

Chapter 1: Rule of law temptations

Points of this class:

(1) Original meaning of the Rule of Law, and its development

(2) Understanding the various and sometimes contradicting understandings on the RoL, and its consequences.

(3) Problems of the RoL reform projects.

1. Meaning of the RoL:

The most essential meaning of the "rule of law" is that no one can be above law. "Law", in this context, is broader concept than mere legislations.

Originally, the "rule of law" is a concept rooted in Anglo-Saxon (England) law. In 1215, the King of England, John, accepted *Magna Carta* (the Great Charter) in order to have support from Barons (feudal rulers). In *Magna Carta*, John recognized customary rights of Barons, and that even king had obligation to obey customary law of England.

In 17th century, the significance of *Magna Carta* was reinvented again under the atmosphere of the civil revolution in England. In 1688-89, as a result of confrontation with the Parliament, James II, the king of England, fled to France, and the parliament invited William III and his wife, Mary, from the Netherlands to England to come to the throne. This event is called the Glorious Revolution.

In this event, William III and Mary issued the "Bill of Rights" that recognized the supremacy of the Parliament to the King and customary rights for property and freedom of English subjects.

Both *Magna Carta* and the "Bill of Rights" included elements of the RoL, such as supremacy of law, limited power of king, protection of human rights, and so on.

* compare to "rule by law".

2. Broad consensus on the "rule of law", but on detail... reductionism and sequencing

As Carothers points out, "rule of law" was accepted by many governments for:

- a. facilitation of market economy -- legal and institutional predictability and efficiency,
- b. democratization -- new constitutions, electoral systems, political and civil rights
- c. alleviation of corruption and ordinary crimes

However, each governments, agencies as well as individuals "may all proceed with putatively common rule-of-law agenda but in practice pursue quite different preoccupations, either in relative isolation from each other or sometimes at cross

purposes."

Given this reality, it might be significant to us to review what the RoL mean. Here, I explain a wide spectrum of the RoL by referring the "thin concept" of the RoL and the "thick concept" of the RoL.

■ **Thin concept of rule of law**→"formal or institutional aspects of rule of law"

For example...

- a. rule or norm for determining which entities may make law
- b. law must be made by an entity in accordance with such rules and norms to be valid
- c. accessibility to law
- d. generally applicable (equality before law)
- e. clarity, consistency, stability and non-retroactive
- f. enforceability
- g. reasonability

These elements are considered necessary for social stability (free from Hobbesian chaos), preventing arbitrary action of government, securing predictability (of contract), efficient dispute resolution and legitimate government. From the institutional viewpoint, capable legislature, efficient implementation system (both administrative and judicial), due process (impartial court, clear rules of evidence etc.) and skilled lawyers are necessary.

*The RoL reform with this concept has minimum political implication. So, you may understand why the World Bank can be the biggest donor of the RoL reform for developing countries.

(See *Article IV, section 10 of the IBRD's Articles of Agreement*: "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.")

■ **Thick concept of rule of law**→"basic elements of thin conception"+"elements of political morality"

For example, those systems should exist in "rule-of-law" state according to "thick concept":

- a. free-market capitalism
- b. democratic form of government
- c. protection of property rights and freedom (classical human rights)

However, certain states may claim that they have rule of law even though their economy is not free-market capitalism. For example, Scandinavian countries and Germany are very different from free-market system, and property rights in those countries are heavily restricted from the US view. But, no one will say that those countries lack the RoL.

If so, how about the case of Asian developmental states with very strong state intervention to economy, for example, Malaysia and Singapore? Or central planning states such as, say, Cuba?

Actually, various economic arrangements, various forms of governments and various conceptions of human rights can not be compared by single measure.

While certain aid agencies putting emphasis on human development (e.g. the UNDP) may say that the RoL inevitably entails political participation, others will concentrate their legal reform effort to formal institution only according to thin concept in order to avoid lengthy political argument.

Just see the spectrum of conception of human rights:

- a. libertarian -- personal freedom is the highest value
- b. classical liberal --- protection of property rights and freedom through the social contract
- c. social welfare liberal --- certain limitation on property rights and state intervention to private sphere
- d. communitarian --- personal rights must be implemented for its social function
- e. Asian value --- duty for community is heavier than individual rights.

3. Ease

Simplistic perspective on legal transplant

Instrumental view on the law

Misunderstanding about the social status of legal elites in developing countries.

law and development (LDM) in 1960s - 1970s

As the author indicates the "rule of law" reform project is not mere transplantation of a rule or rules from one country to another. David Trubek and Mark Galanter criticized the experiment of "rule of law" reform project in earlier year, so called "Law and Development Movement", because the lawyers involved in the LDM supposed the reform too much instrumentally and mechanically.

According to Trubek and Galanter, problems of the LDM are as follows:

- a. transplanting US legal system --> removing traditional barriers and change economic behavior
- b. unilineal development view (modernization theory) --> "underdevelopment = backwardness", "Emulating the trajectory of western industrialized countries"
- c. based on the view of "liberal legalism": purposive, pluralistic procedure, equally applicable through judiciary, and respected by citizens --> idealized view of US law
(*see also, p.28 of the text.)

	Donors	Projects	Counterparts
1960s	the United States (judge advocate office)	<ul style="list-style-type: none"> –Education, Training (US law/ American history of political thought/ Legal English, distribution of US law textbook and English law dictionary, Training for prosecutors in US) –Support for democratic system (drafting election law, the Law Society of Free Vietnam) –Vietnam Law Study (Collection, translation and systemization of Vietnamese law, Lawyer system in Vietnam, Research about land transaction law, research about the improvement of private law) Other (Legal program for improvement of military efficiency) 	Law school, Law students, staff of the Ministry of justice, lawyers, judges, judge advocates, legal scholars
1990s-	UNDP, World Bank, Asian Development Bank, Denmark, Sweden, Canada, France, Japan, Australia, the United States, Private foundations, Universities, NGOs, Law firms	<ul style="list-style-type: none"> –Economic Laws (property law, governance process, commercial law, financial law, foreign investment law, environment protection law, banking law, dispute resolution system, labor law, ownership law, maritime law, petroleum resource law, mineral law) –Justice system (legal information, lawyer training/ legal education, criminal/ civil procedure, penal/ private law, family law) –Empowerment of administrative capacity (administrative law, official procurement, water policy, improvement of institutional capacity) –Democracy/ Human rights (promotion of human rights, legal advising service) 	Ministry of justice, Ministry of planning and investment, Parliament, Court, Prosecutor office, Ministry of water resource, Ministry of finance, Board of audit, Ministry of transportation, National environment agency, local governments, law schools, training institutes, Institute of state and law, Ministry of construction, Ministry of education and training, Ministry of foreign affairs, Agency of education and science, lawyers

Comparing legal technical assistance to Vietnam in 60s and 90s. source: Prugh (1975) and Rose (1998)

[References]

- Rose, Carol V., 1997, “The ‘New’ Law and Development Movement in the Post-Cold War Era: A Vietnam case study”, *Law and Society Review*, v.32 n.1, pp.93-140.
- Prugh, George S., 1975, *Law at War: Vietnam 1964-1973*, Department of the Army, Washington D.C.
- Trubek, David M., & Galanter, Marc, 'Scholars in Self-estrangement: Some reflections on the crisis in Law and Development Studies in the United States', *Wisconsin Law Review* vol.1974.