State Department's request for funding trade liberalisation in Vietnam: 'A top U.S. priority in Vietnam is to support a dynamic and expanding economic environment conducive to reform, legal transformation, and development of a vibrant private sector. USAID programs will assist Vietnam's World Trade Organization (WTO) and Bilateral Trade Agreement (BTA) implementation, comprehensive reform of laws and policies related to trade and investment, and creation of a business enabling environment that fosters private sector development and enhances competitiveness. ... Expanding technical assistance is imperative to develop institutional capacity and human resources for implementation of reforms and best practices, and to ensure that regulatory oversight keeps pace with integration into the global economy.' (US Department of State, *Budget Justification FY 2009*, *supra* note 119, at 394). See also, for the World Bank, Kikeri, Kenyon and Palmadem, 'Reforming the Investment Climate', *supra* note 43, at 11.

<sup>123</sup> See, for example, World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (World Bank, 2004) at 36.

<sup>124</sup> The State Department lists the following target indicators for FY 2008: 'Free Trade Agreements (FTAs) with South Korea, Malaysia, Thailand, Panama and United Arab Emirates enter into force. Two additional Bilateral Investment Treaties (BITs) enter into force; initiate additional BITs. Enter into Open Skies civil air transport agreements with Libya, Brazil, South Africa and Australia.' US Department of State, *Fiscal Year 2008 Performance Summary* (Department of State, 2009) at 99.

<sup>125</sup> See, for example, USAID, *Foreign Aid in the National Interest*, *supra* note 49, at 61.

there are rules, the rules are known, they are actually enforced, independent adjudication exists in cases of dispute, and there are known procedures for changing the rules.<sup>126</sup>

It is thus a common objective of rule of law reform to ‘assist’, as one USAID project put it, ‘development of the legal framework necessary to support Tajikistan’s accession to the World Trade Organization and its participation in the global economy’.<sup>127</sup> Reformers therefore promote accession to international trade mechanisms and use accession processes to further rule of law goals. According to a World Bank study:

Trade and product market reforms proved to be a major driver of other reforms in virtually all our case studies. By increasing competition, such reforms helped shift the incentives of incumbents once opposed to reform while creating new constituencies for change. In Mexico trade liberalization through the North American Free Trade Agreement (NAFTA) induced business associations to lobby the government for reductions in the regulatory burden to help them compete ... And in Colombia greater openness and competition led employers to become vocal supporters of reforms aimed at increasing labor market flexibility ... That an economy’s openness is significantly associated with institutional change is among [our] main findings.<sup>128</sup>

The theme of global commercial integration drives a vision of a global legal architecture, provided and maintained by monadic public actors, along which (certain) private actors can move as frictionlessly as possible. The optimum arrangement is outlined in numerous Bank documents, and comprises the main subject of the 2005 World Development Report (‘A Good Investment Climate for Everyone’) and the IFC’s *Doing Business* reports: the elimination of constraints on the movement of goods and capital, the minimisation of taxes on capital and investment, regulative ease of starting and closing businesses and flexible labour laws.<sup>129</sup> This architectural vision in turn guides rule of law promotion in-country—the

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<sup>126</sup> Shihata, ‘The World Bank and “Governance” Issues’, *supra* note 11, at 85. According to the Bank: ‘Differences in the quality of economic institutions – broadly understood as the “rules of the game” – have been found to be the most significant source of sustained economic growth in both cross-country research and case studies.’ World Bank, *2004 Annual Review of Development Effectiveness*, *supra* note 100, at 51; generally, USAID, *Handbook on Legislative Strengthening* (USAID, 2000). See also Mamadou Dia, *Africa’s Management in the 1990s and Beyond: Reconciling Indigenous and Transplanted Institutions* (World Bank, 1996) at 105; Cheryl Gray and Kathryn Hendley, *Developing Commercial Law in Transition Economies: Examples from Hungary and Russia*, (World Bank, 1995) at 1. The term is from Douglass North, *Institutions, Institutional Change, and Economic Performance* (Cambridge University Press, 1990) at 4.

<sup>127</sup> ARD Inc. and Checchi & Co. Consulting, *Legal and Institutional Framework for a Market-Based Economy*, *supra* note 47, at 2–3. See too Booz Allen Hamilton, *Cape Verde WTO Accession*, *supra* note 46.

<sup>128</sup> Kikeri, Kenyon and Palmadem, ‘Reforming the Investment Climate’, *supra* note 43, at 11.

<sup>129</sup> World Bank, *World Development Report 2005*, *supra* note 118.

protection of the rights and property of foreign investors, the elimination of discriminatory practices favouring domestic investors, and the secure enforcement of property and contract.<sup>130</sup>

## 6. Conclusion

The insistence and comprehensiveness of the rule of law narrative impresses. As a guiding motif, it points to something higher than local politics or sentiment—to a higher good. Indeed, the source of the ‘law’ that is to ‘rule’ remains ambiguous and somewhat mystical. And yet it is difficult to contest: who could argue against the rule of law? In this way, rule of law discourse tends to close down the space for political contestation—and the various other concepts and institutions associated with it in donor literature are rapidly assimilated into the general soup of ‘development’ aid.

Nevertheless, this work is fraught with paradoxes. For one, despite an insistent suspicion about ‘central planning’ and indeed ‘planning’ of any kind in economic affairs, the programs to make all this happen are themselves centrally planned by a small group of large organisations based in a handful of world capitals, and (notwithstanding some inter-agency jockeying) working in close coordination. Second, the existence and pursuit of a procedurally rigorous legislative process grounded in a representative legislature is generally regarded as fundamental to most conceptions of the rule of law. However, funders are typically impatient with these processes, preferring to push through legislative templates developed elsewhere with the help of ‘reform-minded’ executives, bypassing legislative process where possible.

A third niggling paradox is more unsettling. There is a striking contrast between the state-bounded nature of ‘the public’ as ordinarily (and historically) conceived, and of the government tasked with responsiveness to it, on one hand, and the *essentially* transnational nature of the public as it consistently appears in rule of law program literature, on the other: a public composed of ‘domestic and foreign investors’. Who is this transnational public? Presumably it is the aggregate of private interests with an

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<sup>130</sup> On this, see Stephen Knack and Philip Keefer, ‘Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures’, 7 *Economics and Politics* (1995) 207–27; Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W. Vishny, ‘Law and Finance’, 106 *The Journal of Political Economy* (1998) 1113–55; Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, ‘The Regulation of Entry’ 117 *The Quarterly Journal of Economics* (2002), 1–37; Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, ‘Courts: the Lex Mundi project’, Revised Draft funded by the World Bank (World Bank, 2002); Simeon Djankov, Edward L. Glaesar, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, ‘The New Comparative Economics’, The World Bank Policy Research Working Paper No. 3054 (World Bank, 2003); Juan C. Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, ‘The Regulation of Labour’, 2004 *The Quarterly Journal of Economics* (2004) 1339–82; Robert Danino, ‘Reforming Legal and Judicial Systems’, *supra* note 52.

identifiable stake in how a given government organises policy—which would seem to mean, as rule of law literature indeed clarifies, private firms and investors large enough to operate in multiple states. Can the interest of these relatively powerful actors really be understood as equivalent to, or indispensable to, the ‘public interest’ of host countries?

Ultimately, there seems to be at least one way in which rule of law promotion has been a clear if qualified success—and that is precisely in its performative or pedagogical dimension, in the dissemination of rule of law language itself, and of the morality tale it transmits, at least at the rhetorical level. There seems little doubt that the turn to rule of law language has consolidated its hold in international relations, in international development assistance, and in the shared discourse of public authorities and civil society organisations everywhere. Adopted now by all the major international actors, extending to bilateral and UN-based agencies as well as private funders, the language has also, unsurprisingly, become increasingly common among government bodies who must perforce deal with and respond to these agencies. Governments are evaluated on their adherence to this notional rule of law, investment flows towards it, funding is made conditional upon it. And NGOs too find themselves having to invoke this register to expedite funding applications.

Rule of law promotion is frequently criticised—by defenders and detractors alike—as having failed in its objectives. But to have near-universalised a particular vocabulary in regard to fundamental concerns of state and society is no mean feat. Perhaps the question is not so much whether all this rhetoric is leading to ‘improved rule of law’ ‘on the ground’, as the literature often wonders—but rather, what sort of international and transnational transactions are facilitated by this widely shared language, and who benefits from them?