



Right to rule

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Lucy Trevelyan reports on the World Justice Project and the importance to international business of a robust rule of law

Dismissed by some as a concept rendered meaningless thanks to ideological abuse and general over-use, the rule of law has nonetheless not only survived but evolved since Aristotle first pointed out that the rule of law, in contrast to the rule of men, stems from an external and pure authority.

Though it is phrase which means different things to different people in some respects, this safeguard against arbitrary governance still has at its heart some almost universally recognised principles, including a clear separation of powers, legal certainty, the principle of legitimate expectation, and equality of all before the law. It is also a phrase lawyers may hear more of in the wake of a major initiative by the American Bar Association (ABA) – the rather grandly named World Justice Project – which aims to advance the rule of law in the US and abroad (see [\[2007\] Gazette, 22 March, 8](#)).

Solicitor Francis Neate, 'of counsel' in the London office of US firm Kirkland & Ellis and immediate past president of the International Bar Association – which strives to promulgate these standards worldwide and upped its work on this during his tenure at the top – says the rule of law is the only system so far devised by humankind which provides impartial control of the power of the state.

'It is a system still in the course of development in those countries which claim to have it, but its minimum essential characteristics are clear enough,' he says. The most fundamental of these, he asserts, are the separation of powers and the fact that no one is above or beyond the law.

He adds: 'It is likely that a society governed by these principles will be extremely stable, which is the first prerequisite for investment, economic development and business generally.'

The rule of law is therefore not merely a woolly, impossibly idealistic aim favoured by bleeding-heart liberals: it increasingly has a new and eminently powerful advocate in big business, which is realising that in a country without it, doing deals can be very difficult indeed.

Michel Nussbaumer, chief counsel and head of the legal transition programme at the European Bank for Reconstruction and Development (EBRD), says: 'Typical obstacles if rule of law is not adhered to are corruption, unsatisfactory mechanisms for dispute resolution, and excessive red tape. Investors will be scared away and the cost of financing will be high.'

The EBRD, he says, has as one of its aims to foster transition of former communist countries to a market economy. 'In that context, we can see a strong correlation between economic transition and rule of law. Countries that do well in one dimension tend to do well on the other as well. This is why EBRD is engaged in promoting legal reform in eastern Europe and the Commonwealth of Independent States through the legal transition programme. We want to create better commercial laws and to help their effective implementation.'

Mr Nussbaumer explains that the EBRD promotes 'international standards of best practice', as opposed to a set of national laws – such as its model law on secured transactions. 'These standards are applicable everywhere and include recipes that have been tested. However, they need to be adapted to the local environment.'

Institution-building work is crucial to upholding the rule of law, he says, as is making sure that laws on paper are actually implemented in practice. He adds: 'Helping to build judicial capacity is one of the most important things to do in transition countries. This includes training activities but also work to strengthen the local

structures training judges.’

The EBRD has issued full assessments of the progress made by transition countries in the various sectors of commercial law – secured transactions, corporate governance, insolvency, securities markets (see www.ebrd.com/law). The general message is that the business environment is improving but business obstacles are still higher than in mature market economies. Greater problems are generally found the further east you go. The Kyrgyz Republic, for example, has been found to have the highest ‘bribe tax’ – the share of annual revenue companies spend on bribes – of any country in the region.

Roger Smith, director of lawyers’ human rights group Justice – the UK member of the International Commission of Jurists – says business would be impossible in a state without the rule of law. ‘Business needs a working legal system with foreseeable decision-making and without, for example, corruption in order to operate. In a country where the rule of law is not properly adhered to, businesses are left without remedy or protection.’

Businesses will leave countries, such as Zimbabwe, where the rule of law is not upheld, he says, or if drawn by compelling economic reasons will be very cautious, for example in Russia.

Law firms, he suggests, can do their bit to support the rule of law by assuming it as a basis for business in all their advice, by exporting the standards of their home countries and by supporting organisations like the IBA and the work of their home representative bodies, like the Law Society, to bring about rule of law improvements around the world.

Kay Wilde, a partner in Lovells’ Chicago office and co-chairwoman of the firm’s US pro bono committee, says businesses depend on a stable system of laws, regulations and enforcement mechanisms.

‘For example, without a relatively predictable and reasonable tax code, businesses may not have an incentive to make a profit. Likewise, without an efficient and fair system for the enforcement of contractual obligations, investors, suppliers, insurers and consumers may turn to businesses in other jurisdictions where there is greater certainty in the sanctity of agreements.’

Obviously, she says, the rule of law includes basic law-and-order concerns since businesses will not succeed if workers fear for their safety when going to work and consumers are apprehensive to roam shopping districts.

Ms Wilde adds: ‘In the context of business, however, the rule of law includes broader implications, such as stability in the regulation of business registration, employment, financing, taxation, trade, property rights, and insolvencies.’

To this end, she says, Lovells has collaborated with the World Bank to help analyse the legal incentives and roadblocks to doing business in several jurisdictions throughout the world. ‘The World Bank is examining opportunities and barriers to conducting business in relation to a number of topics, including starting a business, obtaining licences, managing employees and paying taxes.’

Other initiatives promoted by the World Bank that will help to advance the rule of law for the benefit of business include simplifying licensing requirements, modernising civil court systems and making employment regulations more flexible, Ms Wilde says.

Mr Neate says that, sadly, business tends to welcome stability wherever it finds it, as will many countries’ foreign policies. ‘The better long-term view is to consider the basis of the stability and what will happen when those enforcing it lose control. We have a dangerous tendency to confer too much respect on “strong leadership”. The short-term view also leads to the argument that it is sufficient for international business to comply with the local law which affects it but not concern itself further with other aspects of the societies in which they operate. The result too often is double standards giving rise to accusations of hypocrisy.’

International business, he says, is still wrestling with these problems, as are politicians. ‘Ideas of good governance and corporate responsibility are now gaining ground, so that these issues are being addressed in many quarters. But they are difficult issues.’

Since the horrors of 11 September 2001, champions of the rule of law have faced an uphill struggle in the wake of the so-called war on terror, which in some eyes has repeatedly been used as an excuse to erode the fundamental rights espoused by the rule of law.

The US has come in for particularly fierce criticism for its apparently increasingly careless disregard of the rule of law in the name of ‘security’.

The UK is by contrast fairly good at upholding the rule of law, says Mr Smith, although its international position has been prejudiced by Iraq. ‘Our legal system, and even our legal aid, is one of the best in the world. Domestically, we need to follow the laws that we have made; for example, we should not have sanctioned the ending of investigation of Saudi corruption in breach of our own legislation and international agreement. Internationally, we need to follow the decision-making process of the UN and to detach ourselves from those forces in the US that despise the UN and believe in force and torture.’

Perhaps conscious of this, the Bill & Melinda Gates Foundation has donated \$1.75 million to the ABA's charity fund to help underwrite the World Justice Project.

ABA president-elect William Neukom says the project will launch a rule of law index that will measure countries' adherence to the rule of law and identify areas in need of improvement. It will also involve the funding of rule of law-based scholarships, conferences and a public education campaign to raise awareness of the rule of law.

Mr Neate comments: 'The Gates Foundation's grant to the ABA project is hugely welcome. The US can bring far more resources to this kind of project, not just in terms of money but also of quality lawyers and motivation, than practically all the rest of the world put together.'

He adds, however: 'The US government has in recent years set the cause back several decades and seriously damaged US credibility in the rest of the world – as has our government – so the ABA faces an uphill task.'

Lucy Trevelyan is a freelance journalist