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Rule of Law Symposium

Teaching the Rule of Law

Robert Stein*

We have heard throughout the day of the enormous amount of rule of law work going on all over the world. This primarily began in the early nineties after the fall of the Berlin Wall and the collapse of the Soviet Union.

The American Bar Association has been a leader in this work, but the work has also been carried out by dozens, indeed, scores of other organizations: national bar associations of countries throughout the world, NGOs, and several for-profit companies.¹ The ABA alone receives over \$30 million a year in grants to carry out this work, and so we know that hundreds of millions of dollars have been expended in these programs over the past eighteen years.²

From their beginnings, rule of law programs have benefited from the involvement of prominent national and international jurists and bar leaders. In the United States, several Justices of our Supreme Court have been leaders and outspoken advocates

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1. See, e.g., Checchi and Company Consulting, Inc., <http://www.checchiconsulting.com> (last visited Mar. 8, 2009); Freedom House, <http://www.freedomhouse.org> (last visited Mar. 8, 2009); International Council for Democratic Institutions and State Sovereignty, <http://www.icdiss.org> (last visited Mar. 8, 2009); International Foundation for Electoral Systems, <http://www.ifes.org> (last visited Mar. 8, 2009); National Democratic Institute, <http://www.ndi.org> (last visited Mar. 8, 2009).

2. See Robert Stein, *Leaving on a High Note*, 92 A.B.A. J. 68, 68 (Aug. 2006), available at http://abajournal.com/magazine/leaving_on_a_high_note.

for advancing the rule of law around the world. Justice Sandra Day O'Connor was a founding member of the ABA's *Central European and Eurasian Law Initiative* ("CEELI") Executive Board in 1990 and continues to be a special advisor to the ABA's Center for Rule of Law Initiatives and board member of CEELI. Justice Anthony M. Kennedy is currently a special advisor to the ABA's Center for Rule of Law Initiatives and board member of ABA-Asia. He has generously participated by telephone in classes of the Rule of Law Seminar at this law school, discussed below, in each of the past two years. Justice Stephen G. Breyer is also a special advisor to the ABA's Center for Rule of Law Initiatives and board member of the ABA's Latin American Legal Initiative. Justice Ruth Bader Ginsburg is on the board of a related ABA rule of law program, the Center for Human Rights. Numerous presidents of the ABA and state and local bars have embraced rule of law initiatives, and this support of leading lawyers and judges has been replicated in many other countries as well, particularly in the western European countries.

The involvement of these jurists and leaders gives special validation to the significance of what has come to be known as the rule of law movement. To add my first-hand observation, I have witnessed how successful these programs have been. Several presidents of countries in which these programs have been undertaken have come to CEELI meetings to express their appreciation and have said, some with great emotion, that their nation might not have developed as effectively as a functional democracy without the expert assistance of volunteer American lawyers and judges.³ The work of CEELI lawyers and judges contributed importantly to the success of the Rose Revolution in Georgia and the Orange Revolution in the Ukraine.⁴

One of the criticisms of the rule of law movement is that it has developed too quickly and too spontaneously, with practitioners responding immediately to the needs and opportunities throughout the world as soon as funding became

3. For example, the presidents of Latvia (Guntis Ulmanis), Bulgaria (Petar Stoyanov), Slovakia (Michal Kovac), and Romania (Emil Constantinescu) have all expressed this view to me.

4. In Georgia, as a result of CEELI's efforts, a decision was made to require all sitting judges to take an examination to validate their qualifications for the position; in the Ukraine, the Justices on the Supreme Court had attended a seminar on judicial independence prior to their landmark decision invalidating an election for the presidency on the grounds of election irregularities.

available.⁵ Critics have said that the subject suffers from a lack of serious scholarly review and analysis. Thomas Carothers has written:

The rapidly growing field of rule-of-law assistance is operating from a disturbingly thin base of knowledge at every level—with respect to the core rationale of the work, the question of where the essence of the rule of law actually resides in different societies, how change in the rule of law occurs, and what the real effects are of changes that are produced.⁶

Carothers has also noted: “The rule-of-law agenda on the international policy stage is of tremendous potential importance and value.”⁷ He says it is precisely because of that fact that more serious analytical research and knowledge about the actual effects of the projects are critical to the eventual success of these efforts.⁸

The course on the rule of law that has been introduced into the curriculum of the University of Minnesota Law School is one response to this call. This important Symposium is another significant response. A primary goal of mine, upon returning to academia after my years in the leadership of the ABA, was to encourage courses and scholarship on the rule of law in the law school world. Important rule of law developments are occurring throughout the world, and law students should be made aware of them. These rule of law programs should be critically examined in law school courses and in legal scholarship.

The Rule of Law Seminar that I teach at this law school is a two-credit seminar that meets once a week for a semester, which results in thirteen two-hour classes. The seminar has been taught in each of the last three years, and I believe it has been a very successful course. Enrollment demand for the course is very high, and student comments have been extremely positive. One student wrote: “Every course in law school, up to this course, seems like preparation for this course. I feel like this course puts all the pieces together for a study of what is justice.” Another student commented: “This course is why I came to law school in the first place.”

5. See generally Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* 13 (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project, Working Paper No. 34, 2003), available at <http://www.carnegieendowment.org/files/wp34.pdf>.

6. *Id.*

7. Thomas Carothers, *Rule of Law Temptations* 7 (ABA World Justice Project, Prepared for World Justice Forum, 2008), available at http://www.lexisnexis.com/documents/pdf/20080806033651_large.pdf.

8. *Id.* at 7–8.

Throughout the semester, the students work in teams of two to research and write papers on some aspect of the rule of law, and these papers are presented in the last three classes of the seminar. The papers are electronically distributed to all of the students in the seminar a week before they are discussed in class, so that after the papers are presented by the authors they are discussed and critiqued by all of the students in the class. The first ten sessions of the seminar are devoted to a discussion of the rule of law and several related concepts and issues. The students are required to read a large number of substantial writings for each class; the assigned readings for the seminar total over eight hundred pages.

FIRST AND SECOND SESSIONS: THE MEANING OF THE RULE OF LAW

The initial two sessions focus on the meaning of the rule of law. A wide range of readings is assigned to provide background for this discussion. Several sessions then follow exploring the relationship of the rule of law to a variety of related concepts and core principles.

THIRD SESSION: JUDICIAL INDEPENDENCE

One session of the seminar is devoted to the concept of judicial independence—a central element of the rule of law. Like rule of law, judicial independence is a difficult term to define. A starting point for this discussion is Alexander Hamilton's Federalist No. 78 focusing on the third branch of government.⁹

Research by the American Bar Association has revealed that "judicial independence" is a term not well understood or supported by the American public. To many, the term has the negative connotation of an "unaccountable" judiciary.¹⁰ The

9. See THE FEDERALIST NO. 78 (Alexander Hamilton).

10. See, e.g., Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 43 CT. REV. 112, 112-13 (2006) (describing threats by members of Congress against "activist" judges who were deemed too independent from the legislative and executive branches and thus became "unaccountable"); Kristine L. Roberts, *Judicial Independence Under Attack: Profession Defends Independence of Judiciary amid Concerns About Accountability*, A.B.A. LITIG. NEWS, Mar. 2007, at 1 (discussing the ABA's defense of judicial independence amid concerns over judicial accountability ballot initiatives in South Dakota and Colorado).

words “fair and impartial judiciary” receive much more support from the public, and this formulation of the concept has been consistently used by Justice Sandra Day O’Connor in her writings and speeches on this element of the rule of law.¹¹

The idea of judicial independence is examined from the standpoint of both: (1) decisional or individual independence and (2) institutional or structural independence.¹² Decisional independence refers to the absence of pressures on judges so that they may decide cases before them fairly and impartially on the facts of the specific case.¹³ Institutional independence, on the other hand, means that the judicial branch operates within a system of checks and balances free of undue pressures from the executive and legislative branches of government.¹⁴

The relative merits of both an appointive system and an elective system of selecting judges are examined in this session. Problems exist in either system of judicial selection; the challenge is to make the judicial-selection system as effective as possible in establishing an independent judiciary, whichever method of selection is used in a particular jurisdiction.

Despite the near-universal acceptance of the value of judicial independence, threats to this ideal persist.¹⁵ To combat these threats, several influential American jurists and scholars have written, spoken, and traveled extensively promoting judicial independence.¹⁶ These writings and speeches are discussed and critiqued in the judicial independence session of the seminar.

FOURTH SESSION: AN INDEPENDENT LEGAL PROFESSION

The role of an independent legal profession is also essential

11. See, e.g., Sandra Day O’Connor, *Fair and Independent Courts: Remarks by Justice O’Connor*, 95 GEO. L.J. 897 (2007).

12. See American Judicature Society, *What is Judicial Independence?*, http://www.ajs.org/cji/cji_whatjsi.asp (last visited Mar. 8, 2009).

13. *Id.*

14. *Id.*

15. See Ginsburg, *supra* note 10, at 112–15.

16. E.g., Stephen Breyer, *Judicial Independence*, 95 GEO. L.J. 903, 907 (2007); Sandra Day O’Connor, *Address at Dedication of the CEELI Institute*, CEELI INSTITUTE NEWSLETTER (CEELI Institute, Czech Republic), June 2007, at 2; Ruth Bader Ginsburg, Supreme Court Justice, *Remarks on Judicial Independence: The Situation of the U.S. Federal Judiciary 2* (Feb. 1, 2001) (transcript available at <http://aladdin.unimelb.edu.au/speeches/ginsberg.pdf>).

to establishing and maintaining the rule of law. Who will defend the rule of law if not the lawyers? A session of the seminar is devoted to understanding what constitutes an independent legal profession and what programs an independent legal profession can undertake to advance the rule of law.

FIFTH SESSION: CRITIQUES OF RULE OF LAW PROGRAMS

The seminar also includes a session examining criticisms of the rule of law work that has occurred throughout the world in recent years. Assigned readings include several papers of the Carnegie Endowment for International Peace Rule of Law series in which many of these concerns are raised.¹⁷ Lawyer and scholar Thomas Carothers, who has authored some of these papers, believes that rule of law program advocates have overestimated the level of real consensus about the rule of law, engaged in reductionist thinking about the meaning of the rule of law, raised a false promise of sequentialism in development of the rule of law, and underestimated the difficulty involved in establishing the rule of law.¹⁸ Others have written that the many rule of law projects by various NGOs are not well coordinated and not part of a comprehensive plan to advance the rule of law in a particular region.¹⁹ Scholars have noted that the goal of these projects should be to create a rule of law culture in a society, where people have the expectation that officials are not corrupt and bribery is not necessary to secure government action.²⁰ The establishment of such a culture takes time, and the critics have cautioned that rule of law advocates too often expect instant results.²¹ Each of the criticisms of Carothers and

17. *E.g.*, Carothers, *supra* note 5; Wade Channell, *Lessons Not Learned 4* (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project, Working Paper No. 57, 2005) available at <http://www.carnegieendowment.org/files/CP57.Channell.FINAL.pdf>; Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law 3* (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project, Working Paper No. 55, 2005) available at <http://www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf>.

18. Carothers, *supra* note 7, at 7.

19. See Channell, *supra* note 17, at 4–6.

20. See JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 310–46 (2006).

21. See Carothers, *supra* note 7, at 6–7.

others is examined and evaluated in this session of the seminar. In most cases the criticisms have validity, but as Carothers himself notes, “[t]hese temptations [or criticisms] do not represent fatal threats or grave dangers to the agenda but rather wrong paths that can result in wasted efforts and bad policy decisions.”²² Clearly it takes time to change a culture—perhaps more than a generation. But, what is the alternative to undertaking rule of law programs? Rather than doing nothing, our responsibility should be to assist those in the region to bring about constructive changes that will ultimately lead to the development of a culture that reflects the rule of law.

SIXTH SESSION: THE PROBLEM OF CORRUPTION

Another session of the seminar examines the difficult problem of corruption—the major threat to the rule of law in most countries. Seminar readings show that corruption is an age-old phenomenon that continues to threaten the rule of law in countries throughout the world.²³ At the same time, rule of law ideals serve as some of the strongest checks on corruption. In this session the students discuss the impact of corruption on the rule of law and actions that have been taken by governments to combat this pervasive problem. The discussion includes a review of the enforcement of the U.S. Foreign Corrupt Practices Act,²⁴ as well as international, multinational, and regional conventions against corruption.²⁵ Another way of analyzing the problem of corruption is provided by an examination of the indices of bribery and corruption worldwide published by agencies such as the World Bank and Transparency International.²⁶

22. *Id.* at 7.

23. *E.g.*, Elia Armstrong, *Combating Corruption for Development*, Oct. 10, 2002 <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN005786.pdf>.

24. *See* WASHINGTON LEGAL FOUNDATION, CONVERSATIONS WITH THE HONORABLE DICK THORNBURGH, PAUL A. VOLCKER, AND HOMER E. MOYER, JR. (2006), available at www.wlf.org/upload/winter2006.pdf.

25. *See* Homer E. Moyer, Jr., *The Emerging Worldwide Jurisprudence of Anti-Corruption Law*, in GETTING THE DEAL THROUGH: ANTI-CORRUPTION REGULATION 2007, available at http://www.gettingthedealthrough.com/narrative_pdf.php?id=47.

26. *See, e.g.*, Transparency International, Corruption Perceptions Index 2008, available at http://www.transparency.org/policy_research/surveys_indices/cpi.

SEVENTH SESSION: HUMAN RIGHTS LAW

One session of the seminar is devoted to identifying the moral content of the rule of law. Should we look to human rights law for that direction? What are the universal human rights that can be identified as being part of the rule of law in all societies and legal traditions?

EIGHTH SESSION: THE RULE OF LAW AND ECONOMIC DEVELOPMENT

Another session of the seminar explores the difficult question of the relationship between the rule of law, economic development, and alleviation of poverty. In recent years the rule of law has become an important part of any discussion of economic development. It is commonly asserted that economic development is not possible without the rule of law.²⁷ Indeed, the World Bank has made it a priority to promote legal and judicial reform as a means to alleviate poverty.²⁸ Not all scholars agree with the UNDP approach. Lawyer and Carnegie Endowment scholar John Hewko argues that no particular legal system automatically gives rise to increased foreign direct investment.²⁹ Similarly, Professor Kenneth Dam suggests that there is a "notable lack of proof" that the rule of law is necessary to attract investment.³⁰ Of course, the example of China also raises significant questions about the relationship between the rule of law and economic growth.³¹

Some writers have drawn a distinction between "thin rule of law"—with very minimal rules relating to recognition of private property and enforcement of contracts—and "thick rule of law"—a more robust rule of law that includes respect for human rights.³²

27. See Carothers, *supra* note 5, at 6.

28. See Maria Dakolias, World Bank, Speech to the EU Judiciary Representatives: The Role of the Judiciary for Economic and Social Development (Nov. 14, 2003).

29. See John Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?* 5 (Carnegie Endowment for Int'l Peace, Democracy and Rule of Law Project, Working Paper No. 26, 2002), available at <http://www.carnegieendowment.org/files/wp26.pdf>.

30. See Carothers, *supra* note 5, at 6.

31. See *id.*

32. See *Order in the Jungle: Economics and the Rule of Law*, THE ECONOMIST, Mar. 13, 2008, at 83 (discussing the book *The Rule of Law and Development*, by Michael Trebilcock and Ron Daniels, which highlights the existence of two different definitions of the rule of law: thick and thin).

NINTH SESSION: WAR CRIMES AND GENOCIDE

An important session of the seminar examines the responses society has made to the most serious of all violations of the rule of law—war crimes and genocide. The impact these atrocities have on the rule of law is enormous and can continue for many years. The prevention efforts of the international community after World War II are reviewed, but unfortunately these crimes continue to occur and are much too common in today's world. Recent examples in countries such as Kosovo, Rwanda, Sierra Leone, and East Timor are examined. Particular attention is given to the challenges of bringing accountability to those guilty of war crimes in post-conflict societies and reestablishing an independent judiciary capable of reinstating the rule of law after it has failed.

TENTH SESSION: RELIGION AND THE RULE OF LAW

Any study of the rule of law at the present time, it seems to me, must include an examination of the role of religion and its relationship to violence and the rule of law. The seminar readings include articles discussing the relationship of various religions to the rule of law.³³ One of the foremost theologians in the world, Dr. Martin E. Marty, of the University of Chicago Divinity School, leads a class discussion of the relationship between religion, fundamentalism, violence, and the rule of law.

SEMINAR PAPER

The students are graded in the seminar on a substantial paper, at least twenty-five pages, that they are required to write on a subject or issue related to the rule of law. Papers submitted in the seminar have addressed a variety of issues—for example, the problem of corruption and possible solutions or an analysis of the state of the rule of law in a particular nation or region of the world. Papers have been submitted on the impact of a particular religion on the rule of law in a specific country or countries. One paper analyzed why rule of law

33. See, e.g., Azizah Y. al-Hibri, *Islamic and American Constitutional Law: Borrowing Possibilities or A History of Borrowing?*, 1 U. PA. J. CONST. L. 492 (1999); Bernard M. Levinson, *The First Constitution: Rethinking the Origins of Rule of Law and Separation of Powers in Light of Deuteronomy*, 27 CARDOZO L. REV. 1853 (2006); Martin E. Marty, *The Religious Foundations of Law*, 54 EMORY L.J. 291 (2005).

reforms have been more successful in some countries in sub-Saharan Africa than in others and examined whether that was affected by the colonial history and traditions of those countries.

RULE OF LAW COURSES IN U.S. LAW SCHOOLS

Earlier I noted the importance of bringing into the curricula of the nation's law schools (indeed, into the curricula of law schools throughout the world) a study of the rule of law and the significant rule of law movement currently occurring in many underdeveloped countries. The Rule of Law Seminar at the University of Minnesota is a response to that need. How unique is the course at Minnesota? To what extent is this subject taught in other law schools in the United States?

A review of the curriculum at each of the two hundred ABA-accredited law schools in the country indicates that about seventeen law schools currently have courses on this subject.³⁴ The results of this survey are somewhat ambiguous because many law schools offer courses with a title that includes the words "rule of law" but that focus on a subject completely different than the issues discussed in this paper. For example, many jurisprudence or philosophy-of-law courses at law schools have a title that includes the words "rule of law."

The approximately seventeen schools offering courses on the rule of law as described in this paper represent about seven or eight percent of the nation's ABA-approved law schools. While that is a relatively small percentage of schools, a disproportionately large number of these courses are taught in some of the nation's most respected legal institutions, such as Yale, Stanford, and New York University Law Schools.

Perhaps due to the breadth of the subject itself, these courses cover a variety of concepts across diverse topics in which the rule of law plays a part. There is no standard syllabus for these rule of law courses, and each course is somewhat unique. Some courses take an approach similar to that taken in the

34. These schools include (in alphabetical order): American University Washington College of Law; Chicago-Kent College of Law; Cornell Law School; Florida Coastal School of Law; Georgetown University Law School; George Washington University Law School; Michigan State University College of Law; New York University School of Law; Seton Hall University School of Law; Stanford Law School; University of California, Berkeley School of Law; University of California, Hastings College of Law; University of Minnesota Law School; University of Utah, S.J. Quinney College of Law; University of Wisconsin School of Law; William & Mary Law School; and Yale Law School.

seminar offered at the University of Minnesota Law School—an examination of the concepts and core principles of the rule of law and its principal challenges. Other courses focus more specifically on a particular area, such as the relationship between the rule of law and economic development³⁵ or the need for the rule of law in nation building or post-conflict societies.³⁶

A significant number of courses focus on the relationship between the rule of law and economic development making it apparent that that is a critical issue in current rule of law analysis. When seeking international financial support, nations often promote internal reform efforts based on how well they exemplify rule of law ideals. As international economic development becomes more relevant to an increasingly globalized world, policy leaders have looked to the rule of law as a means to measure a nation's economic development potential. At Yale, a new seminar on "Development and the Rule of Law" examines the theoretical basis for connecting the rule of law with democratic and economic development. It addresses the importance of rule of law promotion in the competition for international economic assistance. In addition to the benefits of economic development, the seminar explores how these rule of law reform efforts affect other substantive areas such as human rights, corruption, post-conflict rebuilding, and international politics.

The course at Stanford on "International Development and the Rule of Law" appears to take a more critical approach to the subject of the rule of law and economic development, questioning the political economy of legal and judicial reform efforts in developing countries. Through a review of various case studies, the course assesses the impact of significant investments by international agencies such as the World Bank, USAID, and the IMF. The course offers an interesting perspective on the efficiency of efforts to advance the rule of law. At Stanford's "State Building and Rule of Law Workshop" students have the opportunity to design rule of law projects for new nation states. The objective is to propose rule of law reforms capable of erecting lasting legal institutions that may provide security to the most vulnerable of nations.

At least two courses at other law schools focus on the concept of the rule of law in post-conflict societies. At George

35. *E.g.*, Yale Law School.

36. *E.g.*, George Washington University Law School; William & Mary Law School.

Washington University Law School, a course on "Nation Building and the Rule of Law" examines the legal reforms that contribute to stabilizing and rebuilding societies and institutions destroyed by violent conflict. Recognizing that justice systems may have failed or become weakened by the conflict, a course on "Post-Conflict Justice and the Rule of Law" at William and Mary studies how societies can reestablish the rule of law and reform legal systems in the wake of violence.

A common theme among all of these courses however, is the difficult challenge of identifying a definition of the rule of law. This elusive concept, which writers have sought for centuries to define, continues to be a challenge and is addressed in some respect in all of these courses.

CONCLUSION

I am encouraged that courses examining the rule of law and related concepts are now appearing in the curricula of the nation's law schools. As more courses are offered and more law faculty begin to teach in this area, we can expect more serious evaluative scholarship analyzing and critiquing the rule of law work currently underway throughout the world. These programs and the subject will benefit as a more defined body of knowledge and analysis develops on the rule of law and its challenges and successes.

I am pleased to conclude this paper and this Symposium on a positive note by happily observing that the rule of law movement tsunami is beginning to reach the nation's law schools. That, I submit, is a cause for celebration.