SYMPOSIUM ARTICLES

ALEXIS IAN P. DELA CRUZ*

Due Process of Law as Resistance: Dialogue, Empire, and Rule of Law Promotion in the Philippines

* Associate Solicitor, Office of the Solicitor General of the Philippines; Professorial Lecturer, Institute of Law, Far Eastern University (Philippines); LLM, University of Melbourne (Endeavour Postgraduate Scholar); JD and BA, University of the Philippines. The views expressed in this Article are personal to the author and do not reflect official policy positions of the Republic of the Philippines.

The author wishes to thank Professors Sundhya Pahuja and Luis Eslava, as well as the participants of the 2018 Third World Approaches to International Law (TWAIL) Conference, National University of Singapore, for their insightful comments on initial drafts. An earlier version of this Article was submitted in fulfilment of the coursework leading to the LLM at the University of Melbourne.

ABSTRACT

The idea that due process of law is, in essence, a conversation between ruler and ruled underpins many legal systems. Following Lon Fuller, due process creates a "peculiar form of dialogue" that seeks to uphold the interests of those affected by decisionmakers' actions. As empire's most enduring legacy to postcolonial legal systems, due process of law has come to be integral to the postcolonial state's purposive self-imagining in a bid for universality. Yet, despite its symbolic value as an instrument of "justice" in the postcolonial state, due process produces little actual dialogue between ruler and ruled. In the Global South's rule of law promotion, due process thinking remains firmly anchored to its adjudicatory origins and in rationalizing formal domestic judicial procedure and institutions for the efficient settlement of prosaic claims. This Article argues that the coercive imposition of the rule of law in an imperial and developmental context resulted in the failure of due process of law to protect individuals against the arbitrariness of the exercise of state power. This author uses the 2012 Access to Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations *published by the American Bar Association Rule of Law Initiative (ABA ROLI) and the* Rule of Law Index 2016 *report by the World Justice Project (WJP) in considering this argument. The author's purpose is to invite rethinking of due process, from dialogue in the courts, into one that enables resistance to silencing forms of imperial intervention.*

INTRODUCTION
DUE PROCESS OF LAW IN THE POSTCOLONIAL STATE'S MYTH-MAKING

The postcolonial State aspires towards the universality of the Euro-American nation-state. This universality—"a contingent development that initially occurred in the West"[1]—articulated the modern law of the nation-state. Under the universalist rationality, due process of law serves as a fundamental protection against the state's

1 Brian Z. Tamanaha, *The Folly of the "Social Scientific" Concept of Legal Pluralism*, 20 J.L. SOC'Y 192, 197 (1993). *See generally* Ruth Buchanan, *Perpetual Peace or Perpetual Process: Global Civil Society and Cosmopolitan Legality at the World Trade Organization*, 16 LEIDEN J. INT'L. L. 673–99 (2003).

arbitrary deprivation of a person's life, liberty, and property. Yet, throughout the violent imperial encounters of the sixteenth to twentieth centuries, the universalist rationality subsumed "parallel systems of justice for colonizer and colonized"[2] to reproduce within the conquered polity a uniform, monolithic socio-legal order. The imperialist reconceived due process of law as access to administrative or judicial relief to reinforce legal-normative uniformity within the colonial structure.

As imperialism fell passé, external initiatives to develop the "rule of law" within the nascent postcolonial state, such as those led by the American Bar Association Rule of Law Initiative (ABA ROLI) and the World Justice Project (WJP), gave the universalist rationality a new lease on life. The postcolonial state started to purposively imagine itself along the same, *imposed* rationality—a "mythmaking"[3] project—that informs varied rituals which serve symbolic and prosaic functions. I am interested in the coercive imposition of the rule of law within two temporal contexts: first, in the age of imperialism and second, in contemporary rule of law promotion projects in the Global South, particularly in the Philippines. The focus of this Article is how the promise of due process of law was, and is, operationalized in both settings.

In this Article, I argue that rule-of-law promotion in the Global South continues to tether the postcolonial state's due process of law rituals to its narrow administrative-adjudicatory concept. In imperially received due process rituals, the state's actions are considered fair and just as long as they comply with administrative-judicial procedure. As a legal guarantee against arbitrary deprivation, due process operates only in relation to *having*; that is, it protects against the arbitrary taking of something already *had*, be it life, liberty, property, or something else. With rule of law interventions in the Global South, the ritual generated proposes an idealized path connecting due process of law to justice,

---

2 Helen Dewar, *Litigating Empire: The Role of French Courts in Establishing Colonial Sovereignties*, *in* LEGAL PLURALISM AND EMPIRES, 1500–1850 49, 50 (Lauren Benton and Richard J Ross, eds., 2013) [hereinafter LEGAL PLURALISM AND EMPIRES].

3 *See* Alexis Ian P. Dela Cruz, *Royal Pains: Lèse majesté in an International Rights-Based Legal Framework*, 86 PHILIPPINE L.J. 948 (2012) (proposing that the state, postcolonial or not, engages in the deliberate writing of myths of its own choosing); *see also* Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 Nomos 3, 25 (2011); Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, *in* THOMAS CAROTHERS, ED., PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 75–104 (2006).

without laying that path's normative foundations.[4] Lon Fuller once described such a path in relation to political democracy: that due process is essentially a peculiar dialogue between ruler and ruled, albeit "scarcely ever realized in practice."[5] Fuller's thesis expresses a sense of promise inherent in due process of law, which rule of law promotion preaches in the Global South. Yet, without the quality of *having*, access to administrative-adjudicatory relief is illusory. Knowledge and access to procedure became essential to one's ability to speak to power, rendering vast sections of society inaudible to the law and excluding them from the broader dialogues that shape life in general.

This Article is divided into two sections and a conclusion. Section I provides a legal historical account of the privileging of the administrative-adjudicatory register of due process of law through imperialism and contemporary rule of law promotion. Section I then turns to the consequences of initiatives to promote the rule of law as a normative framework for "doing justice" in the Global South despite the many different contextual meanings of the rule of law. Section II further explores the emphasis of contemporary rule of law promotion projects on rationalizing judicial procedure and institutions through manuals and measurement tools developed by ABA ROLI and WJP. I conclude this Article with some tentative thoughts on how rule of law promotion's normative agenda shapes broader social dialogues within the Global South.

I
DUE PROCESS OF LAW: WHICH PROCESS AND WHOSE?

I begin this Section by examining certain registers of due process and the rule of law. One such register is that the rule of law is broadly understood as a check against the arbitrary exercise of the state's power.[6] Due process of law, on the other hand, performs the same function on a much narrower plane: between judge (an agent of the state) and litigant (a person subject to the court's jurisdiction). These registers are prominent themes of contemporary state rituals that cast due process in terms of investigative fairness, notification, hearing, and

4 Devika Hovell, *Due Process in the United Nations*, 110 AM. J. INT'L L. 1, 2 (2016).

5 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1979).

6 Martin Krygier, *Why Rule of Law Promotion Is Too Important to Be Left to Lawyers*, *in* RAIMOND GAITA & GERRY SIMPSON, EDS., WHO'S AFRAID OF INTERNATIONAL LAW 133, 140 (2017).

the opportunity to explain one's side.[7] Legal history reveals that the prominence of those registers is a relatively recent development. This Article's legal historical focus is the Philippines.

Deprivation of life, liberty, and property is not to be carried out *without* following a series of steps ordered by the law.[8] Framed in terms of deprivation, due process of law has evolved baldly into a judge's assessment of facts, usually *after* deprivations have occurred. As the state carried out these deprivations summarily or wrongfully, the state obscured the premise and promise of due process before its co-option into the state's myths and rituals. My purpose in this Article is to interrogate the intuition[9] that due process, through its contemporary rituals, fails to function as a safety-valve against hasty deprivations of life, liberty, and property in the Global South.

A. "Audiencia" to Courts, "Oidor" to Judge: An (Ignored) Legal Historical Account

The beginnings of due process of law in the Philippines were expedient. After losing its massive landholdings in the Americas in the 1820s and 1830s, Spain pivoted its attention to its only substantial Asian colony.[10] Madrid introduced colonial reforms to raise Spain's negative or merely "protective" role in the Philippines to an aggressive intervention managing the affairs of the Philippines' population.[11] One reform was to secure the availability of agricultural land in the colony for the production of food for the Metropolis.[12] Reporting on the state of the Philippine Islands during that period, peninsular historian Tomás

7 *See* Vivo v. Philippine Amusement & Gaming Corp., G.R. No. 187854, 707 S.C.R.A. 276 (Nov. 12, 2013) (Phil.).

8 Const. (1987), art. III § 1 (Phil.).

9 *See* Maks del Mar, *Beyond Universality and Particularity, Necessity and Contingency: On Collaboration Between Legal Theory and Legal History*, *in* LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE 22, 23 (Maksymilian del Mar & Michael Lobban, eds., 2016).

10 *See generally* Mª Dolores Elizalde, *Imperio, Negocios, Raza y Nación: Impresiones Internacionales de Filipinas a Fines del Siglo XIX* [Empire, Business, Race, and Nation: International Perspectives of the Philippines at the End of the 19th Century], *in* Mª DOLORES ELIZALDE, ET AL., EDS., IMPERIOS Y NACIONES EN EL PACÍFICO, VOLUMEN I, LA FORMACIÓN DE UNA COLONIA: FILIPINAS [Empires and Nations in the Pacific, Volume I, The Formation of a Colony: The Philippines] 441–85 (Author trans., Consejo Superior de Investigaciones Científicas, 2001).

11 JOHN D. BLANCO, FRONTIER CONSTITUTIONS: CHRISTIANITY AND COLONIAL EMPIRE IN THE NINETEENTH-CENTURY PHILIPPINES 42 (2009).

12 *Id.*

de Comyn called for the acceleration of general culture that would meet Spanish agricultural needs.[13]

The culture that Comyn alluded to was that of the natives, and the "acceleration" of this culture was undertaken by *indio* families committed to colonial reform.[14] The framing of colonial reform as cultural awareness was purposively redirected toward the creation of new needs amongst the natives—a new culture of capitalism—to sustain Spanish sovereignty in the Islands.[15] To this end, Comyn cautioned Madrid that its maternal pivot to the Islands might raise the natives' suspicion, and recommended Madrid ensure that the rights of the *indio* would be respected from the start of the reforms.[16] This episode of reforms gave rise to an early, albeit rudimentary, notion of due process of law in the Philippines. From Comyn's *estado* (state) project, due process has been an important narrative to the rationality[17] that would eventually become the Philippine state. These reforms, however, proved far too late to reinvigorate Spanish power in the Philippines. In 1898, Spain transferred sovereignty over the Philippines, Cuba, and Puerto Rico to the United States at the conclusion of the Spanish-American War.[18]

In 1900, U.S. President William McKinley charged William H. Taft, head of the Second Philippine Commission ("Taft Commission") and future U.S. president, with the responsibility to impose upon the Islands "the inviolable rule that no person shall be deprived of life, liberty, or property without due process of law."[19] The purpose was to ensure that in the colony, the rule followed "a narrow, undeviating path" of application and interpretation.[20] The long-time Spanish colony, unschooled in (Anglo-American) law, was expected to follow the new sovereign's ways. But operationally, due process of law was to serve an essentially superintendent, rather than protective, function. It would pave the transpacific procedural corridor that led to the U.S. Supreme

13 TOMÁS DE COMYN, ESTADO DE LAS ISLAS FILIPINAS EN 1810 [State of the Philippine Islands in 1810] 30–31 (Author trans., Imprenta de Repullés, 1820).

14 *Id.* at 30.

15 BLANCO, *supra* note 11, at 44.

16 COMYN, *supra* note 13, at 30.

17 *See* BLANCO, *supra* note 11, at 9.

18 Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, T.S. No. 343 [hereinafter Treaty of Paris].

19 Pacifico A. Agabin, Laissez Faire and the Due Process Clause: How Economic Ideology Affects Constitutional Development, 44 PHIL. L.J. 709, 715 (1969).

20 *Id.*

Court as the final court of appeals from all judgments of the Insular Supreme Court.[21]

The United States' imposition of the due process principles in the Philippines contrasts sharply with the history of due process in the United States. This invites the question: "Why is Anglo-American Jurisprudence Unhistorical*?*"[22] And yet, the invocation in the American Declaration of Independence of "the inalienable right to life, liberty, *and* the pursuit of happiness" is actually a confluence of at least four historical streams of thought:

> [*F*]*irst*, the seventeenth century Whig fundamental law tradition derived either from immemorial custom or from an ancient constitution existing before the Norman invasion; *second*, Thomistic natural law, whose content consisted primarily of specifying a person's social duties in an organic community; *third*, the seventeenth century social contractarian conception of natural rights existing in a state of nature and exercised by atomistic individuals against the State [and]; [*fourth*], a conception of rights in which Newtonian scientific laws were gradually transformed into Kantian moral laws.[23]

At the foundational moment of the United States, a notion of due process was articulated through a rich dialogue steeped in various historical traditions. Although birthed in opposition to English colonialism within a revolutionary setting, U.S. due process of law was not originally conceived as a matter of rigid procedure, quite contrary to when President McKinley ordered its imposition in the Philippines. Centuries after that foundational moment, American imperial efforts severed due process from its historical roots of resistance against the abuses of colonial power.

The prominence of procedural due process in the making of the Philippine State is an imperial effort legacy. After 1898, all things Spanish were systematically demonized in the Islands.[24] This was accomplished by portraying the new sovereign as a nurturing father to the poor "Orphans of the Pacific," abandoned by Spain and vulnerable to the depredations of other European powers that held sway elsewhere

---

21 *Id.* at 716.

22 *See generally* Morton J. Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*, 17 OXFORD J. LEGAL STUD. 551–86 (1997).

23 *Id.* at 553.

24 *See* Gloria Cano, *Blair and Robertson's The Philippine Islands, 1493–1898: Scholarship or Imperialist Propaganda?*, 56 PHIL. STUD. 1, 3–46 (2008).

in Asia.[25] "American fathering" would educate the backward Oriental "daughter republic" in self-government through the establishment of an English-language educational system by 1903.[26] The Spanish colonial judiciary, with its *audiencias*, would be replaced by the American court of law: the *oidor*, by the judge. Both Spanish terms, with roots from the Latin *audire*, "to hear," would become outmoded at the dawning of a new American order in the Philippines.

This phasing out was not merely a matter of labels. Removing references to hearing subtly reconceived due process of law into a process that sought merely not to deprive a person of her life, liberty, or property. Dialogue between the state and the individual was recast with a basis focused on *having*, guided by procedure, and open only to those who had the wherewithal to present their grievances to the jurisdiction of a court. The colonizing state, with the rationality it sought to reproduce in what eventually became the postcolonial state, mythologized justice behind the enigmatic shroud of procedure. The mooring of the act of *listening* to administrative-judicial procedure became central in telling a new myth dominated by the captivating narrative of "preparing" Filipinos for the responsibilities of sovereignty. The underlying message was that unless the Filipino learned the imperially-imposed procedure, his or her voice would essentially be inaudible to the sovereign. At the formal end of U.S. sovereignty over the Philippines in July 1946, the due process myth was complete and impenetrable; it was a received narrative that foreclosed dialogue between ruler and ruled in favor of dialogue between judge and litigant.

At the heart of American fathering was an aggressive, colonial policing infrastructure designed to pacify what remained of the Filipino resistance against the transfer of sovereignty.[27] Due process, or substantive due process from the American common law, was construed as the basis of judicially sanctioned policing to entrench the new sovereign but not as a mantle affording Filipinos the protection of the U.S. constitutional relation linking states and territories to the

---

25 Reynaldo C. Ileto, *Mother Spain, Uncle Sam, and the Construction of Filipino National Identity*, *in* IMPERIOS Y NACIONES EN EL PACÍFICO, VOLUMEN I, LA FORMACIÓN DE UNA COLONIA: FILIPINAS [EMPIRES AND NATIONS IN THE PACIFIC, VOLUME I, THE FORMATION OF A COLONY: THE PHILIPPINES] 119, 124 (Mª Dolores Elizalde et al. eds., 2001).

26 *Id.* at 126.

27 ALFRED W. MCCOY, POLICING AMERICA'S EMPIRE: THE UNITED STATES, THE PHILIPPINES, AND THE RISE OF THE SURVEILLANCE STATE 61 (2009).

federal government.[28] Because the Filipinos did not have the status of U.S. citizens, the Filipino being was not accorded the full extent of due process protections. Due process did little to prevent deprivation of Filipino lives, liberties, and properties in the years following the transfer of sovereignty.

President McKinley's instructions to the Taft Commission reflect what H.L. A. Hart observed as the American obsession "with what courts do and should do."[29] Due process was to be inviolable, a self-evident truth. Its imposition on the Philippine Islands was not undermined by normative debates or historical introspection on its meaning. The sovereign ordains a procedure; regardless of the consequent outcome, the outcome is deemed lawful as long as lawyer, litigant, and judge all comply faithfully with procedure.[30] As due process conflates the individual's state of *being* (citizenship, race, social affiliation) with the condition of *having* (rights associated with being citizens, economic resources), it justifies whatever the sovereign might do with being. Yet, *being* and *having* have aspects that are hardly the exclusive domain of the law of the nation-state. Therefore, "no single institution either fully determines or fully controls all of the issues that surround these two important societal assets."[31]

The disjuncture between due process' eighteenth century American revolutionary roots and due process' early twentieth century imposition in the Philippines becomes even more problematic in the context of English legal history, from which the nascent United States sought much guidance. The events surrounding the genesis of the writ of habeas corpus in English law, for instance, instructed how to conceptualize due process of law as a dialogue outside the courts. After a political crisis in the late 1620s between King Charles I and the English Parliament involving the legality of detaining persons by royal prerogative,[32] it became widely understood that deprivations of liberty

---

28 United States v. Bull, G.R. No. L-5270, 15 Phil. 7, 27 (Jan. 15, 1910).

29 H.L. A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

30 Jonathan Gorman, *Legal Consciousness: A Metahistory*, *in* LAW IN THEORY AND HISTORY: NEW ESSAYS ON A NEGLECTED DIALOGUE 84, 106 (Maksymilian del Mar & Michael Lobban eds., 2016).

31 Christian Lund, *Access to Property and Citizenship: Marginalization in a Context of Legal Pluralism*, *in* LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 197 (Brian Z. Tamanaha et al. eds., 2012).

32 *See* BRIAN R. FARRELL, HABEAS CORPUS IN INTERNATIONAL LAW 19–21 (2016).

may no longer be carried out without parliamentary fiat. Parliament then passed acts prohibiting arbitrary imprisonment by the king.[33]

Initially, any seeming relationship between law and justice was not inextricably connected with procedure prescribed by and from a mighty state. In a setting where legality and the state were both in a condition of flux, dialogue enabled English society to acknowledge the horrors of, and later articulate legal limits to, the sovereign's plenary power of detention. After broad social dialogues determined the content and limits of arbitrary detention law, judges became responsible for developing "a writ of majestic, even equitable sweep that made it possible to protect the king's subjects."[34] Through broad collective dialogue against the abuses of the king, liberty (from arbitrary detention) became an important aspect of one's participation (*being*) in the English polity.

Habeas corpus was born from centuries of dialogue between ruler and ruled. The organization of public powers along an ordinary-absolute binary in medieval Europe[35] allowed the public dispensation of equitable measures that were not necessarily tied to the black letter of the law. Due process of law was a contestation that allowed society to make sense of its habits and to question whether any of them were actually unnecessary or harmful rituals "without clear purpose, needless precautions preserved through habit."[36] Yet, from seventeenth century England to the late nineteenth century transfer of sovereignty over the Philippines, due process mutated into something else—a mechanism that foreclosed dialogue.

Through imperial subjugation, the making of habeas corpus by unelected judges has transformed due process of law in the Global South into a doctrine entrenched *per legem terrae* (by "the law of the land") that "presuppose[s] a national judiciary in a national state."[37] Judges thus gained a vital voice in the portrayal of the "majesty" of the postcolonial "nation-state."

Judicial control was thus conceived as a safeguard against an otherwise unlimited power. As government largesse grew, and

---

33 *Id.* at 21.

34 PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 9 (2010).

35 Ian Williams, *Developing a Prerogative Theory for the Authority of the Chancery: The French Connection*, *in* LAW AND AUTHORITY IN BRITISH LEGAL HISTORY, 1200–1900 33, 37–38 (Mark Godfrey ed., 2016).

36 Fuller, *supra* note 5, at 356.

37 CARY FEDERMAN, THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE 81 (2006).

relationships between citizens and the state proliferated, this approach was extended to *dominium*.[38]

Transplanted to the Global South, a new myth was founded upon the assumed superiority of the law of the land[39] over other systems of normative ordering and thinking. The imperial purpose was to reconfigure conquered polities into the nation-state and to re-imagine *being* as *having* in the delineation of the individual's legal protections. For as long as something *had* is not arbitrarily taken away by the state, the legal dimensions of *being* are of secondary importance. From legal-institutional myths received from the colonizer, administrative-judicial procedure would supplant the acts of speaking and listening between the ruler and the ruled with the non-deprivation of individual life, liberty, and property becoming subordinate to "the common good" and the broad agenda of the nation-state.[40] Rules in society would recede in favor of "the rule of law" as the dominant narrative of the postcolonial state's rituals.

From the English political crises that gave rise to habeas corpus, to the American Revolution's construction of the promises and guarantees of due process of law, it seems far-fetched to expect due process to create the "narrow, undeviating path"[41] to justice envisaged in President McKinley's instructions of the Taft Commission. Across the Global South, the imperial encounter violently suppressed indigenous systems of fluid institutions and legalities from having the dialogues that allowed the English and American polities to acknowledge and address their social ills. At the end of the imperial encounter, conquered polities were rebuilt on the foundations of a received rule of law order. This time, however, reconstruction was carried out, not by brute subjugation, but with something more "polite," promoting the rule of law in the Global South.

B. An Impolite Order

Ian Duncanson proposes *politeness* as the basis of constructing social order in the similarly etymologically-derived *polis* and polity.

---

38 GIACINTO DELLA CANANEA, DUE PROCESS OF LAW BEYOND THE STATE 18 (2016).

39 STEPHEN HUMPHREYS, THEATRE OF THE RULE OF LAW: TRANSNATIONAL LEGAL INTERVENTION IN THEORY AND PRACTICE 33 (2010).

40 ANTHONY GREGORY, THE POWER OF HABEAS CORPUS IN AMERICA: FROM THE KING'S PREROGATIVE TO THE WAR ON TERROR 312–13 (2013).

41 Agabin, *supra* note 19, at 715.

He describes politeness as an enabler of conversation that leads to the formation of a "common enterprise by virtue of perhaps implicit understandings born of familiarity and long practice of cooperation."[42] To him, while politeness constituted the foundation of the early English transatlantic polity, it failed to prevent the subsequent rise of a model of empire based on domination and maintained through a fixation with the uniformity of rules.[43]

In this spirit of (im)politeness, I examine contemporary rule of law promotion in the Philippines and in the Global South as a lingering successor to that imperial fixation in this subsection. Here, I acknowledge the fierce theoretical contestations over the meaning of the rule of law. Even rule of law promoters admit the feeling of not knowing precisely what they ought to know as a result of their engagement in these promotion projects around the world.[44] Shorn of the disagreements over its meaning, the rule of law is a specific legality that seeks principally to constrain the personal arbitrariness of those who rule.[45]

The above proposition is made in response to rule of law promotion's tendency to conflate due process of law with the rule of law in a bid to "do justice." To the extent that legality aspires to a de-personalized ordering, rule of law promoters superimpose legality's ideals of uniformity, linearity, predictability, and sequence upon the outcomes of judicial processes. These ideals were central to Western rule of law rhetoric that gained prominence in the early days of the Cold War.[46] Notably, the American Bar Association (ABA) enlisted lawyers to minister the U.S.-led mission of proselytizing the decolonizing world in the ways of the rule of law and democracy against communism:

---

42 Ian Duncanson, *Law as Conversation*, *in* INTERNATIONAL LAW AND ITS OTHERS 57, 79 (Anne Orford ed., 2006) (citations omitted).

43 *Id.* at 83–84.

44 Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* 8 (Carnegie Endowment for Int'l Peace, Working Paper No. 34, 2003).

45 Barry R. Weingast, *Why Developing Countries Prove So Resistant to the Rule of Law*, *in* GLOBAL PERSPECTIVES ON THE RULE OF LAW 28, 38 (James J. Heckman et al. eds., 2010).

46 LAURA GRENFELL, PROMOTING THE RULE OF LAW IN POST-CONFLICT STATES 18 (2013).

> And what is the role of lawyers in the rule of law? Lawyers are the handmaidens of justice [and] the technicians of democracy.[47]

The rule of law and development movement was thus dealt a new lease on life as imperialism grew moribund internationally. To the postcolonial state, this meant receiving billions of dollars in international aid for security sector construction, professionalizing the civil service, and developing national police forces.[48] To precolonial legal systems, this meant the erosion and abolition of the postcolonial state.[49] Today, rule of law promotion forms an important aspect of bilateral and multilateral assistance initiatives to "support democratic reform, encourage better governance, further economic development and prosperity through different strategies and interventions."[50]

As "standard, central, and pricey elements of international aid to countries thought to need economic development . . . and many other good things,"[51] rule of law promotion is a growing sector led mostly by lawyers from the Global North. Rule of law promotion actively shapes the mythology of the postcolonial state: the rule of law is the central narrative in the institutional vacuum created by the departing colonial power. Here, received legal ideals are deliberately presented as superior to the rule of men.[52] Due process of law is thus conceptualized as a series of steps in *positive* law which assumes pure legal categories "that fix in advance the meaning of the legal terms independently of concrete facts . . . in accordance with rules of strict logic."[53] The question of fairness of legal outcomes emerges as a function of the "majesty of the law" with the reconfigured myth largely silent on the accountability of the human institutions that caused these outcomes. Thus, for example, sovereign immunity as *a* rule of law is an entrenched legal fiction that "goes to great lengths to immunise states from suits, even when the violation of *the* rule of law is undisputed."[54]

---

47 Ross L. Malone, *Promoting the Rule of Law: The Role of the American Lawyer*, 45 A.B.A. J. 242, 243 (1959).

48 LaKindra Mohr, *Lessons Learned: An Analysis of Recent Rule-of-Law Reform Efforts in Haiti*, 16 J. HAITIAN STUD. 148, 149 (2010).

49 GRENFELL, *supra* note 46, at 21.

50 Lelia Mooney et al., *Promoting the Rule of Law Abroad: A Conversation on Its Evolution, Setbacks, and Future Challenges*, 44 INT'L. LAW. 837, 838 (2010).

51 Krygier, *supra* note 6, at 133.

52 Waldron, *supra* note 3, at 25.

53 LUC B. TREMBLAY, THE RULE OF LAW, JUSTICE, AND INTERPRETATION 157 (1997).

54 Adam Shinar, *One Rule to Rule Them All? Rules of Law against the Rule of Law*, 5 Theory & Prac. Legis. 149, 165 (2017).

To be sure, rule of law ideals notionally hold the promise that the courts would not act arbitrarily. Such ideals formally ensure judicial affirmation of the state's commitment to not arbitrarily deprive communities or individuals of life, liberty, and property. In contrast, however, communities and individuals in the Global South often find themselves unable to turn to this promise at the precise moment when the deprivations occur.

For example, the argument that the rule of law is plainly a matter of compliance with due process flies in the face of a state's failure to account for the legal protections of the poor against social exclusion and spatial segregation in Brazilian cities.[55] Although the Brazilian Constitution of 1988 reaffirms both the right to private property[56] and requires the use of property to meet its social and environmental functions,[57] traditional conceptions of property and land use favorable to elites and property speculators remain firmly entrenched.[58] Hence, in this specific scenario, any legal reform that rule of law promoters might undertake in addressing social exclusion in the cities of the Global South must be informed with critical discussions on the *role* of law in the urbanization process.[59] Yet, privileging rule of law ideals diminishes due process of law into the judicial determination of whether the state's power to perform certain acts existed in law, instead of protecting individuals against the potential harshness of state action.[60] Arguably, such discussions must take us into a reassessment of the exalted position the courts occupy when refereeing the dialogue between ruler and ruled.

Thus, the conflation of due process of law with the rule of law in projects promoting the rule of law is hardly surprising. After all, the flexibility of its close cousin—legal procedure—propped up the rule of law in colonial regimes.[61] The Washington-based World Justice Project (WJP), for instance, identifies "access to justice" as one of the rule of

---

55 Edésio Fernandes, *Constructing the 'Right to the City' in Brazil*, 16 SOC. & LEGAL STUD. 201, 210 (2007).

56 CONSTITUIÇÂO FEDERAL [CONSTITUTION] Oct. 5, 1998, art. 5 ¶ XXII (Brazil) (Author trans.).

57 *Id.* at art. 5 ¶ XXIII.

58 Alan M. White, *Market Price, Social Price, and the Right to the City: Land Taxes and Rates for City Services in Brazil and the United States*, 44 U. MIAMI INTER-AM. L. REV. 313, 319 (2013).

59 *Id.* at 208.

60 DELLA CANANEA, *supra* note 38, at 146.

61 NASSER HUSSAIN, THE JURISPRUDENCE OF EMERGENCY: COLONIALISM AND THE RULE OF LAW 66 (2003).

law's fundamental aspects.[62] In practice, WJP measures access to justice in terms of timely justice delivery "by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve."[63] Access to justice is framed largely as an issue of adequate legal practitioners. With generally high numbers of lawyers and judges per capita, many of the countries from which most rule of law programs originate have substantively developed structures that ensure and encourage access to the courts. But in the Global South, a growing number of legal professionals is hardly responsive to entrenched legal, economic, physical, and psychological barriers to justice.[64] The result is that justice remains inaccessible to vulnerable sections of the population.[65]

More recently, rule of law promotion, especially from the United States, faces the irony of sustaining its Cold War-era proselytizing impulse abroad at a time of national economic slowdown.[66] In the early days of the United Nations, discussions on the leadership role of the United States in building "international society" through its "civilising influence" did not address issues of the "extension of the realm of Law" as a tool for economic development.[67] This raises questions of why, assuming that the rule of law brings about economic development, the impacts of that proselytizing impulse could still be felt even after a series of economic downturns in the Global North. A suggested response is that the persistence of normative value of the rule of law is because it is a "usable grammar that has come to transgress [national] borders."[68]

---

62 WORLD JUSTICE PROJECT, *Rule of Law Index 2016*, 9 (2016), https://worldjustice project.org [hereinafter WORLD JUSTICE PROJECT].

63 *Id.*

64 Jessica Vapnek, Peter Boaz & Helga Turku, *Improving Access to Justice in Developing and Post-Conflict Countries: Practical Examples from the Field*, 8 DUKE F. L. & SOC. CHANGE 27, 39–43 (2016).

65 *Id.* at 39.

66 Richard A. Epstein, *The Legacy of Progressive Thought: Decline, Not Death, by a Thousand Cuts*, *in* THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 435, 467 (F.H. Buckley ed., 2013).

67 MARK MAZOWER, NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS 101 (2009).

68 Gianluigi Palombella, *Global Threads: Weaving the Rule of Law and the Balance of Legal Software*, *in* FILIPPO FONTANELLI ET AL., SHAPING THE RULE OF LAW THROUGH DIALOGUE: INTERNATIONAL AND SUPRANATIONAL EXPERIENCES 415, 425 (2010).

Yet, when we recall the emergence of habeas corpus as a dialogue between and amongst members of an English "state" still in a condition of flux, no external grammar orchestrated the conversation. Whether the contemporary postcolonial state is similarly in a condition of flux that may be stabilized through rule of law promotion remains to be seen. What is clear, however, is that from rule of law promotion, to the imperialist's reproduction of his own myths and rituals for the "benefit" of the unschooled people of the Global South, the ordering that emerges is neither polite nor resembles the making of the *polis*. Participation (or *being*) in the *polis* is held captive by *having* as the organizing logic of the colonially received due process narrative.[69] In the absence of *having*, due process of law offers *being* no dialogue, much less resistance, to the state.

II
MANUALS AND MEASURES: ACCESS WITHOUT INCLUSION?

Efforts to conceptualize the rule of law in the past labored under its elusiveness. This elusiveness has not discouraged various institutions from pouring vast resources toward rule of law promotion in the Global South. The 1980s and 1990s saw rule of law promotion turn to "inclusivity" that emphasized "substantive outcomes, not just procedural norms."[70] However, this turn failed (and continues to fail) to consider that most rule of law promotion programs are based on open-access legal frameworks that foster competitive entry into political and economic organization—features which are absent in most Global South legal systems.[71] "Inclusivity" is thus conceived as access to justice, judicial procedural soundness, and lawyer trainings. This Section challenges that conception of inclusivity by framing contemporary rule of law promotion as an extension of imperial due process. Here, I examine the tools devised by the ABA ROLI and WJP, respectively the *Access to Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations* (AJAT)[72] and the *Rule of Law Index 2016*.[73]

---

69 *See* Lund, *supra* note 31, at 209.

70 Thomas Carothers, *Rule of Law Temptations*, *in* JAMES J. HECKMAN, ROBERT L. NELSON & LEE CABATINGAN, GLOBAL PERSPECTIVES ON THE RULE OF LAW 17, 21 (2010).

71 Weingast, *supra* note 45, at 33.

72 Access to Justice Assessment Tool: A Guide to Analyzing Access to Justice for Civil Society Organizations, AMERICAN BAR ASSOCIATION RULE OF LAW INITIATIVE (American Bar Association), 2012. [hereinafter AJAT]

73 WORLD JUSTICE PROJECT, *supra* note 62.

A. ABA ROLI and Its Access to Justice Assessment Tool

The AJAT is a manual developed by the ABA ROLI "to make the work of those who aim to improve access to justice more effective."[74] ABA ROLI is a recognized leader in the international rule of law development space and is engaged in projects in over ninety countries targeted to enhance individuals' ability to access justice.[75] It started in 1991 as the Central and Eastern European Law Initiative (CEELI) in Sofia, Bulgaria[76] after the dissolution of the Soviet Union. CEELI placed pro bono American lawyers to provide one-on-one assistance to governments, the bar, or others in the justice sector. One of CEELI's guiding principles is a commitment to "providing 'thought leadership' in the field of rule of law promotion."[77]

In 1998, the ABA expanded its work to Asia through the establishment of its Asia Law Initiative (ALI) with support from the Ford Foundation. Taking advantage of the ABA's connections within the Asian legal community, ALI immediately developed technical assistance programs to explore public interest law litigation in China, Cambodia, the Philippines, and Thailand. In the early 2000s, CEELI's model of engaging pro bono attorneys proved unsuitable to the professionalizing technical legal assistance sector. This led to the 2007 merger of its five regional programs (Central Europe, Africa, Asia, Latin America and the Caribbean, Middle East and North Africa) into ABA ROLI.[78] ABA ROLI has since been a non-profit program "grounded in the belief that rule of law promotion is the most effective long-term antidote to the pressing problems facing the world today, including poverty, conflict, endemic corruption, and disregard for human rights."[79] Specifically, ABA ROLI's program in the Democratic Republic of the Congo was celebrated as "a striking example of how

---

74 AJAT, *supra* note 72, at vii.

75 Jennifer Rasmussen, *A Short History of the American Bar Association Rule of Law Initiative's Technical Assistance Approach*, 31 WIS. INT'L. L.J. 776, 784 (2014).

76 *Id.* at 777.

77 *Id.* at 778.

78 *Id*. at 779.

79 Al Amado, *The American Bar Association Rule of Law Initiative Projects in Ecuador: Moving Toward Comprehensive Reform of the Criminal Justice System and Cross-Border Ties with the United States*, 18 CURRENTS IN INT'L. TRADE L.J. 26 (2010).

much [ABA ROLI's] assistance programs have grown to respond to the special needs and circumstances of various regions."[80]

The AJAT was drafted to adapt the rule of law to the needs of local communities. Two principal beliefs animated its preparation: first, that reliable research identifying problem areas is key to the success of access to justice programs, and second, that local organizations must play a lead role in the development and implementation of such programs within their own communities.[81] Its definition of access to justice is a two-pronged condition where "citizens are able to use justice institutions to obtain solutions to their common justice problems" and where "justice institutions . . . function effectively to provide fair solutions to citizens' justice problems."[82] Written mostly in the second-person voice, AJAT speaks to civil society organizations on access to justice elements, to be explored through three questions concerning (1) the extent of the presence of each element in the justice system, (2) the factors affecting the extent of that presence, and (3) possible reform strategies.[83]

For example, AJAT's section on Legal Framework takes a "back-to-basics" approach in the assessment of "state laws," "formal justice systems," "non-state laws," and "non-state justice systems" (NSJS).[84] This approach notionally accommodates a plurality of customary systems of justice into the formal state justice framework. Upon a closer look, however, AJAT envisions a legal framework in which NSJS decisionmakers must develop "a range of skills and knowledge" to "improve the quality of decision-making through non-state [justice] systems."[85] Although sensible, scholar Julio Faundez argues that such recommendations "are too general to provide a clear guide for action."[86] Recommendations to build capacity amongst NSJS decisionmakers assume that no such capacity exists, or that any such capacity may only be assessed in terms of a state justice framework. Thus, insofar as AJAT seeks to empower civil society organizations in

---

80 James R Silkenat, *The American Bar Association and the Rule of Law*, 67 SMU L. REV. 745, 757 (2014).

81 AJAT, *supra* note 72, at vii.

82 *Id.* at 1.

83 *Id.* at 3.

84 *Id.* at 4.

85 *Id*. at 6.

86 Julio Faundez, *Legal Pluralism and International Development Agencies: State Building or Legal Reform*, *in* LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 177, 178 (Brian Z. Tamanaha et al. eds., 2012).

crafting local access to justice programs in their communities, it appears that a favorable assessment of NSJS lies in close coordination and cooperation with state authorities.[87]

Following Faundez's analysis, the rule of law sector's conflation of legal reform with state building allows us to examine AJAT as a contemporary iteration of colonial methodologies directed towards the making of the modern state. AJAT's framing of access to justice assessment as a set of research guidelines uncannily resonates with the American imperial information gathering effort of the past. It bears the imprint of the Monroan project of "Pan-American sameness" peddled by the U.S. rule of law missions to South America in the 1910s.[88] If the state's object is to render intricate social fabrics legible through a standardized administrative handbook, then "U.S. imperial rule was unrivalled in its ability to 'read' alien terrains through such surface reconnaissance."[89] Within the first decade of U.S. rule in the Philippines, the colonial bureaucracy had already produced several practical compendia on almost everything the Americans needed to know about their new possession: from a list of commercial timbers, to the specifics of the sugar industry, even to a pronunciation guide for local place names.[90] Information gathering was a potent tool of coercion central to the making of the postcolonial state.[91] In contemporary rule of law promotion, information gathering plays an important role in ensuring uniformity, predictability, and stability within state legal systems.

Arguably, then, assessing and framing access to justice as state building will continue to portray NSJSs as *non-*, or *other* than, the state. While AJAT, on its face, endeavors to open access to justice through NSJSs, the latter's contradistinctive labeling against the state justice framework creates the risk of upsetting finely tuned governance arrangements that do not necessarily correspond to orthodox legal, political, or economic theory.[92] What coercion did for the colonial order is what NSJS "capacity-building" is doing for contemporary rule of law promotion.

---

87 *Id.* at 178–79.

88 *See* JUAN PABLO SCARFI, THE HIDDEN HISTORY OF INTERNATIONAL LAW IN THE AMERICAS: EMPIRE AND LEGAL NETWORKS 1–30 (2017).

89 MCCOY, *supra* note 27, at 45 (citations omitted).

90 *Id.* at 44.

91 *Id.* at 47.

92 See Faundez, *supra* note 86, at 192.

Some have downplayed the role of the "political economy of barriers to access to justice" in rule of law promotion's sociocultural turn.[93] But, this downplay conveniently brushes aside rule of law promotion's complicity with the state in maintaining barriers to dialogue between ruler and ruled. If the rule of law means the rule of *state* law, then rule of law promotion is partly responsible for excluding those whose notions of law and legality do not correspond with the structures of the state. If a manual's improved responsiveness to local community needs is any cause for celebration, it is definitely not for bringing about inclusion.

B. WJP and its Rule of Law Index

The WJP is "an independent, multidisciplinary organization working to advance the rule of law around the world."[94] In 2006, Former ABA president William Neukom founded WJP under the principles that "1) the rule of law is the foundation of communities of peace, opportunity, and equity, and 2) multidisciplinary collaboration is the most effective way to advance the rule of law."[95] The WJP's institutional supporters include: the Ford Foundation, PepsiCo, Apple, Microsoft Corporation, Irish Aid, the Singapore Ministry of Law, and the U.S. Department of State, among others.[96] At WJP's foundation, Neukom announced the creation of an environment in which ideas and contributions to the rule of law are judged on their merits: one which aspired to define the rule of law "beyond the thin description of procedural law."[97] Since WJP's 2008 inaugural World Justice Forum in Vienna, Austria, the WJP has focused on the analysis of various factors that contribute to successful rule of law societies.[98]

In 2008, WJP began developing the *Rule of Law Index*, "a quantitative tool to assess not only de jure but also de facto government adherence to the rule of law."[99] The *Index* serves a dual function as a

---

93 MICHAEL J. TREBILCOCK & RONALD J. DANIELS, RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS 277 (2008).

94 WORLD JUSTICE PROJECT, *supra* note 62, at 202.

95 *Id.*

96 *Id.* at 203.

97 Silkenat, *supra* note 80, at 757.

98 *Id.* at 758.

99 Wolfgang Merkel, *Measuring the Quality of Rule of Law: Virtues, Perils, Results*, *in* RULE OF LAW DYNAMICS IN AN ERA OF INTERNATIONAL AND TRANSNATIONAL GOVERNANCE 21, 44 (Michael Zürn et al. eds., 2012).

measurement device and a roadmap for targeted rule of law reforms.[100] One of WJP's four universal rule of law principles is the timely delivery of justice "by competent, ethical, and independent representatives and neutrals . . . of sufficient number [and

representative] of the communities they serve."[101] This is also known as "access to justice."[102] The international community has broadly certified these principles, leading some to assert their universality.[103]

The *Index* measures nine rule of law factors, which are further disaggregated into forty-seven specific sub-factors. Specifically, Factor Seven measures several aspects of civil justice systems, such as access and affordability, non-discrimination, absence of corruption, and freedom from improper government influence. Factor Nine, on the other hand, measures informal justice mechanisms on timeliness, effectiveness, impartiality, and protection of fundamental rights.[104] Factor Nine also measures the effectiveness of "traditional, communal, tribal, and religious courts."[105] The WJP describes the *Index* as being "culturally competent" and applicable to countries of "vastly different social, cultural, economic, and political systems."[106]

Wolfgang Merkel identifies two main issues with the *Index*: (1) as a relatively young measuring tool, it does not provide long time-series data and a systematic sample of many countries; and (2) it lacks both theoretical justifications of the concept and aggregation rules.[107] Moreover, he cautions against the possibility that an expert's knowledge of de facto rule of law is based mainly on public perceptions from a country's metropolitan regions.[108] Assertions of cultural competence and broad international certification of "universal" principles of the rule of law may raise theoretical questions, but certainly not before they raise the question of who made those certifications. The *Index*'s duality as a measuring tool and roadmap for

---

100 *Id.*

101 WORLD JUSTICE PROJECT, *supra* note 62, at 9.

102 *Id.*

103 *See* Mark Agrast commentary in V. K. Rajah, *Panel Discussion: Measuring the Rule of Law*, SING. J. LEG. STUD. 331, 334 (2012).

104 WORLD JUSTICE PROJECT, *supra* note 62, at 13.

105 Rajah, *supra* note 103, at 335.

106 WORLD JUSTICE PROJECT, *supra* note 62, at 13.

107 Merkel, *supra* note 99, at 47.

108 *Id.* at 46.

targeted reform equips it with a voice that, yet again, redirects the due process dialogue from judge and litigant to "indicator developer" and the postcolonial state.

Dominant indicators influence state decisionmakers to follow the WJP model of the rule of law and transform the governance of societies in ways intended to fit specific metrics of performance.[109] With its claim of cultural competence, the *Index* recognizes the diversity of the world's societies, but it also speaks of building and renewing structures, institutions, and norms as every nation's "perpetual challenge."[110] Framed as a perpetual challenge, the rule of law is underpinned by a legitimating historicism that portrays the post-historical" West to the still-historical rest of the world.[111]

At the same time, with its putatively universal principles of the rule of law, the *Index* produces an annual global ranking of states in which laggards may, presumably, look to top-notchers. This ranking eloquently manifests the *Index*'s normative agenda. Where WJP puts forward a contestable definition of the rule of law, the *Index* is one more proposal in the debate and competes with other indicator developers' proposals. However, if the *Index* is permanent and consistent enough, it ceases to be simply one more voice in the debate. Instead, the *Index* influences the other participants' expectations of the rule of law community of practice, and elements of the WJP's proposal become a benchmark against which other possible answers are measured.[112]

The normative function of rule of law measurement has also shown a disciplinary effect on rule-of-law-poor states. In Romania, for instance, rule of law indicators are seen as potential instruments of governance that "can promote transparency . . . increase efficiency, help 'fix governance' problems, and act as disciplinary mechanisms" in Romania's bid for admission to the European Union.[113] By blurring

---

109 *See* Kevin E. Davis et al., *The Local-Global Life of Indicators: Law, Power, and Resistance*, *in* THE QUIET POWER OF INDICATORS: MEASURING GOVERNANCE, CORRUPTION, AND RULE OF LAW 1, 21 (Sally Engle Merry et al. eds., 2015).

110 WORLD JUSTICE PROJECT, *supra* note 62, at 13.

111 SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY 188–89 (2011).

112 René Urueña, *Indicators and the Law: A Case Study of the Rule of Law Index*, *in* THE QUIET POWER OF INDICATORS: MEASURING GOVERNANCE, CORRUPTION, AND RULE OF LAW 75, 93 (Sally Engle Merry et al. eds., 2015).

113 Mihaela Serban, *Rule of Law Indicators as a Technology of Power in Romania*, *in* THE QUIET POWER OF INDICATORS: MEASURING GOVERNANCE, CORRUPTION, AND RULE OF LAW 199, 213 (Sally Engle Merry et al. eds., 2015).

the line dividing the normal and the normative, indicators pressure their targets to shape up according to "common" standards.[114]

To the extent that its measurement tool and roadmap duality advances a normative agenda, the *Index*'s broad conceptualization of the rule of law is rather impoverished in terms of due process of law. I do not, however, suggest that the *Index* engage in a wholesale aggregation of the various registers of due process in measuring the rule of law. As mentioned above, due process and the rule of law are conceptually distinct. Yet, despite the distinction, the *Index* considers some very specific notions of due process in Factors Seven and Nine. Aside from measurement errors that arise from this conceptual conflation,[115] the *Index*'s growing influence[116] is strategically posed to authorize further rule of law interventions in Global South legal systems that do not necessarily reflect or realize the avowed ideals of the rule of law.

Some have lauded the *Index*'s assessment of outcomes like "civil justice" and "informal justice" for departing from rule of law literature's traditional focus on specific actors, like courts and lawyers.[117] Others have argued that the success or failure of indicators rests upon those who use these indicators.[118] The avoidance of references to courts and lawyers, arguably, is only textual. As long as the *Index* functions as a technology of power[119] whose language is principally audible to the state and a handful of lawyers and technocrats, courts and lawyers will remain the only speakers in the broad dialogues of society.

Contemporary efforts to understand the rule of law through manuals and measurement tools attempt a technical-scientific approach to the governance of postcolonial societies. These efforts place courts and lawyers at the heart of building and governing the institutions of the

---

114 David Nelken, *Contesting Global Indicators*, *in* THE QUIET POWER OF INDICATORS: MEASURING GOVERNANCE, CORRUPTION, AND RULE OF LAW 317, 318–19 (Sally Engle Merry et al. eds., 2015).

115 Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 HAGUE J. RULE L. 269, 271 (2011).

116 *See* Rajah, *supra* note 103, at 337.

117 Marits Barendrecht, *Rule of Law Measuring and Accountability: Problems to Be Solved Bottom Up*, 3 HAGUE J. RULE L. 281, 290 (2011).

118 Juan Carlos Botero et al., *How, When, and Why Do Governance, Justice and Rule of Law Indicators Fail Public Policy Decision Making in Practice?*, 8 HAGUE J. RULE L. 51, 67 (2016).

119 *See generally* Serban, *supra* note 113, at 110.

state. In the Fullerian sense, that the law is social architecture, Martin Krygier observes that rule of law promotion in the Global South usually approaches the task "as though establishing [rule of law] where it has not existed."[120]

The reality is quite the opposite. Manuals and measures obsess about access to justice that starts from practice to build theories of the rule of law. Such theories justify continued intervention in the Global South. In the process, they not only conflate important conceptual distinctions, but also pare down due process and the rule of law into the rather parsimonious notion of access to justice. Devika Hovell suggests that the reverse is more appropriate—that is, to work from theory to practice with a view towards the provision of "strong and enduring theoretical foundations to support institutional practice."[121] Such an approach rids rule of law promotion of its dependence on state institutions and enables it to squarely address the issue of those who have long been excluded from societal dialogue.

CONCLUSION: GENERATING RESISTANCE

My attempt to explore due process of law as a dialogue between ruler and ruled in this Article has taken me to a specific narrative of its colonial genesis in the Philippines. I make no pretense about the utility of this narrative for other postcolonial societies. Rather, what I sought to draw attention to is how development interventions, from imperialism to rule of law promotion, held—and continue to hold—the postcolonial state's myth captive to a procedural-adjudicatory imaginary of due process of law. This exploration was undertaken to expose the conceptual distortions that the Westphalian state-form introduced to due process of law,[122] and which are kept in place by efforts to promote the rule of law in the Global South. The exercise of going back to the promise of due process of law—that is, of inclusion within the larger contestations about collective decisions of consequence to human life—requires corresponding efforts to resist token dialogue maintained by rule of law promotion from the Global North.

---

120 Krygier, *supra* note 6, at 161.

121 DEVIKA HOVELL, THE POWER OF PROCESS: THE VALUE OF DUE PROCESS IN SECURITY COUNCIL SANCTIONS DECISION-MAKING 163 (2016).

122 *See generally* Paul Burgess, *Neglecting the History of the Rule of Law: (Unintended) Conceptual Eugenics*, 9 HAGUE J. RULE L. 195 (2017).

Rule of law promotion's relatively recent turn to informal justice systems overtly expands its normative agenda. Yet, at the same time, it harbors covert universalist fantasies fueled by the very same, albeit discredited, impulse to dominate, subjugate, and exclude.

Imagined as a dialogue, due process demythologizes matters of procedure and access to justice to enable its participants to speak, articulate, and even object to collective decisions that would affect their lives. It prevents the ritualistic reduction of speakers into mere items to be ticked off a laundry list of prerequisites that must be met to receive development aid or foreign direct investment, to be admitted to international organizations, or simply, to be taken seriously. Due process of law, conceived as a form of resistance, diverts attention from the outcome of rote compliance with legal procedure into fostering avenues of objection to state actions that do not, in legal terms, "deprive." Imagining what resistance might entail in concrete terms at present is difficult because of the ideational supremacy of the state as the organizing logic of humanity since 1648. Still, I urge the reader to recall that it was once possible to seamlessly participate in the broad dialogues that determine the rules *of* and *in* society because of, and perhaps not despite, the absence of prescriptive interventions that ordain normative predictability, uniformity, and stability at the expense of human differences.