

# **Why law? Why archives? Why a law for archives?**

Trudy Huskamp Peterson

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The question “Why do we need a law for archives?” presupposes that we have answered two prior questions: first, “Why law?” or, more accurately, “Why do we need the rule of law?” and second, “Why do we need archives?” If we can answer those two basic questions, we should have a firm footing to answer the last question, “Why do we need a law for archives?”

## 1. Why law?

Many people in many countries in many ages have tried to define what is a rule of law. Perhaps the most authoritative current international definition is one offered by the Secretary-General of the United Nations to the Security Council in 2004. In the wake of the terrible conflicts during the 1990s, the Council wanted to know what lessons could be learned from the United Nations’ attempts to establish justice and a rule of law in post-conflict societies. The Secretary-General offered to report on the UN’s experience in the past decade, and the Council members accepted his offer. As part of the report he presented, the Secretary-General offered this definition of the rule of law:

[The “rule of law”] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of

supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>1</sup>

A second useful international definition of the rule of law comes from the World Justice Project, a current undertaking by an extraordinary group of international organizations, including such varied bodies as the Inter-Pacific Bar Association, the World Federation of Public Health Associations, Association of International Educators, the International Chamber of Commerce, and the International Institute for Applied Systems Analysis. As part of their work, the staff members of the Project are designing a “Rule of Law Index,” which they hope can be used as a tool to measure a country’s adherence to the rule of law. The Project wants to measure not how the laws are written (de jure) but how they are actually implemented (de facto). To do that, the Project had to decide what were the characteristics of the rule of law—and to make sure that they were “culturally universal, avoiding Western, Anglo-American, or other biases.” After a review of national constitutions and scholarly literature and consultations with experts, the Project came up with four “universal principles”:

1. The government and its officials and agents are accountable under the law.
2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
4. The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges

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<sup>1</sup> Secretary-General to the Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (United Nations Security Council, 2004, S/2004/616), paragraph 4.

who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.<sup>2</sup>

Both the UN definition and the universal principles emphasize that the rule of law is necessary to protect fundamental human rights, and this protection depends upon accountability, enforceability, and equality of treatment. In both definitions, the rule of law is defined not simply as a formal system of rules applied by the government to the governed; it is equally the control of the government by the governed: rule of law, not rule by law. And it is that reciprocity of obligations that makes the rule of law so compelling as a principle for organizing governments.

Ultimately, then, the answer to the question, “Why law?” is, “To protect human rights.”

## 2. Why a government archives?

In 1941, at the dedication of his presidential “library”—actually, not a library but an archives of presidential papers--U.S. President Franklin D. Roosevelt elegantly explained the importance of archives to a people:

To bring together the records of the past and to house them in buildings where they will be preserved for the use of men and women in the future, a Nation must believe in three things. It must believe in the past. It must believe in the future. It must, above all, believe in the capacity of its own people to learn from the past that they can gain in judgment in creating their own future.<sup>3</sup>

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<sup>2</sup> “The Rule of Law Index,” World Justice Project, p. 6, [http://www.lexisnexis.com/documents/pdf/20080828015427\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20080828015427_large.pdf) (accessed 2009-03-02).

<sup>3</sup> Excerpt from speech on line at <http://www.fdrlibrary.marist.edu/collec20.html> (accessed 2009-03-02).

As Roosevelt said, archives serve the past: they are institutions that hold the heritage of human recorded activity.

As Roosevelt also said, archives provide people with the opportunity to learn. They serve both governed and governors as a source for learning about past actions. For the government, archives are a nearly inexhaustible source of information on what the government did and how the government did it, providing the possibility that a government can learn lessons from the past. (That governments usually don't use this resource says more about the behavior of officials than about the quality and contents of archives.) For the governed—the citizens—the archives are absolutely indispensable for holding the government accountable for its actions, both things it has done and things it has not done. For example, did the government do an environmental impact assessment before building the new bridge? What did it say? Was the damage the bridge has caused since it was constructed due to the government ignoring the findings of the environmental assessment? Reports, correspondence, scientific data, architectural and engineering drawings, emails, photographs, memoranda: all are part of the documentation that should be available to answer those questions.

If archives are the bedrock for understanding the past and for learning lessons from it, how do archives help people believe in the future? Archives help provide two important sources for the confidence of people in the future: they underlay predictability of government and they provide the possibility to assert human rights.

Predictability is important for economic life. For example, by knowing the decisions that courts have taken in cases involving an economic issue, businesses can weigh their risks if they take particular actions. At least in theory, if persons know that if they are caught

dealing drugs they will absolutely be sentenced to jail and that courts have enforced that law, they will hesitate before setting out on a career as a drug dealer. Records of government—in the examples, the records of decisions by courts—are essential for predicting the future actions of government. These records must be preserved and made available: that is the job of the archives.

But most important and most central to the future and the rule of law, archives are crucial for protecting human rights. Records are fundamental to prove that an individual is a citizen, that he has a right to vote, that he owns this piece of property, that he has a right to live in this apartment, that he has the right to travel abroad—in fact, his very existence is documented by government records. The United Nations High Commissioner for Human Rights has commissioned a series of booklets on human rights, one of which is on archives and human rights. It looks at the records that are important in holding government accountable and promoting justice, combating impunity, finding the truth of past events, and providing recompense (reparations, restitution of property, and moral and material compensation) to persons damaged by government actions. Archives are fundamental to all these activities.

### 3. Why a law for archives?

States have a responsibility to preserve the records people require to exercise their full human rights. Given the importance of government archives to individuals, people need the certainty that the records will be responsibly selected, protected, and made available.

Citizens want and need fair and equal treatment by the archivists. They want to know what records exist, where they are, what they can see and what they cannot. And they

want to know that personal information about themselves found in the archives will be protected by the archivists impartially.

Without an archives law, no assurance can be given that records will be turned over to the archives: they might or might not, and neither the archives nor the citizen can enforce a transfer. Without a law, there is no assurance that a new or temporary government institution—such as an investigating commission—will be required to even offer its records to the archives. Without a law, there is no assurance that the citizens will have a right to know what is in the archives. Without a law, there is no lever for a person to use to hold the archives accountable if damaging personal information leaks out of the archives; if at all, the citizen would have to rely on other statutes to protest the archives' actions. There is no assurance that reference service will be provided equally to all, that arbitrary and capricious decisions won't be made based on who you know or what you do.

Archives support the exercise of rights, accountability, predictability, and heritage. Law is about equity, predictability, order, and accountability: a series of constraints on arbitrary and unreasonable exercise of government power. No law is perfect; no archival administration is perfect.

No government is ever entirely happy to see laws enacted that make it accountable. But law provides the balance of order and accountability that makes the citizens secure, and an archives law provides important protections for citizens that no other mechanism can provide. Archives are integral to protecting the rights of citizens, and the archives must be legally accountable to them. Archives must be governed by law.