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A Closer Look at the Rule of Law

Elisabetta Baviera

Global interactions increasingly rely on law to govern them. Today, numerous rules dominate the interactions between states and non-state parties. International courts and dispute settlement mechanisms are in place to ensure compliance with commonly agreed norms.

International Law, however, is complex and often lacks universal acceptance. Worse, its influence is disproportionally strong on the poorest countries and countries in crisis. It is in situations of poverty and conflict where international law has the most impact - for better or worse. International legal structures can provide security, stability and access to economic support, but they can just as easily prevent timely and adequate assistance. Development and humanitarian actors must increasingly be aware of their potential as well as their pitfalls.

Good Governance is easily prescribed, but must become a mindset of all involved to make the system work. Less and least developed countries are often governed by constitutions that are complex and inaccessible for their citizens. Without acceptance by their subjects, they weaken and cease to safeguard the nation state against failure. Development assistance must provide more than just models and institutions to move these countries forward.

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Introduction

The rule of law is by now firmly entrenched as a cardinal element of governance-oriented reform programs targeting developing countries, heralded by governments, intergovernmental organisations, international financial institutions (IFIs), development agencies, non-governmental organisations (NGOs), academics and other civil society entities alike as a *sine qua non* of 'good governance', development, democratisation and the protection of human rights. While this statement requires little evidentiary support, it is useful to highlight that the relationship between the rule of law and development is emphasised frequently and forcefully by many of these actors: James Wolfensohn, President of the World Bank, has stated, for example, that "…an effective legal and judicial system is not a luxury, but a key component of a well-functioning state and an essential ingredient in long-term development. … There can be no good and clean government without respect for the rule of law, nor transparent and well-functioning financial markets, nor equitable and sustainable development."[1] As early as 1996, the International Monetary Fund (IMF) was "urged by its Board of Governors to 'promote good governance in all its aspects, including by ensuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption, as essential elements of a framework within which economies can prosper.'"[2] Similarly, the United States Agency for International Development (USAID) warns that "[w]eak legal institutions endanger democratic reform and sustainable development in developing countries."[3] What emerges from these statements is that the rule of law as a policy objective is considered central not only to *economic* development, but also to further-reaching development aims including 'democratisation' and the

[1] J. Wolfensohn, speech at the Second Global Conference on Law and Justice, St. Petersburg, 9th July 2001, reported in World Bank News Release No. 2002/013/S
http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20011894~menuPK:34465~pagePK:64003015~piPK:64003012~theSitePK:4607,00.html
[2] "The IMF and Good Governance: A Factsheet", April 2003,
http://www.imf.org/external/np/exr/facts/gov.htm
[3] USAID, "Strengthening the Rule of Law and Respect for Human Rights",
http://www.usaid.gov/our_work/democracy_and_governance/rol.html

protection of human rights. Indeed, this more inclusive notion of development is a welcome progression in the work of the World Bank and the IMF, organisations that previously considered themselves constrained to 'purely' economic and financial policies, due to the restrictions contained in their constitutive documents.[4] The fiction that development policy can be formulated without reference to law, politics, and wider social issues no longer constitutes such a crippling influence on these institutions' policies, although its legacy is still felt, thanks also to the increasing volume and diversity of academic research in this field.[5]

Rule of law reforms themselves have also improved considerably since they first appeared on the international agenda; the multifarious calls from academics and some NGOs have been heeded to some extent, and international rule of law promotion policies have been refined accordingly. Top-down, formulaic and sector-specific reforms have, in some international aid circles, been supplemented or even replaced with longer-term, grassroots initiatives that seek to promote the development of a 'rule of law *culture*'. Furthermore, the intimate connection between the rule of law and human rights, as well as other deeply political issues, has been to some extent taken on board, with reforms targeting access to justice, corruption, freedom of the press and the independence of the judiciary, some of the essential elements of governmental accountability.

Nevertheless, this essay will suggest that there remain certain fundamental fallacies in the approach of the 'international aid community', particularly governmental agencies and IFIs, to the promotion of the rule of law in the context of development or transitional assistance. The enquiry will begin by taking a step back from the preceding comments, to engage in a brief terminological reflection, where the meaning and implications of 'rule of law' will be addressed (Part I). Consideration will be given in Part II to some of the problems encountered in attempts to promote it abroad, primarily by reference to Thomas Carothers' discussion[6] in relation to the *depth* of reform, which concludes that "[r]ule of law aid

[4] Article IV, Section 3 of the IMF Articles of Agreement: "… the Fund will pay due regard to the domestic social and political objectives, the economic priorities, and the circumstances of members…" Similarly, Article IV, Section 10 of the IBRD Articles of Agreement states: "… only economic considerations shall be relevant to [the Bank's] decisions."

[5] See, e.g., Amartya Sen, "What is the Role of Legal and Judicial Reform in the Development Process?", speech delivered at the first World Bank conference on Comprehensive Legal and Judicial Development.

[6] Thomas Carothers, "The Rule of Law Revival", *77(2) Foreign Affairs 95* (1998)

has been concentrated on more easily attained [i.e. more shallow] … reforms."[7] As argued above, the concerns he raised as early as 1998 have to some extent been redressed, but much remains yet to be improved. The reasons for such persistent shortcomings will be explored in more detail in the main body of the essay, Part III. Special consideration will be afforded to conceptual critiques, aimed at the very foundations of international and foreign legal assistance. In particular, Susan Marks' illuminating analysis[8] of efforts to achieve political democratisation in developing countries will be discussed in relation to the 'rule of law project'. This will lead to the elaboration of wider criticisms voiced by David Kennedy[9] exposing the sidelining of politics he claims is produced by the flawed assumptions underpinning the 'international governance movement'. The implications of these criticisms for the promotion of the rule of law abroad will be considered. Kennedy will provide a springboard to address the fundamental problem that rule of law promotion initiatives lack sound philosophical and theoretical credentials; this will be submitted as a further underlying reason for their discouraging outcomes.

The terms of this enquiry are intentionally broad. What is undoubtedly lost in specificity is gained, however, in insight, since a broad-brush approach highlights that the shortcomings analysed here span far beyond the rule of law.

[7] Carothers, *infra* note 18
[8] Susan Marks, "Guarding the Gates with Two Faces: International Law and Political Reconstruction", *6 Indiana Journal of Global Legal Studies 457* (1999)
[9] David Kennedy, "The Forgotten Politics of International Governance" *2001(2) European Human Rights Law Review 117*

Part I. What is the Rule of Law?

There is no conclusive or exhaustive definition of the rule of law, nor is there generalised concurrence on its components and requirements. The debate among English-speaking Western academics has centred on the enumeration of criteria that 'law' must comply with in order to warrant its very legal status. In other words, the rule of law is described as a yardstick by which to determine *legal validity*, so that a pronouncement or order falling short of the rule of law's criteria cannot *be* law at all. The content of such criteria has been the subject of wide disagreement, hinging on far deeper divergences between legal theorists surrounding to the nature of law and its appropriate function and status in society. For example, in his treatise "The Province of Jurisprudence Defined", John Austin branded 'law' any pronouncement emanating from the sovereign of a societal grouping, which he identified in the person or body enjoying the habitual obedience of the subjects. His image of the rule of law, therefore, was one depending purely on pedigree, or provenance. 'Positivists',[10] whose underlying theoretical aim is to keep *legality* entirely distinct from and independent of *morality* or other value systems,[11] have inspired formalistic descriptions of the rule of law, comprising of criteria that prescribed, *inter alia*, predictability, clarity, accessibility, non-retroactivity, equal application to all, as constitutive of legal validity. We can term this approach the 'rule of law as fairness'. Other philosophers, on the other hand, have insisted that, as well as formal criteria, the rule of law encompasses certain *moral* values, such as "the common good",[12] which preclude the legal validity of an incompatible order or edict. Here, we see cognition of the 'rule of law as justice'.

In addition to conceptions of the rule of law assigning to it the function of determining legal validity, the *political legitimacy* of the state has been the focus of other theorists' work. They have tailored their definitions or descriptions to that core intent, emphasising a very different understanding of the phrase 'rule of law': not

[10] Such as Austin (1790-1859), Bentham (1748-1832), Kelsen (1881-1973) and, more recently, Joseph Raz.
[11] A seminal debate on the connection between law and morality, fundamental to the understanding of the rule of law in the Anglo-Saxon tradition, is that between H.L.A. Hart and Lon Fuller. Hart, "Positivism and the Separation of Law and Morals", *71 Harvard Law Review 593* (1958); Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart", *71 Harvard Law Review 630* (1958)
[12] John Finnis: "…[M]oral norms justify (a) the very institution of positive law, (b) the main institutions, techniques, and modalities within that tradition (e.g. separation of powers), and (c) the main institutions

the rules by which 'something' must conform to in order to *be* law, but a state of affairs, or a system, in which the *law rules*, as opposed to the rule of force, or the rule of arbitrary power. Perhaps this approach is best described as the 'rule of law as legitimacy',[13] the one which most resembles that of the 'international governance movement'. It places the rule of law in the context of '*democracy*', perhaps within the concept of democratic rights or, alternatively, as a prerequisite to the very exercise of democratic rights. Other reflections on the rule of law, those by the proponents of so-called "Asian values", espouse yet another concept, that of 'rule *by* law', which appears to exclude the government from the province of law, while ensuring that it will use law (as opposed to arbitrariness) to rule others.[14] Each philosopher, then, has espoused or constructed a definition or description of the 'rule of law' in accordance with his or her more general theories of law. Similarly, it will be argued, *which* 'rule of law' is advanced in the context of international legal assistance is also heavily influenced by the promoter's purpose, allegiances, and, moreover, assumptions.

The rule of law now appears suitably murky and evasive. While this stream of ambiguities is recognised, to varying degrees, by some of the actors in the field of "legal development,"[15] including the World Bank,[16] one particular set of components of the rule of law appears to have been adopted with relative uniformity by the 'international community' as worthy of promotion anywhere. This is usefully encapsulated by Thomas Carothers: "The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century."[17] From the preceding

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regulated and sustained by law (e.g. government, contract, property, marriage, and criminal liability)." (*Natural Law and Natural Rights*, p. 290)

[13] These categories of rules of law are not in the least clear-cut: there is considerable overlap. They are nevertheless useful to identify the different elements that can be placed at the centre of a rule of law theory.

[14] Although most proponents of "Asian values" have been discredited for being apologetics of authoritarian governments rather than disinterested academics. For example, Sen states: "I should not, I suppose, be too critical of the lack of scholarship supporting these beliefs, since those who have made these claims are not scholars but political leaders, often official or unofficial spokesmen for authoritarian governments. It is, however, interesting to see that while we academics can be impractical about practical politics, practical politicians can, in turn, be rather impractical about scholarship." ("Democracy as a Universal Value". *10(3) Journal of Democracy 3*, p. 14.)

[15] Sen, *supra* note 5, p. 6

[16] Matthew Stephenson, "The Rule of Law as a Goal of Development Policy", brief prepared for the World Bank, http://www1.worldbank.org/publicsector/legal/ruleoflaw2.htm

[17] Carothers, *infra* note 18, p. 96.

theoretical introduction, it is clear that behind Carothers' definition lie several *choices*: here, the rule of law is not merely a formal concept, it relates to the legitimacy of government, and incorporates moral criteria in the form of human rights. Indeed, a further substantial choice is contained in Carothers' explicit inclusion of *civil and political rights*, in his implicit exclusion, that is, of economic, social and cultural rights. This particular conceptualisation of the rule of law is the basis for various types of legal assistance, such as constitutional drafting, anti-corruption programs, or the promotion of judicial independence and accountability. Crucially, the choice of aid programs is conditioned by the adoption of one theory of rule of law as opposed to another. Carothers' criticism of such programs will be briefly analysed in the following section.

Part II. The Stumbling-Blocks of Rule of Law Reform

Thomas Carothers' article "The Rule of Law Revival"[18] criticises efforts to provide "rule of law aid" for not extending sufficiently deep into the legal culture of most recipient countries. Indeed, he warns that the rule of law's "…sudden elevation as a panacea for the ills of countries in transition from dictatorships or statist economies should make both patients and prescribers wary."[19] He suggests that rule of law promotion programs can be categorised into three types, along a scale of depth of reform: the drafting and re-drafting of legislation (type one); the fortification of legal institutions, such as courts, with a view to rendering them "more competent, efficient and accountable"[20] (type two); measures to curb governments into submission to the law (type three). While "…the desirability of the rule of law is clear…",[21] he accuses many reform programs of faltering except (perhaps) as regards the first and second of these categories. In other words, foreign and international assistance in 'strengthening' the rule of law has not fulfilled the expectation that it might encourage government compliance with the rule of law's 'fundamental principles'.[22] The more intricate (and most meaningful) objectives of eradicating cultures of impunity, achieving a degree of government accountability and respect

[18] Carothers, "The Rule of Law Revival" *77(2) Foreign Affairs 95* (1998)
[19] *Id.* p. 95
[20] *Id.* p. 100
[21] *Id.* p. 99
[22] That is, the fundamental principles that underpin a particular *choice* of rule of law.

for the law, as well as for human rights, or securing judicial independence have, he claims, generally drawn negligible benefits from these programs. Carothers finds some remarkable exceptions in certain Eastern European countries, such as the Czech Republic and Hungary.[23] It is no coincidence that they are new member states of the European Union (EU): with a more compelling incentive than some of their neighbours to 'democratise' and satisfy the various other accession requirements, including those relating to the rule of law, these countries harvested the fruits of a concerted drive from within, not merely from the legal aid they received from the EU. Rule of law reform initiatives alone, then, are insufficient measures to beget the deeper and more substantial change that the rule of law truly demands.

Part III. What Goes Wrong?

Carothers ascribes the disappointing overall outcome to, *inter alia*, "… the assumption that external aid can substitute for the internal will to reform."[24] Further, he accuses the myriad of organisations and government agencies toiling to foster the rule of law of poor co-ordination, both with respect to practicalities and, moreover, in their very definition of the rule of law. "Transitional countries are bombarded with fervent but contradictory advice…"[25] Naturally, the underlying objectives of most donors and agencies play a significant role in determining outcomes: a focus on commercial and financial law drafting in order to create a viable environment for foreign investment is not designed to effect deep transformations with respect, for example, to human rights protection. Yet many would argue that the latter is a crucial component of the rule of law. Of course, creating an environment where business is viable is conducive to economic development; many argue that tenets of 'democracy' or human rights are strengthened in the long run as a 'spill-over effect' of economic activity. Even if we accept that *democratic* rights flow from *economic* entitlements, which the following section of this essay is devoted to questioning, this analysis nevertheless overlooks two fundamental questions, the answers to which are to a great extent determined

[23] *Id.* p. 101
[24] *Id.* p. 105
[25] *Id.* p. 104

by the *choices* underpinning rule of law reforms: whose economic activity do *specific* financial and commercial laws foster? Moreover, whose democratic rights do particular *selected* 'models' of rule of law enshrine?

Attention must at this stage be afforded to far more exacting critiques of international and foreign legal assistance, firstly by reference to Susan Marks' line of argument in "Guarding the Gates with Two Faces: International Law and Political Reconstruction."[26]

1. Marks – 'Low Intensity Rule of Law'?

Susan Marks' argument requires some preliminary background, which serves the further purpose of introducing Kennedy's critical theory approach. She draws on a seminal essay by Kennedy,[27] in which he deconstructs common[28] perceptions surrounding the contrast between economic policies within the European Community (as per the 1992 program) and those of Eastern Europe after 1989. In particular, Kennedy questions the received wisdom that the latter are the result of a development which sharply breaks from a previous, radically different path, and that the former, on the other hand, represent developments along a continuum, or "points of continuity."[29] This contrast led to the perception that Western Europe was 'ahead' on the road to economic development, while their Eastern cousins had only in 1989 embarked on the same path. Kennedy alleges that this understanding was in no way logically necessary: the EC program could have been perceived as a novel and unprecedented form of supranationalism, whereas Eastern European policies, influenced, and in many ways dictated, by the international trade regime, might have appeared merely a further step along the track to modernisation. "A geographical divide thus became also a chronological divide, separating points reached in a developmental or evolutionary progression."[30] Therefore, the *choice* of viewpoint justified the international community's insistence on Eastern European countries' adoption of crude capitalist measures, which could indeed be termed "pseudo-

[26] Marks, *supra* note 8
[27] Kennedy, "Turning to Market Democracy: A Tale of Two Architectures" *32 Harvard International Law Journal 373* (1991)
[28] Among commentators, particularly those heralding the new age of 'international legal renewalism' after the normative drought of the Cold War.
[29] Marks, *supra* note 8, p. 459.
[30] *Id.*

capitalism,"[31] since no 'developed' nation embraces them to the extent that they are encouraged abroad.[32]

Marks applies a similar deconstructive method to a related and influential sphere of 'international normative convergence': democratisation. Her analysis is highly pertinent to our present discussion, because promoting the rule of law is an integral part of the 'democratisation project'. Why, she queries, is liberal democracy still nothing but a distant dream[33] for many countries in the developing world, despite "…so many national conferences, new constitutions, and multiparty elections, supported by so many grassroots networks and armies of international consultants and observers…"?[34] In the light of the preceding exposition of Carothers' argument, and of the interconnectedness of the rule of law with democracy, the same question is warranted with respect to the crusade to promote the rule of law. Marks suggests that the 'democratic' frameworks supported abroad, the prime example of which are elections, are but a shadow of the democratic institutions, principles and 'culture' which we in the West allegedly enjoy. Instead, what (if anything at all) the recipients of political reconstruction aid inherit is "low intensity democracy", an "undemanding and highly formal conception of democracy, in which the holding of periodic multiparty elections is taken largely to suffice, and more far-reaching institutional changes are held to be optional extras."[35] This analysis echoes Carothers' critique, outlined above, of the depth (or the lack thereof) attained by rule of law reforms on the international reconstruction agenda, which often result in little more than what we might term 'pseudo-' or 'low intensity rule of law'.

What factors would be helpful to explain the 'dilution' of rule of law principles? To address this question, further mention of the means and ends of specific reforms is required in the first place. This will lead to a critique of an evolutionary perspective on development, including rule of law reforms. The wider ideology behind that conception will then be addressed, and Kennedy's poignant stance will be examined in that context.

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[31] This term is taken from Alice Amsden et al, *The Market Meets its Match: Restructuring the Economies of Eastern Europe* (1994), cited in Marks, *supra* note 8, at footnote 11, p. 463

[32] Furthermore, neither were they adopted in the West's economic development process, on the contrary, protectionism and regulation were common.

[33] A 'dream', it must be emphasised, which is fuelled by the international community's stated aims in their efforts to promote democratisation.

[34] Marks, *supra* note 8, p. 464

a. 'Means and Ends'

Returning to the statements indicative of the Bretton Woods institutions' policy, quoted above, the key relationship that these bodies have identified, which drives them to promote the rule of law is candidly stated: they affirm that the rule of law is indispensable to "…well-functioning financial markets…"[36] and to "…a framework within which economies can prosper."[37] The objective here is not to consider the moral or ethical worth of such motives, given the nature of the institutions, but rather to examine the possible logical consequences of 'pegging' the rule of law to specific economic objectives. Marks considers why the democratisation process frequently leads to "low intensity democracy", and concludes that "…the market itself offers few incentives for an ambitious democratic agenda."[38] This could also apply to the rule of law: the market does not require that governments respect human rights, or that they be constrained in their actions and policies by principles of accountability, responsibility and equality. The market is capable of prospering with minimalist rule of law criteria, the formal criteria listed above, including predictability, clarity, accessibility, non-retroactivity, equal application to all. Crucially, however, these principles need only apply to laws governing the functions of the market: trade partners and investors must be enabled to predict the outcome of their commercial transactions: they therefore gain from *commercial and financial* laws that apply equally *to them*. Provided the absence of a 'true' rule of law does not create conditions of instability so severe that transactions are infeasible and investors kept at large, the criteria employed to determine the 'existence' of the rule of law, in the light of the ends identified by the Bretton Woods institutions, are met by 'cosmetic', sector-specific reforms to the legal system. Ultimately, is there really a strong incentive to go much deeper? Has the "rule of law" morphed, on its journey from the sphere of Western political philosophy to that of 'international development ideology', into the 'rule of the market'?

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[35] *Id.*
[36] World Bank, *supra* note 1.
[37] IMF, *supra* note 2.
[38] Marks, *supra* note 8, p. 466

b. Is Development an Evolutionary Process?

I would turn back to Carothers' essay at this stage, for he makes a statement which Marks would fundamentally disagree with and which is central to the preceding discussion of means and ends. He displays a belief in an *evolutionary* conception of the development of the rule of law: "Around the world, the *movement toward* the rule of law is broad but shallow."[39] Further, he claims that "[t]he widespread embrace of the rule of law imperative is heartening, but it represents only the first step for most transitional countries on *what will be a long and rocky road*."[40] Does Carothers accept that there is a 'road map' to the rule of law, and, moreover, that this path must begin with "type one" reforms, those measures that focus on drafting and, as suggested above, often revolve around the commercial and financial sectors?

Marks, on the other hand, would claim that this assumption is not only fallacious, but also counter-productive to the development of the rule of law properly understood. In relation to low intensity democracy, she argues that a "…linear, evolutionary conception of modernization encourages policymakers to treat reconstruction as a matter of "transition" undertaken in defined stages."[41] It is assumed, in other words, that the transition must be slow, and painful, and that the final destination is predetermined; this obscures the fact that much of the 'pain' is created by acrimonious "pseudo-capitalist" measures promoted by IFIs, *inter alia*. Thus, she identifies the inherent dangers of treating *democratic* transition as inextricably linked to *market* transition: the latter comes to be perceived as part of a morally justifiable "crusade for freedom".[42] Importantly, however, it is not obvious that what many in the 'international aid community' identify as the 'first steps' of this enterprise can lead, in fact, to democracy, development, or freedom.[43] So for the rule of law, then: does there exist solid evidence that superficial, selective and market-oriented reforms are capable of producing a sea change in governance culture, respect for human rights and law-abiding governments? Especially if "…widespread embrace [without more] of the rule of law imperative…"[44] by many governments is perceived as an indicator of 'improvement', or 'development', does

[39] Carothers, *supra* note 18, p. 103 (emphasis added)
[40] *Id.* p. 104 (emphasis added)
[41] Marks, *supra* note 8, p. 469
[42] *Id.* p. 467
[43] Indeed, whether they even lead to *economic* development is also contested. See, e.g., Amartya Sen, *Development as Freedom* (1999)Ch. 2
[44] Carothers, *supra* note 18, p. 104

this *imprimatur* not run the risk of clouding authoritarian and ruthless governments in an aura of international legitimacy (albeit of an embryonic, 'initial' nature), thus turning the stern gaze of the 'international community' elsewhere and leaving local actors with an even steeper hill to climb towards the 'rule of law peak'?

c. Democratisation as Ideology

Finally, Marks alludes to the elevation of international policies promoting 'democratisation', which she shows to be the result of specific economic and political choices, to the status of *ideology*,[45] carrying an almost divine, incontrovertible character. This she attributes to residual perceptions of the 'ideological divide' that operated during the Cold War, which lead to simplistic and often misleading juxtapositions: capitalism vs. socialism, market economies vs. plan economies, or liberal democracy vs. oppressive one-party systems. In a sense then, the demonisation of the Communist Block might have engendered a deification of what are perceived to be cardinal opposites to the economic and political models of Stalinist Russia. While we can accept that 'democracy' in its abstract form, that institution which affords "[e]veryone … the right to take part in the government of his [or her] country, directly or through freely chosen representatives",[46] and incorporates notions relating to the rule of law, is indeed an ideology, and a venerable one at that, nothing justifies the ideological pre-eminence of *specific models* supposedly furthering that ideal. I turn now to David Kennedy for elucidation on why this nonetheless appears to have occurred.

[45] Marks, supra note 8, p. 469
[46] Universal Declaration of Human Rights (1948), Article 21(a)

2. Kennedy – "Reclaiming Politics"[47] from Governance

Kennedy presents us with a challenging perspective on international governance,[48] forcefully advancing that it has in various ways 'invaded the sovereign territory' of politics. With rule of law reform at the forefront of the international governance 'crusade', it is interesting to consider the implications of his contentions on our present discussion. Kennedy rightly suggests that the international governance sector takes a "…managerial and technocratic approach to international affairs…",[49] revealed by the relatively formulaic 'models' of governance it prescribes to developing and transitional countries. From a Realist theoretical perspective, he contends that such a perspective is dangerous, because it "…ignores and conceals real political choices…",[50] which have shaped the models 'transplanted' abroad. My brief discussion of the concept of 'rule of law' has already highlighted that to assume the existence of *one* rule of law is misleading, and that the attention must not be diverted from questions as to 'which' rule of law. Perhaps, then, the consistent adoption of the rule of law 'models' such as that described by Carothers[51] has created the illusion that it is 'the' rule of law.

Consistently with Marks' contention that governance blueprints, or 'models' have attained the higher status of ideologies, Kennedy provides certain provoking explanations for this elevation, and discloses a paradox: it is the very fact that we characterise *political* institutions such as democratic governance, the market economy and the rule of law as *bureaucratic* structures that has led to their glorified status. I would argue that there is much to be said for Kennedy's observation. To a great extent, I believe, the 'international community' endeavours to avoid 'imperial' connotations,[52] particularly uncomfortable for the West due to its colonial past and its present pre-eminence. Therefore, it is keen to present its 'exports', models for democracy or the rule of law, as value-free, liberated from the controversy and relativity of politics,[53] and divorced from their origins: Western political and legal philosophy. Casting a technocratic light on these profoundly political ideas and aspirations renders them more 'manageable'; they become 'commodities', exportable

[47] Kennedy, "The Forgotten Politics of International Governance", *supra* note 9, p. 119.
[48] *Id.*
[49] *Id.*, p. 117
[50] *Id.*
[51] Carothers, supra note 18 p. 96
[52] Michael Ignatieff concisely argues this point in the Introduction to his "Empire Lite: Nation Building in Bosnia, Kosovo and Afghanistan."

without apparent interference in local cultures or politics. Here is Kennedy's paradox: perhaps the belief that the 'dirty' sphere of politics has been evaded, while the process of transplanting Western political capital continues to thrive, could have led to the elevation of these 'models' to the status of ideology – they are the least contentious ideology conceivable, an allegedly 'value-free ideology'. The resulting oxymoron is obviously flawed, however: ideology must by definition include values. Kennedy contends that these have been "forgotten", obscured by 'models' misleadingly characterised as 'apolitical', and thus, 'universal'.

I must re-emphasise at this stage that the *aspirations* expressed through the concepts of 'democracy' and 'rule of law' are indeed universal: we do all have the right to influence our governance, to be treated equitably by the law, to be capable of planning our future according to the law, to enjoy fundamental rights and freedom from arbitrary power. Here I am combining the three 'models' of rule of law that I described above: rule of law as *justice*, as *fairness*, as *legitimacy*. Perhaps the resulting concoction is somewhat closer to the 'real' principles behind the rule of law. They are *not* Western values at all; rather, it is their embodiment in specific 'models' that is the fruit of Western political philosophy. Amartya Sen writes: "The practice of democracy that has won out in the *modern* West is largely a result of a consensus that has emerged since the Enlightenment and the Industrial Revolution, and particularly in the last century or so. To read in this a historical commitment of the West--over the millennia--to democracy, and then to contrast it with non-western traditions (treating each as monolithic) would be a great mistake."[54] Could it be that we have conflated principles and models? 'Ought' and 'Is'? Carothers himself mistakenly speaks of 'the' rule of law as "…a venerable part of *Western political philosophy* enjoying a new run as a rising imperative of the era of globalization."[55]

[53] A term that has acquired, I believe, increasingly negative connotations.
[54] Sen, "Democracy as a Universal Value", *supra* note 14, p.15
[55] Carothers, supra note 18, p. 95 (emphasis added)

Now, having identified what I believe are the universal values of the rule of law, I turn back to Kennedy's critique of international governance to suggest, as he does, that political debate is fundamental to reach the rule of law 'model' which best *realises* the universal principles in culture-specific contexts. Therefore, I would follow his lead to conclude that a technocratic approach to 'spreading' the rule of law, with its misplaced reliance on "nonideological"[56] models, or blueprints, could indeed be the crucial fallacy that has prevented a sea-change in 'good governance' despite the continuing endeavours of the international legal aid community or, more realistically, those members of that community who truly have the universal realisation of the rule of law and related universal values at heart.

Conclusion

With this essay I have sought to highlight that, despite general improvement in international and foreign rule of law promotion strategies, there remain fundamental and extremely detrimental problems relating to the underlying presumptions that such endeavours rely on. The negative impacts of these assumptions are multifarious. For example, rule of law programs based on flawed logic or presumptuous authority might lack, in the eyes of the targeted society, the legitimacy necessary to their efficiency. The perceived legitimacy of these initiatives is all the more fundamental since, as I have argued, legitimacy is itself a fundamental component of 'the' rule of law. Worse still, as Kennedy argues, legal reforms based on models arising from decades Western political debate can actually be detrimental, for they limit or even suppress the crucial "global political debate" (as opposed to merely Western) which could lead to the identification of other models, better suited to specific contexts. Surely, however, the most disheartening of flawed assumptions is that we in the 'West' are the prime guardians of universal principles of fairness, justice and legitimacy. In the light of this final remark, it is perhaps a consolation that this essay has provided more questions than answers.

[56] Another mistaken view by Carothers: to corroborate his contention, which is acceptable, that "…Western policy-makers and commentators have seized on the rule of law as an elixir for countries in transition", he makes the following statement, which is unacceptable: "[d]espite the close ties of the rule of law to democracy… it stands apart as a nonideological, even technical, solution." Carothers, supra note 18, p. 99