UNDERSTANDING RULE OF LAW/SUPREMACY OF LAW AND UNDERLYING OBSTACLES IN TURKEY AND AROUND THE WORLD

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1. INTRODUCTION

Rule of Law has become every country's ambition; developed countries are promoting it, multinational corporations want it, and aid organizations are trying to build it. I've never heard a country say (at least in modern times; the cultural revolution may be the exception), "We reject the rule of law," although by their actions some countries have done so. My goal is to provide some additional perspective on the Rule of Law for discussion and deliberations here. I will start with some of the major obstacles, and then make a few comments regarding my impressions about Turkey and the Rule of Law as compared to other countries. There are three major obstacles that I will discuss briefly today: Defining the rule of law, developing rule of law culture, and legal structure to support rule of law. Let me start with the definitional problem.

2. OBSTACLES

a. Definition

Rule of Law is very hard to define. There is a famous saying in American jurisprudence about pornography, another very difficult legal concept to define. Justice Potter Stewart wrote that while he may not be able to define pornography, "I know it when I see it." The same approach is often used for Rule of Law. It is exceedingly difficult to define, but nearly all countries claim to have it or at least to be making progress towards it.

This difficulty in definition is compounded by very heavy cultural baggage carried by the concept of "rule of law." The notion of rule of law developed out of the western liberal cultures, and as such is laden with western liberal democratic values. To westerners, rule of law is synonymous with numerous

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political, civil, economic and human rights. While there are debates about the scope of these rights, there is pretty good consensus about such things as the right to participate in governance, the freedoms of speech and assembly, the rights to own property and engage in contracts, and some sense of individual liberty. This value-laden notion of "rule of law" can be understood to be the "thick" theory of the rule of law.

I prefer to use and discuss a "thin" theory of rule of law, stripped to some extent of its cultural values. I say "to some extent" because I believe that law is ultimately a cultural phenomenon so that if you took away all of its cultural content you would be left with nothing. The thin theory focuses more on law rather than the values. It looks in a more generalized way at "the ability of law to guide behavior."[1] Although descriptions of the "thin theory" vary somewhat, it is perhaps best understood by comparison to the "rule of man."[2] The "rule of man" has a sense of whim and arbitrariness.

Let me try to specify the elements of the rule of law. In contrast to the "rule of man," the rule of Law has predictability and fairness. One can look to a rule and conform one's behavior to it. Thus, rule of law requires a certain level of transparency, predictability and equality. If the law is not known, one cannot conform to it. If the law is known, but its application unpredictable, then conformance is not possible. If the law is known and predictable, but is applied unfairly, in a way that promotes inequality, then conformance, though possible, carries little moral significance. To these three ideas of transparency, predictability and equality, I would add legitimacy. The rule must derive from some source that has cultural legitimacy because otherwise it is "rule of man."

Of course, concepts like equality and legitimacy can very easily take us back to the thick theory of rule of law. Notions of equality are the basis for many civil, political and even human rights. Legitimacy can be used as a basis for promoting democratic values on the grounds that democracy is the only or perhaps best form of legitimacy. I do not intend to go so far as the thick theory, however, but instead mean to work with a more generalized (and admittedly vague) sense of equality and legitimacy so as to recognize differences in cultural values that do not necessarily undermine rule of law.

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1 Randy Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China*, 11 Cultural Dynamics 315, (1999) (citing J. Raz, *The Rule of Law and Its Virtue* in The Authority of Law, 210, (1979)).

2 *See* R. Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1, (1997).

b. Culture

A second major obstacle to the development of the rule of law is culture. I believe that most law reformers fail to take enough notice of the importance of culture in promoting rule of law. A perfectly drafted legal code and system cannot be dropped into a country and expected to produce even the thin theory of rule of law without cultural support. I would go even further and suggest that culture is not only important to rule of law, that, in fact, rule of law *is* culture.

Historically, rule of law has been a descriptive, not proscriptive term. It was a way of describing the US and some other western democracies. But it was not a conscious choice or goal, but instead was the outgrowth of cultural developments. The development of the rule of law in the United States was a product of a combination of powerful cultural factors: A pluralistic society with divergent religious view engaged in the founding of a government at a time in history rich with ideals of liberal democratic philosophy.[3] The unique mix of cultural factors in America led to the creation of what some call a kind of "civic religion" with the constitution as its sacred text.[4]

Not only did the cultural factors lead to the creation of a rule of law system, but these same cultural factors, reinforced by law and legal practices, support the rule of law by promoting the reliance on law. I often use a very simple traffic example to illustrate the extent to which rule of law culture pervades the American consciousness. Suppose you were driving on a deserted street in the very early hours of the morning, say at 4:00 a.m., and you encountered a red light. What would you do? Americans will stop and wait for the light to turn green. I don't know what would happen in Turkey, but when I've used this example in China some years ago, my audience didn't believe me because it was so contrary to their own cultural context.

Cultural values can also be barriers to rule of law. All legal systems are cultural products, so they reflect the history and values of that society. Cultural values that are opposed to rule of law therefore are strong and deeply imbedded barriers to reform. One example is the cultural sense of entitlement in some societies associated with governmental authority. In many countries people expect those in authority to use their position to benefit themselves and their families. It has been a long tradition and even though the law may

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3 *See* Law as Culture.

4 *See Id*.

forbid it, corruption is very difficult to root out. On the other hand, if culture can be turned in support of legal reform, it can be a useful and potent ally.

c. Structure

The third major barrier to rule of law is the structure of legal systems and institutions. These structural problems are where most reform efforts are focused, and are issues being addressed in significant detail at this Congress. Structural issues include concepts of judicial review and independence of the judiciary. The one structural issue that in my experience is the most challenging around the world is thesupremacy of law. It is only natural that those in power are reluctant to make themselves subject to the rule of law. Those in power are anxious to use law to promote their own agendas, but do not want to be limited by its restrictions.

Those in power in the United States are much more willing to be subject to law than many leaders in other countries. This is well illustrated by the Supreme Court decision in Bush v. Gore a number of years ago. The election results were a constitutional crisis in the making, and even though many have criticized the Supreme Court's decision, those in power and the population at large was willing to accept that decision nonetheless. In other countries, the crisis might have resulted in a military coup or civil war, or at least widespread protests and demonstrations. But Americans, including Al Gore and his supporters, accepted the decision.

This example of structural supremacy of law and the power of judicial review in the Supreme Court emphasizes the importance of culture. While constitutional supremacy and judicial review were structures that allowed a resolution of the crisis, those structures were only effective because of widespread perceived legitimacy within American culture.

3. APPLICATION OF THE OBSTACLES TO TURKEY

Let me now turn to a few remarks about how these obstacles apply in the case of Turkey. I have to begin by admitting that I am not an expert in Turkish law or culture, but I have learned a little and hope that my comments may be helpful.

a. Definition

The difficulty in defining rule of law is both a challenge and an opportunity for Turkey. It is a challenge because it is difficult to know when or to what

extent rule of law has been achieved. This challenge is all the more difficult if a thick theory of rule of law is being used because that interjects cultural values with which Turks may not agree.

But these definitional problems are an opportunity for Turkey to define rule of law to have its own characteristics. Although Turkey is a secular government, the role and influence of Islam is significant. The relationship between rule of law and Islam is complicated and difficult. With so much turmoil and reform underway throughout the Muslim world, this challenge is being faced by many societies. Turkey has many years of experience is addressing this challenge, and that experience will provide a foundation for new solutions that can be an example to others. The "thin theory" of the rule of law allows the promotion of some version of rule of law that can be tailored to contemporary cultural values of Turkey, and I am impressed by the thoughtful discourse underway in this Congress and in other discussions in Turkey.

b. Culture

The cultural issues are the most challenging obstacle because they are so difficult to address. I know relatively little about Turkey's legal or cultural history. But what I've learned about Turkey's constitutional history and the role of the military in governmental reform suggests that the reform of Turkey's legal culture is a long-term project. I do not mean to be critical or overly negative in this assessment. In my opinion, the progress has been remarkable. But every society has cultural tendencies that are so ingrained that it takes generations to change. In light of Turkey's history, it will be difficult to reach the point where law is predominant over military power. As a college student I spent some time studying military coups, and the strongest predictor I discovered of coup behavior was a previous military coup. When the next constitutional or governmental crisis develops in Turkey, will the military step in to address it? Such a result may not be a bad thing; we need only compare the situations in Egypt and Libya to see to benefits of military stepping in to take governmental power. But that is not the rule of law.

One way to assess Turkey's progress in developing a rule of law culture is to look at the way the rule of law in Turkey is perceived by outsiders. The World Bank has an on-going measure of governance indicators which includes an aggregation of perceptions regarding rule of law and corruption. The rule of law index considers the level of confidence that people have in the law. The corruption index measures perceptions of the extent to which public power is

used for private gain. On both of these index measures, Turkey is close to the median.

On rule of law perceptions, Turkey scores a 58. This is not as good as the US (92) or Germany (93), but is better than China (45) or Russia (11). Other countries for comparison that are close to Turkey include Egypt (55), Romania (58), Saudi Arabia (58) and South Africa (56).[5]

On the corruption measure, Turkey's score is 60, two points better its score for rule of law. This is still not as good as the US (85) or Germany (93), but the margin is not as big. Turkey's score is much better than China (36) and Russia (11). While Turkey and Egypt were similar for rule of law, Turkey's corruption index score is significantly better than Egypt's for corruption and slightly better than Romania's score (60 compared to 41 (Egypt) and 54 (Romania)). Turkey's score is the same as South Africa (60) and similar to Saudi Arabia (63).[6] It is notable that the Saudi Arabia scores for rule of law and corruption show that these perceptions are independent of democratic values.

c. Structure

Turkey's progress on structural reform is substantial, and is greater than on cultural aspects of rule of law. Although there are many things that need to be revised and improved in the 1982 constitution, it is notable to me that the constitution addresses supremacy of the law, and promotes and protects supremacy though judicial review. In addition, as currently amended the constitution requires a super-majority to amend the constitution, and depending on the circumstances, may subject proposed amendments to referendum. These procedures promote stability and predictability.

However, the state of emergency and martial law provisions are a significant structural problem, especially when combined with the historical role of the military has played in bringing about governmental change. As I understand these provisions, the Council of Ministers may declare a state of emergency or martial law, and during such time may restrict or suspend freedoms.[7] This undermines predictability of the law because the law may be suspended due to a state of emergency. Moreover, the availability of this

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5 The numbers are based on ranks in 2009 for specific variables in the World Bank Aggregate Governance Indicators, available at http://info.worldbank.org/governance /wgi/index.asp, last viewed 9 May 2011.

6 *Id*.

7 *See* 1982 Constitution, as amended, Arts. 119-122, 125 VI.