

Rule of law in crisis: The need for a new approach

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The rule of law is vital for creating and maintaining democracy; providing security; protecting human rights; and promoting economic development.^[1] Definitions vary, but fundamentally it demands that all are bound by the same law and that the law protects and holds accountable both the governed and governing.^[2] Promoting the rule of law has been a core policy priority for Western states and international institutions since the 1990s.

A Deepening Challenge

Globally, the rule of law is in crisis today. Many prominent advocates, including the United Kingdom and the United States, have seen the rise of political movements openly antagonistic to its ideals. While President Donald Trump's first administration did not formally abandon the longstanding official US policy of backing the rule of law abroad, it was not a priority. How the second Trump administration will behave in office remains to be seen. That said, if his rhetoric to date is any indication, at best, a Trump-led United States shows little appetite to be a leading global proponent for the rule of law in the coming years. Within the European Union, longstanding organisational consensus about the rule of law has been shattered with the mainstreaming of far-right politics. In Hungary, for instance, Viktor Orban has entrenched a government that the European Parliament calls a "hybrid regime of electoral autocracy."^[3] Powerful revisionist states, such as China and Russia, have tried to recast the rule of law as a means to exercise, but not restrain, authority.

This crisis is further compounded by the chronic failure of costly international efforts to advance the rule of law through the use of force in places like Iraq and Afghanistan. Likewise, over forty years of technocratic internationally funded foreign aid that equates rule of law promotion with capacity building and material assistance have consistently disappointed.^[4] Technocratic rule of law work focuses on building skills and improving legal processes, but largely avoids bigger questions of what makes for a more just society or how to get the government itself to be committed to rule of law ideals. This approach has a certain appeal because judicial training and case management systems, for instance, are easy to monitor and can be pursued regardless of the overarching political order because it does not threaten that order.

It is clear, however, that establishing and sustaining the rule of law is a political process. The rule of law requires a commitment to its ideals by, as noted above, both the governing and the governed. Powerful people, including high-level state officials, who violate its precepts must

face at least some prospect of accountability. While not all democratic regimes have the rule of law, research has shown that democratic accountability is essential for both creating and sustaining the rule of law.^[5]

A New Approach

Ultimately, a more promising approach demands both continuity and change. It needs to recognise the rule of law matters as a real foreign policy goal though it is not the only one. Effective foreign policy sometimes requires dealing with unsavoury regimes and tough compromises. Rule of law ideals must sometimes give way to pragmatism. Few people would sensibly argue that Western states should have no dealings with China, a leading economic and global power. Rule of law concerns must be balanced with other vital issues like addressing global challenges like climate change and seeking to maintain key security goals in places like Taiwan while avoiding potentially catastrophic military conflicts.

At the same time, this does not require abandoning the rule of law as an ideal or as a policy priority. Rather, the key is strategically and systematically making incremental improvements when possible and avoiding own goals like unnecessarily strengthening authoritarian rulers or undercutting the rule of law internationally.

While aid still has a role to play, thinking critically about the structure of the aid industry and the organization of government agencies that provide assistance to ensure that building long term, sustainable success lies at the core of their mission. Furthermore, promoting the rule of law comprehensively, as is generally done for transnational security or economic statecraft, can also make a difference.

Justice should also be engaged beyond the state. In countries receiving foreign aid, non-state justice systems rooted in custom or religion generally handle most legal disputes.^[6] This dramatically influences both domestic and international security as it undercuts the state's claim to a monopoly on the legitimate use of violence within its territory. In other words, the state is not always in control even in its own territory. State claims to authority can be highly contentious. It also dramatically impacts the prospects of international rule of law endeavours.^[7] Yet, current efforts overwhelmingly focus on state institutions. More serious and more constructive engagement with non-state justice is essential.^[8]

Even more fundamentally, it is vital to make it clear what the rule of law requires and what it is not. This means pushing back against claims that equate the rule of law with rule by law which renders the law a mere tool of state authority absent any restraint or accountability.

Last but not least, there is a need for states that back the rule of law abroad to try to better uphold those ideas within their own societies. This means following the law both domestically and internationally. Fighting corruption and impunity in society and within the state is vital as is respect for democratic norms and processes. This demonstration is absolutely critical as a seeming lack of commitment to rule of law ideals by its proponents within the international systems has undermined those efforts and provided an opening for authoritarian regimes seeking to undermine the existing global order and legitimize oppression domestically.

In short, strengthening the rule of law, and through it a more rules-based international order, remains not only possible, but essential. Nevertheless, there is no ground for complacency. Real changes and real commitments are vital.

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Disclaimer: The views expressed in this piece are those of the author and do not reflect the views of The Foreign Policy Centre

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