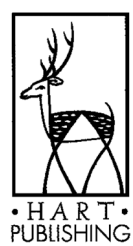
Relocating the Rule of Law

Edited by
Gianluigi Palombella
and
Neil Walker



OXFORD AND PORTLAND, OREGON
2009

7

Can a Post-colonial Power Export the Rule of Law?

Elements of a General Framework

RACHEL KLEINFELD AND KALYPSO NICOLAIDIS

The European dilemma in exporting the rule of law starts with the two faces of universalism: 'our system is better than yours and should prevail' and 'you deserve what we have'. Is exporting the rule of law a by-product of conquest and domination or of transnational responsibility and cosmopolitan solidarity? What would it take for the EU to act as a genuine 'post-colonial' power in this realm, self-reflexive about the echoes of its colonial past and legitimate in the eyes of other countries?

Be it as invaders, colonisers or traders, great powers have long viewed bringing their laws or even 'The Law' to other peoples as a mark of greatness. There was no higher honour Rome could bestow than bringing citizens from the edges of the Empire under the civilising shadow of Roman laws—which in turn became one of Rome's enduring legacies to Europe.[1] In the nineteenth century, the great European colonial powers exported their laws as 'standards of civilisation' to much of the world, whether directly colonised or the object of asymmetric treaties.

Exporting laws did not always mean, however, exporting the 'rule of law'. From Africa to the East Indies, colonisers generally imposed separate laws for the local populations and for colonial rulers. Even outside their direct colonial spheres, Europeans negotiated unequal rights to protect their merchants such as the 'capitulation treaties' with the Ottoman Empire. Keeping the colonial ruling power outside the reach of equal laws on the territory they controlled violated the most basic definition of the term 'rule of law'—but was often the norm.

At times, such as the British banning of *sati* in India, colonial powers did try to enforce equality before the law and provide laws that

[1] See, inter alia, N Davies, *Europe: A History* (Oxford: Oxford University Press, 1996).

empowered the weak—but their strategy was to force changes in local laws that clashed glaringly with their moral principles, not to seek endogenous change. Their strategic style was coercive paternalism. Deferential they were not. Indeed, as the concept of a common 'European civilisation' developed throughout the nineteenth century from a vague notion into a blueprint, Europeans would treat their own society as a standard guideline for the development of non-European societies, carrying within this teleology European conceptions of jurisprudence and basic justice to commercial and property law.[2] In short, exporting European laws and promoting the rule of law were considered one and the same thing.

In the aftermath of World War II and decolonisation, attempts at 'exporting' one's laws to the rest of the world could not escape opprobrium. 'The white man's burden' had become synonymous with paternalism, domination and exploitation—not only in the ex-colonies but also in the metropoleis themselves. When the European Community (EC) began to form in this cauldron of decolonisation, its founding fathers somehow hoped that the selective approach to the past that its member states applied within the Community would carry over outside, and allow it to start with a blank slate in its dealings with the rest of the world. Thus, the early EC aid provided to former colonies with no strings attached can arguably be seen as part of a more general attempt at post-colonial atonement by European powers.[3]

Nevertheless the rule of law promotion agenda made its comeback in the EU context through three separate routes.[4] One, the progressive route, fell within the development ambit and was developed by the epistemic community that saw 'good governance', with the rule of law at its core, as a prerequisite to sustained growth. The second was the security imperative, which grew from the realisation that lawlessness *outside* had direct effects on security *inside* the Union itself. And the third was the desire to improve market conditions for European companies—both to encourage trade-based development in the rest of the world, and as a self-interested goal in its own right. These mixed motives make it difficult to avoid the echoes of colonialism in today's rule of law-building activities, usually carried out for the same avowed mix of idealistic and instrumental reasons as their historical antecedents: on the one hand, the idea that all

[2] For a discussion see J Viehoff, 'Europe's Tainted Universalism? The Civilizing Mission Tradition in International Thought, 1870–1945', MPhil thesis, University of Oxford, 2007.

[3] The reading of EU aid as an attempt to continue providing for colonies while expiating post-colonial guilt after the severing of special trade relationships is the consensus view among development historians: see particularly, ER Grilli, *The European Community and the Developing Countries* (Cambridge: Cambridge University Press, 1994); M Lister, *European Union Development Policy* (London: Palgrave, 1998); and M Holland, *The European Union and the Third World* (New York: Palgrave, 2002).

[4] For an extended treatment of this history see R Kleinfeld, 'Lawyers as Soldiers, Judges as Missionaries: US and EU Strategies to Build the Rule of Law in Weak States from 1990–2004', unpublished dissertation, Oxford University, forthcoming. 2008.

good things, that is peace, stability, prosperity and security, can be brought to conflict-ridden lands by spreading (European) values and institutions seen as universal; and on the other, the lucky coincidence that such law promotion would be 'good for us too', by keeping these lands' (bad) exports, such as drug traffickers, Mafiosi or terrorists, out, while prising their (good) markets open for European companies. In this story, the will to atonement and the will to power are not always easy to disentangle.

Indeed, we can argue that EU universalism has inherited from colonial universalism the uneasy mix of a progressive side and a dark side, albeit in different proportions and in different guises.[5] The mission of the white man was no doubt predicated on a belief in hierarchy and superiority, a feature that allowed not only for unilateral but also imperial universalism (it is not far-fetched to apply this centre-periphery doxa to some of the EU's policies). But the 'civilisational' project then and now also stemmed from a liberal belief that progress was not only possible but was owed to all societies and all of humanity, a belief attacked at the time by scientific racism. Only later was the liberal understanding of the civilising mission undermined from within as the wave of self-determination exposed contradictions in the paternalistic promotion of universal progress. Yet, the cosmopolitan's question remains with us: does Europe's disproportional access to the spoils of modernity, coupled with its partaking in a global system which generates drastically unequal life chances, not create a responsibility to try to improve the lives of others? The end of the Cold War has definitely made room again for the promotion of genuinely liberal goals outside one's border even while scepticism both regarding the practical difficulties and the normative underpinnings of such an agenda continues to prevail in many circles.[6]

So, as we contemplate the EU's motivations and strategies in today's international context, we cannot but ask whether a post-colonial power can legitimately 'export' the rule of law.[7] While the EU does not differ significantly from the US and other developed countries in its efforts and strategies to promote the rule of law abroad, its own features and

[5] For a discussion of unilateral EU universalism see K Nicolaïdis, 'The Clash of Universalisms—Or Why Europe Needs a Post-Colonial Ethos', Paper presented at the ISA's 49th Annual Convention, Hilton San Francisco, CA, US, on 26 March 2008.

[6] For a discussion see A Hurrell, *On Global Order: Power, Values and the Constitution of International Society* (Oxford: Oxford University Press, 2007).

[7] On the EU as a post-colonial power see, inter alia, K Nicolaïdis, 'The Power of the Superpowerless' in T Lindberg (ed), *Beyond Paradise and Power: Europe, America, and the Future of a Troubled Partnership* (London: Routledge, 2004); K Nicolaïdis, 'L'Union Européenne, puissance post-coloniale en Méditerranée?' in T Fabre (ed), *Colonialism et postcolonialism en Méditerranée* (Marseille: Editions Parenthèses, 2004); K Nicolaïdis and J Lacroix, 'Order and Justice Beyond the Nation-State: Europe's Competing Paradigms' in R Foot and A Hurrell (eds), *Order and Justice in International Relations* (Oxford: Oxford University Press, 2002). See also H Mayer and H Vogt (eds), *Europe as a Responsible Power* (Basingstoke: Palgrave, 2006).

traditions may make this pursuit both more problematic and more promising. We will argue that, at a minimum, the EU must be self-aware of its post-colonial legacy in choosing both the objects of reform and the strategies it uses to pursue such reform. For a post-colonial power seeking to improve the rule of law in states with difficult colonial pasts, short-term efficacy and direct strategies must at times be sacrificed for legitimacy and more indirect strategies that build upon endogenous bases of support, if long-term sustainability is the ultimate goal.

In particular, by the 1990s, as the EU re-engaged in the project of building the rule of law abroad, it faced two obstacles. First, not all member states shared in the tradition of 'law export'; indeed, some had even historically been 'importers' as conquered territories of European (Austrian, Russian, Ottoman) empires. Would different imperial legacies across member states not prevent the design of a coherent strategy for intervening once again to change the culture or political system of others? Second, assuming such a strategy could be developed, how would it be received in the country in question? Would the EU be seen as acting in a neo-colonial manner, strong-arming weaker countries to do its bidding for its own benefit? Or could third countries be open to a truly post-colonial EU power, aware of the echoes of its past and forging the means to overcome it?

The present chapter does not purport to address all these questions. Instead, we hope to suggest a general framework and criteria to do so. It is organised in three parts, each corresponding to a conceptual building-block. First, we frame our enquiry by asking: *what* about the rule of law can be construed as universal and therefore legitimately exportable (Section I)? This first part provides us with broad assumptions about what aspects of rule of law promotion might be more or less sensitive to echoes of colonialism, but also shows, we hope, that no aspect can be ruled out or ruled in *a priori*. In each realm, alternative strategies, using direct or indirect, developmental or diplomatic tools, might address more or less well the post-colonial 'imperative'. So, second, we address the two questions above by mapping the different strategies deployed on the ground to promote the rule of law (Section II). And finally, we suggest a third conceptual layer to address the issue of how the legitimacy of post-colonial interventions affects effectiveness by disentangling the ways in which these strategies are received by reforming countries (Section III). We conclude on a prescriptive note.

I. *WHAT*? THE RULE OF LAW(S) FROM THE PAROCHIAL TO THE UNIVERSAL

With the convergence of idealistic and instrumental motivations, not only has the rule of law become the number one requirement for EU accession, but it has also emerged as a staple of the EU's neighborhood policy and its

country strategies in states as disparate as Albania and Indonesia. In 1992, the Maastricht Treaty made the extension of the rule of law one of the primary goals of the European Union's Common Foreign and Security Policy, and the Lomé IV Convention in 1995 allowed sanctions and political conditionality to be applied to aid recipients in the African, Caribbean and Pacific Group of States (ACP) who were in breach of these rule of law requirements.[8] The EU has also made respect for the rule of law one of its troika of requirements for new trade agreements with the world's biggest market.[9] As the EU allocates several hundred million euros to its agenda, there is no Weberian disillusionment in the armies of rule of law soldiers trekking the world under its flag.

There is great confusion, however, as to the battle that they wage. And in particular on the distinction between two agendas: exporting what can be seen as a concept or a value, the idea that power ought to be mitigated by 'paper', that something called 'the Law' can empower individuals against the arbitrary character of the state; and exporting specific ways of setting up well-functioning markets and societies and managing conflicts that may arise therein. These two agendas may be hard to distinguish in practice and their implications may indeed coincide. They nevertheless are often in tension, if not outright contradiction. While the idea of the rule of law may be packaged and presented as a 'thin universal', the specific laws or standards that are exported in its wake are unambiguously European or Western. From the receiving end, the slide from the 'rule of law' into 'laws' is not only slippery but also treacherous. You buy habeas corpus and end up with Habitat Corporation.

Indeed, as some argue in this volume, it is possible to say that as a normative ideal the rule of law is inexhaustible—if done properly, of course. The idea, or even ideal, of government *under* law rather than *by* law simply seeks to curb the lethal association of power and arbitrariness in the management of human affairs. Even at this broad abstract level, however, we could debate with Plato, Aristotle and Jefferson the relative desirability of executive margin of manoeuvre versus stronger checks and balances. More to the point, however, law ceases to uncontroversially enjoy the aura of universality as its specificity is increased. The way Europeans write laws, and the laws they write (if there is such a thing, given the diversity of European legal traditions) constitute a specific set of mechanisms for organising human interaction, making sense of or making visible localised traditions and understandings. There are, of course, other ways for societies to write laws or institutionalise predictable patterns of interaction and conflict resolution.

[8] Common Foreign and Security Policy, Art 11 TEU. Article 180 EC requires that EU development policy focus on these goals as well.

[9] G Crawford, 'Human Rights and Democracy in EU Development Co-operation: Towards Fair and Equal Treatment' in M Lister (ed), *European Union Development Policy* (New York: St Martin's Press, 1998) pp 136–7.

If we are to ask whether the rule of law can be imported, or rather under what conditions which elements are transposable between legal orders, the question is not only a positive one (how can such transposition be effective?) but a normative one (how can it be legitimate even if effective?).[10] Legitimacy may or may not follow from effectiveness, and the trade-off between the two might have a lot to do with how we balance short-term objectives and the concern for sustainability—both of domestic and global orders. It may be more effective and expedient in the short term to rewrite a country's laws as it changes its political regime, but more legitimate and sustainable in the long term to empower local actors, politicians, judges or non-governmental organisations (NGOs) to do so.

In order to begin adjudicating the tension that we see between benign universalism and illegitimate legal imperialism, we must start by spelling out what we mean by the rule of law, and put this object to the test, as it were. First, we disaggregate this object into its four core components or realms where the rule of law in any given jurisdiction may be improved, namely the legal, institutional, cultural and structural.

Second, we suggest the need for criteria in order to assess whether or to what extent the promotion of the rule of law in each of these realms is likely to echo or transcend colonial patterns. There are many options here, and what we suggest is only meant to open a debate. We find it useful to distinguish between externally and internally grounded criteria, and from there to elect universality and empowerment—or rather the potential for each to obtain—as criteria of choice. The universality criterion refers to the process of setting reform goals, specifically, the degree of common (or universal) acceptance of the rule of law objects being promoted, at least among actors that can be considered part of international society. Universality implies symmetry: that laws or understandings of the rule of law are shared and fine-tuned within a multilateral institution, or as a second best, that some parties in the recipient countries may have some reciprocal influence on the law-exporting country; or, if nothing else, that the exporting polity (here the EU) be expected to be consistent between its internal and external legal credo. Underpinning this set of parameters is the belief that the promotion of avowed cosmopolitan or universal norms by powerful states without the bedrock of true institutional multilateralism (universal or at least broad participation in the shaping of these norms) is fraught with contradictions and pitfalls which in the end can only appear to be self-interested and undermine the original claim to universalism.[11]

[10] A point made by Mark Toufayan in his comment on the original draft of this chapter at the Florence conference.

[11] For a discussion of the relationship between normative and institutional solidarity: see R Rao, 'Post-colonial Cosmopolitanism', PhD thesis, University of Oxford, 2007.

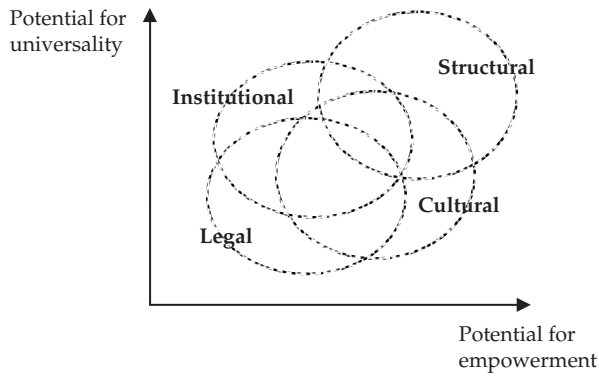
The empowerment criterion is concerned with the substantive nature of reform; it assesses the extent to which the object of promotion empowers (certain) local actors to create their own version of this universal ideal—as opposed to receiving a specific and unilateral 'transplant' from the metropolitan centre, as it were.[12] The distinction is reminiscent of the process versus substantive requirements debate in the realm of World Trade Organization legitimacy: does the outside world (be it another state or an international organisation) require specific substantive laws to be obeyed in the country in question or due processes to be followed in order to arrive at desired outcomes?[13] Another distinction could be made between systemic and targeted empowerment in a given country, where the former can be said to be more impartial if not necessarily neutral. So, for instance, a vexed question in the realm of political parties' support is whether it is more legitimate to support a given political family (for example through Socialist International) or the party system in general.[14] This dimension starts from the presumption that the more substantively specific the externally driven prescription, the more likely it is to be perceived as neo-colonial.

To start with, these two dimensions will serve as very broad parameters to provide us with presumptive standards of 'post-colonial legitimacy'. This does not mean that one realm is necessarily more legitimate than another, but rather that one may be more likely than another to satisfy criteria of universality and empowerment (which is why we draw each realm below as large circles rather than points). We will explore in Section II how the actual strategies followed to promote the rule of law may mitigate or, on the contrary, magnify the presumptions in questions. And we note already that these criteria might not necessarily deliver effectiveness, since we are after the connected but distinct goal of legitimacy. In short, we do not present a deterministic model but rather a broad framework that may help us ask some of the right questions of the new army of rule of law knights deployed around the world. Graph 1 lays out the four realms along these two dimensions.

[12] Of course, with certain reforms, such as improvements to minority rights, changes required may be specific and substantive, while empowering a minority and disempowering a majority. Such reforms may be highly desirable to external reformers, and to internal minorities facing discrimination, while still deeply subject to accusations of neo-colonial imposition. Colonialism is not the only moral measure of such reforms.

[13] For a discussion, see R Howse and K Nicolaïdis, 'Legitimacy and Global Governance: Why a Constitution for the WTO is a Step too Far?' in R Porter, P Sauve, A Subramanian and A Zampetti (eds), *Equity, Efficiency and Legitimacy: The Multilateral System at the Millennium* (Washington, DC: Brookings Institution Press, 2001).

[14] T Carothers, *Confronting the Weakest Link: Aiding Political Parties in New Democracies* (Cambridge: Cambridge University Press, 2007).



Graph 1. ***The four realms of the 'rule of law' and the post-colonial imperative***

The first and most straightforward realm in which rule of law promotion is deployed is the *legal* realm per se. Here promoting the rule of law literally means exporting laws, from ready-made constitutions (or at least constitutional toolboxes) to the whole gamut of law rule-books, from human rights laws to the laws of commercial contracts. Overall, choosing this leverage for introducing the rule of law in a given country is clearly highly interventionist, leaving potentially little room for empowerment of local actors. It may often also be a reflection of asymmetry of influence in the international system, with laws or indeed constitutions belonging to the domestic realm in the 'West' being imported in ways that owe little to the influence and craft of local actors. Nevertheless, with the growth of international law (or rather global administrative law as Benedict Kingsbury and others designate global law as applied to the domestic realm), the legal realm may be amenable to greater symmetry of influence then other realms.

It is as difficult to have a concept of law that does not appeal to concepts of justice as it is to introduce contract laws that do not encourage marketisation. And in all cases, new laws introduce new redistributive bargains within societies which empower and disempower certain actors. But in this realm of action, empowerment, though a possible end result of law promotion, is not part of its process. Charges of legal imperialism and general resentment of the imposition of an alien legal schema on an indigenous legal culture are frequently levied against rule of law reform through legal change—charges which work against country ownership of reform.[15] Detractors assert that legal exports ignore the supposition that constitutions and laws do not catalyse but merely reflect change. The

[15] J Faundez, 'Legal Reform in Developing and Transition Countries—Making Haste Slowly' in J Faundez, ME Footer and JJ Nort (eds), *Governance, Development, and Globalization* (London: Blackstone Press, 2001).

failure, or at least pitfalls, of the law reform-based 'Law and Development movement' of the 1960s and 1970s was claimed to be largely due to the fact that 'a transfer [of laws] without theory cannot succeed, and a theory which does not take into account the pre-existing social and legal structures is worthless'.[16] Possibly, the EU's inherent legal pluralism and its concurrent ability to let local actors choose from a varied legal palette has been one successful response to this line of criticism.

Does this mean we may find a more positive presumption of 'colonial innocence' for the EU in the second realm in which promotion of the rule of law operates, namely *institutional reform*? This refers to the strengthening of the actual institutions of justice (courts, police forces, law schools, magistrates' schools and bar associations, among others), where reform usually comes under specific labels such as 'judicial reform', 'access to justice', or 'police reform'.[17] The preference for reforming the institutional realm was in part due to the influence of the 'New Institutional Economists' in the early 1990s, who began suggesting that development rested on the success of a country's institutions—which North defined not as government agencies or organisations, but as 'the rules of the game in a society, or, more formally, the humanly devised constraints that shape human interaction'.[18] Interpreting this definition often excessively narrowly (and against North's own understanding), proponents of institution-based change claim that many societies have good laws but no rule of law because their institutions are poorly funded and malfunctioning. When these institutions are repaired, the rule of law will be realised. Even scholars such as Linn Hammergren, who have voiced grave doubts about institution-based change, suggest that addressing the technical, politically manageable issues in institutional reform can 'establish progress, credibility, and insights that help [reformers] tackle more fundamental obstacles to reform'.[19]

Indeed, tackling institutions that design, adjudicate, or enforce laws appears at first sight to be less directly interventionist and more empowering, in that it is about creating conditions for local actors to act. In the best of all worlds, it is about creating broadly accepted structures to empower

[16] A Hoeland, 'The Evolution of Law in Eastern and Central Europe: Are We Witnessing a Renaissance of 'Law and Development?' in V Gessner, A Hoeland and C Varga (eds) *European Legal Cultures* (Aldershot: Dartmouth, 1996) pp 482–4.

[17] See Stephen Golub's deconstruction of the rule of law orthodoxy for a listing of these types of projects and their shortcomings, 'A House Without a Foundation', in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006) pp 105–36.

[18] D North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990) p 3.

[19] L Hammergren, 'Rule of Law: Approaches to Justice Reform and What We Have Learned: A Summary of Four Papers', USAID Center for Democracy and Governance (Washington, DC: USAID, April 1998).

'actors for change' in the countries in question. But institutional reform can also (inadvertently) empower only certain actors, such as when the EU presses for judicial anti-corruption activities run by the executive that endanger judicial independence. And if we consider the universality dimension, for example how the 'promoted standards' come about in the first place, such reforms may sometimes be designed in a multilateral fashion (say, by the World Bank) but hardly escape the 'made in the EU' flavour, even in areas where the EU does not have direct competences (as in the creation of central banks or regulatory agencies). We need to consider, inter alia, the often very high degree of *institutional isomorphism* promoted by the EU, whereby EU institutions (like the Commission) seem to want to reproduce themselves and create 'worthy interlocutors' in the countries in question, a phenomenon acutely felt in accession countries.[20] On the other hand, there is, for instance, wide recognition in the EU of the many variants of, say, the federal form of government and thus recognition of the need for adaptation in the import of institutions.[21] And indeed, there is much inconsistency over time and across member states with regards to the standards upheld for rule of law institutions (consider judicial independence in France).

Most importantly, institutions may make little difference to a society whose norms do not support the rule of law. The rejection of legal or institutional 'transplants' is often blamed on cultural incompatibilities, as with Asian societies where loyalty to friends, families and co-workers trumps loyalty to some abstract notion of the rule of law or the state, and therefore to concepts such 'as considering office holding to be a public trust', or 'applying rules without fear or favour'.[22] The rule of law is about the relationship between state and society, and citizens must generally follow the law without enforcement; only a despotic state will have the power to enforce an 'alien' rule of law. For a state to enforce the laws without resorting to undue violence and repression, the majority of citizens must accept the legitimacy of the bulk of the laws, and moral codes within society must generally align with the laws. In regions characterised by what Joel Migdal calls 'strong societies, weak states', this relationship often breaks down.[23]

[20] This phenomenon is not unique to the EU: the US has also been faulted for 'institution-modelling'. See. T Carothers, 'Democracy Assistance: The Question of Strategy' (1997) 4 *Democratization* 122–4.

[21] N Bermeo, 'The Import of Institutions' (2002) 13(2) *Journal of Democracy* 96–110.

[22] R Scalapino, *The Politics of Development: Perspectives on Twentieth Century Asia* (Cambridge, MA: Harvard University Press, 1989), quoted in SR-Ackerman, *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (Cambridge and New York: Cambridge University Press, 2005) p 106.

[23] JS Migdal, *Strong Societies and Weak States: State–Society Relations and State Capabilities in the Third World* (Princeton, NJ: Princeton University Press, 1998). For instance, in Ethiopia, marriage-by-kidnap-and-rape was criminalised, but few people were willing to take such cases to court, and if they did, few judges were willing to uphold laws that violated traditional practice. See E Wax, 'Ethiopian Rape Victim Pits Law Against Culture', *Washington Post*, 7 June 2004.

A culture that does not support the rule of law can take many forms: in inner-city US, informal rules against 'snitching' prevent the government from finding witnesses and arresting wrongdoers; in Indonesia, families celebrate when a family member receives a 'wet' job with chances for kickbacks (even while decrying government corruption); in rural Albania, informal laws tying land to families in perpetuity prevent banks from foreclosing and selling property. A state cannot punish lawbreakers if it has criminalised what is culturally seen as legitimate action.[24] In each case, belief structures and the informal rules governing socially acceptable behaviour undermine the rule of law regardless of laws and institutions.

Hence the importance of the third, *cultural* realm of rule of law promotion whereby efforts must target:

> the set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of the legal system, and about the way law is or should be made, applied, studied, perfected, and taught.[25]

The cultural theory of change claims that the rule of law ultimately exists only when it is upheld as an ideal in the minds of each citizen.[26] This was Montesquieu's conclusion in his *Spirit of the Laws*, just of course as it was that of De Tocqueville:

> Europeans exaggerate the influence of geography on the lasting powers of democratic institutions. Too much importance is attached to laws and too little to mores … If in the course of this book I have not succeeded in making the reader feel the importance I attach to the practical experience of the Americas,

[24] As Alexis de Tocqueville wrote about the US, when demonstrating how culture abets law and order, 'I doubt whether in any other country crime so seldom escapes punishment. The reason is that everyone thinks he has an interest in furnishing evidence proofs of the offense and in seizing the delinquent … In Europe, the criminal is a luckless man fighting to save his head from the authorities; in a sense the populations are mere spectators of the struggle. In America, he is an enemy of the human race, and every human being is against him': *Democracy in America*, ed TP Mayer, trs G Lawrence (New York: Harper, 1988) pp 1, 5, 96.

[25] JH Merryman, *The Civil Law Tradition* (Stanford: Stanford University Press, 1969) p 2.

[26] RC Means, *Underdevelopment and the Development of Law* (Chapel Hill: The University of North Carolina Press, 1980). The cultural theory of rule of law development has its mirror in democratisation literature in Samuel Huntington's *The Third Wave*, which emphasises the importance of ideology, culture, religion, and socio-economic structures in pushing countries towards democracy. See also H Eckstein, 'A Culturalist Theory of Political Change' (1988) 82 *American Political Science Review* 82 (September 1988) 789–804, and H Eckstein, *Regarding Politics: Essays on Political Theory, Stability, and Change* (Berkeley, CA: University of California Press, 1992); N Bermeo, *Ordinary People in Extraordinary Times: The Citizenry and the Breakdown of Democracy* (Princeton, NJ: Princeton University Press, 2003). While in democratisation, a cultural theory of change has been faulted for being unable to account for rapid revolutions, given the slow speed of cultural change (a charge itself disputed by cultural proponents), this criticism fails to function in the rule of law field, where no scholar claims that rapid change is possible.

> to their habits, opinions, and, in a word, their mores, in maintaining their laws, I have failed in the main object of my work.[27]

In Tocqueville's landscape, however, the source of cultural change is undeniably *within* the internal melting pot. Without cultural attitudes supporting the rule of law, the creation of new laws and institutions is no different than the 'cargo cult' practice of building airstrips because villagers believed that such clearings attracted aeroplanes with supplies.[28] As the Peruvian writer (and conservative activist) Mario Vargas Llosa writes, judicial reforms in Latin America cannot be brought about 'unless they are preceded or accompanied by a reform of our customs and ideas, of the whole complex system of habits, knowledge, images and forms that we understand by "culture".'[29]

Thus, cultural change may be the ultimate conduit or obstacle to Western rule of law promotion but, if targeted by outsiders, may also be that most prone to the echoes of colonialism and missionary activity—and so it may also be where the strategy employed (see Section II) may make the greatest difference. The target of intervention is the deepest and most substantive possible. But this does not necessarily rule out the empowerment imperative we singled out above. If those laws which go against informal cultural practice are hardest to enforce (attempts to ban dowry killings in India, child marriage in Nepal, or blood feud in the Middle East) it may also be precisely because they would provide the most significant source of empowerment of the weak, if not of the majority of the country's population.[30] On the universality dimension, there is generally little sense of 'merger of civilisation' *à la* Ataturk. The question of modernity is precisely whether it must reflect evolutions from within or may be imported. Hence the importance of the 2004 Arab Human Development Report, which stressed the need for civic education in human rights and political liberalism *from within the culture* to 'foster broader respect for legal tools and ideas among Arab citizens'.[31]

This brings us to the fourth realm targeted by rule of law exports, namely the realm of domestic power structures, such as judicial independence and civilian control of the military. As Carothers states, 'The

[27] Alexis De Tocqueville, *Democracy in America* (Doubleday Anchor, 1969) pp 308–9.

[28] Cargo cults began as a Melanesian religious movement in the nineteenth century, but received a huge boost during World War II, when allied planes began to appear in the South Pacific.

[29] Quoted in LE Harrison, 'Promoting Progressive Cultural Change', in LE Harrison and SP Huntington (eds), *Culture Matters* (New York: Basic Books, 2000) p 297.

[30] W Channell, 'Lessons Not Learned About Legal Reform', in T Carothers (ed), *Promoting the Rule of Law Abroad* (Washington DC: Carnegie Endowment for International Peace, 2006) pp 146–8.

[31] Nader Fergany *et al*, 'Freedom and Good Governance', Arab Human Development Report (UNDP: 2004), available at http://hdr.undp.org/reports/detail_reports.cfm?view=912.

primary obstacles to [rule of law] reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law'.[32] From the early Greeks to the Enlightenment philosophers shrugging off the chains of monarchy, the rule of law was primarily about forcing a ruler to bend to the dictates of the law and thus freeing citizens from arbitrary abuse and the fear of power. Short of such an understanding, legal and institutional reform can always be overturned by the powerful. If, on the contrary, power is constrained and accountable, the rest will flow. Indeed, we could argue that this is the most universally acceptable understanding of the rule of law.

The category here is, of course, both vague and broad. It may mean empowering individual or institutional reformers within the state,[33] empowering the state against alternative powers (such as oligarchic business or organised crime) or curbing the state itself.[34] And in states that are 'captured'—that is, where business and criminal interests gain political power—reformers looking to create a power structure that would support the rule of law may need to search for a counterweight in another area of (civil) society altogether. And while the changes called for by the rule of law blueprint may be radical (regime change) or more benign (assisting judges in the creation of independent courts), the question remains as to who decides and how—which will be more or less empowering for different actors within that country. Here, again, it becomes clear that the strategy employed to go about rule of law promotion is key to addressing the post-colonial dilemma, rather than the realm or target of change per se, as we explore in detail in the next section.

II. *HOW*? BETWEEN NEO-COLONIAL AND POST-COLONIAL STRATEGIES

We have indicated briefly how the 'what' that is targeted by rule of law reform may be more or less prone to perceptions of neo-colonialism, either due to the extent to which changes pursued are intrusive, specific and substantive, rather than empowering actors in a country to

[32] Carothers, 'The Rule of Law Revival', n 17 above, p 4.

[33] For an overview of how USAID and one of its foremost thinkers conceptualised this issue in the late 1990s, see L Hammergren, 'Political Will, Constituency Building, and Public Support in Rule of Law Programs', PN-ACD-023 (Washington, DC: USAID, August 1998).

[34] See S Holmes, 'Can Foreign Aid Promote the Rule of Law?' (Fall, 1999) 8 *East European Constitutional Review* 68–74; Joel Migdal also makes this point in *Strong Societies and Weak States* (Princeton, NJ: Princeton University Press, 1988).

forge domestic responses to universal goals, or due to the extent to which these changes are shaped asymmetrically rather than partaking in a process of more multilateral or universal agreement. But we can draw few conclusions on these grounds alone. Ultimately, it is the 'how' that matters: in other words, the specific strategies used to pursue changes.

As we turn to the 'how', it is useful to ask first when assessing alternative strategies whether they are direct or indirect. The first—targeted reforms imposed inside a country from outside—are likely to be more immediately effective, but also more constraining or even coercive—more prone therefore to perceptions of neo-colonialism. Along this dimension, sensitivities are particularly strong and the granting or withdrawal of rewards often perceived as paternalistic even by those who might stand to benefit. Indirect strategies, on the other hand, affect change through empowerment of local actors. This does not mean that they are less intrusive; but change is less visibly the result of external influence. Furthermore, either development or diplomatic tools may be used directly or indirectly, which again carries different connotations (see Table 1).

In a nutshell, the response we seek will have to be framed as varying according to prevailing conditions. Most rule of law activities indicated

Table 1: Strategies to Promote the Rule of Law

	INSTRUMENT	
	Development Policy	**Diplomacy**
Direct Use	*Top-down Development Policy* Aid and technical assistance towards legal and institutional reform *Lever of change:* Laws and rule of law institutions	*Coercive Diplomacy* Carrots and sticks, negative and positive conditionality, sanctions *Lever of change:* Government decision-makers
Indirect Use	*Bottom-up Development Policy* Aid and technical assistance empowering constituents of reform *Lever of change:* Local NGOs, civil society (including the press and business community), the general public	*Enmeshment Diplomacy* Conditions and socialisation associated with membership in international or regional institutions *Lever of change:* Culture of the government, bureaucracy, or citizenry; laws and institutions

here are based on the assumption that change is possible. But what is the fit between the tools for change used by the EU and the local realities that it is trying to influence? To simplify, we could argue that each strategy has a 'lever of change' that is doing the work of reforming the rule of law, and that each such lever belongs to one or more of the realms described in Section I. These different levers in turn are suited to different sorts of societies, both in terms of effectiveness and in terms of legitimacy. A country with a strongly developed civic tradition, for instance, will be more suited to a bottom-up strategy than one with a thin, foreign-funded and catalysed civil society. Yet, most of the evidence seems to show that the EU does not reflect on whether a strategy is best suited for a particular state. Rather, its use of each strategy is far more determined by its own historical past. It is fundamentally this absence of a 'logic of appropriateness' that exposes the EU as acting short of its post-colonial ambitions.

A. Direct Development Aid

The most traditional, and most closely studied strategy is to use aid instruments and technical assistance to directly assist rule of law institutions. Direct development is predicated on what we could call an endowment logic—the idea that if states lack foundations in the rule of law it is because they lack the funds, skills and/or technical knowledge to undertake rule of law reform themselves. By providing these inputs, outside actors can catalyse change.

Precisely because it feared accusations of neo-colonialism when most of its aid was targeted at its member states' former colonies, the European Union labelled other states 'partners' and was slower than the US to use development aid in trying to affect their internal features.[35] The early characterisation of the EC as a civilian power, although paradoxically reminiscent of the 'civilising mission' nevertheless was used to play up a post-colonial image and reassure states receiving development aid that they were dealing with a new Europe.[36] The EU only

[35] Providing favourable terms of trade, generous aid and privileged diplomatic relations were linked from the start in the EU's development strategy. Rather than conceiving of these tools as separate, like the US, the EU remained consistent with the colonial legacy of constructing holistic relationships, be it of domination or solidarity.

[36] A typical discourse is that of the EU Commissioner Claude Cheysson, who stated in the 1970s, 'The Community is weak, it has no weapon … it is completely inept to exercise domination. Not being a State, the Community does not have a strategic vision, nor does it have a historical past. Not partaking in the political passions of the States, only the Community can elaborate a development aid policy that can be … politically neutral', in E Pisani, *La Main et l'Outil* (Paris: Lafont, 1984) p 20. For a discussion see K Nicolaïdis and R Howse, 'This is my EUtopia: Narrative as Power' (2002) 40 *Journal of Common Market Studies* 767–92.

began using direct development as a strategy to build the rule of law abroad following the Cold War, as a result of the enlargement process, and changes in the international development community's focus for aid provision. In 1989, when the European Commission assumed the task of aid coordination toward the new Eastern Europe states on behalf of the EU itself as well as its member states, the G-24, the OECD, and the international financial institutions, it populated its new aid programme (PHARE) with development professionals.[37] That epistemic community was just then beginning to consider the significance of what they called 'good governance'—a lack of corruption, strong state institutions and the rule of law—as a variable influencing the success of aid-fuelled development.

Nevertheless, development aid remained largely geared towards economic issues for several years, even though the European Parliament (which saw itself as the upholder of values within the EU) had, by early 1990, anchored PHARE to the establishment of 'the rule of law, the respect of human rights, the establishment of multi-party systems, the holding of free and fair elections and economic liberalization with a view to introducing market economies'.[38] The formalisation of the Copenhagen criteria in 1993—to be used to assess candidate countries' readiness to join—proved a turning point. To become a member-state, acceding countries would need not only to adopt the *acquis communautaire*, the total body of shared EU law (related to the single market or to justice and home affairs) but also to adhere to certain criteria and laws that may not even be under EU competence (for example, aspects of minority laws) and therefore not harmonised or mutually recognised between the member states themselves.[39]

Unsurprisingly, candidate countries submitted with differing degrees of eagerness to such European requirements, leading to variations in the

[37] U Sedelmeier and H Wallace, 'Eastern Enlargement', in H Wallace and W Wallace (eds), *Policy-making in the European Union*, 4th edn (Oxford: Oxford University Press, 2000) p 433. PHARE is a French acronym short for Poland–Hungary Assistance for Economic Reconstruction, although the programme soon expanded to include the rest of Eastern Europe. It was operated by a new service within the Directorate-General for External Relations. Short on staff and expertise, the DG for External Affairs poached staff experienced in third world development from DG-VIII, which dealt with development aid, hired people from other development agencies, and relied heavily on external consultants: J Pinder, *The European Community and Eastern Europe* (London: Pinter, 1991) p 91, Sedelmeier and Wallace, above, pp 434–5.

[38] '"Communication to the Council and the Parliament on the Development of the Community's Relations with the Countries of Central and Eastern Europe', Doc SEC (90) 196 final (Brussels: European Commission, 1 February 1990) p 3. For the Parliament as a norm-entrepreneur and values holder, see Holland, n 3 above, p 130.

[39] For instance, while family law is not part of the *acquis*, its outlines are spread through the EU's political criteria, which insists upon certain 'universal' human rights norms which are not yet universalised in many acceding states.

extent, pace and sequencing of 'convergence' among these countries.[40] Member-state building at this stage involved exporting the rule of law through various channels, including both political and economic criteria as well as conformity with the *acquis communautaire*. To enable local institutions in the weak accession states to uphold and enforce the new body of laws, EU aid was needed. Gradually, aid shifted from market economy building to governance capacity. In 1997, at the Luxembourg European Council that launched the enlargement process, PHARE was reoriented to provide aid targeted towards helping candidate countries meet the *acquis* and membership criteria. The Commission was therefore asked to undertake a highly intrusive process of building the necessary institutions and laws within candidate states, monitoring these institutions, and ensuring that they could be counted on to uphold the values and safety of Europe.[41] Many have argued that through one-size-fits-all policies of transition and enlargement, the EU accession process led to radical disempowerment of acceding states, especially their legislative branches.[42] There is much truth in this, but there was, of course, some degree of prescriptive adaptation in the enlargement process. Most importantly, since membership presumably ultimately entails at least formal equality between member states, and since candidacy for EU membership itself was assumed to be a free choice, it has been harder to frame this process as neo-colonial. Perhaps one can say that the colonial norm survived in Europe mainly through the centre–periphery paradigm applied to Europe itself.

The enlargement process in turn spilled over into the global realm. It provided a pool of trained bureaucrats within the EU aid apparatus who believed in the importance of the rule of law for development and democracy, and who were practised in the use of direct development to build the rule of law. As the EU began to assert a more global reach following the 1992 Maastricht Treaty, these norm-carriers started to expand this rule of law-building strategy to the rest of the world, following the growing conventional wisdom about the importance of good governance and the rule of law to development. The regional organisation of the EU's external relations meant that direct development as a strategy would spread region by region, not country by country.

[40] The convergence–divergence debate which dissects these patterns is at the core of the field of 'transitology'. See, for instance, L Whitehead, *Democratization: Theory and Experience* (Oxford: Oxford University Press, 2002).

[41] While frequently criticised for its intrusion into other states' sovereignty, it should be noted that, after the deepening of the Justice and Home Affairs pillar, the EU agreed to send multinational teams regularly to examine even its own member states' borders, and has also created processes for peer evaluation of member states' courts and judicial systems: see Wallace and Wallace, n 37 above, pp 511–12.

[42] See eg H Grabbe, *Europe's Transformative Power* (London: Palgrave, 2006).

Rule of law promotion has thus followed the general pattern of external EU relationships as a series of concentric circles: strongest in the immediate neighborhood—first Eastern and Central Europe, then Southeast Europe, then the newly independent states in Central Asia, more diffuse beyond. The rule of law also became a focus of development aid in ACP countries, mostly former colonies, where the EU has been most comfortable with a developmental approach. Rule of law-building programmes via direct development are weakest in Asia and Latin America, although even in these regions there are signs of incipient growth.

B. Direct Diplomacy

Direct diplomacy requires the EU to apply diplomatic muscle, carrots and sticks, threats and rewards to cajole other governments to adopt elements of the rule of law. Precisely because it involves a strong element of coercion, suasion or arm-twisting, this strategy has been very hard for the EU to apply consistently. For one thing, and unlike the US, the EU has a belief in diplomatic engagement (as opposed to balancing or containment) that is too ingrained to make threats of sanctions or withholding of diplomatic relations credible.[43] The EU will generally let geo-strategic, historical or symbolic imperatives outweigh failings in domestic reform—as the Albanian case illustrates.[44] This reduces the EU's range of diplomatic options.

Relatedly, it is fair to say that sensitivity to the EU's colonial legacy has directly reduced the scope of its diplomacy. As discussed above, from its inception the EU's complex series of external trade preferences either followed pragmatic economic lines or were based on post-colonial

[43] See R Schweller, 'Managing the Rise of Great Powers: Theory and History', in I Johnston and R Ross (eds), *Engaging China: The Management of an Emerging Power* (New York: Routledge, 1999).

[44] Albania had not made a great deal of progress in improving its domestic rule of law, or even ensuring a functioning government: the European Commission cited its 'widespread lack of capacity to implement its own laws and international obligations … the inadequacy of the judiciary and the prevalence of corruption'. Yet these concerns were balanced by the 'role it is playing as a moderating influence in ongoing conflicts in the region'. Seeking to encourage this moderating influence, the Commission could not fully enforce the diplomacy that its conditionality would otherwise have called for. Instead, the Commission devised a creative solution—recommending that negotiations for a Stabilisation and Association Agreement, or SAA (the first step towards the ante-room for accession) should begin as 'the best way of helping to maintain the momentum of recent political and economic reform, and of encouraging Albania to continue its constructive and moderating influence in the region'. By not recommending an SAA but not recommending against, the Commission has created an intermediate period of negotiations to keep Albania on the path without giving up its conditionality. See European Commission, 'Report from the Commission to the Council On the Work of the EU/Albania High Level Steering Group, in Preparation for the Negotiation of a Stabilisation and Association Agreement with Albania' (Brussels: 6 June 2001) p 8.

ties. The EC had no tradition of granting trade privileges strategically as rewards for allies.[45] Moreover, the EU's considerable development aid programme was not used as a carrot or stick to entice governments towards policy change. From its inception, the EC's aid programme had been conceived of largely as a way of expiating post-colonial guilt, and therefore followed the pre-existing relationships member states had with former colonies.[46] This restrained attitude was backed up by relative scepticism about the effectiveness of aid or trade conditionality. For instance, in a rare case in which the EU Commission linked the release of programme funds to the passage of a law, the head of its own mission to improve Albania's rule of law protested. If the law passed under conditionality, he argued, it would not be owned by the Albanians, and would not be implemented—it would be 'shit, just worthless'. The EU duly removed the conditionality.[47]

EU reluctance to use carrots and sticks to affect the rule of law has varied depending on the realm in question. It is more reluctant to employ diplomacy with regard to institutional and procedural building-blocks such as judicial independence or major political corruption, and more willing to press diplomatically in values-based areas such as human rights laws. This discrepancy is historically path-dependent, and stems from the role of the European Parliament as a normative institution within the EU.[48] The European Parliament began to find its diplomatic voice in the late 1970s, catalysed by the growing popular commitment to human rights. It was a prime mover in the EC's decision to suspend aid to Uganda and Equatorial Guinea on human rights grounds.[49] Parliament's insistence, and the emergence of new democracies in Central America in the 1980s, spurred the Commission to begin thinking of using its external relations—particularly direct diplomacy through political dialogue and economic co-operation—as a means through which it 'could help reinforce democratic principles and human rights'.[50] By the mid-1980s, the EC began adding wording to its trade treaties that made them contingent on countries following democracy, human rights and the rule of law. While rarely used in practice, the precedent was established. When Parliament

[45] See Holland, n 3 above. The idea that the rule of law was a tool to improve trade within developing countries was not conceptualised until the 1990s.

[46] This reading of the EU's aid policy is the consensus view among historians in this arena. See in particular, Grilli, Lister, and Holland, all n 3 above.

[47] R Milkaud, Head of European Assistance Mission to the Albanian Justice System (EURALIUS Mission), personal interview, October 2007.

[48] The European Parliament, as the only European body elected by direct suffrage, has seen itself as a norm entrepreneur, particularly in the field of human rights. See KE Smith, 'European Parliament and Human Rights: Norm Entrepreneur or Ineffective Talking Shop?', *Dossier El Parlamento Europeo en la Politica Exterior* (November 2004).

[49] Grilli, n 3 above, p 105.

[50] *Ibid*, p 238, quote from the European Commission, 'Europe–South Dialogue', (1984) p 91.

gained the power to veto agreements with third parties following the 1987 Single European Act, the strategy of direct diplomacy likewise gained ground.[51] From 1989 onwards, declarations on human rights, democracy and the rule of law became regular features of European Council meetings.[52]

The EC's use of direct diplomacy also grew through its increased comfort with the use of aid conditionality throughout the 1980s, as the EC's development community followed the broader trend of the international development community. Witnessing the worsening terms of trade with African countries in particular, the EC began to interpret these realities through new theories that held that aid could not sponsor growth in countries where governance institutions failed.[53] When, as discussed above, the international development community began to use conditionality in its aid agreements to force what it deemed essential governance reforms necessary for aid to be effective, Europe followed suit.[54]

In 1995, the EU turned what was to be a quick mid-term review of the Lomé IV Convention, which governed aid to the ACP, into a fundamental rethinking of its aid provisions.[55] Negotiators introduced broad political conditionality, including support for democratic and legitimate government and the protection of human rights and liberties. 'Respect for human rights, democratic principles, and the rule of law' was defined as 'an essential element' of the Lomé Convention, and 80 million ecus were reserved for new institutional and administrative reforms 'aimed at democratization, a strengthening of the rule of law, and good governance'.[56] The EU instituted a two-tranche system for delivering aid, withholding 30 per cent of promised aid to ensure that conditions would be met.[57] As a last resort, any ACP state that failed to meet what were known as the 'Article V' political criteria faced suspension from the Convention, and thus of their trade aid relationship with the EU.[58] The EU was perfectly willing to use the strategy: during the 1990s aid to Nigeria, Rwanda, Burundi, Niger, and Sierra Leone was suspended.[59]

The EU's increased readiness to use conditionality also stems from its growing sense of its legitimacy and weight as an international actor, following the 1992 Maastricht Treaty and the beginnings of the Common

[51] Holland, n 3 above, p 120.
[52] Crawford, , n 9 above, p 132.
[53] Holland and Grilli, both n 3 above.
[54] For the history of change in the development community's thinking regarding the use of conditionality, see D Kapur, JP Lewis, and R Webb, *The World Bank: It's First Half Century, Vol 1* (Washington, DC: Brookings, 1997).
[55] Holland, n 3 above, pp 44, 125–32.
[56] See Art V of the Lomé IV Convention 1995.
[57] Holland, n 3 above, pp 48–9.
[58] *Ibid*, n 50.
[59] *Ibid*, p 134.

Foreign and Security Policy (CFSP). Its extensive use of conditionality and diplomacy with the new candidate countries for enlargement, as discussed above (deemed legitimate, since the EU clearly had the right to set the terms on which new members could enter), may also have spilled over into its growing confidence with the diplomatic mode of strategic thought.[60] Naturally, the EU sought to integrate its development programmes with the new CFSP (both of which saw human rights, democracy and the rule of law as normatively and strategically essential).[61] Thus, the Cotonou Convention that replaced Lomé V in the ACP states strengthened political conditionality, while adding a policy dialogue to its external relations with these states.[62]

By the beginning of the new millennium, the EU had three diplomatic voices—Parliament, Council and Commission—all using direct diplomacy as a strategy for enhancing the rule of law abroad. Yet, as with the US, EU direct diplomacy is obviously fraught with double standards and conditioned by the overall tenor of its relationships with external states on a case-by-case basis.

In the former colonial arena of ACP states, the EU unilaterally broadened its policy dialogue to include rule of law issues, while ensuring that issues important to the EU under the general cover of good governance, democracy, human rights and the rule of law would dominate.[63] Through this political dialogue, the EU began to push internal security issues as one of the bases for its rule of law concerns. Under this imperative, it discussed not only human rights and democracy, but also sensitive issues such as the need to curb illegal immigration, drugs and the export of crime.

[60] For studies of EU enlargement and the conditionality and the diplomatic pressure the EU exerts on candidate countries, see D Ethier, 'Is Democracy Promotion Effective? Comparing Conditionality and Incentives' (2003) 10 *Democratization* 99–121; G Pridham, 'The European Union's Democratic Conditionality and Domestic Politics in Slovakia: The Meciar and Dzurdinda Governments Compared' (2002) 54 *Europe–Asia Studies* 203–27; F Schimmelfennig, S Engert and H Knobel, 'The Impact of EU Political Conditionality' in. F Schimmelfennig and U Sedelmeir (eds), *The Europeanization of Central and Eastern Europe* (Ithaca, NY: Cornell University Press, 2005), pp 29–51; F Schimmelfennig, S Engert and H Knobel, 'Costs, Commitment and Compliance. The Impact of EU Democratic Conditionality on Latvia, Slovakia, and Turkey' (2003) 41 *Journal of Common Market Studies* 495–518; A Dimitrova, 'Enlargement, Institution-building and the EU's Administrative Capacity Requirement' (2002) 25 *West European Politics* 171–90.

[61] Holland, n 3 above, p 181.

[62] T Börzel and T Risse, 'One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law', unpublished paper (Stanford, 2004).

[63] Although the EU trumpets its relationship with the ACP countries as being carried out on the principles of 'the four Cs', including co-operation and equality between the partners, one commentator described this round of ACP negotiations as 'A situation of total power asymmetry, where the normative consensus of the EU leaves little room for concessions': O Elgstrom and M Smith (eds), *The European Union's Roles in International Politics: Concepts and Analysis* (London: Routledge, 2000) p 195, quoted in Holland, n 3 above, p 192.

In Asia, however, the EU has been far less able to use direct diplomacy to promote the rule of law. It has very little leverage in the region, and its desire to improve relationships in an area belonging to the US sphere of influence usually trumps rule of law concerns—especially vis-à-vis Asian states more prone than others to dismiss the legitimacy of diplomatic interference in 'internal affairs'. In the Europe–Asia Meeting (ASEM)—the main European forum for engaging diplomatically with Asia—the Asian countries blocked every EU effort to bring human rights to the table. The EU, unwilling to press the point too hard, often struck a gentleman's agreement to avoid divisive topics—although it began to breach that agreement in order to protest against Burma's elevation to the ASEAN presidency.[64] Nevertheless, the EU has used the ASEM dialogue to focus its diplomacy on rule of law issues where Europe and Asia are in agreement, such as transnational crime, drug and human trafficking.[65]

In Latin America, where the EU has long negotiated with Mercosur as well as individual countries like Chile and Mexico, it has incorporated into those treaty negotiations political dialogue on democracy, human rights and the rule of law.[66] Yet these diplomatic ties are weak, and so is the political dialogue with Latin America. The former Soviet Union has also resisted conditionality on the rule of law; while treaties include political dialogue on democracy, the rule of law, and human rights, there is no suspension clause on aid or trade for violation in these areas.[67]

In its Southern periphery, where it has relied on the Euro-Mediterranean 'Barcelona' process since 1995 as a way of strengthening economic relations with Northern African and Middle Eastern countries, the EU's political dialogue has been slow to get off the ground. Its regional approach, unlike the US's bilateral approach, forces it to enter dialogue simultaneously with a group of countries divided among themselves by multiple fissures (not least the Palestinian–Israeli conflict) in a way that precludes discussion of the rule of law.[68] The EU is trying to address the limits of its former approach through the new European Neigborhood Policy, where targeted country action plans are negotiated that include planned reform—but this approach, like much of EU diplomacy, finds its limits in the gap between long-term rewards and short-term costs.[69]

Given the difficulties in using negative conditionality as a legitimate tool while at the same time pledging allegiance to the idea of equality

[64] Holland, n 3 above, p 69.
[65] *Ibid*.
[66] Börzel and Risse, n 62 above, p 18.
[67] *Ibid*, p 15.
[68] *Ibid*.
[69] K Nicolaïdis and D Bechev, 'Integration Without Accession: The EU's Special Relationship with the Countries in its Neighborhood', Report to the European Parliament, October 2007.

and partnership, the EU is increasingly resorting to positive forms of conditionality. Whatever their guise, however, all forms of conditionality remain suspect in the eyes of non-Western countries. Ironically, criticism of the EU for failing to flex its muscles sometimes comes from its partners themselves, at least those who believe that they would be relatively well placed if this game was to be played systematically.[70] In sum, direct strategies of either kind can be used only with caution. They seem to promise short-term pay-offs, but these are often not sustainable. So the EU must assess on a case-by-case basis whether the price—in particular the accusation of neo-colonialism—is worth paying.

C. Indirect Development

Clearly indirect strategies are far less likely to be caught in such a bind. Providing funds to NGOs and other civil society actors, scholarships to individuals, and tools (such as corruption surveys) to empower local actors working towards building the rule of law locally has long been a natural strategy for the US, which has lionised its civil society since de Tocqueville's time. Indirect forms of development assistance can be provided directly by the government to foreign NGOs, or can be provided by a government to NGOs or private sector actors in their own country, which can then work directly with civil society in other countries without the heavy hand of official government interaction. Pre-colonial export of the rule of law from Europe often took place in the latter fashion, as chartered companies such as the British East India Company had to create law-based interactions between their employees and the locals in the areas they controlled.

Ironically, however, it is fair to say that today the EU is not comfortable with this strategy. While it disburses over 300 million euros to its own 'development NGOs' every year, little of this is earmarked for rule of law promotion. Its state-centric approach leads Eurocrats to prefer dealing directly with foreign state governments, even in states that Europeans themselves contributed to creating only a few decades ago. Some would argue that bypassing the state by empowering other local actors seems more like 'neo-colonial' behaviour than straightforward exercise of power from outside. More to the point, unlike the US, the EU does not have a political tradition of democratic empowerment of its own societies, a theme that has only recently emerged in the list of Commission preoccupations.[71] Without a strong internal record of the promotion of civil society across

[70] *Ibid*.

[71] See for instance, K Nicolaïdis, 'Our Democratic Atonement' in *Challenge Europe*, Issue 17 The People's Project? (Brussels: European Policy Centre, December 2007).

continental Europe, the EU finds it difficult to leap to indirect, bottom-up development as an external strategy. Bottom-up development support has largely been promoted by the European Parliament, which created a separate budget line for PHARE in 1994 known as the European Initiative for Democracy and Human Rights (EIDHR)—administered since 1999 by the Commission.[72] Unlike the rest of PHARE, which provided direct grants to the government, the Parliament's EIDHR programme was borne out of the theory of civil society-based development that was percolating through the global political classes in the early 1990s, and was designed to provide funding directly to NGOs for projects directed at improving democracy, human rights and the rule of law in all countries receiving EU aid.[73]

As civil society-building programmes have grown in importance within the international development community, the indirect development strategy may be gaining ground within the EU. For instance, the Cotonou Convention of 2000 includes civil society among the sectors of society deserving of capacity-building assistance, enabling general EU aid in the ACP countries to be used for indirect development strategies as well.[74] The country action plans negotiated under the European Neighborhood Policy contain similar language. But even there, caution often leads EU agents to seek out local actors who may be partially 'accredited' by their own states, from quasi-government NGOs to trade unions, and so on. Despite these small changes, the EU remains ambivalent about bypassing the state in promoting the rule of law, even if the creation of a base of genuinely local supporters might make more substantive, specific reforms less colonial and more locally palatable.

D. Indirect Diplomacy

A much deeper form of indirect promotion of the rule of law is embedded within the EU's agenda of regional integration and its attempt to promote its experience as a blueprint for the rest of the world. Many in the EU believe that the Union's unique contribution to the world is its

[72] 'Final Report: Evaluation of the PHARE and TACIS Democracy Programme, 1992–1997', (Brighton, Hamburg: ISA Consult/European Institute/GJW Europe, November 1997) p 9. Unlike PHARE programmes, EIDHR grants do not require the acquiescence of the country government—the Commission deals directly with applicants. In 1993, PHARE handed management of the programme over to the European Human Rights Foundation, although it remains a Commission project: *ibid*, p 10.

[73] European Parliament Budget Chapter B7-7. For more on this structure, see 'The European Initiative for Democracy and Human Rights', available at http://europa.eu.int/comm/europeaid/projects/eidhr/eidhr_en.htm.

[74] Cotonou Convention, Art 7.

own process of 'enmeshment', which is purported to have brought peace and prosperity to the continent. The EU's main model of change is its own integration process, whereby economic integration through trade liberalisation is pursued on a reciprocal basis and is underpinned by converging standards, harmonisation and mutual recognition.[75] The work of enmeshment is complex. As James Snyder argues regarding the role of enlargement in consolidating democracy:

> The favorable political effect comes not just from interdependence, but from the institutional structures and changes in domestic interests that may or may not accompany high levels of interdependence … The institutionalised, legal character of the relationship would make for predictability, irreversibility, and deeply penetrating effects on the domestic order of the state.[76]

The EU may remain far from extending its competence to most of the realm of governance linked to rule of law promotion. But its underlying philosophy is that the closer countries get to sharing a single economic space, the greater convergence they should seek when dealing with the negative spillover of open borders, such as trade law enforcement, immigration, border standards and policing. The same logic has applied to its external relations. While enmeshment began as a strategy for acceding countries, it has moved outward from this core as the EU sought methods for building stability in other regions, and turned to the strategy it knew best. In April 1997, the Commission created the Regional Approach to the Countries of South-Eastern Europe, which extended much of the pre-accession process of enmeshment to the Balkans, without a strong promise of eventual integration. By 1999 it had solidified this strategy into the Stability Pact, which closely followed the enmeshment project of 'combining financial incentives with trade concessions in the shadow of membership conditionality' to create stability.[77] However, for Stability Pact states such as Albania, this shadow promises to be long, indeed.

The EU's strategy of enmeshment leads to its updated version of exceptionalism or unilateral universalism—the idea that its own experience (or experiment) has been so valuable that other nations should follow suit to usher in a world of greater peace and prosperity. The EU does not just export technical assistance, or even the rule of law itself, but seeks to promote similarly enmeshed regional systems throughout the world. Other regional areas in turn are supposed to learn the lessons learned by the EU countries, *through their own experience*, as it were. Since the process of regional integration not only enhances peace (and thus human

[75] For a recent discussion see K Nicolaïdis, 'Trusting the Poles? Constructing Europe through mutual recognition' (2007) 14 *Journal of European Public Policy* 682–98.

[76] J Snyder, "Averting Anarchy in the New Europe', (1990) 14 *International Security* 5–41.

[77] Börzel and Risse, n 62 above, p 15.

rights), but is also predicated upon law-governed behaviour both internal and external, the rule of law as a normative guideline is supposed to be strengthened in the process. Yet the question remains: does enmeshment require specifically EU laws, and to the extent that it does, what kind of diplomatic instruments does the EU use to promote its laws over equally valid alternatives? In the Balkans, the Mediterranean, Africa, ASEAN, and even in Latin America, the EU encouraged regionalisation, clearly to export a law-governed process. In the event, EU laws, from product standards to procurement and intellectual property rules, were also exported, arguably to the benefit of EU firms. While the guiding concept of reciprocal benefits lingers within the EU, enabling it to see itself as a less intrusive and more co-operative partner than the US in its rule of law efforts, many reforming countries see little difference between US diplomatic conditionality and EU conditionality within the enmeshment process, while finding fault with the EU's particularly slow, bureaucratic and centralised development aid programmes.

The EU has attempted to extend enmeshment to further-flung regions such as Asia and Latin America—but without the lure of potential EU accession, the strategy has found major limits (as exemplified by the case of Mercosur). In short, while the discourse of enmeshment stresses the rule of law, its practice—guided by EU trade interests—stresses 'EU laws or regulations' as core exports. And tensions are likely to arise between the EU's concern to export the rule of law and its desire to export its products, if the former requires an internal process of empowerment which may involve some degree of discrimination precisely against the EU!

The post-colonial setting, in other words, limits the scope of enmeshment. The EU's detailed reports on the progress of other states might be accepted by a country facing the prospect of joining the EU's coveted club—but they sound paternalistic when applied to a country like Indonesia, where colonial echoes still resound strongly. Equally, the idea of enmeshment does not appeal to people who have just struggled to gain their sovereignty, for whom Europe's version of peaceful integration sounds much more like forced domination by larger and strong powers.

If no single strategy, therefore, can appear more legitimate across countries and circumstances, and if, as discussed in Section I, no object of change can be necessarily privileged, we are left with only very broad guidelines to address our main question.

III. *WHOSE*? IMPERIALISM VERSUS FUTILITY, AND THE POST-COLONIAL DILEMMA

So the question we turn to finally is that of the *reception* of the law promotion strategy as practised by today's Europe as the ultimate measure

of its legitimacy. In other words, we do not suggest here assessing actual 'effectiveness' or 'legitimacy' according to some objective measure or benchmark, but rather turn to the evaluation made by those on the receiving end—those whose rule of law we are concerned with. Such reception depends on a host of factors. These include the given country's or agent's historical relations with European powers, their relative power at the regional or global level, the extent to which they defend norms of sovereignty, the level of development of their political systems, as well as other amorphous factors connected to culture, religion or prevailing beliefs. The EU's basic post-colonial dilemma stems from a constant ambivalence on the part of its partners themselves between perceiving the EU as doing 'too little' and evading its post-colonial responsibility, and doing 'too much' and using its power in a neo-colonial manner.

On the side of doing 'too little,' we find the claim that because European countries have caused governance failure in many post-colonial states, they have a responsibility to improve the situation and help these countries develop. Having brought modernity and thus destroyed traditional power structures and adjudication mechanisms, the West has a responsibility to foster the rule of law in countries where they have in the past left a vacuum. More broadly, a solidaristic standpoint on international society connects the universal nature of goods such as the rule of law with the responsibility that actors bear in the system. Whatever their direct or indirect responsibilities, European citizens and their governments have a responsibility to use their resources to assist other people in entrenching this universal ideal. Indeed, a mainstream perception stemming from both governmental and non-governmental circles in many of the polities concerned is that EU procedures and instruments are overly bureaucratic and ineffective—both given the nature of the EU as an organisation and given the reluctance to use negative conditionality and coercive instruments. Or they are seen as useful but rather hesitant, not pushing hard enough on reluctant governments. In short, one strand of criticism is that the EU is not fully bearing the burden of responsibility which derives from its imperialist past. In order to be truly post-colonial, it should redeem itself by helping countries to truly engage with modernity for their own sake, not in order to serve EU material interests.

But the more damning criticism remains that of covert imperialism—the EU will always be doing 'too much' and is incapable of resisting its paternalistic, arrogantly intrusive demons. At its core, the anti-imperialistic argument is that coercion of any sort, embedded in any kind of process (whether through soldiers or merchants), is illegitimate, even for a progressive end. A variant of this critique is values based: that no outside power has the legitimate right to change another culture and polity. The basic issue is choice versus coercion with regard to the agents

with which the EU is interacting. To what extent is the *general* involvement of the EU (and, for that matter, the West) as well as the *specific* prescriptions and proscriptions it puts forth perceived as inevitable or negotiable? Indeed, perhaps the most fundamental measure of a non-colonial relationship is that of *voluntary* engagement, usually entailing at least some degree of equality or symmetry rather than a hierarchical relationship. In a non-coercive relationship, flows of resources and conditions may be uni-directional but are embedded in a context defined jointly by the parties. Clearly, the more coercive and constraining the EU is perceived to be (as a function of both the objects and realms it tries to influence and the strategies it uses) the more imperialistic it is perceived to be.[78]

In this regard, the accession dynamic is fascinatingly ambiguous. On one hand, it may seem less neo-colonial than most other relationships in that it is aimed at ultimately establishing membership in a club to which all have *chosen* to belong. But, of course, choice here, as in most instances of inter-state relations, involves both agency and structural constraints. Did the countries in transition in Central and Eastern Europe actually have a choice, given the lack of credible alternatives? And even if they freely chose to be candidates, did they possess choice over the means by which the route to accession would be negotiated? Obviously the question of choice warrants subtle and differentiated answers.

To be sure, the dilemma is not easy to address. In both directions, the EU is hobbled by its consciousness of its colonial past, but is hard pressed to turn this consciousness into appropriate strategies to promote the rule of law. Its awareness of its post-colonial heritage has caused it both to be overly intrusive and paternalistic, in the name of 'responsibility', while at the same time being overly statist, sovereignty-conscious, and arguably overlooking the desires of citizens within those states in assisting and curbing their corrupt or ineffective governments. Obviously, the EU must tread carefully in dealing with the inheritance of its past. Acute sensitivity to being strong-armed by Europeans lies just beneath the surface for

[78] Here, it is useful to go back to Albert Hirschman's *Rhetoric of Reaction* (Cambridge, MA: Harvard University Press, 1991), where he identifies three principal arguments invariably put forth by what he terms 'reactionary' thinkers to counter the left's 'progressive' agenda. In fact, as he demonstrates himself, these patterns of argumentation are used more generally against agendas for change. On the side of doing 'too much' Hirschman would point to the perversity thesis, whereby any action to improve some feature of a political, social or economic order is alleged to result in the exact opposite of what was intended—such as, in our case, delegitimising institutions that are being supported; and the jeopardy thesis, holding that the cost of the proposed reform is unacceptable because it will endanger previous hard-won accomplishments—such as, in our case, sovereignty, state-building, etc. On the side of doing too little, Hirschman's futility thesis predicts that reformers are too weak to make a dent in the status quo, so attempts at social transformation will produce no effects at all.

Table 2: Addressing the Post-colonial Dilemma

	INSTRUMENT	
	Development Policy	**Diplomacy**
Direct Use	*Top-down Development Policy* Are requirements too specific/disempowering? Do structures lack universality? Is the degree of coercion so great that local ownership is curtailed?	*Coercive Diplomacy* Is the EU able to exercise this strategy with any consistency, or does inconsistency alone render it illegitimate? Does straightforward coercion generate resistance in reforming states with colonial history, even if the objects of reform are desired?
Indirect Use	*Bottom-up Development Policy* Are local reformers co-opted and made suspect internally? Is working through local reformers simply a more insidious form of colonial influence?	*Enmeshment Diplomacy* Is EU membership a real choice, or an enforced necessity? In areas where membership is not an option, is enmeshment simply experienced by receiving countries as similar to direct strategies?

many post-colonial states.[79] Yet state elites may also use accusations of 'too much' intrusive EU action to betray the wishes of their disempowered people, who would conversely accuse the EU of doing 'too little'.

We summarise in Table 2 what we see as the expressions of the post-colonial dilemma in each strategy previously discussed.

In the case of top-down development policy, the core challenges have to do with ownership, particularly whether rule of law prescriptions are owned by local citizens, who have adapted them to the local context. Direct development strategies, when applied to institutions and laws, are particularly subject to a lack of empowerment and of universality. With coercive diplomacy, where partners have a smaller degree of choice, there is a greater need for consequential analysis: pressure is not applied on grounds of principle but with an eye to its likely consequence. When the

[79] In Indonesia, for example, the Dutch Minister of Development Co-operation took advantage of a donors' meeting in 1992 to loudly condemn Indonesia's military government for its human rights abuse. Angry at the perceived imperialistic overtones of criticism from Indonesia's former colonial rulers, Sohearto declared that Indonesia would no longer accept the Netherlands' donations. The Inter-Governmental Group on Indonesian Aid Programs, chaired by the Netherlands, was forced to disband and rename itself, while the Dutch (who wished to provide aid to Indonesia) had to creatively circumvent the ban on their aid by giving to multinational organisations doing work within Indonesia.

EU is unable credibly to exercise its coercive diplomacy, it is not likely to reap positive consequences; nor is it likely to find success when such coercion generates resistance in countries undergoing reform. And setting aside the complicated question of effectiveness, positive aid or trade conditionality, which offers a reward, is far more likely to be seen as legitimate and acceptable than negative conditionality. Moreover, as positive conditionality is predicated on encouraging policies which already exist in some form, it is likely to be more successful. That the EU has increasingly been exploring this route is a sign of such sensitivities. Coercive diplomacy is also subject to clear pitfalls in the rule of law arena: it can lead executives to bypass legislative activity or to pass laws that have no hope of implementation due to socio-economic obstacles, and it can reflect high politics with no broader public acceptance.

Clearly both indirect strategies are less prone to perceptions of neocolonialism, even if supporting groups fighting in Romania to decriminalise homosexuality or in Turkey to expand minority freedoms represent something of an echo of the liberal side of 'unilateral universalism'—like Britain's banning of *sati* in India.[80] Indirect development relies for its legitimacy on the measure of pre-existing local agency. Assisting the Solidarity movement in Poland has a different overtone than creating and funding an entirely foreign effort with local figureheads. However, in countries such as Romania, whose civil society tradition had been entirely crushed, Western funding and assistance may be crucial to jump-starting what can become a truly local movement. In such cases, the most vexing question is: when does empowerment become co-optation, or come to be perceived as such, making such support counter-productive?

Finally, enmeshment diplomacy is not necessarily about the paternalistic embrace of the EU but about the more general cultural learning and power-disciplining virtue of interdependence and engagement in regional communities and international structures (whether or not EU-centred). But if such interdependence is felt to be coerced rather than sought, it fails the test of post-colonial legitimacy. And for countries with the prospect of EU membership, we are brought back perhaps to the most fundamental question of all: is the EU *itself* beyond hegemony (of big member states against others)? Or does the colonial norm also continue to operate within?

IV. CONCLUSION

In sum, the EU's ambivalence today lies in the contradiction between, on the one hand, the 'will to power', or the will to use all the instruments it

[80] J Kopstein, "The Transatlantic Divide over Democracy Promotion' (2006) 29 *The Washington Quarterly* 85–98 at 96.

has at its disposal to influence other countries (where the mitigating factor is the notion of a contract with the 'partner' country), and on the other hand, 'the will to atonement', which would consist in developing a truly post-colonial strategy in promoting the rule of law. But the desire to avoid the echoes of colonialism is not just a product of the latter. Since power and purpose go hand in hand and since effectiveness is the ultimate measure of power, we all need to ask what approaches are most likely to create both desirable and sustainable reform around the world. While in some cases (such as enforcing human rights in the face of a recalcitrant public) the desire to act directly and specifically might seem to carry a normative weight that overrides the imperative of avoiding colonial overtones, external attempts to directly force change are too often unsustainable or cause backlash, harming the endogenous forces that could press more legitimately for such rule of law changes. In the long run at least, there is no doubt that illegitimacy radically undermines effectiveness.

We do not claim to have offered a fully fledged post-colonial strategy for the EU, but we do hope to have provided some elements for further discussion. An EU focused on effectiveness, but aware of the echoes of colonialism which may resonate abroad, would begin its reform effort with self-reflection and attention to consistency between its internal and external practice of the rule of law, as well as a clear separation between the promotion of the rule of law and the promotion of pre-conditions for exporting the European market. It would, to the extent possible, push within each realm of rule of law promotion (legal, institutional, cultural and structural) towards reforms that embody the need for greater universality and empowerment, rather than unilaterally creating and exporting specific substantive reforms. It would wield diplomatic strategies that leaned towards positive rather than negative conditionality, and would look more towards indirect rather than direct methods of catalysing change. And it would attempt to grant true choices and options to partner countries, consistent, of course, with its own beliefs. Such are some of the guidelines that a post-colonial effort to promote the rule of law might follow. Ultimately, the 'rule of law' banner ought to serve an ethos around the world that does not belong to one camp or another: the emancipation of all individuals from fear and oppression.