

# : Global Governance Spotlight

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## A Global Rule of Law Cui bono?

Dr. Henning Melber

**In mid-September 2012, the annual High-level Meeting at the opening of the United Nations General Assembly will focus on the rule of law (RoL). In preparation for the meeting, the UN Secretary-General (UNSG) circulated a report on 16 March 2012 entitled *Delivering justice: programme of action to strengthen the rule of law at the national and international levels*. RoL is thus reinforced as a necessary focus within the debate for the further promotion of existing normative frameworks. Exploring the notion further adds to the discussion about common if not collective universal values, as also reflected in the current debate on global constitutionalism.**

Rooted in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, RoL can be considered an essential paradigm within global governance. Interestingly enough, however, civil and political rights, as much as any reference to RoL, were conspicuously absent from the Millennium Development Goals (MDGs). Their emphasis on the second generation of socio-economically related human rights and the necessary material prerequisites for a life in human dignity were undoubtedly important but risked reducing the debate to a purely “developmentalist” perspective. This often served as an excuse for autocratic forms of governance, sacrificing democracy and civil rights in the pursuit of what was claimed to be socio-economic “progress”.

On the other hand, an emphasis purely on RoL runs the risk that the necessary interface and linkages with the other dimensions of human security and development will in turn be overlooked. The UNSG’s programmatic document seeks to enhance a com-

mon understanding of RoL; this *Spotlight* explores the benefits and possible setbacks and pitfalls in the debate.

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### The rule of law as good governance

Justice needs a rule of law that is more than the law of the rulers. When Algerian diplomat Lakhdar Brahimi gave the Dag Hammarskjöld Lecture in 2002, he placed the rule of law at the core of his reflections. As he emphasised, law must have human beings as its focus. Emerging during the era of the Enlightenment, such a concept of law ultimately embraced all societies in a global order (see Box).

The global community in search of more justice therefore must come to terms with the inherent difficulties in finding measured and justified responses to injustice exceeding the tolerable limits (whatever tolerable limits in the case of injustice and violence might mean). For far too long, the despotic regimes in our world were protected by the principle of state sovereignty and non-interference in domestic affairs and could get away literally with murder. Since the turn of the century, this has changed. The Westphalian order, critically challenged since its early days by concerned advocates of a responsible, humanitarian-oriented international law for its exclusive emphasis on the dogma of national sovereignty, no longer protects despots by all means.

The UN has promoted further and more systematic initiatives since its Secretary-General’s 2004 report *The Rule of Law and Transitional Justice in Conflict*

and Post-Conflict Societies (S/2004/616, 23 August 2004). Kofi Annan then provided a basic definition of RoL, which was taken up by his successor UN Secretary-General Ban Ki-moon.

### RoL as a universal paradigm

The Rule of Law was originally a narrow, legalistic concept, meaning that no man is punishable except for a distinct breach of the law, established in the ordinary courts of the land. Over the decades, this concept acquired a much wider meaning, requiring the existence of just laws and the respect of human rights. (...)

Today, Human Rights Law and Humanitarian Law are important branches of international law, based on the view that the human dimension had to be considered, that people mattered, that they had rights as human beings, and that they needed legal protection. They represent an acknowledgement that laws should be just and that the Rule of Law should have a strong human rights component. (...) The question of human rights has also mobilised people around the world to be vigilant and vociferous about their own rights, and show concern for the rights of people in other countries.

*Lakhdar Brahimi, The Rule of Law at Home and Abroad. The 2002 Dag Hammarskjöld Lecture. Uppsala: Dag Hammarskjöld Foundation 2002, pp. 10 and 14.*

Adherence to international minimum standards is considered an obligation with regard to both substantive justice (i.e. the aims and outcome of justice) and procedural justice (i.e. the process by which those aims and results are achieved). The normative foundation is not only the UN Charter but also the international legal provisions relating to human rights and criminal, refugee and humanitarian law. Since the 2004 report, the concept has evolved into a guiding principle often referred to in resolutions by the UN Security Council as a kind of political imperative. As a research report published in June 2012 by the Stockholm-based Folke Bernadotte Academy on UN Peace Operations and Rule of Law Assistance in Africa 1989-2010 documents, out of a total of 36 UN peace operations to 2007, all but six included some concrete form of RoL assistance. This underlines the prominence RoL has already assumed in conflict management.

The current promotion of RoL is not taking place in isolation. It is hence no coincidence that at a time of political turmoil not only in North African countries and the Arab world and the difficulties in achieving a common platform for responding to the challenges posed by the transitions there, RoL will – at the UNSG's initiative – be the theme of the High-Level Meeting of the UNGA in mid-September 2012.

## The challenges of a RoL debate

As the UNSG's report of 16 March 2012 summarises: "Respect for the rule of law at the international and national levels is central to ensuring the predictability and legitimacy of international relations, and for delivering just outcomes in the daily life of all individuals." The document defines RoL as "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." (para. I.2.) This means that laws have a normative framework and reference point rooted in the internationally adopted and ratified values concerning human dignity and protection from the abuse of law. Not every law passed in a parliament is therefore legitimate. It requires compliance with internationally enshrined norms. The international human rights framework is therefore the ultimate guiding principle against which the rule of law is measured. The report also stresses that the RoL is at the heart of the social contract between a state and the individuals under its jurisdiction, to ensure that justice permeates society at every level. RoL guarantees the protection of the full range of human rights. Put differently: the rule of law cannot be misunderstood as the law of the rulers.

At the global level, RoL translates into "the ability of Member States to have recourse to international adjudicative mechanisms to settle their disputes peacefully, without the threat or use of force." (para. II.A.2.14) Its credibility depends on the adherence to such standards by all state actors. In practice however, international law is selectively applied. The critical question therefore is as to who holds the power of definition when it comes to the application or non-application of such laws.

The UNSG's document also makes the necessary connection between RoL and sustainable human as well as economic development. It advocates a holistic human development agenda, reconciling growth with social protection and the environment. It stresses that in such an agenda, "the rule of law must play a critical role in ensuring equal protection and access to opportunities" (para. II.B.3.26). This is important to note as a complementary perspective to the debates surrounding Rio+20 and the (post-)MDGs: We must certainly be mindful of the link between RoL and the need to find future ways to base societies on a true notion of sustainability while not losing sight of civil rights in the pursuit of socio-economic and cultural rights. But the ongoing question is whether this linkage is made forcefully enough and whether those advocating the socio-economic and socio-cultural dimensions of the rights debate are satisfied that their interests are being acknowledged.

The report advocates the establishment of an “age of accountability” (para. II.C.1). It is aware that this is not a neutral legal affair but requires political engagement from all sides. Promoting the RoL is inherently political and demands frank dialogue (para. II.D.1.48). It requires those in the camp prioritising civil-political rights and those who place a greater emphasis on economic and cultural rights to find a common denominator to bridge their fundamental differences. But how can the best of intentions be acted upon, given that it is not just a matter of political will and that leverage is also required? As a recent report warns, the UN is not in a position to follow up on its own declared aims due to a lack of capacity and weakness (see Box).

#### UN’s potential rule-of-law functions

(...) important knowledge gaps, poor coordination across development, political, and security actors; continuous infighting over roles and responsibilities spurred by weak leadership, a dearth in capacity to actually fulfill established mandates; knowledge gaps; lack on an in-depth relationship with the IFIs and other sources of leverage and legitimacy have dogged UN operations for more than a decade. (...) the idea of a stand-alone capacity for rule-of-law support (...), which could draw in existing rule-of-law-related policy task forces and similar mechanisms from the humanitarian agencies, (...) could have merit. So too does the idea of an Independent Judicial Service, a tool that member states could draw on (at their own choosing) when they want support on a range of executive and advisory rule-of-law functions, but are not the subject (voluntarily or otherwise) of a UN mission presence.

*Camino Kavanagh/Bruce Jones, Shaky Foundations. An Assessment of the UN’s Rule of Law Support Agenda. New York: New York University/Center on International Cooperation, November 2011, pp. 16 and 17.*

Maybe the already institutionalised ‘Special Procedures’ (SP) might strengthen the efforts of the UN in promoting RoL. These are independent experts, who have been tasked under criteria established by the Human Rights Council to promote human rights through either thematic or country-specific mandates. They are true advocates of human rights, often against all odds, and could also be deployed in the further pursuit of RoL.

#### Mind the gap: the limits to a necessary debate

There is, however, a need to balance international assistance with domestic capacity building in a bottom-

up instead of a trickle-down approach to anchor a democratic and fair legal system in local institutions and minds after a period of war-related decay or despotic rule by dictatorial regimes. Law reform and constitutional frameworks should be constituent parts of international crisis management and global governance. In times of global crises, it is furthermore not only (post-)conflict societies which require new stability and legitimacy through institutions and norms serving all members of society. When extra-judicial measures are justified with the argument that these supposedly protect RoL, then the rule of law itself is at stake. It also creates a dubious reference system, which smacks of double standards. These do not bode well with regard to claims to the moral high ground (see Box).

#### A cautious note on ‘norm entrepreneurs’

The crucial issue is how standards and models are applied. Assistance providers need to be aware that ‘transplanted’ laws and institutions will always be subject to detours, resistance and local adjustment, which means that the content and the function of a reformed law or institution will change. Thus reformers may be more helped by concentrating on the process of legal and institutional reform than on the particular content that they wish to support. (...)

An overriding difficulty with the whole rule of law enterprise is that the function of international actors as norm-entrepreneurs tends to create an accountability deficit. (...) The function of international agencies as ‘teachers of norms’ is compromised by a discrepancy between what they say and actually do.

*Richard Zajac Sannerholm, Rule of Law after War and Crisis. Ideologies, Norms and Methods. Cambridge, Antwerp and Portland: Intersentia 2012, pp. 239 and 244.*

To turn RoL into an effective tool requires the political will of the UN member states as represented by their governments. This includes the willingness not only to point fingers when it seems suitable for the purpose of pursuing own interests, but it also expects from all governments to scrutinize and improve their own existing legislature towards a comprehensive RoL in recognition of all substantial human rights. The promotion of RoL, as convincing it might appear, must however also be aware of the animosities among those, who consider political and civil rights as a version of continued Western dominance based on a hegemonic claim to execute the power of definition. The perception needs to be avoided, that a debate on the RoL provides a recipe for solving all challenges (see Box).

The establishment of decent living conditions for as many people as possible is a moral obligation that

needs to be shared among the widest possible alliances of forces, including states, official institutions, civil society organisations and individuals. There is nothing more precious on our Earth than life. We ought to protect and foster it – not least through the responsible cultivation, promotion and application of norms, which should reflect what we should be: people bonded by the values of humanity. But as the RoL debate seems to suggest, there are no easy pathways or avenues to achieve this goal.

### RoL not a panacea

Focusing attention on the rule of law as a broad, if not lofty, concept diverts attention from the coherence, effectiveness, and legitimacy of specific policies that are pursued to ensure security, promote development, or protect human rights. The rule of law agenda threatens to obfuscate the real tradeoffs that need to be made in order to achieve these worthy goals. These tradeoffs are real, partly due to the contradictions of socioeconomic development and political necessities in post-conflict settings and partly due to the contradictions between powerful third-party external actors with their own agendas and expert discourses who seek to intervene during “constitutional moments” of post-conflict reconstruction in the Third World. (...)

It is not argued here that the rule of law is a pernicious idea or a Trojan horse. Effective governance of any society cannot rest on any basis other than law. But the term “rule of law” is currently capable of just too many disparate meanings depending on the international policy agenda in which it is invoked.

*Balakrishnan Rajagopal, Invoking the Rule of Law in Post-conflict Rebuilding: A Critical Examination. William and Mary Law Review, Vol. 49, Issue 4, 2008, pp. 1347 and 1375.*

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