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The rule of law as export product

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ABSTRACT

The Rule of Law is not only a set of requirements for national legislation but also functions as export-product, requiring the governments of fragile or failed states to establish an independent judiciary, separation of powers and the like. This article contains a philosophical analysis of how the Rule of Law is conceptualized in this context, and develops some hypotheses concerning the way in which relations between donor countries and receiving countries risk achieving the opposite of what is intended.

KEYWORDS failed states; Rule of Law; security; goal-legislation; principals and agents; democracy

1. Introduction

Conflicts between the rule of law and legislation may arise if legislative drafters are asked to implement governmental policies in ways that are actually or potentially at odds with the requirements of the Rule of Law. This can already happen if we interpret the Rule of Law as merely a set of formal requirements (a so-called ‘thin’ conception of the Rule of Law) according to which law should be sufficiently general, public, accessible, and non-retroactive. Clashes can be expected if, for instance, tax-policies are implemented by retro-active legislation or if anti-terrorist legislation undermines safeguards for due process. If we choose a so-called ‘thick’ conception of the Rule of Law by adding substantive requirements as well, such as securing human rights or democratic decision-making, such conflicts can be expected to arise even more frequently. Security measures may bypass democratic decision-making; legislation aiming at reducing immigration may violate an entire range of human rights. These are just a few of potential and actual conflicts between the Rule of Law and instrumental legislation, which is mainly designed to realise policy-aims. Although such conflicts are among the first

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and most obvious to come to mind, the relation between the rule of law and legislation is, however, not necessarily a problematic one. We should keep in mind that without legislation there is no Rule of Law at all, in the formal sense of that term; and in many cases legislation aims to strengthen procedural safeguards or to realise more fully the enjoyment of human rights.

There is, however, also another way in which legislation and regulation may contribute to the Rule of Law, and that is by conceiving of the Rule of Law as a state of affairs to be realised by *other* countries and in *other* jurisdictions. The Rule of Law is then an export product. That type of Rule of Law is nowadays advocated as an essential ingredient of European foreign policy, the establishment of which is vital for securing safe European borders. Such Rule of Law is the *object* of regulation rather than a set of principles *guiding* regulation.

This article is devoted to the Rule of Law as such an export product and object of regulation. First, I will explore how the Rule of Law, as such an object, is defined and conceptualised. In Section 2, I will show that the typical form of this Rule of Law discourse can be explained as the result of a particular type of regulation in which merely the goals are imposed and rule-making is outsourced. The relation between donor-countries and receiving countries can therefore be analysed as a relation between Principals who *commission* Agents to achieve Principal's aims. In Section 3, I will pay attention to the mutual dependencies that arise in the context of such a P-A relation and I will argue that the role of the Principal, although assumed to act on behalf of the local population, is nevertheless structured in such a way that the local population tends to be outmanoeuvred by the donor-country. I will argue that in this setting the establishment of the Rule of Law may conflict with democratic empowerment of the citizens of those countries. I conclude by arguing that regulation that aims to export a blueprint of the Rule of Law risks undermining some 'thin' but vital requirements of Rule of Law, according to which relations should be guided by general and constant rules that bind the government and the citizenry alike.

2. Nested concepts

In the policy reports concerning the necessity of exporting the Rule of Law to so-called 'failed' states,¹ we cannot avoid the impression that the very term 'Rule of Law' stands for something that is very different from the definitions given by philosophers of law.² There is an abundance of philosophical

¹Daron Acemoglu and James A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty* (Profile Books, London, 2012).

²For useful overviews of these definitions, see Brian Tamanaha, *On the Rule of Law: History, Politics, Theory*. Cambridge University Press, Cambridge 2004 and Jørgen Møller, 'Systematizing Thin and

literature on the various definitions and concepts of the rule of law. Some authors favour a ‘thick’ description. They assert that the notion of the Rule of Law necessarily (should) encompass the notion of human rights and that commitment to the rule of law entails *ipso facto* a commitment to democracy. According to these authors an authoritarian or unjust rule of law is a contradiction in terms. Others favour ‘thinner’ descriptions and emphasise that the core definition of the Rule of Law consists in no more than a set of formal requirements such as that laws should be general, public, prospective and certain.³

The metaphor of thinness and thickness in which this controversy is couched reveals the underlying assumption that formal requirements should be fulfilled (as ‘necessary conditions’) before more substantive demands (as ‘sufficient conditions’) can be met. One has to be thin in order to grow thick!

However, if there is some grain of wisdom in this assumption, it is certainly forgotten by those who regard the rule of law mainly as an export-product. They define the rule of law in relatively ‘thick’ terms without paying much attention to the ‘necessary conditions’ of generality and constancy. In fact, there are two remarkable phenomena to be observed in the discourse on the Rule of Law as something that should be promoted and exported to so-called ‘fragile states’.

In the first place, it is stressed that the Rule of Law is not an ideal of itself, but is seen as something that is important because it would bring about more *security*.⁴ Bergling referred to this identification of justice and security as the ‘securitization’ of the Rule of Law discourse,⁵ in which the establishment of the Rule of Law tends to be equated with the reform of the so-called ‘Security Sector’. Although less than a decade ago law and order was *not* seen as an integral part of Rule of Law,⁶ it has now become common practice to stress the

Thick Conceptions of the Rule of Law’, at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643367> accessed June, 2017. See also Cormacain in his contribution to this issue. On rare occasions policy reports do give an overview of the common philosophical distinctions. See, for example, Christoph Bleiker and Marc Krupanski, *The Rule of Law and Security Sector Reform: Conceptualising a Complex Relationship* (Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2012). See also Nicolas Hachez and Jan Wouters, *Promoting The Rule Of Law: A Benchmarks Approach*, Working Paper No. 105 – April 2013, Leuven Centre for Global Governance Studies, at <<http://www.fp7-frame.eu/wp-content/materiale/w-papers/WP105-Hachez-Wouters.pdf>> accessed 19 July 2017.

³See J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford, 1979), Essay 11. Raz wants to avoid the ‘slippery slope leading to the identification of the rule of law with the rule of good law’, see p. 227.

⁴A Secure Europe in a Better World, European Security Strategy. Brussels, 12 December 2003. At <<http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>> accessed June 2017.

⁵See Per Bergling, Erik Wennerström and Richard Zajac Sannerholm, ‘Rule of Law and Security Sector Reform: Casual Assumptions, Unintended Risks and the Need for Norms’ (2012) 4 *Hague Journal on the Rule of Law* 98–119, doi:10.1017/S1876404512000061

⁶Rachel Kleinfeld Belton, ‘Competing Definitions Of The Rule Of Law: Implications for Practitioners, Democracy and Rule of Law Project’ *Carnegie Papers*, no. 55, Jan. 2005, at <www.CarnegieEndowment.org/pubs> accessed July 2013.

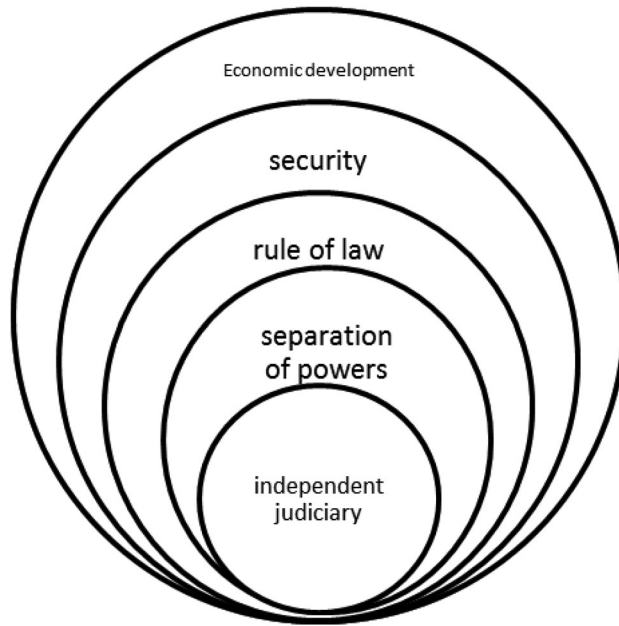


Figure 1. Goals and sub-goals.

importance of security as *the wider* justificatory aim, of which the establishment of the Rule of Law is only a part. Security is therefore sometimes referred to as the ‘wider Rule of Law’. One even tends to mention security and justice in one breath, as is the case in the revealing abbreviation JSSR (Justice and Security Sector Reform). Sometimes an even wider aim is adduced in order to justify the importance of the Rule of Law and security: economic development.⁷

The second phenomenon that merits attention is the fact that the Rule of Law (as well as Security, for that matter) is also seen as an aggregate term. The term ‘Rule of Law’ is seen as a goal that consists of a set of smaller subgoals: an independent judiciary, separation of powers, and the like. So we see that the Rule of Law is either seen as a part of a wider aim, or it is seen as an aim encompassing smaller sub-goals, such as an independent judiciary, good legislative drafting and the like.⁸ The various aims (justice, security, independence etc.) are therefore nested concepts that relate to each other like the well-known Russian matryoshka dolls (Figure 1).

⁷See Note 3. The close link between demands of financial institutions and the export of the Rule of Law is analysed and criticised by John K.M. Ohnesorge, ‘The Rule of Law’ (2007) 3 Annual Review of Law and Social Science. 99–114 at <<http://lawsocsci.annualreviews.org>> doi:10.1146/annurev.lawsocsci.3.011207.080748 accessed 19 July 2017.

⁸Also noted by Kleinfeld, *op. cit.* p. 6

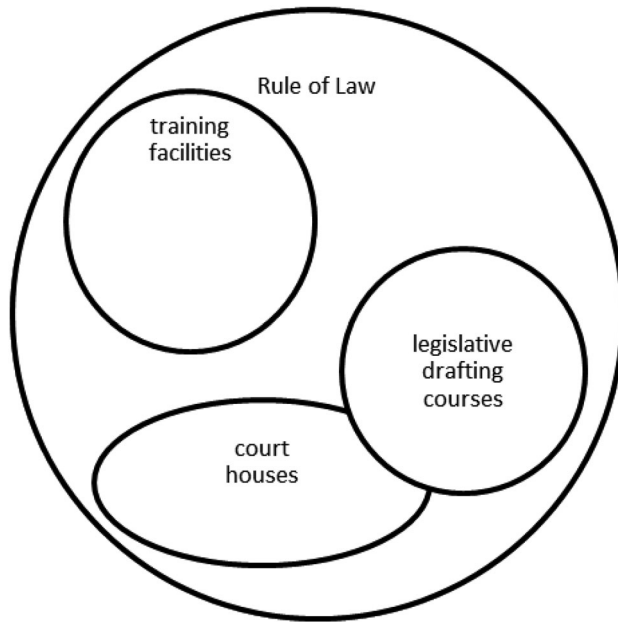


Figure 2. Rule of law as blueprint.

The word ‘aim’ is of course rather ambiguous. It can be regarded as a destination, as a desirable end-point, or as a value. Here, it is above all an *organisational principle*. It denotes a certain – desired – state of affairs which informs and inspires a *sector*: a set of actors, institutions and arrangements that are organised around a common goal. This is clearly the case in the ways one speaks about the Rule of Law. The Rule of Law is the aim around which the so-called ‘Justice sector’ is organised. The term Rule of Law, therefore, stands for the way the Justice sector should be organised (Figure 2).

The representation of aims as nested within each other suggests that the smaller aim helps to bring about the wider aim. This is clear in the Rule of Law discourse, in which it is stressed⁹ that the rule of law enhances security and that security facilitates economic development. At first sight this seems plausible, but a moment’s reflection teaches us that such cause–effect suggestions are without any grounds. As Brooks pointed out, in Nazi Germany violence was intimately bound up with law and order; in Albania, the absence of law went together with a well-ordered society.¹⁰ The relationship between law and security can also be reversed. One could maintain that security is only part of Rule of Law. Security is then a necessary but not a sufficient condition

⁹Brian Z. Tamanaha, ‘A Concise Guide to the Rule of Law’, in G. Palombella and N. Walker (Eds.) *Relocating the Rule of Law* (Hart Publishers, Oxford, 2009) 3–15, 9.

¹⁰Rosa Ehrenreich Brooks, ‘The New Imperialism: Violence, Norms, and the “Rule of Law”’ (2003) 101 *Michigan Law Review* 2275–2340, 2307–2309.

for the Rule of Law, which in turn is the 'wider' notion. Or, alternatively, it is possible to state that the Rule of Law and security are not nested concepts at all. Historically, the Rule of Law could only flourish where state-leaders could not have it 'their way', and had to strike a compromise with their opponents.¹¹ With this in mind we might as well say that a strong security-sector is a threat to the Rule of Law; or, conversely, regard a strong justice sector as a threat to security, as is the case where terrorists should be released after procedural errors; a consequence no Rule of Law promotor ever dared to endorse.

So at the level of abstract aims, the matryoshka representation is misleading. It suggests causal relations that are questionable to say the least. But the same applies to the smaller dolls: the concrete component parts of the Rule of Law. Well-trained judges do not automatically lead to the Rule of Law. They may at best instantiate the concept of the Rule of Law, but even then they only partially instantiate the Rule of Law and there may be better or more appropriate instantiations conceivable. The notion that the Rule of Law is the sum-total of a desired set of institutions can misleadingly give rise to the idea that the Rule of Law is realised and is established as soon as its ingredients (institutions, personnel, training facilities and the like) are established. This reduction of the concept of Rule of Law to a blueprint, a set of institutions, has been criticised by many commentators.¹²

It is important to note that the design of the blueprint pays virtually no attention to the fact that in its most minimal form the Rule of Law is dependent on the notion that there should be law that is sufficiently general and constant and is binding on both citizen and official. The Rule of Law is not merely established by the development of a set of rules, but can only be realised if all actors take these rules as relevant reasons for action and, moreover, if they consistently adhere to such reasons.¹³ The rule that requires a certain action of the citizen as direct norm-addressee should therefore also be relevant as a reason for decision-making on the part of legal actors as indirect norm-addressees. The rule that guides the inspection of supervisors should be known to both the public and the judiciary. Moreover, the rule of law supposes that the law is not only general in scope, but should also be applied in a consistent manner. If a decision-maker justifies her decision by reference to a rule, she implies that similar cases will in the future be solved by reference to the same rule, which limits the amount of discretion of the decision-maker. The institutional blueprint of the Rule of Law as encompassing an independent judiciary or well-

¹¹See Ursula C. Schröder and Johannes Kode, 'Rule of Law and Security Sector Reform in International State Building: Dilemmas of Converging Agendas' (2012) 4 *Hague Journal on the Rule of Law* 31–53. doi:10.1017/S1876404512000036.

¹²Cf. Schröder and Kode, *op. cit.* 'Current forms of international assistance [...] risk degrading rule of law to a mere institutional blueprint: The basic idea is that if the institutions can be changed to fit the models, the rule of law will emerge.'

¹³Mathilde Cohen, 'The Rule of Law as the Rule of Reasons' (2010) 96(1) *Archiv für Rechts- und Sozialphilosophie* 1–16.

trained lawyers *may* contribute to the generality and consistency of the law, but there may other ways as well to realise these virtues. Conversely, the establishment of such institutions does not guarantee at all a certain degree of generality and consistency. In addition, in ‘developed’ countries, these requirements are continuously tested. There is an inevitable tension between, on the one hand, these Rule of Law ideals and, on the other hand, the need for flexible and efficient legislative instruments in order to achieve policy goals.¹⁴

3. A form of goal-regulation

How can we explain the persistent use of these nested concepts in which the Rule of Law is seen either as an encompassing aim or as a sub-goal of some other wider aim? A possible answer to that question is that the promotion of the Rule of Law as well as the reform of the security sector can be understood as forms of international regulation by donor countries, which have at their disposal huge sources of money and expertise. The regulatees are the recipient countries, countries with so-called fragile states, countries in crisis, in civil war, or ‘in transition’, the governments of which are dependent on external resources and/or a good reputation, which is in itself an important prerequisite for attracting such external funding.

Not only can we see this as a form of regulation, but as a form of what I have labelled goal-regulation or outsourced legislation.¹⁵ I have worked on this phenomenon for the past few years in the context of European law,¹⁶ which is of course entirely different from the international context that is addressed here. But the dynamics of goal-regulation can shed light on the typical features of Rule of Law promotion as well. This is because goal-regulation is perhaps the only feasible form of regulating fields if the regulator has not the required abilities, knowledge or power to intervene directly. In goal-regulation the regulator only imposes certain desirable aims to be pursued, but does not prescribe how these goals can be achieved. The regulator confines itself to imposing the aim and outsources further rule-making to other actors, such as supervisory boards, standardisation committees, field-parties and so on. The only difference between these ‘domestic’ outsourcing practices and the regulation of fragile states

¹⁴See Pauline Westerman *Outsourcing the Law: A Philosophical Perspective on Regulation* (Elgar Publishers, forthcoming) chapter 8.

¹⁵The phenomenon that I have called ‘goal-regulation’ is also analysed under the banner of ‘principles based’ regulation, see J. Black, ‘Forms and Paradoxes of Principles Based Regulation’, LSE Law, Society and Economy Working Papers 13/2008, London School of Economics and Political Science, Law Department. Electronic copy available at: <<http://ssrn.com/abstract=1267722>>

¹⁶See my articles ‘The Emergence of New Types of Norms’, in: Luc J. Wintgens (ed.) *Legislation in Context: Essays in Legisprudence* (Ashgate, Aldershot, 2007) 117–133, and ‘Governing by Goals: Governance as a Legal Style’, in: *Legisprudence: International Journal for the Study of Legislation* (Hart Publishing, 2007) 51–72. It is analysed more fully in my book: *Pauline Westerman, Outsourcing the Law: A Philosophical Perspective on Regulation* (Elgar Publishers, forthcoming).

is that the latter is not, strictly speaking, ‘outsourcing’ since the actors to whom rule-making is outsourced could never be regarded as ‘in house’, at least not since colonial times. But the kinds of rules that emerge in both the context of exporting the Rule of Law and other forms of outsourcing regulation are very similar.

In order to make my point clear, I want to draw attention to the three-layered structure of goal-regulation. Goal-regulation starts (a) by advertising a desirable goal or end-state. It then (b) commissions other parties to pursue that end and to develop policies or to draft rules in order to achieve that aim. It (c) concludes by imposing the duty on those others to report back on the progress that has been made towards the desirable goal. This technique is exemplified in the legal form of the European framework-directive. Schematically and by means of a fictional example, it can be rendered as follows:

- A. An aspirational norm: ‘Further the protection of the environment’.
- B. An implementation norm: ‘Make sure that you take the necessary precautions, draft the necessary legislation’.
- C. An accountability norm: ‘Report on the progress you made’.

This rule is then imposed on, for instance, a European member-state. But what does the member-state do? Draft rules as required by B? Yes, but in a form that closely resembles and reproduces the framework directive of the higher level. It says for instance;

- A’. The emission of toxics should be as low as reasonably achievable.
- B’. Make sure you carry out a feasibility study, take the necessary measures, including rule-making.
- C’. Report on the progress you made.

This rule is, for instance, in turn addressed to the inspectorate or to field-parties. The only difference is that A’ is a *concretisation* of A in the sense that it prescribes the achievement of a sub-goal or component part of the original aim. There is no end to this form of concretisation. For what do the inspectorate or field-party do? They again reproduce the structure of the original framework directive, somewhat in the following form:

- A’’. Within two years emission of toxics should be reduced by 10%.
- B’’. Inquire into the ‘best available techniques’.
- C’’. Report on the progress made.

So we see that regulation, at each level, is outsourced to a lower (or more local) level. The only difference is that at each level the organisational aim is rendered more concrete, in the sense that it is a component part of the original aim.

The reason for outsourcing is, I think, the combination of far-reaching ambitions and vast resources with a limited amount of knowledge. European legislators want to ensure hygienic working-conditions but the complexity and diversity of contexts and local circumstances cannot be handled from a central point of view. This combination is also discernible in the relation between rich developed countries and the fragile states. The ambitions are even higher (combat hunger, poverty and terrorism); the knowledge even more limited.

4. Principals and agents

Donor countries are therefore in the position of tourists arriving at an unknown destination; they have the money to hire a taxi but are completely dependent on the taxi driver's knowledge of the city and they must rely on that knowledge even if they do not know whether such trust is justified or not.

The features of such a relation are analysed in the Principal-Agent model.¹⁷ The Principal is the one with resources, who purchases services from an Agent, services that the Principal him or herself is unable to deliver in order to attain an end desired by the Principal (but not necessarily by the Agent). Asymmetry of resources is counterbalanced by a reverse asymmetry of knowledge. In itself this may lead to mutual dependence and reciprocity, but the balance is easily destroyed if the Agent decides to use the resources in order to pursue his own aims rather than Principal's aims. The problem is how to be sure that the Agent follows the Principal's aims. This problem is central to an abundant amount of literature on Principal-Agent relations, that sets out to unravel the conditions for the Principal not to be deceived or to fall prey to 'regulative capture'.

I will not deal with this literature that mainly consists of complex arithmetic and game theory. For the purpose of explaining the matryoshka doll, I think that the Principal can choose to have her way by roughly two strategies: the Principal can motivate the Agent to act in accordance with

¹⁷There is a vast literature on P-A relationships in the public sector. See, for example, Mathew D. McCubbins, Roger G. Noll and Barry R. Weingast, 'Administrative Procedures as Instruments of Political Control' (1987) 3(2) *Journal of Law, Economics, & Organization* 243-277 <<http://www.jstor.org/stable/764829>> accessed 4 January 2010; T. Moe, 'Political Control and the Power of the Agent' (2006) 22(1) *Journal of Law Economics & Organization* 1-29; Jonathan R. Macey, 'Organizational Design and Political Control of Administrative Agencies' 8(1) *Journal of Law, Economics, & Organization*; Conference on the Economics and Politics of Administrative Law and Procedures, 1992, 93-110, Oxford University Press <<http://www.jstor.org/stable/764891>> accessed 4 January 2010; Michael E. Levine and Jennifer L. Forrence, 'Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis' (1990) 6 *Journal of Law, Economics, & Organization*, Special Issue: Papers from the Organization of Political Institutions Conference, April 1990, 167-198 <<http://www.jstor.org/stable/764987>> accessed 4 January 2010.

the Principal's aims, and the Principal can try to control the extent to which Agent pursues the Principal's aims. Motivation may consist of giving reasons that justify the original aim. In order to function as justification these reasons should refer to an aim that is more abstract than the original aim and they should rest on a certain consensus. Probably the two requirements reinforce each other: the more abstract, the easier a consensus can be reached because nobody knows what the abstract aim actually means. Several commentators have observed that this is a possible explanation for the sudden popularity of the concept of the Rule of Law a decade ago. Security-seekers, economic market-openers and human rights activists could all advocate the Rule of Law.¹⁸ I think that the recent identification of the Rule of Law with security as the 'wider Rule of Law' marks a development in which security now enjoys more consensus than 10 years ago.¹⁹ The largest matryoshka doll is the one on which there is the necessary level of consensus needed for it to function as a justificatory aim.

But apart from seeking consensus and motivating agents to pursue the Principal's aim by means of the aspiration set out in the aspirational norms, there is, of course, the need to actually monitor and control the degree to which the goal is pursued. Hence the attached duties to report. The tourist who hires the cab wants to have positive proofs that the taxi driver is reliable. In an ideal world they would be able to take a look at the GPS in order to monitor to what extent the destination is reached. In fact, it is not an exaggeration to say that this ideal situation (at least ideal from the Principal's point of view) is approached in the regulatory states of Northern Europe where constant bench-marking, monitoring, and evaluating are the ingredients of an all pervasive quality management. In a less than ideal world, the Principal is largely dependent on the self-reports of the taxi driver or on credentials, certificates and other such external signs that might give the Principal some indication of the reputation of the Agent.

Both strategies, however, lead to the formulation of more concrete component parts or sub-goals, adduced by the Agent to prove that indeed he has made some progress towards the Principal's goal. He can only prove that by pointing at measurable, tangible and controllable results. He should report on the number of attorneys trained, the amount of casualties reduced, the institutions that were established and the certificates and

¹⁸See, apart from Brooks, *op. cit.* also David M. Trubek, The "Rule of Law" in Development Assistance: Past, Present, and Future. <http://www.law.wisc.edu/facstaff/trubek/RuleofLaw.pdf>. Last accessed June 2017.

¹⁹That consensus is sometimes generated by presenting it as a goal, is also noted by Ch. Perelman and L. Obrechts-Tyteca, *The New Rhetoric, A Treatise on Argumentation*, translated by J. Wilkinson and P. Weaver (University of Notre Dame Press, Notre Dame 1969 [1958]) 261–278. Carothers points at the many controversies lurking beyond this apparent consensus. Thomas Carothers, 'Rule of Law Temptations' (2009) *The Fletcher Forum of World Affairs*, at <http://carnegieendowment.org/files/Rule_of_Law_Temptations.pdf> accessed 19 July 2009.

protocols that were drafted. So we now see the dynamic of the matryoshka doll system: whereas the Principal formulates the abstract goals in order to justify its aims, and to breed consensus on and commitment to these broad aims, the Agent formulates the more concrete sub-goals. And, we may add, the more regulation is outsourced, the more the subgoals are split into finer and finer goals. These finer goals are represented as the (partial) realisation of the overall-goal and for that reason the suggestion of a causal relation is left intact. But what these smaller and smaller targets and results do is nothing more than playing a role in Agent's accounting to the Principal.

Not only fragile states perform the function of Agent. It is good to bear in mind that the donor country not only figures as a Principal but also as an Agent itself. The Netherlands may act as a Principal towards Afghanistan but as an Agent towards the EC or international organisations. The EC commissions member-states to do their share in securing frontiers and promoting the Rule of Law. These member-states have a reputation to gain, as well as additional funding if they succeed in showing that they achieved tangible results. The same applies to the various agencies and NGOs who are in the Rule of Law business. Apart from the EU or international organisations, donor countries also have to account to their electorate. Again, the results they come up with should be concrete, controllable and tangible, if they do not want to be accused of throwing away taxpayer's money.

So in all these relations there is a very strong pull towards a form of accounting of what has been achieved in a positive sense; it should be represented as a partial realisation of the overall goal, and at the same time it should be measurable and tangible. This means that short term successes are stressed, and long term and complex developments are shunned.

Even if the required aim is not tangible at all, as is the case with the Rule of Law, its component parts will be made tangible; a certificate, a set of rules, an institution that can testify to the outside world that some serious progress has been made. These indicators all figure in the monitoring reports that inform us about the progress in the establishment of the rule of law, based on the data collected during peacekeeping operations,²⁰ as well as on internal reports. They function like a certificate, or a licence and can be labelled as indeed a kind of triple AAA, necessary for a good reputation, credibility and, as a result of that, abundant supplies, income and resources.

²⁰For a good overview see, for example, the webpage of the Organization for Security and Co-operation in Europe that advertises monitoring on such items as the performance evaluation of judges in Moldova and publishes handbooks on monitoring administrative justice <<http://www.osce.org/odihr/rule-of-law>> accessed 26 May 2017. On the relevance of monitoring on the Rule of Law see the UN-report of 2016: Rule of Law Tools for Post-conflict states: Monitoring Legal Systems, at <<http://hrlibrary.umn.edu/monitoring/Ruleoflaw-Monitoring.pdf>> accessed 26 May 2017.

5. Rival principals

As I described at some length elsewhere²¹ there are certain advantages attached to being a Principal, which leads to the phenomenon that Agents tend to outsource rulemaking to other Agents, thereby elevating their own position to that of Principal. That explains the multitude of Principal–Agent relations in just one sector, such as the Health sector in the Netherlands. In the international world of Rule of Law promotion, such relations proliferate as well and gain enormous complexity. In order to understand this, we should note that for a government of a fragile state, there are several rival Principals to take into account. First, such a government has to account to a host of donor institutions such as the OECD or the World Bank but also individual States. There is a huge amount of military and financial support at stake here, and the recipient country will do its utmost to secure that support. At the same time, however, that government may have to deal with another Principal: their own constituency. This may not encompass the whole population, since most failed states have governments who only represent a minority, a tribe or a particular group of citizens. But even if the group of followers is small, the support of such groups may be vital for the survival of that government and it needs to account to that particular group as Principal as well.

Which Principal will be deemed the most important one? The question is an empirical one and should be the topic for empirical research. But, offhand, purely on the basis of the dynamic of the exchange relation that exists between Principal and Agent, we might tentatively formulate some hypotheses.

One such hypothesis is that it is probably too simple to assume that since the Rule of Law is in the interest of both the donor country and the constituent people of the recipient country, there is no conflict at stake. If the ‘people’ consists of a minority, which happens to have ascended to political power, it will be reluctant to introduce democratic majoritarian procedures, an independent judiciary will curtail the income of those members who have succeeded to secure a position in the judiciary and so on.²² In that case, the willingness of the local government to introduce the Rule of Law will depend to a large degree on the amount of resources and support they can count on from their own people. The stronger the support of local groups, the less interest will there be to follow the Rule of Law aim of the donor country.²³ Or, to put it the other way round, the more a government is

²¹See Pauline Westerman, *Outsourcing the Law: A Philosophical Perspective on Regulation* (Elgar Publishers, forthcoming) chapter 6.

²²Adriaan Bedner, ‘Judicial Corruption: Some Consequences, Causes and Remedies’, Lecture Leiden 10 December 2002, at <<https://openaccess.leidenuniv.nl/bitstream/handle/1887/18272/Bedner%2c%20A.W.%20Judicial%20Corruption%5b2%5d.pdf?sequence=6>> accessed 31 July 2017.

²³See Louis Alexandre Berg, ‘Guns, Laws and Politics: The Political Foundations of Rule of Law and Security Sector Reform’ (2012) 4 *Hague Journal on the Rule of Law*, 430 doi:10.1017/S1876404512000024

supported by a donor country or donor organisation, the less it will be inclined to listen to the wishes of its own people.

But let us assume for a moment that the aims of these two rival Principals converge and that the citizens of a certain fragile state regard the establishment of the Rule of Law – and all its component parts – to have the same vital importance as the donor countries. This appears to be the case within Europe's borders, for instance in Hungary and Poland, where the population largely seems to share the point of view adopted by the EC. Also in that case, something is fundamentally altered if a government acts in response to the EC or the World Bank rather than to its own people. The difference is that, whereas the people of a certain country are immediately affected by the measures that are taken and the rules that are drafted by its government, the donor-country is not by any means directly affected by such measures. Whereas the donor countries can largely rely on written reports indicating the kind of training that is enjoyed by its police force, or the amount of judicial decisions reached, for the people itself the proof of the pudding is in the eating. The tendency to view rule of law as a part of the wider aim of security has led to training of the police force in Afghanistan by their Dutch, German and American colleagues. What if that well-trained police utilises its knowledge in torturing its citizens?²⁴

The situation that arises once a donor country intervenes, can be grasped intuitively by returning once more to the paradigmatic example of a Principal–Agent relationship as the relation between a tourist and a taxi driver. We might say that in the relation between donor country and recipient country, the role of the Principal is no longer reserved for the tourist himself, who might or might not suffer costly detours, but is taken over by some third person; for instance a regulator such as one may find at big airports, seated in a cabin at the entrance of the airport, regulating and overseeing a smooth transportation of customers by cab-drivers. These regulators see to it that tourists are efficiently processed by taxi drivers and assume the role of (an intermediate) Principal to whom taxi drivers are primarily accountable. Donor countries, but also important organisations – such as the World Bank – put themselves in the position of such regulators. They take over the position of the tourist, so to speak.

Airport regulators (and also international organisations) will claim that matters are processed more efficiently as a result of their intervention and we may be tempted to think that these claims are justified. However, the

²⁴The Dutch parliamentary debates concerning this possibility led to a form of governmental intervention, which was also ill-tuned to the realities of the local situation where a distinction between police tasks and military tasks was hard to maintain. For this and other dilemmas see M. Kitzen, 'The Course of Co-option: Co-option of Local Power-holders as a Tool for Obtaining Control over the Population in Counterinsurgency Campaigns in Weblike Societies – With Case Studies on Dutch Experiences during the Aceh War (1873-c. 1912) and the Uruzgan Campaign (2006–2010)' dissertation (University of Amsterdam 2016).

introduction of an airport-regulator shifts the relation between cabdrivers and clients considerably. The cabdriver is no longer *directly* accountable to the tourist, but to the regulator. The regulator, however, not only pursues the aim of efficient processing, but might also have other aims in mind, for instance, to remain on friendly terms with airport officials or cabdrivers with whom they entertain a longer lasting relationship than with tourists. Although a minimal performance of the cabdrivers is still essential in order to retain the confidence of the public in their activities, these other aims might, in the long run, become more important to the regulator than the driving skills or trustworthiness of the taxi drivers: the regulator usually remains seated in her cabin and only rarely hires a cab herself. The more intermediate layers, the more risks that other – competing – aims will distort the direct interests of the tourists and the more chances for regulatory capture between regulator and cabdrivers.

Similarly, donor-countries may be more interested in enhancing their reputation with *their* Principals, be it either their own electorate or the international bodies that might enhance their reputation than with the citizens of the fragile countries. The position of the citizens who are ultimately affected by the actions of the fragile state's government is therefore not automatically improved by the creation of intermediate layers of Principals. They may enjoy better services, just as the tourists who might generally be better off in regulated airports – but this improvement is not due to their enlarged power to control and depends on the efficacy of the regulator. In so far as the donor countries are successful in enforcing compliance, they diminish rather than enlarge democratic empowerment, not only because material resources and reputation make these governments less dependent on the support of their own people, but also because that people's role is *taken over* by the donor country.²⁵

6. Conclusion

In the discourse on Rule of Law promotion, the concept of the Rule of Law is either used as a shorthand referral to a collection of items, like a bag full of groceries that are desired and purchased by the donor-countries, or it is seen as only part of an overall ideal: security or 'economic flourishing'. The typical embedded structure of these notions is misleading in so far as it is suggested that the more concrete aim will also lead to the more abstract aim.

In this article I have tried to explain the typical structure of the discourse by pointing out that the promotion and export of the Rule of Law to fragile countries can be understood as a form of regulation. Especially in Europe,

²⁵Illustrative of this is the way in which Dutch military intervention in Uruzgan completely bypassed the local population. See M. Grandia, 'Deadly Embrace: The Decision Paths to Uruzgan and Helmand' dissertation, Leiden University (2015).

the Rule of Law is advocated as part of the policy to patrol Europe's boundaries and to enhance its security. Since in most cases there cannot be any direct and interventionist regulation, this regulation takes the form of outsourced or goal-regulation: a form of regulation in which the goals are imposed, leaving it to the regulatee to find out the ways in which these goals can be reached.

The relationship between regulator and regulatee can therefore be adequately captured as a Principal–Agent relationship. In Principal–Agent relationships there is a fundamental asymmetry of knowledge and resources: the Principal having the resources, the Agent having the knowledge. But where the Principal pays the Agent in order to pursue the Principal's aims, there is always the risk that resources are spent on Agents who do not pursue Principal's aims.

Two strategies are open to the Principal who wants to be sure that his money is spent well: he can either try to instil his ideals and goals to the Agent so that they turn into Agent's 'own' goals. Or he can revert to mechanisms of control, in which case the Agent is asked to report regularly on the progress that is made, and where subsidies can be lost or reputations jeopardised if the Agent fails to do so. In the case of the Rule of Law export we see both strategies being used. The Principal advocates the rule of law by means of more abstract aims on which a certain consensus can be expected. And the Principal also asks for regular reports on what has been achieved. Agents can only show progress by referring to concrete, measurable proofs of their efforts.

This means that Principal's justifications lead to ever larger and ever more abstract notions, whereas Agent's justifications lead to ever finer and ever more concrete notions. Both mechanisms lead to the matryoshka doll-like structure that can be found in contemporary Rule of Law discourse.

The elements of the matryoshka doll may perform important functions. Who would deny the value of an independent judiciary or the checks and balances between executive and legislative power? However, if these are states of affairs that are demanded and enforced by Principals other than those who are directly involved and who would suffer the consequences of malperformance, the deeper meaning of the Rule of Law that both government and citizen are generally and consistently bound by the same laws tends to be forgotten. A setting that requires governments to account to others rather than to their own citizens does not contribute to a situation in which governments are accountable to their citizens under the same laws as their citizens. There is a real risk that the export of a Rule of Law blueprint prematurely undermines any serious attempt to establish a mutual and reciprocal framework of rules as reasons for action that bind both governments and citizens alike.

Disclosure statement

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