

2010

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Recommended Citation

Ronald A. Brand, *Promoting the Rule of Law: Cooperation and Competition in the EU-US Relationship*, 72 *University of Pittsburgh Law Review* 163 (2010).

Available at: https://scholarship.law.pitt.edu/fac_articles/301

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ARTICLES

PROMOTING THE RULE OF LAW: COOPERATION AND COMPETITION IN THE EU-US RELATIONSHIP

*Ronald A. Brand**

On May 6–7, 2010 a conference on “Promoting the Rule of Law: Cooperation and Competition in the EU-US Relationship” was held at the University of Pittsburgh. The conference was divided into three sessions during the first day, focusing on “Defining the Rule of Law,” “Programs and Policy Objectives: Can External Programs Influence Internal Development of the Rule of Law?” and “The Role of Civil Society and Legal Education in Developing the Rule of Law.” On the second day, the moderators of the first day’s sessions each reviewed his/her session and the invited group participated in a focused discussion of the issues that had been raised. Participants included representatives from the Council and Commission of the European Union, the European Court of Justice, the Council of Europe, the International Bar Association, the American Bar Association Section of International Law, the United States Army JAG Corps, the United States Marine Corps, the Third Circuit United States Court of Appeals, the United States Agency for International Development, the United States Institute of Peace, World Learning, and the United States Department of Commerce, as well as academics.¹

Both the definition of “rule of law” and a clear picture of United States (US) and European Union (EU) programs promoting it were difficult to define

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1. All participants spoke in their personal capacities, and did not necessarily represent the views of their respective employers.

at the conference. Nonetheless, the discussion did allow some useful general conclusions.

I. WHILE A CONSENSUS DEFINITION OF THE "RULE OF LAW" IS DIFFICULT TO ACHIEVE, THERE ARE COMMON ELEMENTS TO THE DEFINITION ON WHICH MOST ALL CAN AGREE

The concept of rule of law requires both procedural and substantive focus. On the procedural side, due process, judicial review (by an independent judiciary), equality of application of the law, and transparency of the rule-making process are all elements of any coherent understanding of the rule of law. Each of these elements, however, brings its own definitional issues. Moreover, the western origins of the concept of rule of law raise questions about how the concept works when exported to non-western cultures.

A more difficult question is whether the rule of law must be defined by inclusion of specific substantive rights. Do specific international legal instruments such as the Universal Declaration of Human Rights set out individual rights that are so fundamental that the rule of law cannot exist without their acknowledgment and protection? Discussion at the conference indicated that Europeans are much more ready to focus on substantive rights as necessary to the rule of law, while Americans tend to found any definition on procedural elements. This may reflect differences between civil and common law legal training, but it also demonstrates the dual focus that any coherent definition of the rule of law must embrace.

In the end, it was not clear that a formal definition is necessary to the establishment and existence of the rule of law. It was suggested that, at least for judges, this may be an "I know it when I do it" concept. One participant seemed to capture the concept with the idea that the rule of law exists when there are "a number of basic principles that make the good things easier and the bad things more difficult."

II. EXTERNAL PROGRAMS OF THE EU AND THE US CAN AFFECT INTERNAL DEVELOPMENT OF THE RULE OF LAW IN ANOTHER COUNTRY, BUT BOTH GOVERNMENTAL AND NON-GOVERNMENTAL EFFORTS AT SUCH IMPACT RUN THE RISK OF COUNTERPRODUCTIVE RESULTS

The discussion of how selected programs affect rule of law development in specific societies provided several lessons. The first is that it is difficult, if not impossible, in either the US or the EU to find a governmental source that has responsibility for (or even an understanding of) the catalogue of rule of

law programs funded by either government. While rule of law is considered a fundamental objective in the external relations of both the US and the EU, there seems to be no coordination of rule of law programs within either government, let alone serious coordination of such programs between the two governments.

The second lesson regarding rule of law programs is that they cannot be effective without the development of relationships of trust. This aspect takes formal context in the accession process within the European Union, but is equally necessary to non-governmental efforts such as the American Bar Association's Rule of Law Initiative. The third lesson is that there must be local accountability and ownership for any program to be successful. And the fourth is that there must be a clear understanding of the rule that is intended to be implemented.

Not all rule of law programs demonstrate an understanding of these lessons. There are several reasons for this. There is a tendency toward short-term projects that fit annual budgets and a desire for immediate, measurable outcomes. There is also a desire for control of the program by the external government or organization funding the program. This is further exacerbated by the failure to match program provider ideals with local realities. Finally, there is a focus on the "law" element of "rule of law," rather than on the "rule" that is to be enhanced by the law. This too often results in a claim of success, for example, when a new law is enacted, regardless of whether it is understood or whether the executive and judicial systems are capable of successfully implementing the law. Programs must be focused on the long term, they must be built on relationships of trust, they must facilitate local ownership, and they must fit local realities.

III. CIVIL SOCIETY AND LEGAL EDUCATION HAVE IMPORTANT ROLES TO PLAY IN EU AND US RULE OF LAW PROGRAMS

Discussion of American Bar Association Rule of Law Initiative programs and of legal education provided examples of specific impact on the development of the rule of law in transition countries. They also demonstrated the benefits of efforts outside of a governmental framework (even if funded by governments) to promote the rule of law.

The export of legal education, particularly through LL.M. (Master of Laws) programs on both sides of the Atlantic, proved important not only to efforts to externalize rule of law development, but also to the internalization of the lessons learned. The rule of law is something to be developed not only on individual national (or regional) levels, but also through international law.

Governmental conduct indicating both acceptance of and respect for international law is an important part of the effort to establish the rule of law in other countries. When that conduct is consistent with international law, it makes success of governmental, civil society, and legal education efforts to promote the rule of law much more likely.

Legal education, in particular, demonstrates the lessons of rule of law promotion. It requires a long-term view, and long-term funding, to allow foreign students to study in the EU and the US and to trust that they can carry home with them the lessons of the rule of law in a manner that will result in local ownership, and implementation through culturally appropriate methods.² The risk is thus perhaps high, but the potential reward can also be dramatic.

IV. THE EU AND THE US CAN BENEFIT FROM THE DEVELOPMENT OF A COMMON UNDERSTANDING OF THE RULE OF LAW AND SHOULD PROMOTE IT THROUGH PROGRAMS THAT ARE EFFECTIVE AND WELL-COORDINATED

In the end, the conference participants were unanimous in the opinion that, while a common understanding of the rule of law would be a positive development, no matter what that definition, the rule of law should be promoted by both the EU and the US. This can be accomplished through both governmental and non-governmental programs. Currently, however, within each of the EU and the US, there exists no internal coordination of rule of law programs, or any single source from which one may determine what programs are being funded or implemented. Rule of law programs are more likely to achieve success if there is a clear understanding within each of the EU and the US of the full contingent of programs in which each government is engaging for the promotion of the rule of law, as well as cooperation between the EU and the US in their efforts to promote the rule of law. Until it is possible within each of the EU and the US to simply determine the full panoply of rule of law programs in which each is engaged, it will not be possible to clearly measure the success of the overall effort or to engage effectively in that effort in a cooperative manner.

2. See RONALD A. BRAND, *The Export of Legal Education: Its Promise and Impact in Transition Countries*, in *THE EXPORT OF LEGAL EDUCATION 1* (Ronald A. Brand & Wes D. Rist eds., 2009), for examples of the impact of legal education.

V. THE WRITTEN RECORD

The four articles that follow provide an excellent exposition of the matters discussed at the conference. As the above discussion indicates, any reasoned discussion of the rule of law results in two basic conclusions: first, that there is no single accepted definition of what we mean by the term, and second, that there exists no definitive catalogue of rule of law programs initiated by either the US or the EU. Mark Ellis and Ricardo Gosalbo-Bono address the first conclusion in very cogent, useful, and interesting approaches to defining rule of law. Wade Channell and Esa Paasivirta follow with thought-provoking discussions of just how the US and the EU have tried to use programs to influence rule of law development in other countries. The package provides both a tour of thought and practice in regard to rule of law and a foundation for considering just where that thought and practice should take us in the future.

In *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, Ellis addresses the “elasticity of meaning” of rule of law, which allows it to be both the focus and goal of so many “expert” projects and to gain such universal support.³ His experience in American Bar Association Rule of Law programs and the International Bar Association provide a strong foundation for his analysis. His article provides an excellent summary of existing commentary and the divide it demonstrates between a formal and a substantive approach to defining rule of law. Distinguishing rule *by* law from rule *of* law, he focuses on the importance of fundamental substantive rights, distinguishing further between derogable and non-derogable rights.⁴ This leads to a clear list of non-derogable rights which Ellis finds necessary to any society based on rule of law.⁵ But it does not prevent what he finds to be the need for certain derogable rights—rights lacking the “full force of international law.”⁶ Ellis makes his distinction clear by applying it to the specific example of Singapore.⁷ The result is a thoughtful and thought-provoking discussion worth the time of anyone concerned with the rule of law.

3. Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72 U. PITT. L. REV. 191 (2011) (manuscript at 1, on file with the *University of Pittsburgh Law Review*).

4. *Id.* at 2.

5. *Id.* at 14–19.

6. *Id.* at 19.

7. *Id.* at 22–29.

In *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, Gosalbo-Bono provides a wonderful historical review, demonstrating both common heritage and differing conceptions of rule of law.⁸ This is followed by a discussion of the rule of law in international law and a catalogue of rule of law programs of the EU.⁹ In the process, Gosalbo-Bono uses the concept of rule of law both to distinguish the US and EU from other cultures through their focus on rule of law, and to question whether the resulting concept of rule of law transplant well on a global scale.¹⁰ He begins and ends with four principles he finds necessary to both the definition and development of the rule of law: (1) limitations on the arbitrary use of power, (2) supremacy of law, (3) equality of application of the law, and (4) respect for universally accepted human rights.¹¹ The last of these provides common ground with Mark Ellis' focus on non-derogable rights, and sets up opportunity for further development of the discussion on defining rule of law.

Channell follows with *Grammar Lessons Learned: Dependent Clauses, False Cognates, and other Problems in Rule of Law Programming*, in which he draws on his experience at the United States Agency for International Development (USAID) to address rule of law programming by reflecting on "some grammar problems."¹² Suggesting that we focus on the noun, rather than the prepositional phrase, Channell tells us that "Rule of law is not about law, it is about rule. And getting rule right is the foundation for the laws by which rule is exercised."¹³ With this starting point, he analyzes definitions of rule of law put forth by other commentators, with particular consideration of what he finds to be a false cognate in the use of "government" in defining the rule of law.¹⁴ His discussion then moves to problems in understanding whether "reform" in rule of law programs means the same to those concerned with the effort.¹⁵ Using grammatical analysis, Channel ultimately concludes that rule

8. Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and Its Implications for the European Union and the United States*, 72 U. PITT. L. REV. 229 (2011) (manuscript on file with the University of Pittsburgh Law Review).

9. *Id.* at 39–74.

10. *Id.* at 84.

11. *Id.*

12. Wade Channell, *Grammar Lessons Learned: Dependent Clauses, False Cognates, and Other Problems in Rule of Law Programming*, 72 U. PITT. L. REV. 171 (2011) (manuscript at 2, on file with the University of Pittsburgh Law Review).

13. *Id.* at 3.

14. *Id.* at 9.

15. *Id.* at 12.

of law programs, *if* properly implemented, can influence both the will and the capacity of the host country at which those programs are directed.¹⁶ His article provides a nice piece of the package here by tying definition to purpose, and purpose to result.

Paasivirta nicely ties up the package in *Can External Programs Influence Internal Development of the Rule of Law? Some Observations from the EU Perspective*.¹⁷ He emphasizes that external incentives must be coupled with local ownership, providing a rather logical extension of Channell's discussion of will and capacity.¹⁸ Using EU programs and the Council of Europe's Venice Commission as examples, Paasivirta draws very specific conclusions regarding local ownership of development programs, dialogue with partner countries, donor coordination, and institutional and financial sustainability.¹⁹

For anyone interested in rule of law, whether as a concept, a goal, or a focus of development programs, this set of articles provides food for thought and an appeal to action that can both achieve legitimate goals and develop sustainable results. It integrates US and European approaches and thought on important issues as developed by four practitioners directly involved in rule of law issues on a day-to-day basis. It was both a pleasure and a privilege to be a part of the discussions that produced these papers. I believe it will be the same for those who read the pages that follow.

16. *Id.* at 15.

17. Esa Paasivirta, *Can External Programs Influence Internal Development of the Rule of Law? Some Observations from the EU Perspective*, 72 U. PITT. L. REV. 217 (2011) (on file with the *University of Pittsburgh Law Review*).

18. *Id.* at 4.

19. *Id.*

