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TRANSITIONS TO THE RULE OF LAW

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Liberal democracy is held to be a combination of two sets of institutions—democratic ones that ensure that governments are accountable to popular choice, and liberal ones that provide for a rule of law. There is a huge literature on democratic transitions, much of it written since the onset of Samuel P. Huntington’s “third wave” of democratization in the mid-1970s (and often published in the *Journal of Democracy*). It is a bit strange, however, that relatively little analytical work has been done on transitions to the rule of law that is comparable to what has been done on transitions to democracy. Lawyers have obviously written extensively about the rule of law and its promotion in developing countries, while economists have both theorized about rule of law and sought to correlate it to economic outcomes. But there has been relatively little comparative theorizing as to why the rule of law is stronger in some countries than in others, how it evolves in relation to other institutions, and where the rule of law came from in the first place. In this article, I would like to suggest a framework for thinking about this problem, which might be the basis for a research agenda over the *Journal of Democracy*’s next twenty years.

The first problem that arises in thinking about the rule of law is defining it. As with the term “democracy,” there are a wide variety of meanings given to the rule of law that make theorizing difficult. In the past couple of decades, there has been a huge amount of attention paid to what is labeled the “rule of law” as a practical issue in democracy and governance promotion. Much of this interest has been driven by economists, who have their own peculiar understanding of the rule of law and as a result have a distorted view of what it is and how it comes about.¹

When economists speak about the rule of law, they are usually refer-

ring to modern property rights and the enforcement of contracts. Modern property rights are held by individuals, who are free to sell or transfer their property without restrictions imposed by kin groups, religious authorities, or the state. The theory that relates property rights and contract enforcement to economic growth is straightforward. People will not make long-term investments unless they know that their property rights are secure. Similarly, trade requires contracts and a legal machinery to enforce them and to adjudicate the disputes that inevitably arise among contracting parties. The more transparent the contracting rules and the more evenhanded their enforcement, the more that trade will be encouraged. This is why many economists emphasize the importance of “credible commitments” as a hallmark of a state’s institutional development. There is at this point a substantial empirical literature that correlates strong property rights to long-term economic growth.²

The problem with the close identification of rule of law with property rights is that it excessively narrows the definition of law and is inconsistent with the understanding of the term traditionally held by lawyers. By the older, legal definition, the law is a body of rules of justice that bind a community together. In premodern societies, the law was believed to be fixed by an authority higher than any human legislator—either by a divine authority or by nature. Kings, barons, presidents, legislatures, and warlords could issue new positive legislation, but if they were to function within the rule of law, they had to legislate according to the rules set by the preexisting law and not according to their own volition.

This earlier understanding of the law as something fixed either by divine authority or by nature implied that the law could not be changed by human agency, though it could be interpreted to fit novel circumstances. With the decline of religious authority and belief in natural law in modern times, we have come to understand the law as something created by human beings—that is, as a species of positive law—but only under a strict set of procedural rules guaranteeing that the laws correspond to a broad social consensus on basic values. In the contemporary United States, this means that any new law passed by Congress must be consistent with a prior and superior body of law, the U.S. Constitution, as ratified by supermajorities and interpreted by the Supreme Court.

There is obviously some relationship between the traditional legal understanding of the rule of law and the economists’ identification of law with property rights. If a government does not feel bound by a preexisting rule of law but considers itself fully sovereign in all respects, there will be nothing to prevent it from taking the property of its citizens or of foreigners who happen to be doing business on its territory. If general legal rules are not enforced with respect to powerful elites or against the most powerful actor of all, the government itself, then there can be no ultimate certainty about the security of either private property or trade.³

On the other hand, it is perfectly possible to have “good enough” property rights and contract enforcement that permit economic development without the existence of a true rule of law. A good example is the contemporary People’s Republic of China (PRC). There is no rule of law in the lawyers’ sense in China today: The Chinese Communist Party (CCP) does not accept the authority of any other institution in China as superior to it or able to overturn its decisions. While the PRC has a constitution, the CCP controls the constitution rather than the reverse. If the current Chinese government should want to nationalize all existing foreign investments in China or to renationalize the holdings of private individuals and return the country to Maoism, there is no legal framework to keep it from doing so. The Chinese government chooses not to do so out of self-interest, and this seems to be generally regarded as a sufficiently credible commitment to future good behavior. An abstract commitment to “rule of law” has not been necessary for the country to achieve double-digit rates of growth for more than three decades.

If we define the rule of law not as credible property rights and contract enforcement, but as the government’s acceptance of the sovereignty of a preexisting body of law representing a social consensus on rules of justice, then we can proceed to ask the question: Where has the rule of law come from historically, and how might we expect it to emerge in the future?

Religion and the Rule of Law

If one is seeking a source of social rules that is invariant and reflects the shared moral values of a community, the obvious place to look is religion—not as it is practiced in modern pluralistic societies, but in the position that it occupied in premodern societies such as ancient Israel, medieval Europe, or the early Islamic world. Religious rules are held by believers to be the product not of human agency but of divine authority, and are therefore binding on all human agents, including the political sovereign. Indeed, most rulers in such societies never claimed to be sovereign; God was sovereign, and the ruler merely acted as God’s deputy or vicar on earth.

It is therefore not surprising that the rule of law first originated in societies dominated by a transcendental religion, and that the first laws that rulers had to respect were religious ones. The Hebrew Bible and Talmud, the Roman Twelve Tables, the early Church decretals and canons, the Sunna and *hadith*, the Vedas and *shastras* were all recognized in their respective societies as shared rules of justice, and in each society—Israelite, Roman, Christian, Muslim, and Hindu—rulers explicitly recognized a duty to live under the religiously defined law.

The only major world civilization in which a religiously derived rule of law did not emerge is China and the East Asian countries influenced

by Chinese culture. This is because China never developed a transcendental religion higher than ancestor worship that was broadly accepted by its elites as authoritative. Ancestor worship is not a good source of law, since no one has an obligation to worship anyone else's ancestors; it therefore cannot impose generally binding obligations on a large society. Hence while the Chinese developed extensive legal codes during the Qin, Han, Tang, and Ming dynasties, these were all positive law—that is, enactments by the emperor, who did not recognize any authority higher than himself.⁴ Other religions introduced into China, such as Taoism, Buddhism, and Christianity, were mostly protest religions not reflecting a larger social consensus.

The rulers of many societies outside of East Asia thus recognized that they lived under a law that they themselves did not create. Yet the degree to which this would impose real restrictions on their behavior depended not just on this theoretical acknowledgement, but on the institutional conditions surrounding the formulation and enforcement of law. The law would become a more binding constraint on rulers under certain specific conditions: 1) if it was codified into an authoritative text; 2) if the content of the law was determined by specialists in law and not by political authorities; 3) if the law was protected by an institutional order separate from the political hierarchy, with its own resources and power of appointment; and finally, 4) if the law actually corresponded to the lived social norms and values of the community to which it was applied, including the ruling elites who presided over the political system.

In contrast to other law-governed societies, Western Europe was exceptional insofar as law was institutionalized earlier and to a higher degree than elsewhere. This was probably less a function of the underlying religious ideas than of historically contingent circumstances of European development, since the Eastern Orthodox Church never went through a comparable development. Thus in the West, the rule of law became embedded in European society even before the advent not just of democracy and accountable government, but of the modern state-building process itself. This is evident in all the dimensions of institutionalized law.⁵

Codification. In contrast to India, where the Vedas were transmitted orally and written down only at a relatively late point, the three monotheistic religions of Judaism, Christianity, and Islam were all based from a very early point on authoritative scriptures. In both the Eastern and Western Christian churches, the Bible was supplemented by a confusing welter of Church canons, decrees, and interpretations. This changed in the late eleventh century with the rediscovery of the *Corpus iuris civilis*, the great sixth-century compilation of Roman law under the Emperor Justinian. The sprawling body of canon law was systematized in the twelfth century in the *Decretum* of the jurist Gratian. No similar rationalization of law ever occurred in the Eastern church or in the Hindu

or Muslim traditions until the codifications that were carried out under Western influence in the nineteenth century.

Legal specialization. The new system based on Roman law was spread throughout the whole of Europe from the great law school at the University of Bologna. Whereas kings, emperors, and other temporal rulers had made ecclesiastical law before the eleventh-century Gregorian reform, law became the province first of the church and then of a legal profession trained in canon and civil law. In this respect, Christianity does not differ substantially from Islam, which also put law under the custody of a hierarchy of legal specialists (the *ulama*) or Hinduism, where the priestly Brahmin class had a monopoly as specialists in law.

Institutional autonomy. “Caesaropapism” is a term coined by Max Weber to denote a situation in which temporal authorities have the power to appoint and dismiss religious ones. Both the Eastern and Western Christian churches were caesaropapist until the Investiture Conflict of the eleventh century, in which a strong-willed Pope Gregory VII challenged the Holy Roman Emperor’s right to appoint popes and bishops. The prolonged struggle between pope and emperor resulted in the Concordat of Worms in 1122, which gave the Catholic Church the right to name its own cadres. This right, together with the practice of priestly celibacy (which effectively prevented priests from trying to place kin in positions of power), enabled the church to free itself from temporal politics and create what legal scholar Harold Berman labels the first modern bureaucracy, on which later state bureaucracies would be modeled.⁶ No religious establishment in any other cultural tradition ever succeeded in institutionalizing itself to this extent.

Correspondence between law and social norms. The normative dimension of law—that is, people’s belief that the law is fundamentally just and their subsequent willingness to abide by its rules—is key to the rule of law. The most secure form of law depends not on draconian punishments, but rather on voluntary compliance on the part of most citizens. It is not clear that Europe had a particular advantage over India or the Middle East in this regard, since the religiously based law of all three civilizations shaped and reflected broad social norms. One of the great problems with trying to import modern Western legal systems into societies where they did not exist previously, in fact, is the lack of correspondence between the imported law and the society’s existing social norms. Sometimes the importation of legal rules can speed up a process of social change, as when laws mandating equal rights for women are imposed in a society dominated by males. But if the gap between law and lived values is too large, the rule of law itself will not take hold.

European political development was unusual insofar as a strong, dominant legal culture emerged in Western Europe during the Middle Ages before there were modern states. There was in fact a kind of transnational legal culture, underpinned by the ecclesiastical law of the Cath-

olic Church, that constrained the ability of early-modern state-builders in England, France, Spain, and other Western countries to accumulate unchecked power. Few absolute monarchs were willing openly to violate the property and personal rights of their elite subjects without something approaching due process—unlike state-builders in China or Russia, who could act with much more arbitrariness and brutality. The emergence in England of a uniform common law, which was originally an extension of the law of the king's court and was enforced by centralized royal authority, did much to legitimize property rights at a very early point in the country's history.

Europe was no different from other societies insofar as a rule of law protecting citizens against arbitrary actions of the state itself was initially applied only to a minority of privileged subjects. Consider, for example, the letter by Madame de Sévigné, one of the great salon patrons of seventeenth-century France, which Alexis de Tocqueville quotes in *Democracy in America*. In the letter, she describes how soldiers in Brittany were enforcing a new tax, turning old men and children out of their houses in search of assets to seize. Some sixty townspeople were to be hanged the following day for nonpayment. She writes: “[T]he fiddler who had begun the dance and the stealing of stamped paper was broken on the wheel; he was quartered and his four quarters exposed in the four corners of the town.”⁷

Obviously, the French state would not have enforced such drastic penalties on Madame de Sévigné and her circle. It is therefore not true that there was no rule of law in seventeenth-century France, but the law did not regard commoners as legal persons entitled to the same rights as the aristocracy. Likewise, in the United States at the time of its founding, blacks were enslaved and treated as property rather than as citizens, and not even all whites were treated equally—women and white men without property were denied the right to vote. The process of democratization is one in which a rule of law applying only to elites is gradually expanded to include all adult persons. This pattern continues to the present day, where the elite rule of law in South Africa under apartheid was expanded to apply to nonwhites after that country's transition to democracy in 1992. It is much easier to expand an existing elite rule of law than to create one from scratch.

In both India and the Muslim world, a rule of law as we have defined it above clearly existed much as it did in Christian Europe. The law was codified by religious rather than temporal authorities; it was guarded by a separate religious institution staffed by specialists; and it was accepted as something sovereign over the will of temporal rulers. Both the Hindu and Muslim traditions differed from the Christian one in that the body of religious law was never *fully* systematized or codified, and neither the Brahmin class nor the Muslim *ulama* ever constituted themselves into a single, powerful hierarchy.⁸ The received bodies of law in Hinduism and

Islam were interpreted by a network of religious jurists—*panditas* and *qadis*, respectively—who applied existing precedents to new cases.

Many people in the West have persuaded themselves that the separation of church and state is somehow intrinsic to Christian society but an aberration under Islam. The truth of the matter is that the two religious traditions are more similar than different in this regard, and that the actual degree of separation between religious and secular authority depended very much on historical circumstance. The “two swords,” spiritual and temporal, were fused in the person of many Christian princes, while the dominion of caliphs and sultans often became distinct as institutions in the Muslim world matured. The scholars or *ulama*—specialists in *shari’ a* or Muslim law—had their own standards and order, and temporal rulers in the Middle East needed to go to them for legitimacy and religious sanction. If the *ulama* were generally weaker in their ability to check political power than were European churches, it was less the result of doctrine than of the caesaropapist institutional arrangements that existed in many Muslim lands.

The Transition to Modernity

In all three regions—Europe, India, and the Middle East—a religiously based rule of law was undermined and displaced during the transition to modernity from the eighteenth century onward. In Europe, this was the result of an internal, organic process, as the Reformation undermined the authority of the Catholic Church and the secular ideas of the Enlightenment eroded belief in religion as such. New theories of sovereignty, based on the authority of king, nation, or people, began to replace the sovereignty of God as the basis for legal legitimacy. As many observers have pointed out, in the West the rule of law predated modern democracy by many centuries, and so it was possible to have a *Rechtsstaat* in eighteenth-century Prussia that checked executive authority well before the principle of popular sovereignty was admitted. But by the late nineteenth century, the democratic idea had gained legitimacy everywhere, and law increasingly came to be seen as the positive enactment of a democratic community. The habits engendered by the rule of law had by this time become deeply embedded in Western society. The idea that civilized life was coterminous with law, the existence of large and autonomous legal establishments, and the needs of a burgeoning capitalist economy all served to strengthen the rule of law even as its basis of legitimacy changed.

The same was not, unfortunately, true of other law-governed societies in India and the Middle East. There, contact with the West tended to undermine the authority of traditional religious-legal institutions, which were seen by many as marks of backwardness. The British abolished the Indian system of *panditas* altogether in the 1860s in their attempt

to resurrect what they believed to be an authentic Hindu law, which in any event gave way to imported European law by the twentieth century.⁹ In the Middle East, the Ottomans undermined their own *ulama* with a similar, late-nineteenth-century effort to codify *shari'a*, which became just one of a number of legal systems. After the birth of the Turkish Republic in the 1920s, its entire Muslim legal establishment was replaced wholesale by European civil law.

The independent Indian republic that was founded in 1947 was a liberal democracy that carried forward the legal traditions of the British Raj, and it indeed sought to reestablish the broken tradition of Hindu law in personal matters. Things worked out much less well in the Arab world. The traditional monarchs put in place by the British and French colonial authorities in such places as Egypt, Libya, Syria, and Iraq were quickly replaced by secular nationalist leaders who proceeded to centralize authority in powerful executives that were limited neither by legislatures nor by courts. The traditional role of the *ulama* was abolished in virtually all these regimes and was replaced with a "modernized" law that emanated solely from the executive. The exception to this was Saudi Arabia, which had not been colonized and which maintained a regime that balanced executive authority with a Wahhabi religious establishment. Many of the executive-dominated regimes turned into oppressive dictatorships that failed to produce either economic growth or personal freedom for their people.

The legal scholar Noah Feldman argues that the rise of Islamism in the early twenty-first century and the widespread demand for a return to *shari'a* throughout the Arab world reflect a grave dissatisfaction with the lawless authoritarianism of contemporary regimes in the region and a nostalgia for a time when executive power was supposedly limited by a genuine respect for law. He argues that the demand for *shari'a* should be seen not simply as a reactionary turning back of the clock to medieval Islam or a wish to impose harsh Taliban-style punishments, but rather as a reflection of the desire for a more balanced regime in which political power would be willing to live within predictable legal rules.¹⁰ The repeated demand for "justice," incorporated into the names of many Islamist parties, reflects not so much a demand for social equality as a demand for equal treatment under the law. Powerful modern states that are not tempered by rule of law or accountability simply succeed in being more perfect tyrannies.

Whether modern Islamists can achieve a democratic regime limited by a rule of law is, however, a delicate question. The experience of the Islamic Republic of Iran after the 1979 revolution is not encouraging. The Islamic Republic's 1979 Constitution could have been the basis for a moderate, democratic, law-governed state. It permits legislative and presidential elections, limited by the decisions of an unelected Supreme Leader and a Guardian Council composed of senior clerics who are the

human representatives of God. In itself, this type of arrangement is not necessarily “medieval” or premodern. If the role of the Supreme Leader and Guardian Council were defined merely as that of a supercharged traditional *ulama* with Supreme Court–like powers to periodically declare laws passed by a democratically elected Majlis (parliament) un-Islamic, they could make a more plausible claim to be an updated form of traditional Islamic rule of law.

Unfortunately, the 1979 Constitution grants the Supreme Leader not just judicial powers, but substantial executive ones as well (in Section 8, Articles 107–12). Like Otto von Bismarck’s German imperial constitution or the constitution of Meiji Japan that was modeled on it, the Iranian constitution carves out a reserved sphere of executive powers, given not to an emperor but to the Supreme Leader. He has control over the Islamic Revolutionary Guard Corps and the paramilitary Basij, and he is able to intervene actively to disqualify candidates running for elective office and to manipulate elections to produce favorable outcomes.¹¹ As in Japan and Germany, these executive powers are corrupting, and they have led to increasing control of the clerisy by the armed forces rather than the reverse relationship specified in the constitution. Thus Iran’s clerical hierarchy, much better organized than anything in the Sunni world, has lost its judicial function and turned Iran into a genuine theocratic dictatorship that routinely jails and kills opponents without regard for law.

Drawing Some Implications

This historical excursus into the origins of the rule of law has certain implications for the way in which the rule of law might be promoted in the future. The first has to do with sequencing. Historically, the rule of law emerged first among elites and was a means of regulating conflict among the rich and powerful within a society. Today, the international community believes that any development program needs to be applied universally if it is to be done at all; a program that works only in the capital city or for the privileged alone is regarded as a failure. But resources are scarce. In purely technical terms, legal systems are among the most difficult and costly governmental systems to construct because they have huge infrastructure needs and require both human and physical capital. Historical experience with law suggests that more targeted programs may set important precedents that will eventually bear fruit as the society develops the capacity to spread them more broadly. There may be lower-cost alternatives based on customary or hybrid rules that will work better in the meantime.

The second implication has to do with the need for law to be normatively grounded in the values of the underlying society. Because we in the West now define law in purely positive and procedural terms,

we tend to promote the visible procedural infrastructure of the law as it exists in developed countries—things like formal legal codes, computerized dockets, bar associations, efficient courtrooms, and the like.¹² We tend to worry less about whether the imported law actually commands the respect of people in the society. The use of foreign models

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does not much matter when dealing with something like a commercial code, but on issues of personal status, family law, inheritance, and the like it can be far more problematic. Many successful democracies such as Israel and India deviate from modern liberal legal practice by accommodating traditionally based rules, precisely in order to get buy-in from the communities involved.

We will confront this issue directly if and when the Arab Middle East or Iran ever truly democratizes. Western liberals (like myself) want to see two separate things: first, that the law should act as a check on arbitrary executive power; and second, that the content of the law should match our cultural values (for example, fully equal juridical status for women). We should certainly want to promote the former, but should we also promote the latter if its effect is to weaken respect for the law as such? Is it better to proceed incrementally in building legal institutions that work, even if we find the content of the law not to our liking?

This is not a question that can be answered in the abstract, because we can never really know what the underlying social consensus is in societies undergoing a democratic transition. The protesters contesting the results of Iran's June 2009 presidential election, as well as their candidate Mir Hosein Musavi, for the most part claimed that they did not want to undermine the Islamic Republic, but only to make it live up to its democratic promises. Were the clerical-military regime to fall, would Iranians want a rule of law defined by *shari'a* or by a modern, secular legal system, like that of Iran's liberal 1906 Constitution? Divisions on this subject among the protesters would almost certainly emerge were a transition to occur. The stability of a future rule of law would depend on which version of law most truly reflected the society's values. If it turned out that Iranians were conservative and wanted *shari'a*, then outside democracy promoters would have to decide whether they valued the rule of law in itself, or only law reflecting their own values.

With regard to a future research agenda, we need to study transitions to the rule of law in a much more rigorously comparative framework. Every premodern non-Western society had some combination of customary and formal law that then collided with modern Western legal

norms and institutions. We are still learning about colonial law and how it was applied, as well as of the extent to which the colonial framework was carried forward in postindependence legal systems. Of particular interest would be societies that successfully adapted Western law to their own cultural traditions. Japan, for example, has far fewer lawyers per capita than the United States and a much lower level of litigation, because the Japanese government at a certain point decided to push litigation into a less costly arbitration system. Yet it is not clear that Japan's rule of law is any weaker than that of the United States.

Better knowledge of transitions to the rule of law should also make rule-of-law promoters more humble about what they can expect to achieve. Strong legal systems did not spontaneously emerge simply because there was an economic demand for them, as some economists suggest.¹³ Rather, the law developed "exogenously" (as an economist would say)—that is, for reasons external to the economic system, such as religious belief. Moreover, the West European pattern of development was one in which the rule of law existed before anyone tried to construct a strong modern state. As a result, law prevented the most tyrannical forms of a strong state from ever appearing in the first place. We should admit to ourselves that we have very little historical experience in successfully constructing a rule of law in societies where this pattern is reversed and where a strong state precedes law. Outsiders have learned a great deal about democracy promotion over the past twenty years and have considerable ability to help organize and monitor elections. Whether anything remotely comparable will be possible with regard to rule of law remains to be seen.

NOTES

1. See Stephan Haggard and Andrew MacIntyre, "The Rule of Law and Economic Development," *Annual Review of Political Science* 11 (2008): 205–34.

2. See, for example, Daniel Kaufmann and Aart Kraay, *Governance Matters IV: Governance Indicators for 1996–2004* (Washington, D.C.: World Bank Institute, 2005). There was also a prolonged debate over the dubious assertion that common-law systems were more friendly to growth than civil-law ones. See Rafael La Porta et al., "Law and Finance," *Journal of Political Economy* 106 (December 1998): 1113–55.

3. This was the theme in Douglass C. North and Barry R. Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England," *Journal of Economic History* 49 (December 1989): 803–32.

4. After the Shang dynasty, the Chinese in theory developed an amorphous concept of "Heaven," whose mandate the emperors bore; this hardly amounted to law, however, and was mostly invoked ex post to legitimize the dynastic transition.

5. On this point, see Joseph R. Strayer, *On the Medieval Origins of the Modern State* (Princeton: Princeton University Press, 1970).

6. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983).

7. Alexis de Tocqueville, *Democracy in America*, trans. and ed. Harvey Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 2:537.

8. The one exception to this was the Shia hierarchy in Persia, which most closely resembled the hierarchy of the Catholic Church.

9. J. Duncan M. Derrett, *History of Indian Law (Dharmaśāstra)* (Leiden, The Netherlands: E.J. Brill, 1973).

10. Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008), 111–17.

11. Shaul Bakhash, *The Reign of the Ayatollahs: Iran and the Islamic Revolution* (New York: Basic Books, 1984).

12. For an overview and critique of contemporary rule-of-law promotion efforts, see Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, D.C.: Carnegie Endowment, 2006).

13. Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (New York: Cambridge University Press, 1990), 51–52.