

## QUICK READ SYNOPSIS

Law, Society, and Democracy:  
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## I. THE RULE OF LAW: WHAT IS IT?

## Democracy and Equality

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- Background* This article closely examines the meaning of democracy and discusses the logical and practical connections between it and various forms of equality.
- Democratic forms of government are those in which the laws are made by the same people to whom they apply.
  - In autocratic forms of government the lawmakers are different from those to whom the laws are addressed.
  - The question is, What is the relationship between autonomous forms of government and equality?
- Autonomy* What does it mean for a form of government to be autonomous?
- Democracy is not the same thing as popular sovereignty because a people can decide to enact antidemocratic rules.
  - Nor is democracy equivalent to majoritarianism, in which the majority of the people exercise control over their government.
- NOTE: These examples suggest that popular sovereignty and majoritarianism may be intimately associated with the practice of democracy, but they themselves do not define democracy. We can coherently speak of enactments of popular sovereignty or of majorities that are antidemocratic.
- Democracy* Democracy refers to the values associated with collective self-determination.
- Governments do not become democratic merely because they hold elections in which majorities govern.

- It is a mistake to confuse democracy with particular decision-making procedures and to fail to identify the core values that democracy as a form of government seeks to represent.
  - The values of autonomy are essential to democracy—values associated with the practice of self-determination.
- Self-Determination*      Self-determination is more than making decisions or electing those who make decisions.
- The practice of self-government requires that a people have the warranted conviction that they are engaged in the process of governing themselves.
  - Self-determination turns on the difference between making particular decisions and recognizing particular decisions as one's own. It is about the authorship of decisions.
  - Collective decision making is democratic when there is a connection between the particular wills of individual citizens and the collective will of the state.
    - When citizens feel alienated from the general will, voting on issues is merely a mechanism for decision making, a mechanism that can easily turn oppressive and undemocratic.
    - The value of democracy can be fulfilled only if there is a continual mediation between collective self-determination and the self-determination of individual citizens.
    - Democracy requires that citizens experience their government as their own and responsive to their own values and ideas.
- First Amendment*      The First Amendment protects democracy by safeguarding the communicative processes by which citizens seek to construct an uncoerced agreement that is responsive to their views.
- Citizens are free to engage in public discourse so as to make the state responsive to their ideas and values.
  - Modern democracies must regard their citizens, insofar as they engage in public discourse, as equal and autonomous persons.
  - It is the essence of democracy to replace the unilateral respect of authority by the mutual respect of autonomous wills.
- Democracy*      Democracy requires that persons be treated equally insofar as they are autonomous participants in the process of self-government.
- Democracy must regard each citizen as an autonomous, self-determining person, at least insofar as is relevant to maintaining a living identification with the self-government of the state.
  - The purpose of communication within public discourse is to empower citizens to participate in ways that will permit them to believe that public opinion will potentially respond to their views.
    - If the state too closely regulates when and how a person may speak, speech may lose its ability to mediate between individual and collective self-determination.
- Democratic Legitimacy*      The equality required by democracy can easily be experienced as thin and formal, in contrast with the robust forms of substantive equality associated with theories of distributive justice.

*Moral  
Equality*

- Much depends on our understanding of the logic of democratic legitimacy.
- This logic requires that citizens be treated equally with respect to the requirements of autonomous participation in the practice of self-government.
- Democracy presupposes an equality measured in terms of the autonomous agency required by democratic legitimacy.

As democracy is a form of government committed to self-determination, democracy must also encompass self-determination about the meaning of the moral equality of citizens.

- A democracy will decide the meaning of moral equality in the context of public discussion and debate.
- Advocates of strong egalitarian principles regard debate as offering inadequate protection for distributive justice because they believe the judgment of citizens may be distorted by prejudice and bias.
- Democracy and strong egalitarian principles do not have to be in opposition to each other.
  - Strong egalitarian principles may have significant democracy-reinforcing effects.
  - Systematic violation of these principles may sometimes lead to the failure of democratic legitimacy—democracy requires only that inequities that undermine democratic legitimacy be ameliorated.

NOTE: Inequities need not be resolved for reasons of fairness or distributive justice but simply because such inequities undermine democratic legitimacy.

*The  
Implication*

The unsettling implication of the above reasoning is that democracy is quite compatible with important forms of status subordination, as long as these forms of subordination are not experienced by citizens as alienating.

- At the time that disempowering of women was accepted, democracy did not require that this subordination be ended.
- Democracy requires self-determination by the people, but it does not itself define who the people are.
- Insofar as egalitarian norms developed that made the disempowerment of women alienating, precluding the identification of citizens with the general will of the state, democratic arguments emerged for ending this status subordination. This suggests that strong egalitarian principles are in a dynamic and dialectical relationship to democracy.
- As egalitarian principles become politically salient, as they make inequities visible and oppressive, as they create alienation, they prepare the way for democracy-based arguments for amelioration of inequities.
  - Thus democracy and strong egalitarian principles are intimately related.
  - Democracy does not entail these principles but is itself affected by them because it must reckon with the threats to democratic legitimacy generated by these principles.
  - Democracy is in this sense tightly connected to egalitarian commitments.
  - Democracy and equality are bound in an indissoluble knot, mutually reinforcing and mutually antagonistic.

## Reflecting on the Rule of Law: Its Reciprocal Relation with Rights, Legitimacy, and Other Concepts and Institutions

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QRS

- Background* Central to discussion of law and social change is a discernable relationship between legitimacy, the rule of law, and respect for human rights.
- To the extent that a government is subject to the rule of law, the human and civil rights of its citizens are advanced.
  - When citizens can bring disputes concerning rights to court rather than fight in the streets, the rule of law is advanced.
  - Respect for rights and the rule of law are likely to make a government more acceptable and hence more legitimate.
  - A basic requirement of legitimacy is that government advances everyone's share of primary social goods, their opportunity to participate in society, and hence their basic rights.
  - Rights are not only statements of ideals or entitlements but goals and tools for pursuit of these goals, the means for pursuing law reform and enhancing society's legitimacy.
- NOTE: From the end of WWII until the present time has been one of the greatest periods in the development of international law and the world rule of law. The EU and European Covenant on Human Rights are particularly remarkable as is the development and recognition of human rights in the EU since WWII.
- Law and Social Change* To study the promotion of human rights and the establishment of a world rule of law, we must think about social change both worldwide and in individual countries and the role of law in social change.
- Legal, political, and cultural events and circumstances just prior to and following the 1954 decision in *Brown v. Board of Education* show how the interaction of law and culture results in social change.
  - An example is the period between 1937 and 1954, which was a tumultuous time including the end of the Great Depression, WWII, the Holocaust, the Korean War, and the beginning of the cold war.
  - *Brown* has led to a quarrel over method; legal philosophers creating or criticizing decision-making methods should struggle to understand the relationship between social forces and the work of decision makers.
- NOTE: The *Brown* decision has a quality the author describes as ultimate legitimacy, yet in its aftermath to the present the decision produced legitimacy costs.
- Rule of Law* Why is it that the protection of civil liberties should be associated historically with the advance of the rule of law?
- One thing is that the rule of law governs those in authority as well as the public.

*World Rule of Law*

- Under the rule of law, citizens should be protected by law against their government as well as against private violence.

From the experience of English-speaking countries one can develop some ideas that are not particularly original for advancing the world rule of law.

- *Control of private violence*: On the world stage, the UN or some similar institution must have the authority to authorize the international use of violence by one country against another—at this time the move is in that direction.
- *Role of courts*: Courts have two connected roles: to protect civil liberties and to control private violence. Encouraging citizens to use the courts is a positive contribution to the rule of law.
- *Establishing international rule of law*: Using European developments as a model, regional courts can be established—international investment and commercial activity will be advanced as a result. See also international commercial arbitration.

*Political Friendship*

An inquiry, using tools of social science, into the qualities that make law or changes in law more likely to be acceptable would seem to advance our understanding of how to promote the rule of law and human rights advances.

- Dworkin (1986) contended that the legitimacy of law is grounded in fraternity, community, and their attendant obligations.
- Political friendship would seem to present both problems and opportunities for furthering the world rule of law.
  - A new institution like an international court does not fit easily into the existing pattern of political friendships and interactions.
  - Commercial activity will be an important element of the interactions that lead to political friendships.
- Personalist theory offers a foundation for political friendship saying that we are more fully persons when in relation with other persons.
  - At the foundation is a commitment to afford each person deep respect and concern.
  - Political friendship, in that view, then leads to a theory of rights, obligations, and legitimacy.

*Primary Social Goods*

Each person under personalist theory has a right to participate in the common action of society and a right to the means necessary for that participation.

- The means necessary could be described as primary social goods—those goods necessary or important for participation in the common action of a society.
- In personalist theory, primary social goods are very helpful in constructing a theory of rights. As in the U.S. Constitution, basic rights are those designed to protect primary social goods.
  - Rights protecting against the deprivation of the personal, economic, and political goods necessary to basic participation.
  - Legitimacy in personalist thought then shares a common grounding with the theories of rights and obligations.
  - A society is legitimate to the extent that it strives to advance and protect everyone's and each one's share of the primary social goods.

*Rights Related to "Horizons"*

International human rights scholars taking positions related to their horizons question whether economic rights are more important than civil liberties or vice versa.

- Horizons, the normal human condition of having “limited knowledge and understanding,” affect our understanding of rights.
  - Every rights statement is made within a horizon and from a point of view that is limited in scope.
- Both judges and law reform attorneys should be conscious of horizons.
  - A law reformer must find a way to make his or her arguments comprehensible within the narrow horizons of the judge.
  - He or she must persuade the judge to cross beyond those narrow horizons to see the problems of his or her client.
- A law reformer and one concerned with the advance of the rule of law and human rights should be conscious of the phenomenon of horizons, of the experiences that open the opportunity for expanding our understanding.
- Judges who recognize their horizons—their limited knowledge and understanding—should be able to cross horizons.
  - Commitment to crossing horizons is a means for promoting human rights and is a topic for legal philosophers and social scientists.

*Advance of Rights*

The advance of rights is related to the advance of the rule of law and to the legitimacy of new governmental arrangements.

- The availability and regular use of the process of law reform to establish rights should contribute to the legitimacy and stability of governments and regional organizations.
- The regular use of law reform campaigns should contribute to strengthening and expanding the rule of law.

*Natural Law*

Government’s subjectivity to the rule of law lays a strong foundation for the development of civil liberties and the advance of human rights.

- The institutionalization of higher law for this purpose is in the mainstream of the natural law tradition.
- Natural law in its many incarnations over the ages has served as a vast storehouse of resources to advance the rule of law.
- The notion of a higher law is the essential contribution of the natural law tradition to the advance of the rule of law and the promotion of human rights.
- International law could serve as the higher law that could subject otherwise unrestrained rulers to the rule of law and the respect for the human rights of their citizens—this process has begun.

NOTE: Natural law is not a set of propositions or even ideals, important as *they* are to natural law, but a process of human experience by which our regard for our fellow human beings grows, is generalized into ideals and commitments, is institutionalized, and regularly changes by crossing horizons.

## Can the Welfare State Survive in a Globalized Legal Order?

Samuel Krislov, American University

*Background*

Neither predictions that the welfare state would endanger law and freedom nor that globalization would make the welfare state obsolete seem verified by recent history. However,

- There has been a retrenchment, particularly in denationalization, for fundamental economic reasons.
- Most entrenchments have occurred in the United States from feelings that social benefits were overgenerous.
- Funding issues will be a challenge to social security, health care, and unemployment protections.
- Changes in “safety nets” will also challenge the rights and full-class citizenship of the unsuccessful or unlucky.
- The antiwelfare effort sees doom for welfare states in that they are luxury systems inhibiting international efficiency.
- Other problems include changing of demographics regarding wealth and the increasing percentage of the elderly in populations.

NOTE: Economic realities have curtailed the growth of U.S. governmental programs. In Europe, welfare protection has been cut back, although it is still broad in its coverage compared to the United States.

*Benefit  
Reductions*

The trimming of welfare benefits came also from demonstrated costs and competitive disadvantages in international trade.

- There was a revulsion to greater and greater demands for benefits by nonproductive segments of society.
- The public supported reduced benefits but generally turned to support of welfarist parties after reductions were made—the welfarists see this as a prudent regrouping rather than the end of welfare.

*Freedom*

Welfare state countries show little sign of marching away from freedom.

- In spite of considerable monetary controls, economic liberty is maintained at a high level.
- Personal rights are profoundly protected—on the whole they are firmly planted in a tradition of personal freedom and liberty.
- Complex checks and balances are sources of freedom.
- Many of the conglomerates contain requirements and buttresses for freedom—most conspicuous are the EC requirements that members maintain a democratic structure and adhere to human rights.

*The Asian  
Threat*

Pronouncements of the eclipse of the United States and Europe emerged with Japan’s rise as a quality producer and the entry into the world markets by other Asian countries.

- The fear was of cheap foreign labor leading to relinquishment of the lead in manufacturing.
- At first, authoritarian systems seemed to succeed, but a series of predictably bad choices created a system doomed for failure—only Korea and Taiwan moved from market system to law-constrained economy and then to freedom as manifestations of Asian democracy and free expression.

NOTE: The United States has emerged as the big winner, benefiting from intellectual property in industrial know-how and its skill at training, along with the use of internationalized assembly of multinationally produced parts into finished, maximally profitable products.

*Globalization*

Predicted efficiency of globalization was to be a by-product largely of two factors.

- There would be an intensification of the trend toward mobility of the factors of production and coproduction of goods.
- The absence of legal barriers and minimization of physical barriers would permit products or parts of products to be made where there was the great-

est comparative efficiency, but free trade remains a fiction as one hand cuts while the other creates new barriers.

Many argue that opportunities will grow when obstacles to competitiveness are removed and the artificial barriers to the flow of goods and services are broken down.

The migration of jobs to seek cheaper labor is suggested to be efficient in reducing costs and just in reducing worldwide income disparity, but outsourcing becomes a sore point when the jobs involve highly skilled functions such as computer programmers.

#### *Global Legal Order*

One other claimed nemesis remains: the emergence of a global legal order may inhibit many forms of welfare regulation, as it does in the European community and in NAFTA and WTO protocols.

- Larger, more established powers, however, are reluctant to yield leadership to a motley grouping of smaller nation-states.
- No one has been ingenious enough to formulate a decent structure to establish new law on a basis regarded as legitimate—the exception being violation of human rights and genocide.
- NGOs provide a vast, interlinked web of transnational structures.
  - They constitute an international civic society, although NGOs have virtually no legal power.
  - They are a foundation, a buttress, a supplement to legal order, but this structure is an unlikely matrix for world order.
- The emergence within the WTO of panels making “determinations” is the most lawlike aspect, exciting the spirits of global law enthusiasts.

#### *Other Global Influencers*

International forms of expert opinion influence legal changes.

- Policies on health and on product standards are influenced by expert opinion and by the public “voting with its purse.”
- Worldwide investor confidence also is an influencer.
- NGOs inform the public or mobilize opinion.

#### *Standards*

Perhaps the purest form of claim to objectivity and expertise is expressed in the form of standards.

- Penalties for not measuring up range from refusal of delivery to confiscation.
- Standards are versatile and apply to more than quality; pricing and safety are also in the formula.
- In addition to protecting consumers, standards protect society with respect to ultimate usage and distribution—they also affect the basics of a product’s manufacture, assembly, or development.
- The caveat is there is subjectivity and manipulation for gain in creating and enforcing standards.
- The move toward globalization has gone hand-in-hand with efforts to objectify standards and to eliminate tax-and-nontax barriers to trade.

NOTE: For virtually all standard developers and users, a national standard authorized by an organization like ANSI maximizes access to a national market.

#### *Resolving Conflicts*

It is increasingly likely that the underpinnings and intertwinement of competing legal orders will continue to create conflicts resolved either through political negotiations, or by the creation of agencies with limited decision power like the WTO.

*Internet  
Communi-  
cation*

Internet communication generally makes the universe of information more global in all areas.

- The organization of people with similar views in NGOs and in communication networks is a dramatic change for the world.
- The difficulties governments experience in curtailing global contact among people and trying to isolate their citizenry is the strongest hope for globalization of the spirit and therefore the law.

## II. CASE STUDIES

## A. MOVES TOWARD DEMOCRACY

## Overcoming Apartheid: Can Truth Reconcile a Divided Nation?

James L. Gibson, Washington University in St. Louis

*Thesis*

A major analysis of the work of South Africa's truth and reconciliation process shows the following:

- There is no evidence that the "truth" proclaimed by the Truth and Reconciliation Commission (TRC) damaged reconciliation.
- Indeed, the truth-finding process contributed to at least some forms of reconciliation among at least some groups.

*Truth and  
Reconciliation*

Two themes have dominated discussions of the truth and reconciliation process in South Africa.

- No one seems to know what "reconciliation" means.
- However, everyone was certain that "reconciliation" had failed or at least not lived up to expectations.

*Reconciliation*

Discussions of reconciliation in South Africa typically deal with two things:

- The micro truth about what happened to specific loved ones.
- A macro focus on the reconciliation of victims and perpetrators.
  - Reconciliation usually means acceptance of blame, apology, and forgiveness.
  - This often has deeply religious overtones (with the risk of mistakenly equating forgiveness of past enemies with reconciliation).
  - There is also the focus on who profited from apartheid and which groups and people were injured by it—coming to grips with the subjugation of the black majority by the white minority.
  - The overarching focus of reconciliation involves trying to bridge the divide between various distinct and generally separate racial communities. Reconciliation may be thought of as a continuum describing the relationship between those who were masters and slaves, not just those who were victims or perpetrators of gross human rights violations.

NOTE: The TRC is considered to be a facilitator that can improve communication and mutual tolerance of diversity.

*Key to Reconciliation*

The key to reconciliation is that South Africans of every race accept all other South Africans as equals, extending dignity and respect to them.

- This requires that people come to interact more and communicate more, which in turn can lead to greater understanding and perhaps acceptance.

*Connecting Truth with Reconciliation*

Some in South Africa believe that not only does truth not lead to reconciliation, but instead it leads to irreconciliation by exacerbating tension and conflict.

- The view is that truth finding can
  - Uncover horrific human rights abuses.
  - Reawaken long dormant memories and animosities.
  - Generally force all sides in the struggle over apartheid to confront each other.
- The alternative view is that, by documenting atrocities from the past, the process can succeed in getting people to rethink their views.

NOTE: Sharing responsibility, blame, and victimhood evens the score ever so slightly, providing a basis for dialogue.

*Measuring Reconciliation*

The four components of reconciliation are

- Interracial reconciliation.
- Cultural respect for human rights.
- Political tolerance.
- Institutional legitimacy.

NOTE: Based on the results of the research, one might draw the following conclusions about the levels of reconciliation among the racial groups: Africans not very reconciled, whites somewhat reconciled, coloured South Africans somewhat reconciled, and South Africans of Asian origin somewhat reconciled. Reconciliation still has a long way to go before it predominates in South Africa, even if the level of reconciliation is higher than many expected from a country so close to civil war so recently.

*Acceptance of TRC's Truth*

One of the objectives of the truth and reconciliation process was to create a collective memory for South Africa—an accepted version about the past.

- The TRC's multifaceted truth is not necessarily an officially sanctioned truth but is instead an amalgamation of ideas about the past with which all must now contend.
- To test whether truth contributes to reconciliation, the author developed a summary measure of the degree to which each individual accepts the TRC's historical truth about apartheid.
  - Everyone accepts that those who struggled for and against apartheid committed horrible abuses.
  - Nonetheless, a significant proportion of every racial group believes that the idea of apartheid was good.
  - Thirty-nine percent of blacks believe the struggle to preserve apartheid was just.

*TRC  
Successes*

- A plurality is willing to attribute abuses to individuals and not to the state.
- Most important, widespread agreement exists that all sides in the struggle over apartheid did horrible things.

NOTE: The author believes the data suggest that the TRC's revelations played some role in producing a common understanding among all South Africans of the country's apartheid past.

At some level, the truth and reconciliation process clearly succeeded. It appears certain that something must have altered the course of the transition, avoiding the bloodbath that many predicted would accompany the transition to majority rule. More specifically, the author argues that

- The data show that truth and reconciliation do go together and are compatible with the view that the collective memory produced contributes to the levels of reconciliation.
- Certainly the data show that documenting the truth about the past does not lead to irreconciliation, as so many feared it would.

*How Truth  
Leads to  
Reconciliation*

Based on attitudes prior to the transition, strong impediments to reconciliation existed. Some external force was needed to provide an impetus for attitude change and to get the transition going.

- In the past, blacks and whites most likely understood and trusted each other very little, rarely interacted, held vicious stereotypes, and disliked and felt threatened by each other.
- Beliefs had to be shaken up because most people do not pay attention to a slow trickle of unwelcome information—the TRC was able to create enough noise for people to reassess their racial attitudes.
- Blacks also learned that horrible things were done by both sides.
- The frequency and quality of interaction between races has increased, allowing them to get to know each other, and this likely contributes to further reconciliation.
- Impediments were overcome by widely accessible information that had no hidden ideological messages that might cause defensiveness.

NOTE: Whites attentive to the truth and reconciliation process learned that their side was less than noble in creating and defending apartheid and that opposition was perhaps less radically evil in its efforts to create a new system.

*Conclusions*

In moving toward reconciliation, once one concedes that the other side has legitimate grievances, it becomes easier to accept their claims and ultimately to accept the new political dispensation.

- Truth commissions must seek to act impartially.
- There should be nonretributive forms of justice produced by the process.
- People need to be able to tell their stories and to be heard.
- A process that is open, humanized, and procedurally fair allows penetration of the consciousness of virtually all constituents.
- Most important, the process must resist resorting to “victor’s justice” in which only the crimes of the defeated are criticized, and should instead cast blame for human rights abuses impartially and fairly, wherever such blame is appropriate.

## The Federal Constitutional Court: Guardian of German Democracy

Donald P. Kommers, Notre Dame Law School

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- Background* The Federal Constitutional Court (FCC) is an important custodian of political democracy in Germany. This article is an overview of the FCC's most important decisions on election law, political parties, and parliamentary democracy.
- The FCC has promoted equality of opportunity among competing political parties while guarding the integrity of elections.
  - It seeks to root Parliament's law-making powers in elections and voting.
  - It has defended the principle of fair and equal representation in the system of personalized or modified proportional representation (PR).
  - It has shielded minority parties against discriminatory legislation.
- NOTE: By exercising its authority to pass sentence on the validity of elections and on the dissolution of Parliament, the FCC has consolidated its reputation as the ultimate guardian of both democracy and the rule of law.
- The Basic Law* Germany's Basic Law—that is, its constitution—includes several provisions empowering the FCC to review the constitutionality of political parties as well as other electoral procedures and institutions.
- The Basic Law establishes political parties as major agencies of political representation for they express the political will of the people.
  - Germany's electoral system provides for a modified system of proportional representation.
  - The Basic Law creates a “free democratic basic order” whose defense the state is duty-bound to protect.
  - Several of the Basic Law's innovations for stabilizing the political system include the diminished power of the president, the constructive vote of no confidence, the limits on the power of dissolving Parliament, and the creation of the FCC.
- The FCC* Established in 1951, the FCC has evolved into one of Germany's most important policy-making institutions.
- It is the only tribunal able to declare statutes and other governmental actions unconstitutional—it is the guardian of the Basic Law.
  - It handles federal/state conflicts, clashes between branches of the national government, and the constitutional complaints of ordinary citizens.
- Judicial Decisions* The judicial decisions discussed in this article focus on elections, political parties, and parliamentary representation. They are important because they have helped to
- Stabilize party government.
  - Make political representation responsive and responsible.
  - Anchor the system more generally in the democratic values at the heart of the Basic Law.
- NOTE: These studies look at
- Proportional representation.
  - Voting rights and their relationship to the PR system.
  - Constitutional policies related to party funding.

- Handling of election cases similar to Bush/Gore in 2000 in the United States.
- The limits of the Basic Law's power to dissolve Parliament.

## Religion, Constitutional Courts, and Democracy in Former Communist Countries

James T. Richardson, University of Nevada, Reno

### *Background*

This article makes two key arguments and attempts to combine them in a way that shows the importance of religious motivations to the development of democracies in former communist countries (FCC).

- One argument concerns the role played by religion in undermining communist governments of the former Soviet Union (FSU).
  - A corollary is that religious motivations have given impetus to democratic movements as FCC redefine themselves.
- Second is that courts, specifically constitutional courts, are playing an important role in promoting democracy in some FCC.
  - A corollary is that constitutional courts in some FCC have been very solicitous of religion and religious institutions, particularly traditional ones, and have helped define a major role for religion in a number of FCC.

### *Role of Religion*

The Catholic Church led by Pope John Paul II contributed to the downfall of communism in a significant way.

- The pope, immediately upon becoming pope, started talking about human freedom, encouraging people to fight for their rights.
- The uprisings in Poland in the 1980s and the inability or unwillingness of the Soviets to suppress them contributed directly to oppositional developments in other Soviet republics.
- Religious motivations played a key role in the development of new constitutional democracies in the FCC.
  - The strong emphasis placed on the worth of the individual within the Christian religious tradition is a key element in the development of the democratic impulse.
  - Showing that there is a higher law above that of potentates was crucial.
  - Vatican II made a strong statement about freedom.

### *Constitutional Courts*

The tendency to adopt constitutions has contributed to the establishment of constitutional courts to interpret and enforce those constitutions.

- In some of the FCC, constitutional courts have become quite strong with considerable popular support—Hungary being a good example.
- In other FCC, such courts have run afoul of political forces and have had their power curtailed or were not able to develop much authority.
- In Russia, the courts have regained some power by putting heavy emphasis on cases elaborating individual rights.
- The courts can force politicians to honor commitments, thus serving as an important check and balance to postcommunist governments that might

adopt different policies—in some cases they are the primary vehicles of democratic values in FCC.

- Constitutional courts have had to take on a major role of defining the place of religion in postcommunist societies.

*Hungary and Russia*

Below is a comparison of how constitutional courts deal with religion in Hungary and Russia.

- In Hungary, the court system in general and the constitutional courts in particular were very solicitous of the role of religion.
  - The court played a role in promoting and defending religion as deserving of a prominent place in the public square of Hungary.
- In Russia, the picture was mixed, reflective of the centuries of dominance by the Russian Orthodox Church (ROC).
  - A coalition was formed between the ROC and politicians to protect the church more so than individuals.
  - Those who want Russia's future tied to Europe succeeded in getting Russia to join the Council of Europe, which puts Russia under the sway of major European institutions such as the European Court of Human Rights.
- It seems safe to say that even within the context of a Russia dominated by the ROC and a strong presidency, the constitutional court has made some difference in terms of support for basic human rights such as religious freedom.

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B. TRANSITIONS AND PROBLEM CASES

## Transitions to Constitutional Democracies: The German Democratic Republic

Inga Markovits, University of Texas at Austin

*Background*

In totalitarian states, the waning of utopian hopes may be compensated for by an increased interest in law and rights and by the growing professionalism of a disenchanting legal class.

- The practice of legality—even the legality of a totalitarian state—can threaten and undermine the effectiveness of autocratic rule.
- In looking at GDR legal history, the author claims
  - Respect for law grew gradually over forty years.
  - The techniques of party interference with the judiciary changed from direct interference in specific cases to ideological indoctrination and control.
  - The party itself became increasingly ambivalent about its judicial policies.
- The article looks closely at the history of one East German trial court to determine what specifically it was that increased the significance of law throughout its life span and to draw conclusions about the general conditions for a global spread of the rule of law.

*Late 1950s*

By the late fifties, party authorities moved from directly meddling with concrete decisions to exerting their influence behind the scene and, from there, to

*Party  
Influence*

generally impress the party line by way of the ideological and legal training of judges and their supervision by superior courts.

- The training of judges improved.
- Judges' professional self-confidence increased.
- The roles of various state authorities became more differentiated.
- The party was better at controlling and directing its own cadres.
- The Ministry of Justice and superior courts began to point to the independence of judges as an excuse for resisting local influences.

NOTE: All of this does not mean that the courts really *were* independent from the party. East Germans never believed they were.

How did the party exert its influence on the judiciary?

- By moving a conflict from the area of law into the area of politics. In cases in which the party was interested in a particular outcome, it would persuade the court to give it time to find what was called a political solution outside of the judicial process. The case before the court was first suspended and then withdrawn. The court cooperated in this process of displacement. But judges, as a rule, were neither willing—nor apparently expected—to break the law.
- The search for a political solution did not necessarily mean that the parties to a suit would get less than they were entitled to under the law. But it removed politically touchy issues from the authority of judges. With the dockets thus sanitized, the system could preserve a locally limited kind of judicial independence in the courtroom.
- Judges lived in two worlds.
  - As jurists, they were to apply the letter of the law.
  - As party members, they were, outside the courtroom, to do their best to realize the policy goals of the party—hence the importance of their ideological indoctrination.

*Indirect Party  
Influence*

As the party moved out of the business of directly indoctrinating judges, the Ministry of Justice and the GDR Supreme Court, staffed with party members, took over.

- By the 1980s, the political indoctrination of judges met with their increased indifference.
- Most judges seemed to like the law better than the party.
- The party no longer seemed to hope for true believers. A judge's political loyalty seemed less a matter of conviction than of political correctness.

*Dwindling of  
Utopian  
Hopes*

East German legal developments in the 1970s and 1980s reflect both the dwindling of utopian hopes and the entrenchment of professionalism.

- On one hand, the loss of political faith required a tight and efficient supervision. The system by which the lower courts were supervised by the superior courts became increasingly streamlined and effective.
- On the other hand, the growing professionalism of the GDR judicial bureaucracy made it push for more rule-of-law protections.
  - The GDR Supreme Court and Ministry of Justice admonished lower courts to show greater respect for defense counsel.
  - They criticized the unnecessary issuing of arrest warrants.
  - There is increasing official talk of the respect for individual rights.

*Last Years of  
Socialism*

The relationship between the party and the court became confused in the last years of socialism.

- The party wanted judges to be both obedient and more independent.

- The Supreme Court and the Ministry of Justice wanted legal change, but not the responsibility for change.
- Local judges tried to steer the right course between conflicting orders.

*Conclusions*

What can be learned from the study of one East German trial court for the likely development of authoritarian legal systems?

- An inverse relationship seems to exist between political and legal faith. The higher a legal system's political faith, the lower its perceived need for law. As political beliefs are fading, the search for legal solutions to social conflicts is likely to rise.
- Legal sophistication seems to encourage sympathy toward law reform.
- It would make sense to strengthen the legal systems, even of totalitarian countries, in the hope that expectations of law could help delegitimize and push back practices of injustice.


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## Sudan: A Nation in Turbulent Search of Itself

Francis M. Deng, Johns Hopkins University

*Background*

Sudan is a country in painful search of itself, afflicted by a wave of regional conflicts rooted in an acute crisis of national identity.

- Three factors, Arabization, Islamization, and slavery, played a pivotal role.
- In the past, an Arab-speaking Muslim, culturally Arabized and with Arab descent, was elevated to a position of respect and dignity.
- A non-Muslim black African was deemed inferior.

NOTE: By the nineteenth century, the North was Arab-Islamic and the South was considered indigenously African in racial, cultural, and religious terms. These two are now in a zero-sum conflict of identities. Sudan faces critical choices of either equitable national assimilation or partition.

*Issues*

The political developments and the challenges of peace and unity pose a series of interlinked questions and issues.

- What role does religion—specifically Islam—play in shaping identities?
- How do regional conflicts challenge the Arab-Islamic establishment?
- What are prospects for a more inclusive national identity framework?
- Will the Arab-Islamic element cooperate or resist change?
- What would be the outcome if they resist?

NOTE: These questions are critical to the prospects of the Sudan remaining united or disintegrating along racial, ethnic, or religious lines. The country has the potential of being either a conciliator among its neighbors or a point of confrontation, with ripple effects extending beyond the regional context.

*Conflicts*

It is not mere differences that cause conflicts but the implications for the shaping and sharing of power, wealth, services, development opportunities, and the overall enjoyment of the rights of citizenship.

- By this yardstick, the South found itself, after independence, the most marginalized and oppressed region in the country.

- The first conflict went from 1955 to 1976 when the South was granted regional autonomy, but resumed in 1983 when the government unilaterally abrogated the agreement.
  - This second war's declared objective was to restructure a country that would be free from any discrimination.
  - This recasting of the issues began to gain support in the North.
- Twelve years after a Darfur rebellion was crushed in 1991, two non-Arab movements in Darfur, the Justice and Equality Movement (JEM) and the Sudan Liberation Movement and Army (SLM/A), staged a second rebellion—what is currently happening in Darfur is also happening in the South and in the bordering areas of the Nuba Mountains and the Southern Blue Nile.
  - The economic factors involved in Darfur and the mirrored situation in the South are also similar.
- Traditionally, conflicts were managed and resolved by intertribal means, but now these methods are undermined and weakened.

*Peace*

A path toward peace has been charted in the South, Abyei, Nuba Mountains, and the Blue Nile.

- The protocols stipulate principles for inclusivity and for addressing grievances of other marginalized areas, such as Darfur.
- The irony is, while the war in the South was coming to an end, regional conflicts were erupting in the North.

NOTE: What is unfolding in the Sudan is challenging the prevailing myths of identity and revealing the complexities of the country's racial, ethnic, cultural, and religious configuration.

*Self-Identification*

Self-identification is the pivotal factor in determining identity. In the Sudanese context, two sets of discrepancies need to be addressed:

- The extent to which self-identification with Arabism conforms with the objective factors, in which the African element is dominant.
- The degree to which the Arab-Islamic model can be said to be representative of a country that is otherwise pluralistic in race, ethnicity, religion, and culture.

NOTE: Where self-identification by a particular group is projected as the national identity framework, with normative principles that determine participation in the shaping and sharing of power, national wealth, social services, developmental opportunities, and the rights of citizenship, it ceases to be a personal matter and becomes a public policy concern.

*New Developments*

Significant developments now appear to be playing out in a way that is challenging dualistic characterization of the conflict.

- The likelihood remains that the North will stay committed to a version of the Arab-Islamic vision and the South will opt for secession.
- The myth of northern identity as Arab has begun to be challenged, not only by northern non-Arabs but also by many among the "Arabs" who increasingly acknowledge the African component of their identity or who believe in a more equitable national identity framework.
- On the other hand, the persistent efforts to preserve the hegemony of the Arab-Islamic identity cannot be underestimated.

NOTE: The demand for a new, secular, and discrimination-free Sudan is rising, but it is countered with the assertion of an extremist version of the Arab-Islamic model for the country.

*Wider  
Relevance*

Problems similar to those described in Africa constitute a widely shared problem of statehood and nation building around the world.

- These others are acutely divided nations where some groups enjoy the rights and dignity of citizenship, while others are marginalized and relegated to virtual statelessness.
- Although these have been treated largely as humanitarian concerns, all these countries are challenged to explore a national common ground and to develop an inclusive sense of belonging, with the rights and obligations of full citizenship.

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## Expecting the Unexpected: Cultural Components of Arab Governance

Lawrence Rosen, Princeton University

*Background*

The development of democracy in the Arab world does not always pay sufficient attention to the cultural foundations of Arab political and social life.

- Concepts of the person, time, memory, and relationship need to be considered as vital elements of the political cultures of these countries.
- Against the above background, it may be possible to suggest elements of constitutional and legal organization that are more in keeping with Arab cultural orientations, rather than imposing Western constitutional forms assuming they will suit local needs in the Middle East.

NOTE: Simply drawing constitutional models from the West is to court failure or meaningless legislation.

*Arab Culture*

Before considering the imposition of Western democracy, it is useful to explore some aspects of Arab culture. Consider

- Ways in which concepts of person and time affect the idea of power.
- The nature of reciprocity and ingratiation in the development of the bonds of obligation.
- Institutionalized ways for leveling difference.
- The relation between Arab concepts of chaos and their views of the moral/religious underpinnings of human nature.

NOTE: The cultural concepts and institutional forms are vital to any understanding of Arab governance and how they may be drawn upon in fashioning culturally responsive constitutions.

*Obligations*

In the Arab world, a person is primarily identified in terms of his or her network of obligations.

- The individual is defined by the ability to marshal dependencies and overcome opponents on behalf of himself and those with whom interdependent ties have been formed.
- Successful construction of a network of dependents implies both self-mastery and worldly effect.
- The emphasis is on ownership, not of things, but as a focus of the relations among persons as they concern things.

- Movement* The idea that the state must preserve property as personal possession is less central than ensuring freedom of movement—the ability to enact one's capacity to forge interpersonal ties wherever they prove most beneficial.
- Any attempt to restrict movement, whether through educational or economic opportunity, cuts deeply into the Arab sense of justice, maturity, and legitimate authority.
- Self-Concept* Another factor has to do with the conception of the self.
- The idea that the self is a unity rather than potentially fractionable is central to Arab concepts of personhood, moral worth, and social place.
  - The idea that a person may play a role in one context wholly separate from other roles is largely inconceivable—the idea that officials or judges might rule contrary to their personal beliefs conflicts with the idea of a person as a unity of traits and ties.
  - Fractionation is certainly not a prerequisite to democracy.
  - The counter of fractionation—focus on the unity of the person—renders the idea of institutions less a separable entity upon which to build a political system and more an aspect of the individual who combines multiple attachments as part of a unified social person.
- Time* Events are commonly categorized not by strict chronology but by whether they have a continuing effect on relationships.
- The important thing is whether persons or events are seen as having a continuing impact on current relationships.
  - The ways in which memory is manipulated by the state, or the ways in which time is used to legitimate or delegitimize ongoing structures, may bear on the course of political development.
- Social Organization* Several aspects of social organization also correlate with the pattern of relationships.
- Although most Arabs do not belong to actual tribes, these political forms have features that affect many perceptions and relations.
  - A tribe's political form is not the defining or constant feature about it—their foundational quality lies not in the design they take at a given moment, but in their ability to take on such variations while retaining certain central features.
  - If one regards every social unit as standing on the same moral footing, that no one family or person is permanently of greater moral worth than any other, then leveling devices that knock people down to size support this image of moral equivalence.
  - Power tends to be both personal and susceptible to limitation—it is accumulated by getting others indebted and being able to play the expectation of reciprocity to advantage.
    - It is this interchangeability of reciprocal obligations, and the quest for information about others' networks of obligation, that forms a central component of the political cultures of the Arab world and the changes that may be taking place in them.
- Limiting Power* Power comes by taking on the qualities ideally associated with a given position and coming to be treated as someone in that position.
- Proof of position is by worldly acts rather than formal induction into an institutionalized position.
  - Leaders take consultation from those who have acquired the status and power of being acknowledged.

- The ruler's position is ratified in an institution called *bay'a*, which appears to be a democratic process, but the acknowledgement is traditionally comprised of those regarded as knowledgeable and worldly.
- Corruption* Corruption forms an important indicator of the concept of power itself.
- Arabs characterize corruption not as abuse but as the failure to share whatever largesse comes one's way with those to whom one has forged ties of obligation.
    - People even joke that one can undercut an autocrat by bribing a person below him to disregard the superior's orders; this presents a limitation on power.
- Chaos* Identifying certain moments as ones of chaos may also fit the patterned emphasis in Arab life on the relational and the negotiable.
- To understand acceptable order, one may need to understand the meaning and structure of acceptable disorder.
- Language* Language is central to the ability of any Arab to maneuver in his world.
- A person who can capture the definition of a situation can turn it to an advantage—an asset for forming relationships.
  - Arab political rhetoric is the trying out of a concept, which if it takes will capture the situation in a particular way—a man builds a following with “the word” and must show others how this builds relationships.
- Islamic Law* Islamic law, when seen against this cultural backdrop, appears somewhat different than it is often portrayed.
- A judge's credibility depends in part on the ways he has built a reputation for knowledge and acceptable discretion.
  - Custom takes precedence over law—judges have extremely wide discretion except for strict Quran prohibitions.
  - The Quran is not an intensely lawlike document, leaving a great deal left for humans to determine.
- Arab versus Western Views* The failure to see how ideas such as time and person, property and chaos play out in the context of political culture may lead to a view of future Arab politics that is too dependent on ideas of Western democracy and legitimacy.
- Any legitimate Arab leader must put together his following in a highly personalized way.
  - Legitimacy comes from the fabrication of networks of indebtedness that demonstrate a person's ability to marshal allies.
- Creating Constitutions* Creating culturally responsive constitutions raises the question as to how one can develop a constitution that is in accord with the sentiments of the people. Some of the freedoms of importance to Arabs are
- Freedom of movement—this mobility incorporates both spatial and relational elements.
    - Spatially, it is important that people be able to own land wherever they are able to purchase it.
    - Relationally, there must be clear definitions of corruption and in education there must be clear statements about the process by which rules for obtaining degrees can be altered.

- Freedom of law—laws must be locally responsive to local culture, but an individual must be able to opt out to be judged under national law.
  - Laws must be shown to further the Quranic principles of avoiding evil and doing good.
- Freedom of the local—local groupings must be supported as part of the “tribal ethos.”
- Freedom of personality—a sense of distinctive personal identity is culturally emphasized among Arabs.
  - Everyone should be assured of having civil identifying documents and passports.
  - Arabs want the right to privacy about their personal lives and want freedom from home search without warrants.

*Conclusion*

Of the twenty-two Middle East Muslim countries, none is commonly regarded as a democracy.

- Nothing inherent in Arab cultures is against the development of democracy.
- Simply drawing constitutional models from the West is to court failure.
- Constitutions that not only reflect underlying cultural assumptions, but also recognize the continuing force of personalism over institutionalized roles, will have far more meaning.

NOTE: What the West needs to understand is that quite fundamental aspects of person, time, and relationship will deeply inform whatever changes take place. We must recognize cultural influences. The development of democracy in the Arab world must pay sufficient attention to the cultural foundations of Arab political and social life.

## Rule of Law and Lawyers in Latin America

Rogelio Pérez-Perdomo, Universidad Metropolitana, Caracas

*Latin  
American  
Democracy*

In Latin America, presidents of all countries have been democratically elected, with the exception of Cuba. Yet has the rule of law progressed?

- Even in countries that hold periodic elections and where the opposition has a chance of winning, the judiciary may perform poorly and public officials could commit abuses against citizens.
- Strengthening the judiciary has become a critical task.

*Constitutions*

In the nineteenth century, Latin American countries adopted constitutions.

- Among essential features, there were distribution of the state apparatus in different branches and the bill of rights.
- The idea of a constitutional government, as stated in documents, was difficult to put into practice partly because lawyers' real practices did not necessarily follow stated ideals.
  - Lawyers were very important people even before independence and democratization.
  - Lawyers were officials of the state rather than defenders of citizens; many

erved as parts of cabinets and parliaments and as leaders of political parties.

- Under the national idea of a constitutional government, the emphasis in Latin America is on the limit imposed upon the different organs of the state more than on citizen's rights.

*Political Systems and Lawyers*

Latin American political systems during the nineteenth and twentieth centuries can be labeled as personalist—an individual acted as an axis and set the pace of the political apparatus.

- Many diverse political systems had in common the important presence of a dictator like Peron or Pinochet.
- Constitutional constraints to their power and the safeguard of individual rights were absent. Neither judges nor justices put their efforts in stopping the abusive conduct of those in power.
- The lack of resistance or collaboration may have several explanations:
  - Collaboration was an opportunity to amass a personal fortune and to enjoy the privileges of power.
  - Some may have thought that leaning toward an authoritarian ruler was a lesser harm or even a good thing under difficult circumstances.
  - Lawyers depended on the state for their living.
  - The idea that law was completely unrelated to ethics and its notion as a neutral discipline was popular among lawyers.

*Judicial Reform*

During the past fifteen years, at the time of tremulous democratization, there has been an important effort to reform the judiciary.

- The power of judges has been limited in a transition from the inquisitorial style to the oral and adversarial system.
- Courts have adopted new technologies and managerial practices.
- Judges have undergone training.

NOTE: At present, it does not seem that justice is more accessible to everyone or that it protects better the rights of citizens. Judges are not more independent or impartial.

- Judges have not been able to protect the rights of citizens or groups who oppose governments under rulers like Fujimori, Menem, or Chavez.
- In more moderate countries, judges have gained more independence and have become political arbitrators.

*Risk Takers*

It is interesting to see how citizens and lawyers have decided to step forward and take enormous risks to protect their rights against authoritarian regimes.

- Many judges now rule against the interests of the political establishment.
- Judges are assuming their constitutional role more and more.
- Some lawyers and judges are challenging the establishment through legal means.
- Judges are taking a stand even when they know they will be fired or sanctioned.

NOTE: As lawyers now think of themselves as associated with the people (and not mainly to the state) and can get an income outside the state, the independence or resistance of legal professionals could be considered a new trend.

## Law and Development of Constitutional Democracy: Is China a Problem Case?

Randall Peerenboom, UCLA Law School

### *Background*

China is frequently portrayed as a problem case for the law and development movement.

- For some, the problem is that China has enjoyed remarkable economic growth, apparently without the benefit of “the rule of law.”
- China has resisted the third wave of democratization and officially remains a socialist state.
- For others, a problem is China’s poor record on civil and political rights.

NOTE: Overall, China appears to be following the path of East Asian states. This seems to be the most successful “model” for relatively large countries to achieve high levels of economic growth, implement rule of law, and eventually democratize and protect the full range of human rights through some form of constitutionalism.

### *Rule of Law*

Five East Asian countries rank in the top quartile on the World Bank’s rule of law index: Singapore, Japan, Hong Kong, Taiwan, and South Korea.

- Evidence shows that implementation of rule of law is necessary, though by no means sufficient, for sustained economic development.

### *East Asian Path*

The “East Asian Path” involves the sequencing of economic growth, legal reforms, democratization, and constitutionalism, with different rights being taken seriously at different times in the process. It involves

- Emphasis on economic growth in the initial stages of development.
- Government investment in human capital and institutions, including reforms to establish a basic legal system.
- Democratization in the sense of free elections being postponed until a relatively high level of wealth is attained.
- Constitutionalism beginning, including the development of constitutional norms and the strengthening of institutions. Citizens enjoy economic liberties, rising living standards, and some civil and political rights.

After democratization, citizens have greater protection of rights although with some ongoing abuses.

NOTE: There are also examples of less successful paths involving countries at lower levels of wealth and authoritarian systems that did not invest in human capital and institutions. They tend to have the weakest legal systems.

### *China*

Given the high correlation between wealth and rule of law, countries are best evaluated relative to other countries in their income class.

- China is meeting or exceeding expectations on most measures.
- The legal system played a greater role in economic growth than suggested and will play an even greater future role—China’s legal system outperforms the average in the lower-middle income class.

- Chinese citizens enjoy more freedoms—including civil and political freedoms—than ever before.
- Despite many problems, China outperforms the average country in its income class on most major indicators of human rights and well-being, with the exception of civil and political rights.
- As China negotiates modernity, it may well give rise to one or more novel varieties of capitalism, rule of law, democracy, and human rights.

*Conclusion*

Is China a problem or a paradigm? China's performance has exceeded expectations, and it appears to be progressing well along the same general path as its East Asian neighbors.

- For those who judge by civil and political rights, China today will be judged a failure, as would have other states at this development stage.
  - China's utility as a model for other states may be limited by recent economic globalization and democratization in most countries.
  - In any event, no single model is likely to work everywhere given the diversity of initial starting conditions and the complexities of the reform process.
- What we have learned is that there is a need to be pragmatic about legal reforms.
- Just as China's slower approach to economic reforms resulted in impressive economic growth, so the contextualized approach to legal reforms resulted in steady progress.

NOTE: Success hinges on the ability of Chinese reformers to continue to improve the legal system and ultimately to address the political obstacles that are currently barriers to the full realization of rule of law and are likely to become even more serious barriers in the future. There is a real danger that government leaders will move too slowly on political reforms and fail to implement deep institutional reforms of the legal system.

## III. INTERNATIONAL PROCESSES

## Toward a World Rule of Law: Freedom of Expression

Kurt Wimmer, Covington & Burling

*Background*

Freedom of expression is guaranteed by international treaties, but countries differ in their view of its meaning and how it should be protected.

- The borderless Internet makes it more difficult for despots to limit their citizens' access to information from outside their borders.
- There are legitimate disputes over the application of national law—each nation must apply its own rules without diminishing the freedoms available to citizens of other states.
- This article suggests that nations should focus on applying the law of the country in which speech originates, following the view of the EU.

*Treaties*

International treaties guarantee individuals the right to receive information and the right to freedom of expression through media of their choice.

*The Dilemma*

- This right is tempered by permissible restrictions to protect national security, individual privacy and reputation, the impartiality of the courts, and the like.
- There is widespread disagreement on the extent to which countries may build on the minimal levels assured by international norms.
- Laws dealing with protection of reputation vary dramatically from country to country, as do laws addressing the electronic media, political speech, and commercial speech.

Countries have no realistic process to achieve an accommodation between their own rules and another country's rules. The focus is on three issues:

- When a state may apply its laws against citizens of another state.
- When it has jurisdiction over citizens of another state.
- Whether and to what extent states must enforce judgments of foreign courts.

NOTE: Any widespread adoption of restrictive strategies means that the essential character of the Internet will be altered, and its capacity to act as a universal source of information will be lost.

*Libel, Privacy, and Content Litigation*

A number of high-profile cases have demonstrated the difficulty of moving toward a single rule of law for global free expression because of the Internet. Two cases involve Dow Jones in Australia and Yahoo! in France.

- *Dow Jones v. Gutnick*—Australia ruled that jurisdiction will be found at the place where the damage to reputation occurred, usually the country of residence of the claimant.
  - The High Court extended this concept to the Internet and said publishers would be required to assume that they could be subject to suit anywhere in the world.
- The Yahoo! case—A French court ordered Yahoo! to use all means necessary to prevent French users from accessing Yahoo!'s auction site, which featured Nazi items in violation of French laws.
  - Yahoo! filed suit in the United States to void the judgment in this case. The trial court found for Yahoo!, and the French groups appealed. Although fines are mounting in France, no decision has been issued in the U.S. appeals court.

NOTE: These cases demonstrate the ability of a country with relatively lower standards for free expression thwarting the efforts of other countries with differing legal constructs. In many cases, Internet publishers are legitimately concerned that they will be unable to control the legal obligations that Internet content may trigger.

*The EU Approach*

One of the few exceptions to the view that a publisher is subject to the laws of other countries is the position of the European Union.

- For electronic contracts, commercial communications, and online provision of professional services, companies are subjected only to the jurisdiction and the law of the member state in which they are established.
- This principle recognizes that only the country in which a publisher is "established" can fully regulate its activities. The publisher would know the scope of legal liabilities beforehand.
- If the EU approach were to be followed universally, accommodating the diverse interests surrounding free expression in a world rule of law would be more straightforward.

- Conclusion* It may be impossible to forge a world rule of law on free expression that goes beyond the floor established by the major human rights treaties binding on virtually all countries.
- If the law of “the country of origin” (following the EU) is applied to judge Internet publications, many of the most difficult issues dealt with in international litigation could be minimized.
  - Laws against Internet content could give publishers incentive to avoid extending beyond their borders—denying large portions of the world’s population the ability to receive diverse sources of information.

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## Divided Nations: The Paradox of National Protection

Francis M. Deng, Johns Hopkins University

- Background* A conflict exists between the UN Millennium Declaration of September 2000 and the respect for the territorial integrity and noninterference in internal affairs of world states.
- There is a tension between international protection of the vulnerable and the sovereignty of the states.
  - The paradox is that most of the member states of the UN are, in varying degrees, divided nations, suffering from acute national identity crisis as both cause and effect.
  - The attention of the international community tends to be focused on the humanitarian dimension, while the states do not want interference.

- The Internally Displaced* Some 25 million people in more than fifty countries are internally displaced persons (IDPs), denied safety and deprived of the essentials of life.
- The IDPs are paradoxically assumed to be under the care of their own governments, despite the fact that their displacement is often caused by the same state authorities.
  - The worst affected are minority or marginalized groups in conflict with the dominant group.
    - They are seen as the enemy and are neglected and persecuted.
    - Disconnected from the enjoyment of their rights, their marginalization is tantamount to statelessness.
  - In most cases, identity differences imply stratification and discrimination—internal conflicts are a desperate reaction to injustice, which in turn provokes ruthless counterinsurgency that aggravates the crisis.
  - These people must look to the international community to fill the vacuum of responsibility—someone to address the humanitarian crisis and mediate the conflict.
  - Any resolution must promote justice and respect diversity while exploring a common ground for national unity.

NOTE: Governments intent on preserving their status quo are likely to resist outside involvement—their people still require national authorities to provide

*The Core Question*

for their security and general welfare; this despite the legally binding basis for international protection and assistance to needy populations.

The core question is, What does the concept of protection entail, and who is best equipped to provide it?

- The challenge is to provide the safety and dignity of a civilian population.
- Experience indicates that there is still a wide gap between what ought to be done and what is being done.
- Much of the international protection is in monitoring people's rights. The states involved continue to be an obstacle to real protection and assistance.

NOTE: Ever since the UN Commission on Human Rights created a mechanism for protection and assistance, work has been carried out in a number of areas in an effort to have an effective international response to the challenge. A set of Guiding Principles has been a source of empowerment to the IDPs.

*Guiding Principles*

While there has been a growing acceptance of the UN's Guiding Principles, the development of mechanisms for protecting and assisting the IDPs is crucially important.

- A collaborative effort of organizations now works collectively to address the needs of the IDPs, and the prevailing view is that virtually every organization and every field worker has a protection role to play.
- Important practical questions still need to be answered.
  - What are the most effective ways to address protection?
  - How should the secretary-general exercise his leadership to reinforce the collaborative approach?
  - How can the Security Council be more effective without bias based on particular national concerns?

NOTE: On a positive note, the Security Council has recognized the need to address the lack of effective protection for civilians in armed conflict. It has recognized the threat to international peace and has specifically requested that situations where IDPs are under threat of harassment and harm be brought to its attention.

*Conclusion*

Based on the author's experience with the internally displaced, several lines of action can be proposed.

- "The Responsibility to Protect" should be condensed into a forceful statement endorsed by the General Assembly and Security Council.
- The reports of the human rights mechanisms should receive executive support to reinforce and enhance their influence.
- The invocation of values and principles in dealing with governments is likely to provoke less defensiveness than binding legal instruments.
- The core body for the collaborative approach should include all the relevant bodies of the UN system.
- Those whose mandates are relevant to protection of the vulnerable should be given access to address the Security Council, at least in high risk situations.

NOTE: The normative principles for action are in place, they only need to be acted upon.

## Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone

Donna E. Arzt, Syracuse University School of Law

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- Background* Since 1993, a revolution in public international law has taken place through the creation of international criminal tribunals for war criminals.
- Perception of their legitimacy is a crucial factor.
  - They must also have popular credibility to serve as effective deterrents to future war crimes.
  - This article looks at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL).
- Objectives* The two institutions share similar objectives for their respective operations.
- The ICTY mission is to
    - Bring to justice persons allegedly responsible for serious violations of international humanitarian law.
    - Render justice to the victims.
    - Deter further crimes.
    - Contribute to the restoration of peace by promoting reconciliation.
  - The SCSL is expected to
    - Revitalize Sierra Leoneans' belief in the rule of law.
    - Combat the culture of impunity.
    - Promote respect for the rule of law.
    - Bring a sense of justice after the horrific crimes.
- Achievements* Each tribunal has produced landmark rulings contributing to the developing jurisprudence of International Criminal Law.
- The ICTY has
    - Expanded upon the legal elements involving the Geneva Conventions of 1949.
    - Narrowed the perceived differences between laws applicable in internal and international conflicts for the protection of individuals.
    - Made significant advances in international humanitarian law pertaining to sexual violence in wartime.
    - Identified and applied the modern doctrine of criminal responsibility of superiors.
  - The SCSL has
    - Held that heads of state are not immune in international tribunals.
    - Ruled that it has jurisdiction to try the recruitment or use of children under fifteen years old as soldiers.
    - Established a Defense Office to give legal representation to arrestees before they acquire their own counsel.
- Outreach Efforts* Both the ICTY and the SCSL have engaged in efforts to communicate with their citizenry.
- In 1999, the ICTY established a program to counter the propaganda against it by promoting the Tribunal's impartiality and independence.

*Perceptions of Legitimacy*

- They used live audio and video web broadcasts in the Bosnian/Croatian/Serbian language.
- They also used press releases, TV interviews, and roundtables and conferences with national officials, NGO representatives, and victims groups.
- The SCSL has an outreach program to educate the population about the court's mission and procedures and to invite local civil society groups to offer their views. Activities included
  - Town hall meetings.
  - Sessions with targeted groups such as the police, the army, the bar association, journalists, victims groups, and students.
  - Posters, radio, and video programs in the country's four languages.

The objectives of the international community in establishing the tribunals do not automatically translate into popular acceptance.

- Most people in Serbia view the ICTY as an unavoidable and enforced precondition for Serbia's full return to the world community—the views sideline the issue of the guilt of those indicted by the ICTY.
- In Croatia, a similar pattern prevails regarding the ICTY:
  - More than 52 percent of people believe that The Hague wants to criminalize the Homeland War.
  - More than 78 percent opposed extradition of citizens to the ICTY.
- In Sierra Leone, by contrast, receptiveness toward the Special Court is rather broad, with concerns expressed more in regard to details and implementation than overall legitimacy.
  - People saw it not only as a mechanism for justice but also as an instrument to transform the judicial system.
  - The SCSL may have grown in stature after the indictment of Charles Taylor for war crimes and crimes against humanity.

*Perceptions of Impartiality*

Below is a description of perceptions of tribunal impartiality.

- The Serbian population overwhelmingly distrusts the ICTY, believing it is politically motivated and biased against those defeated in war.
  - Almost 70 percent did not believe the ICTY acted impartially concerning Serbian defendants.
- The SCSL, from its beginning, has contended with the local perception that it is an American demonstration project either to undercut the International Criminal Court or to gather intelligence on al-Qaeda in West Africa.

*Effects on Reconciliation*

The respective local populations have been concerned that the tribunal's operation would endanger the fragile peace and reconciliation processes.

- Because the SCSL is located inside the country where most ex-combatants remain at large and often under "protection" of their commanders—potential for unrest and destabilization is ever present.
- Many in Sierra Leone, including ex-combatants, were confused about the difference between the Special Court and the preexisting Truth and Reconciliation Commission (TRC).
  - Because many ex-combatants feared the TRC would convey their testimony to the SCSL, despite the prosecutor's denials, their participation was low.
- Regarding the ICTY, local victims groups often express bitterness when they learn of plea bargains.
  - They see it as a cover-up at the expense of victims.

- Institutions like the ICTY can impair the very reconciliation they seek to advance if the rewards they hand out in appreciation for reconciliation become a source of bitterness.

*Conclusion*

How can one compare or assess the perceptions of these two tribunals and predict their impact on the long-term development of democratization and the rule of law in these locales when the evidence is so incomplete and uneven?

- Much more data should be collected, or at least more time must pass so views can develop into facts.
- Justice must not only be done, but be seen to be done.

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## Global Rule of Law or Global Rule of Law Enforcement? International Police Cooperation and Counterterrorism

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*Background*

Security and intelligence agencies of national states engage in collaboration in matters of terrorism and other crimes, despite critical differences in their respective countries' attained level of and formal commitment to constitutional democracy.

- It can be said that terrorism has effectively been criminalized under a world rule of law enforcement.
- The legitimacy of a global democratic order is challenged when international police operations can take place outside the confines of legal safeguards and human rights restrictions.
- A central question is if and how a global order of law enforcement can lead the way to a global order of law.

*Bureaucratization Theory*

The bureaucratization theory of international police cooperation was developed to analyze the behavior of modern police institutions under conditions of increasing globalization.

- The bureaucratization theory maintains that public police institutions reveal a tendency toward independence from the governments of their respective national states.
- The degree of a police institution's autonomy will vary and have variable implications depending on social conditions, especially attempts by governments to politicize police activity during periods of intense societal upheaval.
- The theory does not deny that policing is related to state control, but holds that the behavior of police agencies is not wholly determined by reference to their relation to the political center of states.
- Periods of societal upheaval affect the institutional autonomy of police institutions in functional and organizational ways.

*Politicization Efforts*

Efforts to politicize police are not surprising, as national crises typically bring about a centralization of power in the executive branch.

- What is ironic is that these politicization efforts occur progressively at times when police institutions continue to expand and solidify a position of autonomy that enables them to better resist such attempts at political control.
- On theoretical grounds alone, the degree to which the autonomy of state bureaucracies has been accomplished in periods of relative stability cannot be assumed to be without consequences during moments of upheaval.

*September 11*

An interesting parallel to historical attempts to politicize policing during periods of war and revolution are the dynamics of international policing since September 11, 2001.

- Legislative and other policy responses, especially in the United States, have gone far beyond what could have been predicted.
- The Patriot Act and the creation of Homeland Security have been among the most concrete political efforts to unite and oversee the various security agencies involved in the “war on terror.”
  - Police autonomy is unprecedented in scale.
  - Police can, thus, more effectively resist political influences.

*Interpol*

Following regulations on organized groups that engage in acts of violence and regulations on explosive substances, Interpol passed a resolution in 1984 concerning “Violent Crime Commonly Referred to as Terrorism.”

- The resolution encouraged member agencies to cooperate and to combat terrorism within the context of their national laws.
- In 1985, a resolution called for the creation of the Public Safety and Terrorism subdirectorates to coordinate and enhance cooperation.
- In 1998, Interpol issued a condemnation of international terrorism called a Declaration against Terrorism.
- After September 11, Interpol condemned the attack as “an abhorrent violation of law and of the standards of human decency.”
  - High priority was given to the issuance of Red Notices for terrorists sought in connection to the attack.

*Interpol after September 11*

Interpol reorganized in several key respects after September 11.

- Interpol created an “11 September Task Force” to coordinate international criminal police intelligence.
- Interpol also instituted a command center open 24/7.
- A Financial and High Tech Crimes Sub-Directorate was created that specialized in detecting money laundering.
- In 2002, Interpol announced a Terrorism Watch List providing direct access to information on fugitive and suspected terrorists.
- A new global communications project was announced as Interpol’s highest priority level.
- The organization has managed to attract cooperation from police agencies representing nations that are ideologically very diverse and not always politically friendly.
  - Members do not always trust one another.
  - Major powers like the United States typically conduct international activities unilaterally.

*Depoliticization*

In terms of the objectives of social control, the bureaucratization of policing involves a depoliticization of counterterrorism efforts.

- Cooperation among state bureaucracies policing terrorism can take place irrespective of the similarities and/or differences among nations in political, legal, cultural, and other respects.
- The autonomy of state bureaucracies creates the potential for policing efforts against terrorism to be planned and implemented without regard for considerations of legality, justice, and politics.

*Conclusion*

It is important to recognize that the processes and structures of policing and other state activities are composed of a multitude of dimensions and institutions that are not necessarily in tune with one another.

- The state's powers are dispersed across a multitude of institutions whose activities the state can no longer carefully control.
- As the case of international police cooperation shows, the institutions that develop and multiply during the state's continued development cannot be assumed to always be carefully disciplined by the center of the state.
- The expansion of state bureaucracies, such as the police, has ironic consequences.
  - As the state grows, the relative power of its center weakens.
  - The many functions of the state are not always neatly harmonized.
- A model suggested toward the adoption of constitutional-democratic principles at the global level of law and politics to decrease the chances of terrorism must also take into account the manner in which effective control of terrorism is currently accomplished by international cooperation among public police agencies.

## Environmental Protection, Free Trade, and Democracy

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*Background*

Environmental and free trade laws both have some capacity to aid development of democracy, but that relationship is somewhat complex.

- International environmental law often addresses problems with roots in some of the unfortunate by-products of private productive activities.
- Because international environmental treaties often address problems from private conduct, treaties start—rather than end—the establishment of an environmental rule of law. International environmental law encourages the development of domestic environmental law.
- Free trade law grew out of the GATT, which encouraged friendly commercial relations among the developed countries.
  - Free trade is an essential element in efforts to spread the blessings of economic development to poor countries.
  - It discourages states from banning imports and enacting discriminatory tariffs to protect domestic industries.

*Changes in the 1980s*

Until recently, international trade law and international environmental law proceeded along separate tracks.

- The separation between trade and environmental law began to erode in the 1980s. Disputes involving matters such as the disposal of hazardous materi-

*Democracy*

als affected trade, which had been unrestricted before the environmental concerns.

- Some of the free trade decisions led to charges that institutions, like the WTO, are antidemocratic.

NOTE: This raises the question as to what, if anything, international law on the environment and law on international trade have contributed to democracy.

Generally, a case can be made that environmental protection and free trade coincide with democratic government.

- It is not so clear that either of these bodies of law creates democracy—it might just be that democracies tend to favor free trade and environmental protection.
- International rule of law, as conventionally conceived, exists in some tension with democratic ideals.
- Democratic legitimacy only comes from consent by processes offering some possibility for citizen participation.
- The rule of law and the idea of democracy sometimes reinforce each other but sometimes exist in tension with each other.
  - The rule of law needs adherence to laws, even if the particular application is unpopular and thus appears, in a sense, antidemocratic.

*National-Level Law and Democracy*

On the national level, the relationship between international law, international environmental law, and democracy is also complex.

- Nation-states influence each other's law through means other than formal treaties—international conferences and other mechanisms for sharing ideas can lead one country to emulate another.
- For example, countries have adopted variants of the U.S. National Environmental Policy Act (NEPA)—a preaction assessment of environmental consequences that requires public participation.
- The spread of ideas like NEPA might be seen as international environmental law spreading democratization—although local conditions such as economics and culture may inhibit this process.

*Strengthening Democracy*

Environmental law may strengthen democracy.

- If it does, it must do so through creating public participation possibilities that strengthen the engagement of civil society with the creation of law.
- Environmental protection can sometimes motivate a demand for democracy where none exists, as in the case of then-Czechoslovakia.
- The failure of existing institutions to protect the environment can produce demands for democracy.
- While environmental issues may be a catalyst for democracy, often human rights and economic issues prove more central.

*International Trade Laws*

The picture regarding international trade is equally complex.

- Free traders argue that free trade aids democracy because it builds wealth. But perhaps it is the other way around: democracy creates conditions for free trade as a viable policy.
- If people want protectionist policies, then the rule of law undermines democracy, at least in the short term.
- Free trade obligates national governments to avoid protecting domestic industries, even if their people want that protection in particular cases.

## Global Business: Oversight without Inhibiting Enterprise

John Philip Jones, Syracuse University

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- Background* This article discusses what regulations should be imposed, country by country, to encourage legal and ethical conduct by international firms.
- Abuses can be controlled through tighter scrutiny of foreign direct investment (FDI) at a local level—abuses must be policed in the foreign country despite any official corruption.
  - Local politicians and bureaucrats, who issue licenses, must be motivated by concern for public welfare and nothing else.
- Libertarian View* Libertarians see global business as an extension into the international sphere of the principle of the division of labor, which provides economic efficiency. The arguments in favor of global business are
- It provides work in overseas markets at wage rates usually above the prevailing rate.
  - Goods are produced relatively cheaply, which is of great value to everybody, including American consumers.
  - American workers displaced by foreign labor move on to expanding industries and better jobs—from the rust belt to the sun belt.
- NOTE: Global business needs to be scrutinized in a way that its excesses are detected and corrected without inhibiting the enterprise of the system.
- Benefits* Data demonstrate the overall benefits of global business.
- The idea that globalization is to the exclusive benefit of rich countries is a fallacy.
  - Firms must show themselves as good citizens in foreign countries or they lose in the long term; this benefits the locals.
- Problems* In the field of international business there are two broad groups of problems.
- Those derived from different and less stringent controls over foreign than over home operations.
  - Those stemming from investment and financial policies.
- Overcoming Abuses* Traditional response to problems has taken the form of
- Generally weak legal regulations within the individual countries where global businesses are established.
  - Sanctions imposed by the companies themselves—self-regulation.
- Sanctioning* The potential abuses need to be more strictly investigated than they are at present.
- The logical forum to address problems is the United Nations, although the UN is presently not capable of strong sanctioning.
  - A model would be the Better Business Bureau in the United States.
- FDI* FDI is in the interest of both the investor and the receiving country.
- Investors want to put up the money only if the proposal meets commercial criteria.

- Receiving countries know it is good for employment, income, and tax revenues—there are exceptions where foreigners are limited in percentage of ownership of any one enterprise (xenophobia).
  - FDI plans should be subject to tough negotiation.
  - FDI is always regulated by the receiving country.
  - FDI can make an almost immediate difference to the economic health of developing countries.
  - Problems must be dealt with rigorously and proactively.
  - Safety standards and marketing policy should be applied uniformly across all parts of a company—in the home country and the foreign subsidiaries.
- NOTE: If receiving countries are to avoid disasters, politicians must think exclusively of the economic and social welfare of their people.

## The “Good Governance” Concept Revisited

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### *Background*

In the debate surrounding the issues of debt forgiveness and increases in aid, experts, policy makers, and observers stressed the need for governance reform and policy changes to ensure transparency and rule of law, accountability in public finances, improvement in governance standards, and creation of a productive private sector.

- To spend new aid productively, suggestions were made to increase aid beyond its current levels to countries with good governance and to give debt relief only to countries with good performance and tolerable political accountability.
  - The UN objection to the above was that debt relief for the very poor nations makes sense and should be extended regardless of bad governance.
- As there is no consensus on how to measure good governance, the term remains ambiguous and the result is imprecise.

### *World Bank*

As a condition for lending, the World Bank requires the recipient government to show effective performance and to promote further reforms.

- The rationale is that when a government combats corruption, nepotism, bureaucracy, and mismanagement, it uses aid to reduce poverty.
- Traditionally, the Bank has not considered political issues to decide to undertake aid programs in the recipient state.
- Public sector reform aimed at efficiency and economic growth remained the Bank policy and practice until a shift in the 1990s after a crisis of governance in Sub-Saharan Africa showing a lack effective use of aid in the region.
  - Thus, good governance appeared on the Bank’s agenda in 1991.
  - Governance was to be an indication of how power and authority are exercised for development in the management of a country’s economic and social resources.

### *Governance*

A UN paper suggests that the new mandate for governance arrived when growing doubts regarding the purpose and effectiveness of the international financial institutions (IFI) seemed to threaten their funding.

- The Bank's governance discourse reflects the tension between economic and political aspects of governance without, at the same time, providing precise criteria for good governance and for evaluating a recipient country for the appropriate conditions for allocation of aid.
- One of the key aims of the Bank's designing a good governance approach was state-market relationships characteristic for Western neoliberal systems.
- Internally directed conditionalities address the structuring and operation of the aid recipient country's institutions and are aimed at rolling back the state systems of many developing countries.
- While the emphasis has been on the economic dimensions of good governance and the state's capacity to effectively use the aid, the Bank continued its apolitical approach to reform by focusing on efficiency in public administration, the rule of law, and transparency and accountability as the major elements to ensure economic growth and development.
  - Ignoring the question of how legitimate a government and its power structures are, the Bank did refer to citizen participation and the role of the state as pertinent governance factors having a bearing on development.

*Allocating Aid*

After a few years, it became apparent to the Bank that sociocultural and political contexts in the recipient countries—not the Western donor's preferences—primarily shape the agenda.

- Little change occurred because of resistance from entrenched socioeconomic and political interests.
- Acknowledging that conditionalities have failed to induce reforms and good government, the World Bank and the donors have shifted their focus from conditionality to selectivity in allocating aid.
  - The World Bank says that the governments better able to use aid are those with good economic performance, and aid should be linked to performance in countries with effective institutions and sound policies.
- A critic, Jan Pronk, said, "Policy improvement and better governance should not be seen as pre-conditions for development aid, but also as objectives themselves."
- Graham Harrison asserted that the Bank has a liberal worldview, which it has imposed on African states in promoting governance reforms. These prescribed reforms, he says, cannot succeed because, although the African states make cosmetic changes in response to the Bank's demands, not much in fact changes.

NOTE: Based upon past experience and current trends, for governance reforms to succeed the history and culture of the recipient country matter the most.

*IMF*

In the 1980s, the number of developing countries seeking assistance grew, the World Bank/IMF intrusions grew, and hence the number of structural adjustment programs (SAPs) became the norm and conditionality expanded.

- The IMF felt that in inducing capital flows and enhancing market confidence, it was acting as a catalyst.
- By the late 1980s, there was a backlash against the SAPs, and by the 1990s, more than half of IMF programs were failing implementation—this in the face of research that showed conditionality does not work.

*The United States*

- Two factors are mainly responsible for the Fund's governance agenda:
  - The rise of capital account openness.
  - The difficult political consequences of its adoption of structural adjustment.
- The Fund's governance policy did not necessarily reflect the primacy needs or interests of those the IMF purported to help, but rather of Western countries and Western NGOs who were far less affected.
  - Decision making at the Fund about the direction of its agenda in each country must be responsive to the country's cultural and political traditions, preferences, and sensitivities.

The National Security Strategy of the United States in 2002 provided the rationale and framework for new U.S. development assistance under a new Millennium Challenge Account (MCA).

- Noting past failures, the president said that the MCA is for projects in countries whose governments rule justly, invest in the people, and encourage economic freedom.
- The Center for Democracy and Governance in 1998 had already organized its work in five areas—democratic decentralization, legislative strengthening, government integrity, policy implementation, and civil-military relations.
- The U.S. Agency for International Development (U.S. AID) said it will work in a complementary fashion with another agency, the Millennium Challenge Corporation (MCC), “employing principles of selectivity based on commitment and performance in countries that can aspire to MCC eligibility or are good candidates for transformational development.”
  - U.S. AID identified nine principles of development and reconstruction assistance to achieve objectives.
  - The MCC uses sixteen indicators to qualify countries to pass the test they must rule justly, invest in people, and establish economic freedom.

NOTE: In 2005, there was consensus on linking assistance to performance, measuring results, and evaluation and “ownership.” A country's commitment to change and its allocation of resources are important factors to assure effective use of aid in reducing poverty.

*Conclusion*

Conditionalities have not necessarily brought about policy reforms that are sustainable over the long term.

- For reforms to succeed, domestic support, ownership, and commitment are crucial—otherwise aid dependence had a negative impact during 1982 to 1995 on corruption, rule of law, and quality of governance.
- Selectivity as a form of ex post conditionality should not penalize least developed countries by concentrating aid on good performers, most of which are middle-income countries.
- Past performance cannot be an effective indicator or guide to future performance; rather governance reforms must be the guide.
- The good governance agendas are being refined—although impossible to have a clear-cut demarcation between economic and political aspects of governance, the current confusion and ambiguities need to be further clarified.