

**DAVID MARSHALL, *THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD*, CAMBRIDGE, MA, HUMAN RIGHTS PROGRAM, HARVARD LAW SCHOOL, 2014**

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Prescribed as the cure-all for the “ills of countries in transition from dictatorships” to “statist economies”,<sup>1</sup> the rule of law revival began in the mid-1980’s in Latin America and has since been promoted by international donors and development banks in almost all corners of the world. In the last two decades, the rule of law *revival* has since transformed into a “rule of law *paradigm*”.<sup>2</sup> Today, more than ever before, the rule of law is considered key to “sustainable political and economic development” and has become “*the* central policy” in international development cooperation.<sup>3</sup> Nonetheless, the rule of law has also come under increasing criticism. In particular, it has been criticized for being “inadequately theorized”, which has led not only to considerable disagreement over its contents,<sup>4</sup> but also fears that “the rule of law might devolve to an empty phrase” completely devoid of meaning.<sup>5</sup> This criticism is fuelled by the “parallel conversations” that are taking place between academics who focus on the rule of law’s end purposes and ideals and practitioners who are mainly driven by its institutional attributes.<sup>6</sup> While rule of law scholars increasingly call for “focus and modesty” to rule of law reform efforts, the international rule of law movement “remains undeterred from adopting ‘comprehensive’ whole-system approaches.”<sup>7</sup>

Stemming from a workshop convened by the Human Rights Program at Harvard University in November 2013, the book *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* grapples with some of these criticisms by bridging theory and practice. The editor, David Marshall, is the chief of the Global Issues Section of the New York Office of the High Commissioner for Human Rights with field experience in post conflict states such as Afghanistan, Iraq, Kosovo, Nepal and South Sudan. He brings together more than a dozen rule of law

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<sup>1</sup> Thomas Carothers, “The Rule of Law Revival” (1998) 77:2 Foreign Affairs 95 at 95-6.

<sup>2</sup> Matthias Kötter & Gunnar Folke Schuppert, “Applying the Rule of Law to Contexts Beyond the State” in *Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer, 2014) 71 at 71.

<sup>3</sup> *Ibid* at 71–2.

<sup>4</sup> R P Peerenboom, *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (London, New York: Routledge, 2004) at 33.

<sup>5</sup> Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, New York: Cambridge University Press, 2004) at 114.

<sup>6</sup> Rachel Kleinfeld, “Competing Definitions of the Rule of Law” in *Promoting the Rule of Law Abroad: in Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006).

<sup>7</sup> David Marshall, *The International Rule of Law Movement: a Crisis of Legitimacy and the Way Forward* (Cambridge, MA: Human Rights Program, Harvard Law School, 2014) at xiv [Marshall].

practitioners from the United Nations (UN), the World Bank and the Open Society Justice Initiative, with research affiliations to Stanford University, the University of Pittsburgh and London School of Economics, to analyse case studies and share lessons learnt and best practices in an attempt to restore some of the legitimacy that, according to them, rule of law reform efforts have lost.

The resulting compilation of essays covers a diverse set of case studies on rule of law projects focussing primarily on post-conflict and fragile states, where international rule of law reform has received the most attention. Case studies touch upon a wide breadth of issues such as land rights in Liberia, Uganda and Mozambique; criminal prosecutions in Nigeria; peacekeeping in the Solomon Islands; and health services accountability in Sierra Leone. While the book studies the experiences of rule of law “recipients”, it places a strong emphasis on the work of rule of law “reformers”. Several chapters are dedicated to an analysis of how the professional field of rule of law reform is organized across the United Nations, the World Bank and bilateral donors. With such diversity of experiences and perspectives, Marshall is careful to caution from the beginning that the book is “intended to raise questions” more than “provide definitive answers”.<sup>8</sup>

The compilation begins with an overview of the definitional challenges underlying the concept of the rule of law, emphasizing its contested nature. Every organization and scholar seems to have a slightly different interpretation of what the rule of law means. Yet, it is also its contested nature that makes the rule of law so appealing, enabling it to be both conceptually broad and ideologically neutral. In his chapter, James Goldston underscores that more attention needs to be paid to the cultural and social factors that influence the rule of law is understood. Interpretations of the rule of law only acquire meaning “in the working out, in particular places at particular times, of the dialectic relationship between law and justice”.<sup>9</sup>

Keeping in line with an emphasis on culture, Haider Ala Hamoudi’s study of rule of law programs in Iraq points to the religious and tribal legal orders that exist alongside official state law. Hamoudi argues that paying greater attention to cultural implications and power relations will inevitably require a break away from state centred conceptions of law to recognise the influence of functioning non-state legal orders. While rule of law programs are increasingly expected to pay closer attention to local contexts and legal pluralism in recognition of the fact that there is often more than one legal system in operation in any one social field, this is easier said than done. Mareike Schomerus’ study of rule of law programs in South Sudan contends that context is not a stable entity, but is instead “a performative interplay between changing, symbolic and imagined realities and histories”<sup>10</sup> as culture is “permanently evolving and reimagined manifestations of social realities.”<sup>11</sup> This will ultimately require a more flexible understanding of rule of law in a way that has yet to be found.

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<sup>8</sup> Marshall, *supra* note 7 at xv.

<sup>9</sup> *Ibid* at 25.

<sup>10</sup> *Ibid* at 166.

<sup>11</sup> *Ibid* at 183.

The compilation dedicates almost half its chapters to identifying key problems emerging in the professional field of rule of law reform led by international institutions. Deval Desai's study of the job descriptions and personnel specifications of rule of law specialists applicable within international and bilateral donor institutions finds that those working in rule of law reform lack a common sense of purpose and shared approach to reform. However, he suggests that the lack of determinate content in the work of rule of law reform provides an opportunity to "constantly generate a sensibility for experimentation" to adapt rule of law efforts to local contexts.<sup>12</sup> On the other hand, Marshall suggests that the UN's work on rule of law assistance lacks clarity of purpose, adopts increasingly unrealistic mandates and has shown little evidence of success. Marshall instead recommends that the UN adopt a modest, focused and incremental approach, grounded in international human rights law because it would better supports local priorities, initiatives and solutions.

In a similar vein, Louis-Alexandre Berg, Deborah Isser and Doug Porter use their experience with the World Bank's Justice for the Poor program in the Solomon Islands to argue that donors must reorient the way they understand justice and the role they play in promoting it. They propose an "upside down view" of justice that begins by recognizing that justice is more than a particular set of institutions but instead "the outcome of contests over social, political and economic good in domains that are mediated by broad range of state and non-state authorities".<sup>13</sup> It is only once a unique context-tailored understanding of justice is arrived at that the relevant institutions can be identified and the appropriate role for external assistance can be better understood. Stemming from another World Bank Justice for the Poor program, this time in Sierra Leone, Margaux Hall, Nicholas Menzies and Michael Woolcock push for justice reform efforts to adopt a more conscious stance of experimentalism. To achieve this reform, efforts would need to take a significant departure from its current result-oriented culture towards an approach which is ubiquitous in the web-based world – the continual testing and refinement of operational alternatives based on the ongoing collection of data.

Two chapters in the compilation study more locally led solutions to rule of law reform. Through his wide-ranging overview of struggles for land claims by communities in Liberia, Uganda, Mozambique, Sierra Leone and India, Vivek Maru advocates for the use of paralegals, who, he argues, with quality training and supervision can help overcome power imbalances and remedy injustice. Due to their proximity to the communities that they serve, paralegals are able to go beyond merely delivering a technical service. They are able to empower citizens to better understand and use the law. Todd Foglesong's chapter shares the experiences of the Attorney-General in Lagos State, Nigeria. Utilising indicators designed by the Program in Criminal Justice at Harvard University<sup>14</sup>, the Attorney-General changed the procedure

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<sup>12</sup> *Ibid* at 72.

<sup>13</sup> Marshall, *supra* note 7 at 268.

<sup>14</sup> The indicators measured the dynamics of pre-trial detention, including the duration of custody for remanded defendants and the lengths of proceedings before and after the completion of police investigations.

by which prosecutors determine whether or not to charge a suspect being investigated for a grave criminal offence. Foglesong suggests that even such ‘banal acts of public administration’ can be seen to exemplify an act of the rule of law in its contribution to an intangible cultural belief about the restraint of power.

In the closing chapter, Erik Jensen reflects on his own personal frustrations with the rule of law industry over the past three decades. In the context of a historical gap between theory and practice, he suggests that compilations like this one can help to bridge this traditional disconnect by adding to the growing body of empirical research and comparative work that is available to inform the efforts of rule of law practitioners.

This book provides an informative overview of identified shortcomings, challenges and potential solutions garnered from more than eight case studies of rule of law reform efforts from around the world. It is refreshing to see the insights that the book offers on the importance and complexities of considering local culture in rule of law efforts. In particular, Hamoudi’s emphasis on the need to give greater recognition to non-state legal orders and Schomerus’ warning that context embodies “very complicated social realities” that are constantly evolving, both push the boundaries of the traditional institution-centric approach of rule of law reform efforts.

However, some of the chapters could have benefited from a closer engagement with the definitional challenges associated with the rule of law raised by Goldston in the first chapter. While there are useful and interesting lessons to be learnt from the case studies on land rights in Liberia, Uganda and Mozambique; peacekeeping in the Solomon Islands; and accountability in health services in Sierra Leone – one cannot help but wonder: what is it about these case studies that make them about the rule of law rather than broader legal or institutional reform efforts more generally, and is there a difference?

Furthermore, many of the chapters remain confined to a discourse between representatives of the UN and the international donor community. While there is great diversity in the countries and issues studied, the background behind the perspectives offered remain strikingly limited. Out of the eight case studies presented, half focus specifically on UN and World Bank projects and are authored by UN and World Bank staff. Such perspectives are undoubtedly important, given the leading role that both agencies play in law reform efforts in post-conflict and fragile states. However, it seems that this book is aimed squarely at an audience with a strong interest in rule of law efforts undertaken primarily by the international donor community. The compilation is relatively silent on the perspectives of governments, local civil society organisations, businesses and legal scholars who have embraced and facilitated rule of law efforts in their own countries. The rule of law continues to be subject to ongoing definitional challenges and disagreement over how the rule of law is best achieved. In the face of such indeterminacy, Deval Desai has suggested in this compilation that it is necessary to ‘shift the focus to forms of knowledge – the nature of the storytelling –

thereby leaving open to political contestation the substance of the rule of law'.<sup>15</sup> In identifying the way forward for future rule of law reform efforts, it is critical to share not only the knowledge and stories of international rule of law reformers, but also the experiences and perspectives gained by domestic actors in "recipient" countries. Otherwise the political contestations over the substance of the rule of law will remain remarkably one-sided.

Despite these critiques, this book is a valuable resource for those interested in the international rule of law movement. It provides an important source of information for those wanting to avoid past mistakes. Yet, it must be read with the recognition that it represents primarily the voice of the international donor community rather than the international rule of law movement as a whole.

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<sup>15</sup> Marshall, *supra* note 7 at 73.