Globalizing the Rule of Law: Some Thoughts at and on the Periphery

Maxwell O. Chibundu
University of Maryland School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/ijgls

Part of the Civil Law Commons, and the International Law Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ijgls/vol7/iss1/5
Globalizing the Rule of Law: Some Thoughts at and on the Periphery

MAXWELL O. CHIBUNDU*

INTRODUCTION

In the wake of the unparalleled economic and political success of the West, rendered in stark relief by the fall of the Berlin wall a decade ago, a triad of concepts has been deployed both to explain the West’s ascendancy, and as a prescription for the laggards of the emerging (or “transitional”) and underdeveloped countries of the former communist and Third World societies. “Democracy,” the “free market,” and the “rule of law” are advanced as a trinity that underpin liberal capitalism,¹ and without which developing and transitional societies will continue to languish in the shadows of misery. These claims are then presented within what is surely the Zeitgeist of the decade—“globalization.” We live, it is frequently asserted, in a “global village.” By implication and frequent prescription, the “international community” is (or must be) bound by uniform and universally shared rules, practices, and institutions. Taken together, these four pillars of contemporary “liberal” hegemonic ideology—democracy, free markets, rule of law, and globalization—smilingly explain with equanimity and logic why it is in the interest of the rest of the world to be like North America and Western Europe.

Tempting as it is either to accept or reject these claims as platitudes, or to insist on their validation through rigorous empirical data, a third possibility is to recognize that, like most social institutions (and the ideas that underpin them), the truth (or poverty) of the claims (and therefore their ultimate utility, if any), lie less in subjecting them to such classic rational proofs, and more in

* Professor, University of Maryland School of Law. I would like to thank Alfred C. Aman, Jr., David P. Fidler, and the Indiana University School of Law–Bloomington for giving me the opportunity to reflect on the issues addressed in this piece. The views of my co-participants in the Symposium have enriched my own, and for that I am grateful. My colleague, David Bogen, gave me very helpful criticisms for which I am grateful. Finally, I acknowledge with appreciation the research assistance of Mr. Daniel C. Gardner, University of Maryland Law School class of 2001.

the reasoned unearthing of the complex web of interconnected (and sometimes contradictory) ideas at work in these simple but popular phrases. Seeking to go beyond sloganeering—whether of the simple-minded or of the sophist—I explore through this Article the murky relationship between norms and descriptions. I take the idea of the rule of law as a value that (at least in the abstract) commands approbation. Globalization, however, is generally used descriptively but with the clear implication that since no force can change it, all had better get on board. And so, most readers of this Article, as would most others in the West, will have few qualms in prescribing the globalization of the rule of law. But what are the implications of such a prescription? How often do we take a stance outside of our self-created universe to consider the ramifications of our prescriptions? Above all, what are the connections between rules, practices, and institutions, and can these connections be created or maintained within a universalist frame of reference?

For the purpose of this Article, I have chosen three themes whose promotion command general assent within the communities that the readers likely inhabit: globalization, privatization, and the rule of law. In examining these three themes from the perspectives of their enthusiastic proponents in the West and their more skeptical detractors in the disadvantaged areas of the world, I seek to illuminate the extent to which the liberalism at the core of contemporary globalism remains enmeshed in the prism of privilege, even as it asserts the primacy of pluralism and preaches intolerance of local dictators and autocrats.

The Article proceeds in the following stages. Part I presents some views of "globalization." Part II outlines some features of the concept of the "rule of law." Part III relates the rule of law to "privatization" as a factor of globalization. Part IV explores the connection between a globalized rule of law and international legality.

I. GLOBALIZATION

Much has been written about globalization, and adding to that confused and confusing literature should be a last resort. Yet, if any sense is to be made of the vast literature that this highly ambiguous term is generating, the reader deserves some kind of reference point from the vantage of the writer. Within that framework, it is essential to distinguish the rhetoric of globalization from its reality, and that reality from utopian objectives.
There is no doubting that we live in a world whose ideology and physical endowment are significantly different from those that were prevalent even twenty-years ago. The transmission and receipt of information across space and time is markedly faster. The now ubiquitous networks of computers, satellites, and telephones, and the audiovisual linkages that they make possible, have clearly enabled increased flows of goods, capital, persons, and information across traditional geographic and political boundaries at rates that make the regulation of such flows less subject to ponderous bureaucratic preferences. The hegemony of many nation-States over activities within their borders, and perhaps over many of their citizens, is a good deal less secure. The market is a more preferred institution for organizing and regulating economic transactions, and the sphere within which such transactions are thought to be appropriate has expanded immeasurably. Whether these changes imply a less heterogeneous world is more open to debate, for the quantity of interactions does not necessarily speak to the quality of the exchanges that they engender, and to the extent globalization is about the transcendency of linkages, the quality of the ensuing exchanges is surely as important as their quantity and velocity.

Conceding the potential that technological change has for both the temporal and spatial bridging of transnational socioeconomic practices, it remains nonetheless possible to identify four conceptions of globalization with special resonance for the rule of law, which are discussed below. While all four share the recognition of globalization as having the potential to free individual activity from conventional sources of authority—notably the State—they differ markedly both in the extent to which they view such freedom

2. Debate exists about the extent to which current flows of goods and capital are markedly different from those of earlier periods such as the turn of the twentieth century. See, e.g., David Goldblatt & David Held, Economic Globalization and the Nation-State: Shifting the Balance Power, in 22 ALTERNATIVES: SOCIAL TRANSFORMATION AND HUMAN GOVERNANCE (Iss. 3, 1997). What seems above the fray is that the instantaneous and broad integration of the transnational communications that are integral to the movements of capital, goods, and persons is qualitatively different today than it was in the prior periods of internationalization. That difference has significance for the cultural content of globalization which is essentially at the core of the concept of the rule of law, and of this Article.


as already having taken place, and the normality of unshackled individualism. Three of these four conceptions of globalization emphasize the importance of globalization as a dynamic process, while a different, yet somewhat overlapping, group of three hails it for its focus on liberating the individual from forced institutional choices.

Two views of globalization tout its primary virtue as liberating the individual from the tyranny of authority: that of the State, and that of the multinational corporation. Under the former view, the technology of instantaneous communication renders archaic the geography of place by permitting one and all to be participants in the life of all and allowing each individual the freedom to express his or her own uniqueness. Life is lived in the present, not in the past, and to see is to be. Globalization clips the authority of traditional institutions—including, and perhaps especially, the State—by making it possible for insiders to communicate in real-time with outsiders, and for outsiders to bring pressure to bear on local politicians (including other gatekeepers of tradition such as religious leaders and party officials). The insider also obtains a vista into the outside world and is thereby able to recognize repressive rules, customs, and habits. Not surprisingly, proponents of “international human rights” and of “democracy,” who hold these conceptions of globalization, invoke it as an ally in the project of universalizing the ground rules for acceptable politics and statecraft.

A related but distinguishable invocation of globalization focuses on its potential to upend those economic relationships between the individual and the enterprise that have been fostered by the industrial revolution. For some, globalization is to be lauded because it permits each and every individual to become an entrepreneur capable of independently discovering and exploiting markets for goods and services without being tethered to conventional cultural strictures. The individual can therefore challenge the “big corporation” by giving or withdrawing her labor, consumption, or investment at will, with little regard for the confines of space, culture, or politics.

For others, that the corporation can exploit the same liberating technology to offer or withdraw employment, locate investments, exploit markets, or evade national regulations, presents a distinctly different perspective on globalization. In a world where temporal boundaries are rendered less and less consequential, given consumption patterns in which demands for services are less easily satiated than demands for goods and immobile industrial labor, and where the mandatory command of State authority shares equal (if not

inferior) billing in popular legitimation with privately ordered rules, the
globalization of the power of the multinational corporation is a phenomenon
that should not be equated with the empowerment of the individual, civil
society, or "grass roots non-governmental organizations."

Finally, a common usage of "globalization" has served the same purpose
for the last fifth of the twentieth century that terms such as "modernity" and
"post-modernity," "internationalization," "interdependence," "industrialization," "developed," or even "civilized" have done for other
periods—that is, the crystallization of an otherwise vacuous abstraction of a
consequential norm of "progress." The term "globalization" ambiguously
evokes and beguilingly promotes the description and adoption of a loosely
framed set of Western institutions and practices as the standard means for
structuring and understanding relationships that cross geopolitical and cultural
boundaries. It serves both to disclaim any particularized functional meaning
and also to recommend, through the surface objectivity of triumph and
success, the universalization of core practices and institutions that might
otherwise be considered of parochial interest only. The globalization of such
entertainment as Hollywood films or television programs, like the
transnationalization of eating habits as manifested by Chinese, Mexican, and
fast food chains, are no more indicative of Western hegemony than Islamic
fundamentalism is of Arab hegemony. By extension, the ascendancy of
democratic rule, multicultural education, adjudication, privatization, and
floating currencies epitomize universal demands. The cultural phenomenon
of globalization is thus to be cut loose from its moorings in any particular
setting, reflecting rather the satisfaction of the demands and aspirations of a
global community.

To expound on the idea of the rule of law as an element of the
globalization creed thus provides one means of inspecting the differing
conceptions of globalization. In what follows, I exploit the concept both for
its consequentialist values and for the purpose of defining the boundaries of
its normative innocence. The concept of the rule of law is especially well-
suited for this undertaking for a variety of reasons: the idea—at least in its
unelucidated form—commands virtual universal approbation, it transcends the
moral and functional dichotomy, and as indicated earlier, it has become a

prevalent and universalist justification for what might otherwise appear to be self-interested prescriptions of policy. Most significantly, however, its realization is dependent as much on internally embedded institutions and practices as on explicitly articulated ideas and objectives.

II. THE RULE OF LAW

In thinking about social practices or institutions, especially those that have attained (or fallen into) the domain of a cliche (where the idea of the rule of law now dwells), it is convenient and useful to begin by stating the intuition commonly associated with the practice or institution. On its face, the phrase suggests subjection to law, obedience to it, and guidance by it. As will become evident from the ensuing discussion, this implies a positivistic conception of law; that is, a notion of law as an artifice of human organization that functions within particularized associations, and whose parameters, however ambiguous in their generalities, are susceptible of being ascertained in particular instances. The idea of the rule of law thus elicits an imagined realm dominated by the evenhanded and principled use of social power. It is deployed as an oppositional concept to arbitrary rule or rule by caprice. As such, it is a statement of the “supremacy” of law over “personal rule” or expedient politics.

Within this framework, two plausible (but extreme) conceptions of the rule of law should be eliminated—expeditiously, as it were. The first conception to be eliminated is the idea that the “rule of law” means the unyielding enforcement of whatever is deemed or proclaimed to be “law” by whoever is in power. The second is a set of immutable orders that must be undeviatingly adhered to or enforced against all persons at all times and in all circumstances. On the one hand, both of these approaches possess the capacity to yield stability or order, a “virtue” with which law is frequently associated. On the other hand, neither of these will endure or indeed be tolerated within any of the social structures that characterize human organization. Intuition suggests that the rule of law has as a primary purpose the compulsion of accountability—it should be able to compel the lawgiver as well as the subjects. However, a principle that fails to discriminate among persons and


circumstances will be ineffective. All our senses impose on us the need to discriminate, and that can hardly be less true of the rule of law than it is of our physical senses.

Within these polar ends, history and logic suggest three ways of viewing the rule of law. First, we may mean and insist on the existence of specific rules or laws that further human welfare. Thus, only those societies that enact and faithfully attempt to enforce certain kinds of laws may be said to be ruled by law. Second, by the “rule of law,” we may be referring to the internalization of the values embedded in the procedural aspects of regularized lawmaking and law enforcement. Finally, the phrase may describe the aggregate benefits that derive from institutionalizing the mechanisms and processes of lawmaking, interpreting the law, and law enforcement. Of course, a society that embodies all three would be the consummate rule of law society. But these attributes come in varied doses to different societies at different times. Far from being mutually reinforcing, their histories suggest they may diverge, forcing a society to act in preference to one or the other conception of the rule of law. Thus, for utilitarian and epistemological reasons, it is worthwhile to understand the environment for the dominance of each view of the rule of law, and for their optimization.

A. The Rule of Law as the Law of Rules

All societies, it is fair to say, are governed by rules. Rules can be classified along many dimensions, such as their nature, purpose or function, source, and (most pertinent for the purposes of this Article), flexibility of application. We are, of course, familiar with the distinction between legal positivism and natural law. Indeed, but for our embrace of legal positivism, it is fair to say that the liberal, administrative, bureaucratized welfare State would otherwise be illegitimate. It is no coincidence that legal positivism emerged contemporaneously with the welfare State—first in Continental Europe, and then in the Anglo-American world.

A variant of the positivism-natural law debate is currently being played out in the context of the rules versus standards debate. It is a debate that most of us can luxuriate in, confident as we are that the outcome is unlikely to challenge foundational aspects of our contemporary life. Yet, the rules-standards dichotomy is one that is critical to the conception of the rule of law

---

in the so-called emerging or transitional societies, and certainly in the
developing countries of sub-Saharan Africa. There, the rules-standards debate
is far from being solely of academic interest.

The adoption, enactment, promulgation, and above all, codification of
statutes and decisional judicial rules are tendered not only as indicia of the
rule of law in developing societies, but more significantly as instrumentally
relevant to the modernization of their economic and political infrastructures.
In the economic area, for example, there are vigorous arguments for more or
less nondiscretionary official stipulations on such otherwise highly contested
subjects as title to property, means and levels of taxation, foreign investment,
privatization, and the regulation of securities markets and corporate
governance. The specificity of rules is posited as enhancing "transparency,"
while the vesting of discretion in bureaucratic or political entities is often
viewed as tantamount to encouraging corruption and the abuse of power.

Belief in the efficacy of specific rules as an instrument of economic
growth is not, however, a 1990s phenomenon. It dates back to the first wave
of the "law and development" movement which flourished in the immediate
aftermath of the decolonization process of the early 1960s. That movement
has been written about extensively, and its features will not be rehashed
here. It does share, with the contemporary globalization Zeitgeist, a belief
in the agency of specifically articulated rules to promote economic growth by
putting the foreign investor on notice, thereby shaping her expectations and
commitments. Of course, the march towards authoritarianism in much of the
developing world in the late 1960s and 1970s demonstrated four distinctive
shortcomings of the rule of law defined in terms of the specificity of rules.

First, in the hands of civilian governments, neither the specificity of rules
nor their codification proved to be effective deterrents to extra-legal conduct.
The difference between "law in the books" and "law in action" was a good
deal more profound in real life than most North American legal realists could
have imagined, even in the most hyperbole-laden of illustrations. Second, the
new military autocrats proved to be as capable (or in many instances even
more capable) of drafting highly specific substantive rules as the civilian
governments that they overthrew. In fact, in many instances, the "decree"
drafters were the same civil servants and bureaucrats who had spearheaded
codification. Third, there was little to correlate the specificity of laws (or for
that matter law in general) with the inflow of foreign investments or with
economic performance. Rather, governmental policies, both in developing

11. See generally id.
and industrialized countries, which were generally expedient responses to geopolitical considerations were better predictors of the giving of economic incentives and, over the medium- to long-run, of economic performance. Fourth, the content of many of the specific substantive rules was anything but liberal. Thus, few laws could be more specific than those which nationalized foreign interests, or which stipulated the method for calculating the value of expropriated property.

Similarly, within the political arena, specificity in the articulation of constitutional rights has long been a hallmark of post-colonial States. The approach has tended to receive less endorsement from Western intellectuals than specificity in the economic sphere. Yet, it is difficult to see why it makes sense to insist on specificity in the promulgation of those rules that seek to regulate economic behavior, but not those in the political arena. An attempted conventional explanation borrows from Isaiah Berlin’s frequently invoked distinction between “negative” and “positive” freedom. Political rules, as conventional jurisprudence teaches, work best when framed as limits on State power, rather than by imposing affirmative obligations on the State. Such prohibitions should be general, not specific.

The rules-standards dichotomy points out a crucial feature of the “rule of law” arguments to which I shall return. It is that the idea may have significantly different meanings for the player from without, than it does for the player from within. For the foreign investor, specificity of economic rules is preferable to a lack thereof, even when those rules are unlikely to be enforced. Such specificity provides at least a totem that may be useful even for those skilled in navigating the intricacies of operational law. For the player from within, however, especially the underprivileged members of that community, it may well be that it is the explicit statement of the affirmative obligations of the State that are critical. Thus, for example, in the current climate of privatization, the foreign investor likely prefers a legal regime that articulates as specifically as possible the rules of the game. An employee in an entity to be privatized, however, may prefer rather vague rules on privatization, and would rather push for a provision within a constitution that assures to all a right to full employment, however “pie in the sky” the idea might seem to the outsider.

---

B. The Rule of Law as Process

Liberalism, it is commonly noted, is characterized first and foremost by its commitment to process, rather than to specific substantive rules, virtues, or norms. This is certainly the case with the liberal idea of the rule of law. Process seeks to channel administrative fiat, to provide to all equal opportunity and access to decisionmaking, to routinize the processing and adjudication of claims, and to assure the integrity of the rule of law by segregating judicial independence from ordinary politics. In regularizing judicial decisionmaking, such process purports both to afford equal treatment to those who invoke the applicable law, and to render law administrators accountable to society without making them subject to its transient whims.

It turns out, however, that law as process is not quite as transparently objective as one might wish. Essentially, the core problem stems from the familiar chestnut that it may be just as evil to treat differently situated persons alike as it is to treat like persons differently. Similarly, a procedure that works in one circumstance may be entirely unsuitable for another, and given the abstract quality of processes, it may be less susceptible to conditioned negotiation than substantive rules. This is particularly likely to be the case in a political environment where plural politics is characterized less by shifting coalitions of functional interest groups than by long-enduring cleavages that track primordial attachments.

The failure of process as a check on governmental power in the newly independent States of Africa was often cited as an indicator of the failure of the rule of law in those societies and an explanation for their continuing economic underperformance. In the 1990s, it is quite commonplace to prescribe process as an ingredient of liberal constitutionalism and as essential to attracting foreign investment. Yet, consider the implications of this view of the rule of law from two distinct perspectives: those of the foreign investor and those of the locals.

From the former’s perspective, process is a standardized structure for obtaining decisions and for resolving disputes, the cabining of administrative and political discretion, and nondiscriminatory treatment vis-a-vis the natives. In short, some degree of certainty, predictability, and (as the foreigner would

---

"fairness" are required within even a flexible regime of substantive rules. In this framework, society need not bind itself to specific rules so long as it makes clear and adheres to established processes for deciding and implementing the rules. Unspoken, of course, is the reality that functioning within a process-based legal regime requires expertise of a highly technical character. For example, one is not only familiar with the specific rules in question, but is also aware of whose mores dictate the capacity to manipulate those rules by playing the process game. Obtaining such expertise can be expensive. That is probably the point of critical relevance to the locals; yet, there are other salient points.

The relevant process for rule of law purposes, of course, does not refer to the traditional practices or conventions of the developing society. Indeed, most post-colonial countries could not (and for all practical purposes cannot now) meaningfully appeal to traditional practices because they possessed no single coherent set of practices that transcended the multinational, multilingual, multireligious, and/or multiethnic communities that colonial powers bludgeoned into European-style nation-States at the eve of decolonization. The new States arguably could have sought to fashion administrative rules from the composite of their several indigenous conventions. But it is no less likely that the cost of arriving at the necessary compromises would have been just as high, and with no greater certainty of success than the alternative that most of them took: succeeding to the inherited practices left by the departing colonizers. Nonetheless, the adoption by these countries of procedural rules, which were developed for the governments and courts of the colonizing countries, required the post-colonized countries to invest heavily in creating a new cadre of experts who learned the law without necessarily being imbued by it.

That Western legal procedures and practices proved, for the most part, to be no more than alien rituals indifferently practiced by the legal technocrats of the developing countries and easily cast off as inconvenient when challenged by political developments was a familiar criticism of the law and development movement. Yet, that should hardly have come as a surprise. The cost and complexities of formal process generated informal routines of problem-solving while lacking institutional support. These informal routines were impotent to replace the formal procedures.
C. Institutions as the Rule of Law

"Wishing" may not "make it so," but in our mass media-driven society, "naming it" seemingly does make it so. Often in the popular imagination (and that may be all that counts in the contemporary environment), a society is "democratic" apparently because we say it is, and once pronounced democratic, it is automatically a "rule of law" society. Similarly, a "free market" environment exists when and if opinion-shapers so assert, and having thus concluded, it follows that the society is or is not governed by the rule of law. Current standard rhetoric thus presents a tautology: to declare a society "democratic," "market oriented," or "rule of law based" is a statement that if a society possesses one virtue, it also must possess the others. Current usage of these terms seem incapable of acknowledging a descriptive phenomenon without according (or denying) full-fledged legitimation to the society in question.

But what makes these three otherwise distinguishable concepts cohere? Increasingly, the response of social scientists who accept the rhetoric is to find coherence in the study of "institutions." Lawyers, faithful to the pragmatism of the profession, have embraced the "new institutionalism" by defining the rule of law less with regard to substance and procedure and more with the capacities and functioning of the implementing institutions. Such institutionalism operates at three levels. First is the articulation of the distinctive role of the judiciary as a separate and independent branch of government, but with the authority—indeed responsibility—to check the exercise of power by the other branches. Second, essential to judicial independence is the qualification and competence of the individuals who run the judiciary (including judges, lawyers, and administrators, among others). Third, the effective functioning of the judiciary depends as much on the availability of necessary tools (mortar, paper, and computers) as on the spirit and competence of personnel.

Policymakers in the West—especially those responsible for development assistance both within individual governments and in the multilateral financial

---


16. Notably, the focus is on judicial rather than legislative, executive, or administrative institutions, perhaps because the functioning of the latter are typically associated with the "democratic" norm.
institutions—have thus in recent years focused on elaborating the institutional elements of the rule of law. Preaching U.S.-style “separation of powers” doctrine, aid to and reform of the judiciary of transitional and emerging countries sometimes have been conditioned on the “independence” of the judiciary, a phrase often equated, however erroneously, with the availability of judicial review. Further, it has become quite customary for foundations and aid donors in the West to direct attention to the qualification and competence of officials and personnel (as well as the equipment at their disposal) connected with lawmaking and enforcement in these transitional societies—from the military to the civil service and from legislators to judges. There is the recognition that the rule of law may depend as much on the practical availability of tools as it does on the intentions and philosophies of law.

Yet, there is scant evidence that institutionalism will successfully bring the rule of law to those societies where the formulation of substantive rules and proceduralism have failed. After the initial embrace of institutionalism by these societies (hardly a surprise since there were invariably substantial pools of funds at stake), scholars and jurists in these societies are increasingly questioning whether institutionalism constitutes any less of an imperial undertaking than the transplantation of substantive rules and processes.

And yet, the rule of law does matter—even when viewed independently of the market or of plural democracy. Despite the difficulty of generating consensus on substantive rules, and while substantive rules are capable of being manipulated, a society that gives heed to substantive rules is more likely to be effectively run than one that does not. Similarly, notwithstanding the economic costs involved in creating procedural edifices, the existence of procedural rules that are followed go a long way toward legitimizing the outcomes generated from their use. And of course, institutionalized practices often tend to command reflexive acceptance, thereby dispensing with the costs of constant challenges and attendant uncertainties. These benefits can be realized whether the rule of law emerges from the interplay of market forces and pluralism, or from enlightened despotism. What can be said for the former is that they may be more likely to generate a rule of law regime than the latter. In what follows, I explore the relevance of the concept of the rule of law to privatization in order to illustrate its strengths and weaknesses within the contemporary setting of globalization.
The proselytizing of privatization as a universal good is rivaled only by the touting of globalization, democracy, and the rule of law as universal goods. While privatization, like globalization, was clearly on the rise in the 1980s, it has come to the fore in the last decade. As with “democracy” and the “rule of law,” its universalization is primarily a function of the collapse of the Cold War international order. And while the adoption of privatization policies have no doubt been coerced in some cases by such expediencies as pending national bankruptcies, it is equally clear that many of its proponents, whether in the West, the East, or the South, argue for it on profound philosophical and functional grounds. Privatization, as a rule of law proposition, thus requires understanding its current acceptance, not only as a functional economic instrument, but equally as a political statement reflecting both the geopolitical and temporal dynamics of globalization discussed in the previous section.

As an initial matter, while exorbitant claims are sometimes made for linking the rule of law to privatization, the cause and effect relationship between them is more sensibly viewed as operating at the margins. Privatization, like nationalization before it, is a macroeconomic policy whose parameters and contours are determined by political considerations. For the implementing government, the primary determinants of the decision to privatize include the following: ideology, capital and employment needs, sustainability of fiscal and monetary policies, and pressures from external financial institutions and foreign governments. For the investor, the economic terms of the transaction are primary. The weight and values assigned these considerations, of course, may be influenced by the rule of law criterion. Thus, since one of the motivations for privatization frequently is to elicit financial inflows from foreign investors, a privatizing government is likely to adopt those measures that foreign owners of capital would consider as consistent with the rule of law. Similarly, an investor’s calculation of the potential returns on an investment made in a privatized entity will likely reflect a rule of law premium or discount. For the privatizing government, the consequences of the perceptions held by the investor and the international financial institutions are real, but they alone do not determine privatization policies.

The animating philosophy of privatization is a distrust of governments as stewards and managers of economic assets. In many cases, this distrust is grounded on the inefficiencies of political bureaucracies that attempt to
GLOBALIZING THE RULE OF LAW

maximize profit—surely an oxymoron. In the immediate post-World War II period, these inefficiencies were tolerated as necessary costs of the experiments in post-war reconstruction and the creation of just and equitable welfare societies (e.g., Western Europe), economic development (e.g., Latin America), or as integral to political independence and nation-building (e.g., Africa and South Asia). The results were “mixed economies” in which the State, for a variety of reasons, acquired outright ownership in certain industries, while heavily regulating others. Thus, the so-called “natural monopolies” (typically in such infrastructure-related industries as transportation and such public utilities as energy and telecommunications), extractive industries (e.g., mining and forest products), infant industries (notably beer brewing and textiles in Africa and South Asia), and “national security enterprises” (including broadcasting, banking, aircraft, and uranium processing) were acquired by governments to save employment in failing industries, for national security purposes, to protect the “national patrimony” from foreign ownership, or as sources of patronage. Rarely were microeconomic considerations relevant factors in these cases, and macroeconomic concerns were relevant only in the broadest sense.

From a rule of law perspective, whether in the advanced industrial States of the West, the authoritarian military regimes of Latin America, or the embryonic post-colonial States of Africa, the move to State control was accomplished well within the bounds of recognized rule of law principles. The point is best illustrated by reflecting on those cases that most seem to challenge it, namely, the nationalization projects of many developing countries in the extractive industries (notably crude oil and copper) in the 1960s and 1970s. While the economic rationale and political wisdom of these projects may be questioned, there is no arguing the legalisms of their implementation.

Typical nationalization was the product of extended bargaining between the national government and the foreign concession holder. In such maneuvering, each side framed economic and political power (or their relative lack thereof) in terms of legal rights. For national governments, mineral resources represented the “commanding heights of the economy,” and ownership in and control of these resources were necessary incidents of

---

17. By “nationalization,” here, I mean state-ownership and control rather than “indiginization” or the shifting of ownership and control to nationals. Both forms of “nationalization” can and were sometimes effectuated through “expropriation.”

"national sovereignty."\textsuperscript{19} For foreign (usually multinational) companies, economic interests were secured by preexisting arrangements, notably previous contracts. Hence, the legal question was framed in terms of the scope of the legal doctrines of "pacta sunt servanda" and "rebus sic stantibus." What is important here is not which doctrine trumped (neither did), but the realization that the inevitable reallocation of some (but equally inevitably not all) preexisting rights and powers should be mediated by resort to established legal doctrines. That there was (and in fact still remains) lack of clarity as to the prevailing doctrine in a given circumstance, and that the parties were not equally happy with the outcomes, does not detract from the rule-bound character of the bargaining processes. The rule of law does not depend for its legitimacy on the automatic application of clearly specified doctrines, or on the existence of equal and like bargaining powers among the parties.

Nor was the effort to adhere to the rule of law limited to those aspects of the nationalization process that involved foreign interactions. Of particular relevance to the emergence of the rule of law concept in current discussions on foreign investments is that the host countries implemented their nationalization programs through the statutory creation of legally autonomous or semiautonomous parastatals. In theory, if not in practice, the legal regime provided criteria-based independence and accountability for these institutions. Indeed, much of the legal structures were borrowed from Western Europe. In the context of Nigeria, for example, the new parastatals created to deal with the nationalized crude oil sector were patterned after the various produce marketing-boards bequeathed to the Nigerian polity by the post-World War II colonial administration.

The point then is that the collapse of the State interventionist model evident in the privatization movement cannot be attributed simply to the legal roots (or more accurately, the supposed lack thereof). The existence of formal institutions may be necessary to the idea of the rule of law in the foreign investment sphere, but they are hardly sufficient. It is against this backdrop that I explore the concept of the rule of law in the current privatization environment.

That the ouster of State ownership and control (i.e., privatization) must be subject to the rule of law would seem to be an axiomatic proposition. The sort of "transparent" accountability fostered by the rule of law seems particularly apposite where public property is being disposed of in an environment characterized as much by qualitative ideological commitment as by quantifiable yardsticks. Privatization schemes should thus be subjected to rule of law evaluation for the following reasons: first, as a means of compelling public officials to think through and enact laws or edicts that favor the public interest over private ones; second, that in the implementation of the laws, bureaucrats do not misappropriate public property either to benefit themselves, relatives, friends, or others from whom they have received or intend to receive favors; third, that national laws and policies are consistent with international norms; and fourth, that decisionmakers focus as much on the long-term consequences of their laws and policies as on exigent factors or short-term returns. In short, the rule of law concept encourages and permits the scrutiny of official action by outsiders through the prism of dispassionate analysis. Whether such "objectivity" implies the universalization of applicable criteria is at the heart of potential disagreements over the rule of law. Differences over the application of the concept of the rule of law to privatization (or indeed any other aspects of contemporary globalization) thus are less about the potential utility of the concept as about its application in the particular circumstance.

Consider the first two arguments above. In the privatization setting, the rule of law fosters the articulation and implementation of laws and policies that favor public interest. Empirical support for this position has been found by contrasting the privatization process within societies acknowledged to be governed by the rule of law—notably Western Europe—with those where the rule of law (when grudgingly acknowledged to exist) is said to rest on less secure grounds. The former situation is characterized by clear and specific legislation that is transparently implemented. In the latter situation, legislation is frequently of a general and highly discretionary (if not muddled) character, that is effectively not subject to reasoned legal review. Such general and discretionary legislation is antithetical to the idea of the rule of law because, among other things, it shifts the focus of power, responsibility, and ultimately accountability from legislators to bureaucrats. This is so because the legislation: first, fails to give readily executable guidelines to bureaucrats; second, denies potential investors meaningful legal rights in the form of the precise scope of the rules of the game, as well as easily ascertainable and
enforceable rules or standards; and third, limits the capacity of the public to monitor or otherwise participate in the privatization process.

Whatever may be the correctness of these claims, what they demonstrate is the close relationship between legislation and enforcement. All societies decry poor legislating and loose enforcement. The ideal situation would be to have clear legislation arrived at by consensus and enforced in a frictionless manner. While this ideal may seem attainable from the vantage point of the foreign investor, the political demands and institutional structures of the host country render unattainable such a friction-free environment. However, this ideal would not necessarily prove advantageous for democracy or pluralism in such societies. Thus, putting aside these idealized situations, we are confronted with interesting questions as to the nature, scope, and valuations of the trade-offs inherent in the relationships between clear legislation and discretionary implementation.

Clear and specific legislation requires at a minimum the conjunction of three premises: national consensus on the privatization scheme; an effectively administered legislature; and a proficient technocracy of bill drafters. The concurrent existence of these three requirements may emerge over a period of time, but in the short-term (the period within which most globalization issues are discussed), their coincidence is not only highly unlikely, but efforts to create them will generate countervailing societal pressures.

Because privatization necessarily involves the reallocation and redistribution of hitherto public resources, it is likely to generate division in a legislative body that genuinely represents the interests of a diverse community. Inherent uncertainties about privatization, such as the value of the assets to be privatized, the most efficacious manner of privatization, the necessity (if any) for differential regulation, and the need for residual State ownership or control demand vigorous debate and compromised resolutions.

The problem of valuation falls into two broad categories. First, it is unclear what assets should be privatized. This issue is particularly acute in the privatization of infrastructural interests in the so-called “natural monopolies,” such as the production of electricity or the running of airports. Whether these entities should be sold as a unit, transferring wholesale their monopolization of essential facilities (e.g., traffic control and electricity distribution), or whether they should be broken up into component parts (e.g., terminal and landing facilities separated from traffic control, or power generation separated from electrical distribution) pose as many political as economic questions, and
the approach taken necessarily affects valuation. Second, since these assets were acquired and operated by the government for a variety of reasons, traditional economic yardsticks of valuation, such as return on assets or replacement costs, may be inapposite. This is especially the case in formerly socialist societies and some developing countries where the classical conception of a market, as operating optimally in terms of arms-length transactions among voluntary buyers and sellers, is at best fledgling. Solutions developed in long-functioning market societies or mixed economies such as those of Western Europe or Latin America may be of little relevance in Eastern Europe or Africa.

Similarly, there is no uniformly appropriate method for transferring public assets to the private sector. Rather, each society must develop and implement those means that take account of its history, politics, economic structures, and future aspirations. Over the last decade, at least five distinguishable approaches have been tried, each reflecting political compromises as much as economic realities. For developed capitalist economies like the United Kingdom, existing stock-market exchanges offer adequate fora for privatization. Preexisting mechanisms for setting the price of initial offerings can be resorted to, and once undertaken, the fully functioning secondary market can be relied upon to apportion the risks and benefits of ownership. But even in these societies, so strong is the political linkage to privatization that the market mechanism alone has not been relied upon to distribute its spoils. In seeking to privatize coal mines in the United Kingdom, for example, politics—rather than economics—dictated parliamentary allotment of shares in the mines to coalminers at non-market prices. Likewise, the retention of the so-called “golden share,” which has become a feature not only of British privatization, but of privatizations in other developed market economies such as France, Germany, and Italy, merely illustrates the axiom that the nature and scope of privatizations frequently are determined as much by political as by economic forces.

The political-economic divide is even more blurred in societies where the allocational function of formal market exchanges is of more recent vintage. Here, legislatures cannot simply rely on well-established customs and practices, but must seek to give effect on a case-by-case basis to arrive politically at distributions. This often results in general legislation wherein

the particular parameters have to be worked out in the administrative environment. East European legislatures, thus, have experimented with a variety of approaches ranging from the ostensibly “democratic” (but arguably more appropriately termed “populist”) schemes of distributing vouchers to the general public, to the “corporatist” allocation of assets to managers, workers, or other stakeholders within the enterprise. In some instances, as a means of dealing with both the valuation and distribution problems, these societies as well as many in Africa and Latin America have relied on “negotiated bids” for, or auctions of, specific assets rather than on the sale of enterprises as going concerns. Because these dispositions are likely to generate highly particularized problems in individual transactions, it may be counterproductive to insist on narrowly drawn legislation as a prerequisite to effectuating them. For both political and economic reasons, the legislative mechanisms authorizing the transfer of assets from the public to the private sector may span a broad gamut, without thereby impugning the integrity of the process, or more particularly running afoul of the rule of law. In any event, the pull-and-tug of deliberations over these choices, buffeted as they will be by the special pleadings of particular interest groups, may be as essential to the legitimization of the democratic credentials of enacting legislatures as is the validation of their representativeness through the ballot-box. The result of the deliberative process, if fairly pursued against the backdrop of relative inexperience in the privatization process, is likely to be unclear and ambiguous legislation. Indeed, appropriate legislation may leave it up to a professional bureaucracy to create rules on an ad hoc basis in response to experience and evolving concerns.

Yet, the resulting grant of bureaucratic discretion must be checked. There is no disputing the power that bureaucrats exercise as a result of imprecise legislating. Moreover, the technocratic competence of the bureaucrats who find themselves thrust into the new world of privatization surely is subject to


23. Again, a detailed discussion of these varied approaches to the privatization of public assets is beyond the scope of this Article. The essential distinctions between these approaches and the public offering consist in the much narrower grouping of participants and the fact that it is hard assets rather than the bundle of interests, rights, and liabilities (or “nexus of contracts”) that constitutes the corporation or “joint stock company” that is being disposed of. See generally Maxwell O. Chibundu, Law and the Political Economy of Privatization in Sub-Saharan Africa, 21 Md. J. Int’l L. & Trade 1 (1997).
skepticism. Finally, stories abound to indicate that there is a need for checking the exercise of discretion by administering authorities.\(^{24}\)

There are three possible avenues for doing so. First, enabling legislation can (and should) provide for periodic accounting by the administrators. This might take the form of reports to and oversight hearings by the legislature, disclosures to the general public, or open meetings and the like.\(^{25}\) Second, the setup of administrative structure, custom, and practice may encourage voluntary monitoring of the conduct of the bureaucracy by the general public at large, or by those with business before the administrative bodies. Finally, legislation may provide for judicial or quasi-judicial review. There are trade-offs of efficiency and accountability among these approaches, and the preferable one (or combination of approaches) cannot be asserted without close examination of the sociopolitical and economic environment within which the privatization is taking place.

Legislative oversight, at best, can only be exemplary. No legislature can devote its necessarily limited resources to the kind of close scrutiny and close monitoring that may be essential to assure that a bureaucracy, which is not already steeped in an ethos of selfless public service, remains fully accountable to the public interest. Moreover, as with judicial review, close scrutiny by the legislative branch will raise problems of the appropriate distribution of power among the various branches of government, the resolution of which are bound to create significant tensions about (if not outright challenges to) the legitimacy of fledgling political institutions. Similarly, dependence on monitoring by interest groups or "civil society" runs the risk of collusive behavior between the bureaucracy and the private monitors that may not be in the long-run interest of the larger society.

Take as an example the quite familiar and ubiquitous problem of "corruption." Broadly understood to refer to the knowing exchange of public goods by public officials at less than fair value for private benefit, corruption is a practice whose universal condemnation is rivaled only by its prevalence.

---

\(^{24}\) Stories of defalcations arising from privatizations in developing and emerging economies such as Mexico, Russia, and Indonesia, are now staples of reporting in the Western media. Illustrative, for example, are those related to the role of the Salinas brothers in Mexico’s privatizations. See, e.g., Joel Millman, *Mexico Probe Calls a Sell-Off Suspicious, Questions Role of Ex-President's Brother*, WALL ST. J., Sept. 27, 1996, at A15; cf. Laurie Hays, *Friend in the Citi: Private Banker Wooed, Then Sought to Drop Mexico's Raul Salinas*, WALL ST. J., Nov. 1, 1996, at A1 (describing relationship between Citibank and the brother of former Mexico President in moving money out of Mexico into anonymous/pseudonymous Swiss banking accounts).

\(^{25}\) Nigeria’s privatization program, for example, even though undertaken under a military dictatorship, did require the filing of periodic reports. See Chibundu, *supra* note 23, at 5-6.
Generally understood to have numerous causes, not the least of which are the relative economic underpayment of public officials and cultural practices (i.e., conditions that are peculiar to the local environment), and the combating of which were hitherto left to national governments. The scrutiny and eradication of corruption in recent years has taken on a multilateral international cast. As in other demonstrations of the globalization phenomenon, the dominant belief is that neither geography nor political and cultural particularities should be allowed to insulate the practice from the moral and legal condemnation of the “international community.”

Corruption doubtless generates dead-weight loss for those societies in which it is practiced. By definition, public wealth is transferred to private actors at less than (or no) value. Thus, it is not only to be condemned, but to be discouraged, deterred, remedied, and punished. The question that arises is what is the appropriate forum for doing so. Competing fora must be evaluated in terms of their likelihood to: first, define the problem rationally within the context of the actors; second, promote incentives for developing properly calibrated measures that will tackle the problem; third, facilitate the proper targeting of those measures for the purpose of procuring their optimal effectiveness; fourth, provide adequate mechanisms for flexibly adjusting the measures in response to experience; and fifth, permit the integration or institutionalization of the measures as regularized components of the social and economic structures of the society.

Thus, even if it is uniformly accepted that it is (or should be) morally and legally wrong for a public official to obtain private payment for the performance of public duty, the occasions in which such may be said to occur are not transparently uniform. It takes little imagination to condemn a State minister who awards a public contract because of the transfer to her of ten percent of the value of the contract, but what do we say of a bureaucrat who makes such a decision with the knowledge that in a year or two, she will be looking for employment from the recipient of the contract? True, there is a temporal difference in their positions; but that difference surely assumes less significance if we learn that the national institutions of the former have not

evolved sufficiently to permit the revolving door that is a fixed element of the latter. In such a situation, it is simply nonsensical to speak of corruption solely in the present. Moreover, that contemporaneous quid pro quo is forbidden, while the use of public positions as springboards for future benefits is not, does not constitute a satisfactory answer. There may be a variety of reasons why laws on the books may exist that purport to penalize the former but not the latter. Their enforcement cannot be meaningfully removed from the environment in which they operate. Not all laws are, nor should be, rigorously enforced. There must be an escape hatch for ill-conceived or ill-implemented laws, and localizing the enforcement mechanism frequently presents such an escape mechanism.

In what way, then, does the internationalization of the problem of corruption further the choice of the local polity as the appropriate forum for dealing with it? Typically, four arguments are advanced. First, developing countries and emerging economies are at a severe disadvantage in dealing with corruption. These economies are very much in need of foreign investments and have weak bargaining positions in the competition for international capital. They will therefore be unwilling to take vigorous steps to police corruption if that would mean short-term loss of investment opportunities to other developing economies. Creating and enforcing international standards for corruption would remove this fear because all capital-importing economies would then present an identical facade on the corruption front, thereby making it necessary that owners of capital employ criteria that are more legally defensible for making their choices. Second, since some of the participants in any corrupt act are necessarily public officials, it might be expecting too much of any society to rely solely on its own means for policing the conduct. Third, in any event, the effects of corruption cannot be contained within the artificial national boundaries that are the creations of politics and geography. Its effects may be felt as much within the home country of the bribe-giver as that of the taker. Internationalizing the regulatory framework may thus be

28. Of course, this does not excuse corrupt payments made in explicit violation of law. But it does undercut the claim that there is or can be some universal standard for determining what constitutes "corruption," or even the narrower concept of "bribery."

29. Indeed, this was the basis on which the United States enacted its Foreign Corrupt Practices Act—by far the most comprehensive effort to date to regulate corruption in international commerce. As generally recounted, the Act was spurred by the perceived effects on U.S. foreign policy of disclosures that U.S. corporations had bribed foreign leaders in places like the Netherlands, Japan, and Pakistan. See DONALD R. CRUVER, COMPLYING WITH THE FOREIGN CORRUPT PRACTICES ACT: A GUIDE FOR U.S. FIRMS DOING BUSINESS IN THE INTERNATIONAL MARKETPLACE 3-4 (1994); DON ZARIN, DOING BUSINESS UNDER THE FOREIGN CORRUPT PRACTICES ACT (1995).
essential both to make the prohibitions effective through active coordination of their enforcement, and to avoid conflicting regulations where each regulator may otherwise focus on its own narrow needs. Finally, it may be the case that despite its best intentions, a country simply lacks the resources with which to fight corruption. When confronted with the necessity to prioritize, law enforcement, scarce police, judicial, and other technical expertise may be better devoted to dealing with more visibly devastating ills, or to tackling issues that are either more readily susceptible to solution or are more likely to produce immediate and readily perceived results.

As impressive as these explanations might sound at first blush, their closer scrutiny renders the environment for the globalization of the policing of corruption less benign. Two preliminary observations are worth making. First, until the 1990s, the United States stood alone in regulating transnational corrupt practices, and even so, it limited those regulations to conduct with very close connection to the United States.30 Indeed, other industrialized nations were not only indifferent to the prevalence of corrupt practices in international commerce, but many of their laws, such as the treatment of the relevant questionable payments under their tax codes, arguably furthered such practices.31 Second, there is little evidence to indicate either that the incidents of corruption across the globe have increased in the 1990s, or that the increase in international attention to the problem during the decade has contributed to its reduction.32

Ultimately, however, the core difficulty with the globalization of the rules on corruption is the misshapen focus of the problem that it presents, and the

30. Thus, the law applied to the bribery of public officials (“questionable payments”) by U.S. nationals and to the failure to disclose such payments (where material) by a company whose stock is listed and traded on an established U.S. securities exchange. See 15 U.S.C. § 78m (1994).

31. See, e.g., Andreas G. Junius, Foreign Corrupt Practices Act: Compliance Issues from a German and European Perspective, 4 ILSA J. INT’L & COMP. L. 361, 362, 363 n.5, 369 (1998) (reporting that in a survey of the tax treatment of payments to public officials in 13 industrialized countries, “five jurisdictions were found to explicitly deny the deductibility of bribery payments as legitimate business expenses under their respective tax laws. That leaves the other questioned states allowing the deduction of international bribe payments by the concerned private business organizations”).

32. There is an unfortunate tendency in this age of globalization to equate the popularization in the West of a topic with its emergence or increased occurrence. Thus, a dynamic argument is presented solely on the basis of static data, with no effort to show how or why the latter supports the former claim. The resulting prescriptions thus fail to take account of the potential disruptions they may inflict on the lives of those to whom the prescriptions will apply. See, e.g., Julie B. Nesbit, Transnational Bribery of Foreign Officials: A New Threat to the Future of Democracy, 31 VAND. J. TRANSNAT’L L. 1273 (1998) (contending on the basis of single-event surveys that “the incidents and magnitude of transnational bribery are on the rise,” and that “recent initiatives against transnational corruption [should] address corruption on a global scale”).
significant costs that attend this flaw. It is axiomatic that societies differ significantly in their dividing lines between the public and the private. Yet, all believe that there is something wrong with the unfettered appropriation of public goods by private individuals. Much of the debate about internationalizing corrupt practices has therefore hinged on the appropriate rules for reconciling these seemingly divergent realities. One possibility is to identify a core set of actions that are prohibited at all times and in all places. Transparency International, a non-governmental organization whose annual “corruption index” receives much media attention, apparently subscribes to this perspective since it uses a standardized set of indicators to rank societies on its corruption index. The approach makes sense if the focus of concern is to provide information on which a more or less homogeneous cadre of managers and intelligentsia running multinational corporations, or other international institutions, can base their conduct, or if the information is intended simply to titillate or to be didactic to a “globalized community” that believes itself to have shared norms. If the point of the exercise is less insular, however, then the approach surely is suspect. For example, the objectives of data-gathering on corruption might be expected to go beyond the simple dissemination of condemnatory information to include the varieties of questionable conduct that arise and the manner different societies deal with them. Issues of corruption are not only about the moral acceptability of the underlying conduct or the cost such conduct imposes on “doing business” within particular societies (aspects that resonate with the Western audience), but also the effects on the host society of having to adapt to new rules. Those effects are both short- and long-term. Clearly a society declared to be “very corrupt” runs the risk of losing foreign investment to those declared to be less so, and it may be that in the long-term such societies will adapt to the mores and practices deemed to be acceptable in international commerce. But pronouncements of standardized criteria, unaided by credible enforcement mechanisms, do not assure such an outcome.

Seemingly in recognition of this possibility, official approaches to the regulation of corruption, while condemnatory have left it essentially up to individual societies both to define and to punish the conduct. The Organization for Economic Cooperation and Development (OECD) guidelines, while setting out the range of practices which might be covered by a bribery statute, nonetheless leave it to the individual State Members to formulate the specific applicable rules, and to do so within their own legal structures.
The approach taken by the United States in its Foreign Corrupt Practices Act, the oldest and without question most developed of this genre of potential statutes, is illustrative. While making it generally unlawful for U.S. entities to make corrupt payments to foreign officials, the Act exempts from its prohibitions payments to those officials whose duties are essentially "ministerial or clerical,"\(^3\) apparently as an acknowledgment of the routine and lawful practice in some societies of making small or "grease" payments to procure services from such public officials.\(^4\) On its face, this would seem to demonstrate the capacity of rules formulated within one political system to take cognizance of and reflect the cultural proclivities of other societies. And yet, this approach (notwithstanding its benign intent) on closer scrutiny suffers from significant shortcomings.

In the first place, the obeisance to cultural differences is superficial. The enacting legislature deems itself competent to decide which of the otherwise unacceptable practices should be tolerated by the foreign culture. Thus, the U.S. Congress authorizes U.S. entities to make "facilitating payments" to foreign officials whose duties are "ministerial," but not to those who exercise discretion. But by what (or whose) criteria should the existence of discretion be judged? Are "questionable payments" to a presumptively discretion-lacking health inspector at a customs post really any less detrimental to the well-being of international commerce than like payments to a presumably discretion-laden supervisor at a State-owned bicycle plant? When the questionable payment is picked up by the mass media, the answer is clearly "yes." Legislatures of course ought to give attention to appearances, but legislation should not be driven by the need primarily to combat perception.

Of more significance—at least from the perspective of emerging economies—is the functional consequence of the unilateral arrogation by individual States of the right and power to decree the parameters of the conduct of transnational actors within foreign States. That concern should be exacerbated by the use of multilateral interest groupings such as the OECD to sanction the practice. The issue here is not simply the querulous philosophical totem of sovereignty, as important as that may be in its own right, but the quite practical one of leveraging regulatory power in one society to the economic disadvantage of others.


\(^4\) The example usually given is that of the acceptability of the "bakshish" in Arab communities. See Junius, supra note 31, at 361-62.
Clearly, the regulation of foreign corrupt practices implicates the interests of the State in which the potentially prohibited conduct takes place as readily as those of the regulating State. The optimal resolution of any conflict lies in cooperation among the affected States. Invariably, that will take the form of attempts at reconciling regulatory approaches. Among the most obvious steps would be sympathetic efforts at understanding divergent interests, cooperation among regulators, negotiating relevant standards of conduct, and even permitting the arbitration of rules by the regulated. It would seem that these are goals whose realization can be facilitated by the new technologies at the heart of globalization.

Increasingly, however (and no doubt as an incident and manifestation of the “globalization” phenomenon), powerful States view such efforts at reconciliation either as futile or unnecessary. Thus, while international agreements such as the OECD-sponsored Antibribery Convention provide the veneer of international collaboration, the substance of the arrangements is to legitimize unilateral action. Each (wealthy and economically powerful) OECD Member State is required to adopt laws that penalize the payment of bribes to foreign officials by economic actors within its jurisdiction. Each such State thereby determines what constitutes permissible payments made in foreign countries.

This approach, which is more a testimony to power than to law, is not limited to governmental action. Employing many of the tools of globalization—social and technological—organized non-governmental interest and pressure groups have become prominent actors in the field. These groups, such as Transparency International, are less susceptible to the accountability regime that international law seeks to impose on governments. And although the groups sometimes purport to represent international interests, their memberships, sources of funds, and articulation of preferences render such claims highly debatable.

The reality of economic growth in most societies is that it has entailed a fair amount of “corruption.” Individual human beings are not efficiency-maximizing robots. They possess familial passions; they are driven by short-term calculations of personal advantage; they exercise differential influence over other persons; and all these tendencies can and are translated into economic and monetary reward systems. The problem of “corruption” in many of the so-called “emerging” societies (and certainly in Africa) is often less about the prevalence of payments for favorable treatment—as much as they should be addressed—as it is about outright theft of public property by the very
powerful. Little in the emerging law of corruption addresses or (given the increasing tendency to deal with these problems through exclusionary clubs, like the OECD) can address this latter situation. Nor are there any international conventions seeking to impose regulations on the capacity of banks or other financial institutions to aid, abet, or launder such lootings.  

When strong States act unilaterally, their economic dominance leaves the weaker States with having to accept the imposed rules with whatever costs result from their sociopolitical structures, or to seek to countermand them with offsetting rules, and with the certainty that economic costs would follow. This is an ironic consequence of globalization. The very tools that permit near-instantaneous communication, and that enable each individual potentially to substitute her location and position for that of someone else, render that individual less likely to take into consideration the consequences of the policies being advocated. The framing of corruption as an issue of global concern emanates from the same basic sources and essential impulses as those already surveyed with regard to privatization: that is, lulled by instantaneous global communication, superficially similar experiences are all too readily equated and a handful of successful responses are prescribed as transcendent solutions. In particular, the role of the private sector is harnessed as the fountain of wisdom.

In summary, then, the rule of law is relevant to privatization only so long as it furnishes a means acceptable to those engaged in the process (the local and the outsider), by which they can make “officialdom” account for its decisions.

IV. THE RULE OF LAW IN AN INTERNATIONAL SYSTEM

The intellectual debate over globalization is in no small measure a contest about the extent to which there is, or should be, a convergence of practices and beliefs across geographical boundaries, such that it is optimal to regulate those practices and beliefs as one. Framed in more familiar terms, the issue is whether the consequences of globalization have created an international

---

35. But see Jeff Gerth, Under Scrutiny: Citibank’s Handling of High-Profile Foreigners’ Accounts, N.Y. TIMES, July 27, 1999, at A6 (reporting preliminary investigative hearings by U.S. Congressional committees where the alleged money laundering is deemed antithetical to U.S. political interests). Although Swiss banks typically are branded as the betes noires institutions for secreting corruptly obtained assets, it is notable that the Swiss judicial system has perhaps been most forthcoming in investigating the presence in Switzerland of despoiled assets by the political leaders of third world societies. The return of the Marcos loot to the Philippines being the most widely reported.
community that can be subjected to standardized rules. Laws function only within defined communities. A set of conventions has legitimacy as law, only as long as it is invoked within that community. Outside of the community, those conventions lose the automatic conference (or denial) of legitimation that is the primary value of legality. Thus, the debate over globalization is important both for what it says about the existence of a transnational community bound by legal standards, and the acceptability of those standards.

Power is, of course, relevant to the making of law; yet, once made, law typically abjures the invocation of power as an integral element of its legitimation—or perhaps more appropriately, law so enfolds power in itself that they become one. It is the object of law to coerce compliance unobtrusively. The conditions under which this is possible may be, and have been, debated; but one instance is where there is a general perception within a community that the application of law does not depend on the privileged status of a member of that community. Thus, until quite recently—before the onset of this age of globalization—it was quite common to argue that there was no such thing as “international law.” This was due in part because what passed as “law” all-too-obviously hinged on the most understood source of power—military might. For the most part, the international system was said to be “anarchic” because this power functioned to legitimize authority.

As indicated previously, one of the dominant features of contemporary globalization is the perception of the creation of a transnational community in which geopolitical boundaries are reduced to no more than bureaucratic nuisances. In this view, power is rendered innocuous, and its use invisible. Law applies indifferently to persons of all nationalities. The ascendance of non-governmental entities as the purveyors of power is hailed as a blessing because it reduces the influence of governments in the making of international law. The values that these entities espouse and which, presumably, are thereby embedded in the international legal system that they foster, are those which promote the interest of the individual over those of the State, human rights over State rights, democracy over autocracy, and legality over lawlessness.

But take a second look at these claims: this time from the perspective of those at the margins. Consider power as flowing less from the possession and use of military might and more from the ownership and control of economic assets. Here, we find that one of the remarkable features of the international legal regime, in this era of globalization, is the role being assigned to two

36. See the discussion of the concept of the “Rule of Law” supra Part III.
principles in the regulation (and indeed creation) of the international economic order: the hitherto esoteric notion of "national treatment" has become the norm, and the "most favored nation" status (MFN)—a relic of the bipolar world of the Cold War—is now accepted as an essential principle of (non)discrimination. Multinational corporations based in the West push for the former, and Western "human rights" organizations find the latter indispensable in the promotion of their objectives. What both principles have in common, and where they seem to matter, is in bringing to the fore the power of the government of strong States to subjugate those of weaker ones. This is so, whether the defense (in the case of national treatment) is "equal treatment" or (in the case of MFN) is "individual" or "human" rights.

In the abstract, the principle of national treatment accords with what is perhaps the twentieth century's greatest contribution to civilization, that of the equality of persons. In its totalizing form, national treatment argues that the citizenship or nationality of a person or legal entity should be of no account in the distribution of State-sponsored rights and privileges. Foreign nationals should receive no less favorable treatment than local citizens. But this principle has always been applied selectively, primarily through treaty arrangements. Indeed, in the nineteenth century, powerful States negotiated for privileged treatment of their nationals. Thus, in Egypt and China (two end-of-the-century examples), the powerful States of the West imposed upon these Eastern vassals preferential treatment for Western nationals in access to the judicial and economic resources of these Eastern States. Similarly, the "Calvo Doctrine," which required foreign investors to abjure the protection of their national governments in disputes with their hosts, was a Latin American response to what these countries perceived as the unprincipled application of the nationality principle by the dominant European and North American powers. National treatment, as it emerged in the twentieth century, was thus an effort to bridge these counter-positions. Moreover, it was not advocated as a universal principle, but rather as a much hedged and particularistic concept. Article III of the General Agreement on Tariffs and Trade (GATT), perhaps the best known application of the national treatment principle, exemplifies this particularism.

But the principle is now being unhinged from its particularized moorings. The proposed draft of the "Multilateral Agreement on Investments" (MAI) among primarily OECD States (although those whose conduct the Convention
is intended to regulate will be non-OECD States) not only provides for unequivocal and all-encompassing national (and MFN) treatment, but in a display reminiscent of late nineteenth century power, diplomacy goes on to also require for additional measure that foreign investors shall receive the better of such treatment.

The Energy Charter Treaty (ECT) and various component agreements of the World Trade Organization (WTO) provide for according treatment to foreign nationals no less favorable than those granted to nationals of the signatory State. But, these provisions are more notably nuanced in their scope and application than those of the MAI.

The evenhanded treatment of all persons who are similarly situated, as explained earlier, is a positive feature of the rule of law; to the extent that national treatment is a straightforward application of the feature, it is to be welcomed. But of course, both domestic and international law frequently distinguish between nationals and foreigners on the presumption that they are not "similarly situated." What bilateral and multilateral treaties and conventions, such as the proliferating Bilateral Investment Treaty (BIT) and the WTO, do is to overcome the presumption on the basis of "consent" by the contracting parties. But the presence of "consent" in these situations is at best a legal fiction. The United States (and other capital exporting States) resorted to the BIT, precisely as a means of circumventing emerging international customary law that ratified nationality-based discrimination in the treatment of foreign investments. Unapologetically using their overweening economic muscle, capital exporting States compelled needy, capital-poor States to choose individually between adherence to the lofty pronouncements of the

---


39. See id. art. III(3) (National Treatment and Most Favoured Nation Treatment). Noteworthy is the potential applicability of the national treatment and MFN principles as framed here to non-economic actors such as religious, cultural, and human rights organizations. See id. art. II(2) (defining a covered investment to include "[e]very kind of asset owned or controlled, directly or indirectly, by an investor... (i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled... ").


41. Cf. MAI Negotiating Text, supra note 38, art. III, with ECT, supra note 40, art. 10. Exploring why this is (or may be the case), while interesting is beyond the object of this Article.

United Nations General Assembly, and the practical benefits of friendly economic relations that would follow the acceptance of a BIT. Similarly, negotiations in such fora as the Uruguay round of multilateral trading arrangements (leading to the WTO), the ECT among European States, and the MAI have insisted on redrafting the terms on national treatment that the weaker countries, using their numbers and commodity production bottlenecks of the early 1970s, had sought to enshrine as customary international law.

But the most striking feature of these efforts at creating "international law" is less the unabashed deployment of power, than it is the open exclusion of the participation of many of those whose conduct the law directly regulates. The subtle exclusion of the weak from the lawmaking process—even when their interests are the most affected—is neither new nor unusual. Exclusion is sometimes the price to be paid for consensus. Trumpeting such exclusion, and making it the norm, however, is a radical departure from standard practice, and challenges the conventional conception of procedural justice which Western liberal philosophy has generally embraced. The "take it or leave it" ethos embodied in such approaches as the MAI, where the powerful negotiate among themselves and then invite others to sign-on and cheerfully singalong, would seem to pervert the "consent" theory that underlies the use of treaties as the basic instrument of international law.

And yet, it may be that jettisoning procedural justice as a yardstick of international legality is an inherent byproduct of globalization. While industrialization delegitimized the inequalities of feudal distributions, globalization legitimizes the uneven distributions brought about by differential access to technology-based information. The justification is not only the purely economic one of efficiency, but the political-legal one of substantive justice. Arguably, recent history demonstrates that the threat to human

---


welfare is less economic predation than it is State-sponsored denials of individual liberty and human rights. The individual and voluntary associations of individuals (the so-called "civil society") provide the best guarantee of liberty and human rights. Modern technology provides civil society with the means to check State power, and globalization enables the transnational collaboration of civil societies in this venture.

The argument appears flawless. It elicits support from the intelligentsia of the East as much as of the West, and much of the South as well as the North. On its face, only governments—the gatekeepers of the State—should be opposed to this argument. And yet, it is precisely those governments, particularly of the West, that negotiate the national treatment provisions discussed above. This paradox suggests that there is something amiss in the logic of the argument. That the divide of government and civil society (and in whose service or detriment globalization inures) may not be quite as bright as depicted above is further illustrated by the disjunction between the principle of "most favored nation treatment" and its application in contemporary international law.

If the national treatment principle can be traced back to the nineteenth century, the most favored nation doctrine, as a legal standard, is essentially a post-World War II concept. Enshrined most prominently in GATT, it permits flexibility and discrimination in interstate negotiations, while requiring that the end-product of such negotiations be evenly applied to all members of the "club." A State gives only as much as it is willing, or able, to give to the whole, on the basis of its own calculated interests (including, of course, what it expects in reciprocity from its conduct), not on some uniform appeal to a standard or mean that represents a "second" or "third" best choice. Having settled on a standard, however, a State under MFN is then obliged to apply that standard to all other group members without regard to the level of reciprocal benefits from each individual State. Thus, MFN simultaneously recognizes and furthers the interest of each State in determining for itself the level of engagement with foreign States, while denying that State the capacity to choose (to discriminate insidiously) among the beneficiaries of that engagement.

Globalization seems to be undercutting MFN, not enhancing it. In contrast to national treatment, private groups in the industrialized countries

45. Arguably, however, one may find its seeds in the postwar settlements of the Congress of Vienna and the various post-revolutionary negotiations between the European powers and the emerging States of Latin America; but these were too spasmodic to constitute an international legal doctrine.
increasingly urge their governments to abandon the concept, and to distinguish and discriminate among States on the basis of such factors as a country's record on human rights, the environment, child-welfare rules, industrial labor policies, religious freedom, and market orientation—to name the most frequently invoked. Consequently, where employment of the national treatment principle by pressure groups seeks to limit the power of governments to regulate relationships within their societies, the MFN principle (or more accurately insistence at denying its application to countries that run afoul of preferred Western standards)\textsuperscript{46} reinforces the regulatory role of those governments.

Not surprisingly, there is tension in many Western societies between groups which, while united in viewing globalization either as the necessitation or justification for diminished governmental involvement in society, or as the universalization of standards and rules, find that their push for these goals yield paradoxical results. The very technology that creates the perception of a borderless world of empowered atomic individuals also displays the rapaciousness of centralized power which can only be regulated by invoking governmental power. The response has been to look to the international community to provide the benign governance both to suppress errant national governments and institutions, and to provide the requisite rules and standards applicable directly to individuals and subgroups within national societies. Hence, schemes of simultaneous “harmonization” and “deregulation,” and of “internationalization” and “regionalization” emerge.

But the legitimation (and therefore ultimate legality) of these approaches is belied by functional realities and normative considerations at the margins. An internationalized rule of law scheme seems available only through the coercion of powerful States or powerful pressure groups within those States. These interests, in order to make effective rules, resort to such fora as the OECD or sidebars within the WTO. But, these rules are not (and cannot) be limited solely to the participants; such limitations would denude them both of effectiveness and of the pretensions of globalization. But the exclusion of those to whom a law is to apply from the making of that law is precisely the antithesis of democratic rule, a normative pillar of the emerging international order. Since that norm cannot be ignored, the next best thing is to rationalize

---

\textsuperscript{46} The annual debate in the United States whether to extend or withdraw MFN in the context of trading relations with the People's Republic of China is, in reality, only the most openly debated of a much more pervasive phenomenon. Virtually all instances in which “economic sanctions” are sought can be framed in terms of the withdrawal of MFN.
the conflict by pretending a concurrence of interests exists among “democratically elected governments” and “civil society” in the West, and “civil society” elsewhere—a concurrence whose plausibility modern technological developments all-too-readily have transformed from the realm of the imaginary to that of reality. Rarely do proponents of this assumed concurrence pause to consider the complexities inherent in establishing convergent interests, not only within more or less similarly endowed societies, but particularly in polarized ones.

There is, however unfortunate, a concrete reality that cannot be wished away, even in our globalized mind-set. It is the continuing, and indeed increasing, gap between those in societies with ready access to the modern technologies that direct globalization as the relatively unhindered flow of goods, capital, ideas, and persons (thereby creating the distorting illusion of a cleavageless community), and those who lack such access. The former’s claim to be a superior voice than traditional governments for the latter must be treated with a good deal of skepticism, not only because their experiences differ profoundly, but also because the history of the last decade undercuts it. Whatever the defects may be (and they are numerous), nondemocratic governance is more susceptible to being called to account for the rules that they make and their enforcement than are transnational institutions, governmental or non-governmental.

Democratic constitutionalism may be the preferred form of assuring accountability under a rule of law scheme, but so far, it operates solely on a national basis. This is true even of pretenders to supranational governance, such as the European Union. Thus, as long as the State is the central unit in international law responsible for the welfare of a community, the relevant rule of law norms must be filtered through its perspectives. This is not a claim that those perspectives are right and just, rather it is a claim that they are essential to the well-being of the particular community. Globalization’s suggestion of a transparent substitution of the observer for the regulated is an illusion that is compounded when we assign universal attributes to those institutions that work for the benefit of the observer. Rapid technological change is bringing with it significant changes in our capacity to penetrate hitherto distant worlds. It is less clear that these changes are altering fundamental human nature, and the latter is just as important in shaping the norms and uses of the rule of law.
CONCLUSION

The maturation of satellite technology, and the advent of the personal computer as a near-ubiquitous office and middle-class household product in the West, have significantly bridged temporal and spatial disjunctions in the physical transmission and receipt of information.

Whether the effects of these technological changes are more revolutionary than those of predecessors such as the telephone, telegraph, or the jet airplane (not to speak of the steamboat) may be of academic interest. It is clearly the case that dominated as it is by the professional middle-class, contemporary weltenschaung presents these transformations as the creation and manifestation of a new global society. Where hierarchies had dominated the structure and relations among previous international societies, the new global society has been portrayed more or less as the freewheeling interplay of autonomous persons acting for their private gains. Thus, the European domination of the international society during the colonial age, and the domination by U.S. multinationals in the age of “interdependence,” have given way to a “global society” where the only hierarchy is that of personal knowledge, not of nation-States or institutions. It is a global society—not merely an “interdependent” one—because the individual armed with a computer and a satellite dish can be just as significant a player in this society as any nation-State (save perhaps one) or multinational corporation. After all, that concept is the lesson of the fall of the British Pound Sterling in 1992. And the ubiquity of U.S. fast-food chains is readily matched and countered by the internationalization of the appetite for Chinese, Indian, Mexican, and like “multicultural” foods. Similarly, global Christian evangelism is matched by the transnationalization of Muslim fundamentalism. World music, of course, is global, and while the production of commercial cinemas may still be the preserve of Hollywood and Bombay, they nonetheless draw their themes from across the globe. Even matters of war and peace evince similar globalizing phenomena. Not only has the post-Cold War world witnessed an unprecedented resort to international military coalitions to fight “rogue States,” and the United Nations’ system for “peace-making in failing States,” but these have been done with the active involvement of globalized non-State actors, notably human rights and charitable groups, that respond to crises without regard to national frontiers. Thus, the globalization age represents, as these proponents would have us believe, the ascendance of the professionalized and technocratic intelligentsia, rather than the dominance of
Western culture. The guiding ethos, if one is to be found among these actors, lies in self-actualization rather than in any primordial attachments to kinship, nationality, or the like. The extent to which these changes either have given rise to, or reflect, significant restructurings in institutions and cultures is the critical debate that surrounds the issue of "globalization."

In this Article, I argued that the "two spaces of globalization" are as present in the area of the "rule of law" as elsewhere. There are those spheres of technocratic elitism into which a small proportion of the Third World may have bought, but there are other spaces of globalization—the spaces not simply of "civil society," but of weakened States. Simultaneous exchange of information will not cure those conditions. The near-instantaneous communication across the globe provided by current and emerging technologies makes it easy to believe that we are all going through the same experiences. In this atmosphere, it is tempting to see law, particularly the rule of law, as simply another commodity easily manufactured according to well-delineated specifications and readily sold across borders and cultures. When we do so, the specifications we have in mind are, of course, those with which we are familiar; those that have proved successful in our dominant societies are those of the West. However, as Kevin Brown's contribution to this Symposium amply demonstrates, the connection between experience and values is, to say the least, complicated. Even if one assumes shared experiences, the response to those experiences is unlikely to be identical. To the extent that the rule of law calls for rationally articulable responses to experience, we may expect the development of certain patterns of behavior; but it is unlikely that those patterns will be identical in their content.

The one certainty that is likely to transcend the current flux of dynamic exchanges across the globe, however, is that a period of retrenchment will follow. The duration of, escape from, and building on that retrenchment will in significant measure depend on the institutional foundations that are integrated into the current globalization phenomenon. Implementation of the rule of law affords one means of creating institutions that will not only aid the efficient channeling of current outbursts of creative productivity, but that will also limit the unwelcome but inevitable consequences of current excesses. However, effective institutionalization of the concept of the rule of law—and therefore its long-term efficacy—demands stripping out the rhetorical veneer of self-congratulation or self-aggrandizement that have become the hallmarks

47. See Kevin Brown, Globalization and Cultural Conflict in Developing Countries: The South African Example, 7 IND. J. GLOBAL LEGAL STUD. 225 (1999).
of its invocation. Focus must be placed on the complex mechanisms of procedural rectitude, path-dependent substantive reforms, and institutional checks on power that are essential attributes of the concept. If this Article persuades the reader that, above all else, the global reach of the rule of law requires paying a decent respect (i.e., something more than verbal attention) to local particularities, then it will have succeeded in achieving the writer's primary objective.