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Conclusion

From Rule of Law Promotion to Rule of Law Dynamics

Randall Peerenboom, Michael Zürn, and André Nollkaemper

Rule of law promotion is a dynamic field. There have been significant changes over time in content, strategies, programming, and funding priorities of rule of law promoters (Jensen 2003; Hammergren and Gillespie, this volume). The original law and development movement in the 1960s and 1970s believed the key to be legal education and an instrumental use of law to pursue social change. In the 1980s, the emphasis was on legislative reform and the passage or revision of laws based on foreign models. When that failed to produce the desired results, the attention shifted to institutions under the banner of rule of law and good governance. In practice, rule of law was used interchangeably with legal reform, which in many cases meant judicial reform and the need to establish an independent judiciary. When that approach also came up short, the scope of reform was expanded politically to include democracy, civil and political rights, freedom as an end of development, a robust civil society, increased political participation, and now the new governance of the postregulatory state with its emphasis on private actors and public–private hybrids.

From the perspective of rule of law promotion, these changes are mainly due to frustrated expectations on the side of rule of law promoters and behavioral adaptations in response to obstacles and poor results. In contrast, rule of law diffusion and rule of law conversion provide alternative perspectives that highlight different sources and causes of rule of law dynamics. From these alternative perspectives, rule of law dynamics are at least due to social processes initiated but not foreseen by rule of law promoters and by the reading of and the responses to rule of law in the recipient countries.

When we consider rule of law dynamics from the perspective of diffusion, it can be observed that the rule of law has been disseminated over different levels of government and into new areas, which cannot be explained or captured by processes of rule of law promotion. In particular, there is a growing normative expectation that states will comply with basic rule of law principles. Although compliance with basic

rule of law principles is not (yet) a requirement for recognition of states, there seems to be an emerging standard of rule of law in international law, as evidenced by the growing demands to extend the rule of law concept to the transnational and international sphere. International organizations (IOs) involved in the rule of law promotion, exerting pressure on target countries, are themselves increasingly the target of rule of law promotion. Even transnational regulatory institutions are sometimes judged against the criteria of the rule of law.

Also, the outcome of rule of law promotion can only be understood in relation to local responses. Even the most perfect rule of law promotion strategy will lead to a conversion of the original concept when it meets local actors and practices.

To better understand the dynamics of rule of law development, more attention must be paid to the interaction between rule of law promotion, rule of law diffusion, and rule of law conversion. In so doing, we come back to the questions raised in the Introduction to this book. Have the major actors in the rule of law field, including the “great powers” and IOs, altered their strategies, programs, and practices to reflect the shift to new levels and new forms of governance? Do rule of standards apply to new international and transnational forms of regulation? Should they be modified to fit the different context? Can the interactions between national and international levels be structured so that they do not become a new source of rule of law violation? Does international law provide a clear and acceptable set of standards that can form a common baseline for rule of law promotion both in states and for new forms of governance? Finally, how does rule of law promotion, whether or not based on standards of international law, cope with the wide variety of forms of resistance from the targets of rule of law promotion? In this concluding chapter, we address these issues, taking up in turn rule of law promotion, diffusion, and conversion, and summarizing for each the main developments, their causes, and key issues for further research.

1. THE DYNAMICS OF RULE OF LAW PROMOTION DEVELOPMENTS

Notwithstanding the aforementioned significant changes over time, rule of law promotion efforts continue to share certain dominant features and strategies. For most Western state powers and the more influential international development agencies, rule of law promotion is generally seen as part of a broader strategy that emphasizes democracy, good governance, and the independence of the judicial system. Most of the major state powers have chosen a mixed approach that combines socialization (persuasion) with positive and negative conditionalities and in some cases coercion (imposition through military means; see Schimmelfennig, this volume). IOs and transnational nongovernmental organizations (NGOs) rely on similar approaches for promoting rule of law, albeit with less use of coercion (see Heupel, this volume).

While there are successes to be reported, for instance in the area of human trafficking (Lloyd, Simmons, and Stewart, this volume), the failures and problems of

rule of law promotion are too striking to be ignored. Most importantly, the significant efforts put into rule of law promotion have produced on the aggregate level mild improvements at best (Merkel, this volume). New developments in response to the poor results are to be expected, including attempts to differentiate the addressees of rule of law promotion, an extension of the scope of actors involved in rule of law promotion activities, and growing awareness of legitimacy issues. Other major developments include the following.

First, while Northern European countries remain committed to democracy promotion, there seems to be a downgrading of it at least in the United States (Carothers 2009a). Increasingly, a significant number of rule of law promoters and rule of law recipients seem to think in terms of a developmental model in which rule of law precedes democracy. In this view, rule of law promotion is a necessary condition for democracy. Also international law, which now poses certain demands on how states provide for a domestic rule of law, falls short of requiring democracy (Aust and Nolte, this volume).

It remains to be seen whether the Arab Spring in the Middle East and North Africa will provide a new boost to democracy promotion, much as the fall of the Berlin Wall in 1989 stimulated democracy promotion throughout the 1990s. Although the international community on the whole celebrated the fall of authoritarian regimes, many commentators cautioned that overturning dictators was only the first step on a long and arduous path toward a functional democracy. Moreover, Europe and America are focused on overcoming the economic crisis and are increasingly preoccupied by the challenges resulting from the rise of China and other emerging countries. They may lack the political will, and the financial and human resources, to support another major democratization effort in the Middle East and North Africa.

Second, rule of law promotion has often been criticized for reliance on one-size-fits-all solutions that failed to distinguish between postconflict situations and different stages of development. Linn Hammergren's analysis of the World Bank's evolving strategies for middle-income countries (MICs) is a response to that. The definition of MICs (i.e., countries with per capita income from \$900 to \$12,000) still contains huge socioeconomic differences and will require further disaggregation. Nevertheless, a first step has been taken in developing more refined categories that may lead to the design of more tailored and hence effective promotion strategies and reform packages.

Third, the scope of rule of law promotion has expanded to include military cooperation with civilian organizations in a range of activities to establish legal institutions and the rule of law (Röder, this volume). Although the shortcomings of these efforts are substantial and the results less than satisfactory, they point to a broadened understanding of rule of law promotion.

Fourth, the idea of rule of law promotion does not really work for the rule of law at the international level. Because the rule of law at the international level concerns the

international community as a whole, there is no obvious distinction between actors who engage in rule of law promotion and recipients of such attempts. For this reason, the development of the rule of law at the international level is better captured by the perspective of diffusion (see subsequent text). However, in a more narrow sense, we can identify a distinct effort of rule of law promotion at the international level within international institutions, notably the United Nations (UN). Such organizations bring a degree of centralization into the otherwise horizontal system of international law. Their institutional context allows for a “vertical dynamic” in which the rule of law can function. Furthermore, because UN membership captures the entire international community, rule of law policies of the UN are the best approximation for rule of law promotion at the international level. For example, the UN Secretary-General stated that “the United Nations must work towards the universal application at the international level of the Organisation’s definition of the principle of the rule of law.”¹

Indeed, rule of law promotion efforts of international organizations are now not limited to attempts to improve the rule of law within states (Aust and Nolte, this volume); they are directed to international organizations themselves (Genkow and Zürn, this volume). Such organizations (most notably the UN) have recognized that they should meet the standards that they prescribe for others, if only because the failure to do so undermines the credibility of their external rule of law policies. This has also been shown to undermine the willingness of norm addressees to accept the prescriptions and ambitions of the UN.

Finally, rule of law promoters show a growing awareness of resistance on the receiving side. Any reform produces winners and losers. National and international donors, however, are not well positioned to address these types of local political contests, in some cases because of limited mandates, in other cases because of a lack of local knowledge (see Hammergren and Heupel, this volume).

1.1. *Causes*

In general, the most significant changes in rule of law promotion activities are driven by *perceived problems*, with necessity once again serving as the mother of invention. For instance, civil–military cooperation is the offspring of the military invasion of Afghanistan and Iraq. The downgrading of democracy reflects reform fatigue and disappointment over the enormous human and financial costs of the wars in Afghanistan and Iraq as well as the poor performance of many third-wave democracies and the limitations of democracy promotion (Carothers 2004; Diamond 2008). The recent interest in MICs reflects the fact that today most countries are MICs, which for the World Bank means a very different market for traditional loan

¹ Second Annual Report of the Secretary-General on Strengthening and Coordinating United Nations Rule of Law Activities, 20 August 2010, UN Doc. A/65/318: para. 9

activities as well as a different environment for technical assistance programs. Having focused primarily on low-income countries, often with poor results, donor agencies and academics alike are attracted to the challenges and opportunities presented by MICs. The decision of the UN to address rule of law problems within the organization is a direct result of resistance by states to conform to UN rule of law ideals if the UN itself did not obey such principles.

Although prior failures are often the source of change, the causes of the failures are often deeper and the obstacles to rule of law promotion more fundamental than the modification of policies indicate. These obstacles can be broadly classified as lack of knowledge, market forces, and institutional incentives and culture.

Thomas Carothers (2006a) and other industry actors have highlighted *lack of knowledge* as one of the main reasons for the poor results of rule of law promotion. One aspect of this lack of knowledge refers to different notions about what the rule of law is, and what should be promoted. The concept of rule of law remains unclear and contested. Rule of law serves many masters, and rule of law promotion is aimed at achieving many goals from the more technical enhancing of judicial efficiency and higher levels of professionalism to broader political goals such as economic growth, democratization, human rights, and geopolitical security (see Schimmelfennig, this volume). The relationship between these goals remains unclear; for instance, the relationship of rule of law to economic growth, the consolidation of democracy, and the protection of human rights is still being sorted out (Collier 2009; Peerenboom 2005).

The multiplicity of conceptions, goals, and strategies may lead to conflicting policies and different emphases in different contexts (Kleinfeld 2006). IOs or NGOs generally do not attempt to coordinate their programs with others (Heupel, this volume). The result is that different actors are often working at cross purposes or duplicating efforts. At the very least, given limited resources, the prioritizing of certain goals may hinder progress in realizing other goals. Overloaded governments cannot do everything at once, and yet little is known about the proper sequencing of reforms, which is highly dependent on context.

Our findings support these insights and the importance of improved coordination, but they do not identify this as the most important reason for the poor results to date.

The *lack of knowledge about the recipient countries and appropriate means to exert influence* seems to be more important than different concepts of rule of law. Along this line, many critics correctly attribute the poor results to the emphasis on top-down reforms, the focus on building state institutions, and the mismatch between the attempt to transplant laws and institutions appropriate for economically advanced liberal democracies to radically different contexts. In this view, a greater role for civil society and the private sector is advocated (Channell 2006), with more attention to bottom-up approaches that focus on the immediate needs of citizens for justice, poverty alleviation, legal empowerment, and “rights-based” development

(Banik 2009; Golub 2006; Stephens 2009).² Numerous critics have thus pointed out that international actors need to have a better understanding of the legal, political, and economic history of the recipient country (Taylor 2009). The limited and, to some extent, even perverse effect of the International Criminal Court's efforts to strengthen the rule of law in Uganda is largely attributed to a failure to adapt to the local context (Nouwen, this volume).

The chapters in this volume highlight the *lack of legitimacy* as another major reason for the limited success of rule of law promotion. The lack of knowledge about the recipient countries contributes to this legitimacy deficit. Many rule of law promoters are seen as remote external forces pressing societies to change their culture without a deeper understanding of it (Nouwen, this volume). To remedy this, international advisors must work more effectively with local actors, which requires that they have better linguistic skills and greater cultural sensitivity. They also need to tailor their proposals to local circumstances and ensure that reforms meet the needs of local constituencies.

Moreover, rule of law promoters are often seen as acting in their own interest. NGOs and experts, dependent on outside funding or consulting contracts, treat the knowledge gained from projects as trade secrets and are constantly on the lookout for the next "big thing." To secure projects, they promise more than they deliver and they ignore cautionary lessons learned from the past. As with any business concerned with efficiency and economies of scale, they tend to rely on standard prescriptions and reform packages rather than developing programs tailored to the specific context. All of the main parties involved in the project – the donor agency, the subcontracting NGO or expert consultants, the leaders in the recipient country – have an incentive to assess the project in positive terms. As Linn Hamnergren wryly remarks in her chapter, the World Bank's internal assessment process concluded that, like the children of the fictional Lake Wobegon, all projects were "above average."

At the same time, national interests still play a role. Not surprisingly, the countries most affected by human trafficking were the biggest supporters of its criminalization (see Lloyd et al., this volume). Major powers promote rule of law not only for altruistic reasons, but out of self-interested concerns for geographical stability or in the belief that rule of law reforms are related to market reforms that will provide new consumers for their products or will provide greater access and a more level playing field for their country's companies. As Schimmelfennig (this volume) notes, major powers have attempted to export their own institutions, practices, and models, not only or necessarily in the belief that these are the best solutions for the target country's problems, but because doing so is in the best interests of important constituencies in the promoting state. Rule of law funding priorities also reflect domestic political

² See also Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*. Volume 1. Commission on Legal Empowerment of the Poor and UNDP, 2008.

concerns, rather than being rational policies developed on a basis of what works: “As a consequence, rule of law promotion policies may vary with the different economic and strategic objectives of foreign policy actors” (Schimmelfennig, this volume).

The failure of international actors themselves to abide by rule of law principles arguably is the most important source of the legitimacy deficit of rule of law promotion efforts. In some cases, the lack of legitimacy results from the nature of the intervention, as when the North Atlantic Treaty Organization intervened in Kosovo and Iraq without UN approval and a clear mandate under international law. In these cases, the feeling is that like cases are not treated alike. In other cases, it results from how rule of law promotion is carried out. All too often there is inadequate consultation with local leaders and citizens, with citizens most concerned about public administration, poor governance, procedural violations, and the inability to resolve civil disputes while the military emphasizes security and the three Cs: courts, cops, and corrections. In still other cases, the emphasis of international actors on formal institutions undermines local institutions, and laws modeled on Euro-American precedents conflict with local norms and values (Nouwen, this volume).

Although there appears to be a trend toward less coercive modes of transmission, conditionalities and imposition of reforms through force continue to play a prominent role in many contexts (see Heupel, this volume). The incorporation of rule of law principles in international law, although still in its early stages, may have a positive impact in encouraging reforms in domestic legal systems, but it may also legitimate more coercive approaches, including military intervention aimed at regime change, just as the growing body of human rights law has legitimated military intervention in the name of humanitarian intervention (as long as it is approved by the UN Security Council).

1.2. *Future Areas of Research*

The rule of law promotion industry faces many challenges, with many areas in need of further research.

First, recent years have seen the development of a burgeoning literature on issues related to the measurement of rule of law, and the proliferation of new indices in response to claims that existing indices were conceptually or technically flawed (see Merkel, this volume).³ Unlike many previous indices that included rule of law indicators as part of broader measures of democracy, good governance, political stability, or the business environment, the recently developed index of the World Justice Project (<http://www.worldjusticeproject.org/>) is solely dedicated to the rule of law, whereas the American Bar Association has developed even more specialized indices such as the Judicial Reform Index, Legal Profession

³ *The Hague Journal on Rule of Law* has devoted a special issue to the measurement of rule of law.

Reform Index, Prosecutorial Reform Index, and Legal Education Reform Index (<http://www.abanet.org/rol/publications.shtml>). There are also efforts to create an index that focuses on criminal justice.⁴ In response to the concern that most indices focus too much on state institutions, others have sought to develop an index that measures access to justice.⁵

None of the indices is perfect; all suffer from shortcomings in the underlying data and fall short on various technical dimensions; no single index fully captures – or could ever possibly capture – “the meaning” of rule of law. But progress has been made, and further progress can be expected. One example is the role that the World Justice Project attributes to the implementation of international human rights standards, thus in part overcoming the traditional separation between domestic and international conceptions of the rule of law. There is reason to hope, then, that new and improved indices will go a long way toward addressing the challenge that much of what we know or think we know about rule of law is based on flimsy foundations, scientifically suspect data, and poorly conceptualized indicators.

One of the biggest problems with most indices, even many of the new ones, is that they are based on very general rule of law principles. However, it is now widely recognized that basic rule of law principles are consistent with a wide variation in rules, institutions, and practices. This not only makes it difficult to measure rule of law but also affects rule of law promotion (Merkel, this volume), because it leads to confusion for both international donors and domestic policy makers. One possible agenda for the next generation of research would be to attempt to sort out which packages of reforms (rules, institutions, and practices) work in which contexts and at which levels of development. The increasing amount of data now available may allow this to be pursued through quantitative methods. By calling attention to different contexts and dynamics, some of the qualitative work now being done on MICs, postconflict situations (Bergling 2006; Zajac Sannerholm 2007),⁶ and legal developments in authoritarian regimes (Ginsburg and Mustafa 2008; Peerenboom 2010a) may also provide guidance.

A second and related area in need of further research concerns the sequencing of reforms. The rise of China and the success of other Asian states have fueled the debate over whether economic growth and the establishment of rule of law should precede democratization or vice versa (compare Carothers 2007 with Peerenboom 2010b). Another macrolevel sequencing debate centers on economic policies and

⁴ See the United Nations Rule of Law Indicators Project, in conjunction with the Vera Institute of Justice and members of the Altus Global Alliance. Available at <http://ar.unrol.org/doc.aspx?n=Newsletter+for+United+Nations+Rule+of+Law+Indicators+Project+June+2009.pdf>.

⁵ See Hague Institute for the Internalisation of Law, “Measuring Access to Justice in a Globalising World.” Available at <http://www.hiil.org/research/main-themes/rule-of-law/research-project-measuring-access-to-justice-in-a-globalising-world/>.

⁶ See also International Network to Promote the Rule of Law (INPROL). Available at <http://www.inprol.org/visitorhome>.

models of development, pitting shock therapy, neoliberalism, and the Washington Consensus against gradualism, the developmental state, and the Beijing Consensus, or more accurately, the East Asian Model (Peerenboom 2007). There is also the debate over whether to emphasize aggregate development or promote sustainable rights-based development, which in rule of law programming circles is manifest in the conflict between those who emphasize top-down institutional reforms and those who favor more bottom-up strategies of access to justice and legal empowerment. Another contested sequencing issue involves the need in failed or postconflict states to prioritize peace-keeping, security, and the law-and-order components of rule of law relative to the demands of citizens for improvements in daily public administration and civil dispute resolution mechanisms that address their more immediate needs.

Although judicial independence has been central to rule of law programming, and now is also supported by obligations stemming from international human rights law (Aust and Nolte, this volume), study after study demonstrates that giving more independence and authority to incompetent or corrupt judges does not produce just outcomes or enhance public trust in the judiciary in developing countries.⁷ Although the need to sequence reforms in a way that balances judicial independence with judicial accountability is now often acknowledged in theory, how to do so in practice remains elusive.

More fundamentally, judicial reforms have been central to rule of law promotion efforts, but the focus on the judiciary ignores the holistic nature of reforms. Reforms must not only encompass all components of the legal complex (the courts, police, prosecutors, notaries, the legal profession, paralegals, law schools, etc.) but must also be complemented by changes in social norms and practices. Given the prominent role of lawyers in designing programs, reforms are often narrowly conceived in technical terms that ignore the broader social, political, economic, and cultural context. Lawyers tend to have an excessive faith in the power of law to change behavior. The focus on the judiciary also overstates the role of courts in promoting economic growth and resolving civil disputes. Moreover, the proper role for courts is much contested, even in countries known for rule of law (Peerenboom 2010a).

Further research is required to identify which institutions are best suited to resolve different types of disputes in a particular context and how to coordinate the roles of formal and informal institutions. There is also a pressing need for more empirical studies of how laws, including international laws, are implemented and how institutions actually operate in practice. There has also been little systematic study in the rule of law field of how to change social attitudes and norms and build support for rule of law reforms. In short, there is a pressing need for more research on the dynamics of rule of law diffusion.

⁷ Transparency International, "Global Corruption Report: Corruption and Judicial Systems" (2007). Available at http://www.transparency.org/publications/gcr/gcr_2007/#download.

2. THE DYNAMICS OF RULE OF LAW DIFFUSION

2.1. *Developments*

Although rule of law promotion has produced less-than-stellar results in the traditional area aimed at developing states, it has led to a dynamic resulting in rule of law diffusion in unanticipated areas, most notably at the international and transnational levels.

First, rule of law diffusion has followed broader processes of internationalization and globalization. Transboundary investments, migration, and crime often call for parallel processes to strengthen the rule of law. States that are faced with human trafficking, for example, may strengthen law enforcement. Neighboring countries then feel compelled to follow suit to avoid the relocation of the unwanted practices to their less-regulated shores (Lloyd et al., this volume). In general, to the extent that the rule of law has diffused as an organizing principle of nation-states, this is part of the dominance of a Western script of what is modern, which is partially independent from efforts to actively promote rule of law. As the chapter by Merkel shows, rule of law developments and rule of law promotion efforts correlate weakly at best.

Second, rule of law has increasingly become a part of the prescriptions of international law pertaining to the way in which states should organize themselves (Aust and Nolte, this volume). In particular, the justification of strong interventions into war-torn societies on grounds of the rule of law has highlighted the issue of the extent to which states are bound to implement rule of law domestically as a norm of international law. Many governmental statements and declarations purport to view the rule of law as a central principle for the internal organization of states. Although international lawyers may debate to what extent rule of law has become a constitutive norm of sovereignty, there are certainly some signs that it is increasingly accepted as a regulatory norm in international law.

Third, rule of law has increasingly become part of the organization and operation of international institutions themselves (Gemkow and Zürn, this volume). This development is in part fueled by a consistency argument: If international organizations promote the rule of law by means of incentives and coercion, then they should be bound by rule of law principles as well. Although recipient countries that invoke the lack of consistency to justify resistance may be concealing other motivations, the criticism has had enough merit to spur some IOs to adopt rule of law principles embodied in international law. This is more the result of a process of diffusion of rule of law norms from their original domestic context to the international sphere, rather than the result of intentional promotion by the main actors in the rule of law industry.

Fourth, the demand for consistency is aimed not only at international organizations but also nonstate actors in international relations. The concept of rule of law is increasingly applied to transnational rule making and new modes of governance

as well as to military actors whose mission is not primarily to establish the rule of law.

To be sure, the results of such developments at the international and transnational level are modest at best. Given the national interests and geopolitical objectives of the major powers, the limited degree to which rule of law standards have been accepted and applied in international institutions, notably the Security Council, is to be expected. Major powers resist rule of law diffusion, just as less developed countries do. Similarly, transnational regulation and the tendency to rely on nonstate actors when intervening in foreign countries are partially driven by the desire to remove these activities from the constraints of national and international law and insulate them from public debate. The incentives to keep such arrangements outside of the realm of the rule of law are strong, and thus the resistance to applying rule of law standards to these areas is equally strong.

2.2. *Causes*

All of these cases of rule of law diffusion involve a number of mechanisms that are interactive in character and cannot be controlled by a small set of actors. Learning and persuasion, mimicry and emulation, and competition may lead to such unforeseen results (Simmons et al. 2008). Rule of law diffusion is therefore not limited to strategically employed coercion and incentives, but is also the result of dynamic processes triggered by rule of law promotion efforts but not intended by the promoters. This is especially true when it comes to the application of rule of law principles to IOs and other international actors and to transnational rule making and governance. As the Schuppert chapter shows, we are only at an early stage in the process of extending rule of law principles to transnational rule making. The same holds for extending the rule of law to the international level generally, and to the operation of international organizations in particular. However, the normative argument that IOs *should* comply with such principles to enhance their legitimacy and the legitimacy of their rule of law promotion activities seems compelling, given the resentment expressed by many over the immunity enjoyed by IOs and the apparent hypocrisy in IOs promoting principles that they themselves do not follow (Gemkow and Zürn, this volume). Research on the dynamics of the evolution of norms in the international realm shows that such dynamics can create significant effects (Finnemore and Sikkink 1998; Risse, Ropp, and Sikkink 1999). The boomerang effect has played a role in many processes. When international actors use norms to justify what they do, the norms are empowered over time and come to apply to those who have invoked them. A number of different causal mechanisms may lead to such a result, although most often a combination of pressure and learning is decisive (see also Lloyd et al. and Gemkow and Zürn, this volume).

Notwithstanding the many obstacles and resistance from interested states and international actors, rule of law diffusion is an observable trend, and there are likely

to be further positive developments in the future. The unanticipated results so far of the normative dynamics initiated by rule of law promotion suggest that it may be possible to develop a more universally acceptable conception of rule of law and a set of rule of law principles or standards applicable to all states and transnational actors and activities. The historical development of human rights law provides some basis for optimism. Rule of law appears to enjoy wider acceptance across ideologies, religions, and political regimes than democracy and many allegedly universal human rights, and yet there is no International Bill of Rule of Law comparable to the International Bill of Human Rights (which consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights), much less anything like the dense network of international, regional, and domestic laws and regulations that govern specific human rights. To be sure, for rule of law to retain its appeal and avoid the normative critiques that assert Western bias in the international human rights corpus, the process of incorporation of rule of law principles into international law would have to be based on a more inclusive universalism that includes views and values from other traditions (Otto 2009).

2.3. Future Areas of Research

Further research is required to better understand the causal mechanisms that lead states, IOs, and other transnational actors to adopt and comply with rule of law principles, and how that process may be supported. Although rule of law promoters increasingly realize the utility of an emerging international rule of law standard to support their efforts, we now need to identify the causal pathways through which rule of law diffusion takes place and incorporate these insights into a general theory that explains rule of law diffusion across countries and levels of governance (national, transnational, international, and regional).

Rule of law diffusion across levels of governance raises a number of challenging questions about conceptions of world order in which different legal systems based on the concept of rule of law interact with each other. Ultimately, the legitimacy of interventions into societies from the outside depends on such a conception. One response to this challenge is the constitutionalization of world politics. Constitutionalization in this context refers to a process in which different legal orders are integrated by the establishment of an ultimate legal authority in the form of a (written or unwritten) constitution that serves as higher law and is grounded in shared fundamental values (De Wet 2006; Klabbers, Peters, and Ulfstein 2009). Although this vision is intimately bound to the concept of rule of law, it goes further by identifying an overarching authority and prescribing legal means through which it can be achieved. This project therefore contains a strongly utopian flavor. As long as there is no common understanding of the community that needs to be constitutionalized, the lack of consensus may lead to fundamental conflicts and any step

toward strong constitutionalization may be read as an instrument of power. Given the enormous differences in power in the international system, a full process of constitutionalization may therefore reduce, rather than enhance, legitimacy – especially in the view of weak states from the southern hemisphere that often perceive constitutionalization as a project of prolonging Western dominance (see, e.g., Rajagopal 2003).

Legal pluralists therefore argue against the constitutionalist approach that major components of an international rule of law can be established in the absence of a global constitution, in a world in which different political authorities exist without being integrated in a hierarchical order. To be sure, one of the major objections to such a notion of legal pluralism (Krisch 2010) or cosmopolitan constitutionalism (Kumm 2009) is that it cannot guarantee a stable rule of law. This may be an overly strong claim, however, given the various possibilities and mechanisms for resolving conflicts between different legal orders, including mutual acceptance of general legal principles (Bogdandy and Venzke 2010; Kumm 2009). Moreover, there are good normative arguments that certain conflicts between legal orders have to be solved outside of the legal sphere anyway, because they involve political matters (Waldron 1999; Zürn et al. 2011). After all, even in domestic systems known for rule of law, many important matters are decided through political channels. If legal pluralism, that is, legal orders that stand in a nonhierarchical relationship with each other, prevails, then the main issue to be resolved is where legal or political mechanisms can be developed to coordinate the different legal orders without generating an excessive amount of legal uncertainty. On this point, more empirical research is needed that would help identify the interacting processes between different (in particular national and international) legal orders. Such research should identify the degree to which international institutions, to the extent that they do not fully conform to external expectations of rule of law compliance, are held in check by national legal (including judicial) and political organs and processes.

In any event, we are at present by all accounts very far from living in a world where international relations are governed by rule of law principles. It is even debatable whether it makes sense to conceptualize “international rule of law” based on an analogy to domestic rule of law given the many structural differences between nation-states and the international legal order (Chesterman 2009). Rather than trying to fit square pegs into round holes, it may be better to try a radically different approach that does not begin with domestic rule of law as the model for rule of law at the international level. This approach would require a thorough analysis of the normative aims of the international legal order and the purposes that international rule of law is meant to serve, as well as the institutions that would be required to achieve it. Although this approach runs the risk of undermining support for efforts to create an international order that comports with the image of domestic liberal democratic rule of law writ large, it need not. It may provide a more realistic framework for pursuing the possibilities and limits of an international rule of law for states that

is based on the notion that different forms of political authority require different sources of legitimacy.

Nevertheless, such a differential approach has to take into account that part of international law, notably international human rights law, penetrates domestic legal orders and as such has a dual character – being constitutive of the international and the national rule of law at the same time (assuming that rule of law is conceptualized in thick terms that incorporate human rights notions). There is therefore a strong argument that, at least to the extent that international law is controlling national law, it should satisfy equivalent, not lesser, standards of the rule of law (Bodansky 1999; Crawford 2003).

These different conceptions of international rule of law and their interrelationship are highly complex and may differ between regions and between particular functional areas of international law. More research is needed on the normative, theoretical, and empirical issues relating to the diffusion of rule of law both at the international–transnational level and at the domestic level.

3. THE DYNAMICS OF RULE OF LAW CONVERSION

3.1. *Developments*

One lesson learned over the years is that rule of law principles and practices are likely to be transformed by the recipient actors (Gillespie, this volume). Bringing in the recipient perspective is thus essential to our understanding of rule of law dynamics because the conversion process affects the outcome of rule of law promotion, which in turn leads to further changes in the methods and objectives of rule of law promotion. Three findings are of special importance here.

First, developing countries are now questioning whether rule of law in the form currently promoted is necessary for economic development given the success of China and other Asian states. Their success seems to support a more pragmatic and modest approach aimed at second-best solutions and “good enough institutions” rather than trying to leapfrog ahead through legal transplants of laws and institutions modeled on those in advanced states. More assertive and confident MICs are also decidedly less inclined to accept conditionalities or to bow to the wisdom of foreign powers on key policy issues that no developed country government would dream of ceding to outside actors (except for the EU).

Second, increasing concerns about the legitimacy of rule of law promotion are having a negative impact on rule of law promotion. Recipients are increasingly questioning whether key decisions regarding the strategies and methods of rule of law promotion are the result of a due political process and adequately take their particular needs and circumstances into account. The lack of consistency in these policies, the willingness to subordinate them to considerations based on national interest, and the weakness of rule of law mechanisms on the international level

undermine the credibility of rule of law promotion efforts while lending credibility to those who invoke the lack of legitimacy to resist reforms.

Third, the poor record of rule of law promotion over the past several decades is beginning to erode political will for further reforms both among major powers and international institutions involved in rule of law promotion. The reallocation of funding from legal reforms and democracy promotion to security concerns, although partially the result of 9/11 and the ensuing so-called war on terror, also reflects reform fatigue and a growing sense that rule of law and democracy promotion efforts are just not working (Merkel, this volume). To be sure, Western powers have a history of beginning reforms and then not following through when the going gets tough and domestic political winds change. The reformulation of the mission statement from state building and promotion of democracy in Afghanistan and Iraq to the narrower objective of disabling Al Qaeda is only the last in a series that includes the hasty retreat of U.S. forces from Somalia; the withdrawal of UN peace-keeping forces and other personnel when some peace-keepers or UN offices were attacked in Somalia, Rwanda, East Timor, and Iraq; and the failure to adequately fund the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia (Majtenyi 2004), the Sierra Leone special war crimes court, and the Sierra Leone Truth and Reconciliation Commission (Schocken 2002; Udombana 2003). The rule of law field is filled with the carcasses of half-completed projects left to die for lack of funding.

3.2. *Causes*

Rule of law conversion challenges are part of a wider set of challenges that arise when translating concepts across different social contexts. Similar issues occur in the efforts to promote human rights or to persuade countries to adopt (neoliberal) economic policies or to join efforts to deal with nuclear proliferation and climate change. Nevertheless, rule of law has its own dynamic, and recipient-side problems may be more severe than in other areas.

One explanation for the poor results of rule of law efforts emphasizes political economy obstacles and conflicting interests within the recipient state. Trebilcock and Daniels (2008) highlight three types of *interest-based constraints* on the part of the recipients. First is opposition from political leaders in authoritarian states or illiberal democracies who are afraid of establishing alternative sources of power and legitimacy. Second are interest-based conflicts among state organs, between state organs and special interest groups, and within civil society among various interest groups. For example, efforts to enhance the independence and authority of the judiciary may be opposed by the legislature and administrative agencies; the police and prosecutors may oppose attempts to strengthen the defense bar; judges may oppose reforms aimed at enhancing judicial efficiency or ensuring accountability by subjecting the judiciary to supervision by judicial counsels, the media, and citizen

groups; and business associations representing heavy industry may lobby against broad standing rules for NGOs favored by environmental activists. Third is the more mundane corruption and rent seeking by individuals or groups of individuals, which cause them to resist welfare-enhancing reforms and to distort the rules.

There is no doubt that all three interest-based obstacles present challenges to successful rule of law promotion. Before assuming that leaders in developing states are inherently opposed to legal reforms or lack the political will to implement reforms in the face of interest group opposition, however, it bears noting that rule of law reform is only one of the many challenges they face. Establishing a functional legal system is a costly business, as the high correlation between wealth and rule of law suggests. Strengthening the legal system may be just one part of a broader effort at state building. The costs of rule of law reforms may outweigh the benefits given a crowded reform agenda in developing states. Failed or low-income states in particular may simply lack the resources and capacity to carry out complex legal reforms.

In any event, many countries, especially MICs, do have the political will and the resources to carry out meaningful reforms. After all, there have been successful cases of rule of law reforms as well – most notably in East Asia but also in Latin America and elsewhere. Thus, interest-based constraints are not insurmountable in all cases.

As noted, two popular explanation of the poor results of rule of law promotion are an overemphasis on top-down reforms and a mismatch between the attempt to transplant laws and institutions appropriate for economically advanced liberal democracies to radically different contexts. A potential corrective would be to pay more attention to bottom-up approaches that focus on the immediate needs of citizens for justice, poverty alleviation, legal empowerment, and “rights-based” development (Banik 2009; Golub 2006). A somewhat broader and more fundamental proposal would be to take more seriously the different cultural contexts and how they require appropriate institutional translation of the rule of law principle, thus modifying not only the mix between top-down and bottom-up approaches but also the mix between formal and informal institutions and the mix between developing new institutions based on foreign models versus adapting existing institutions.

This more fundamental proposal acknowledges that *cultural constraints and normative conflicts* are key barriers to successful adoption of rule of law concepts and implementation of rule of law principles and practices. After all, rule of law reforms do not occur in a vacuum. Reformers are not working on a blank slate. Rule of law reforms often conflict with, and tend to displace, existing normative and governing structures (Upham 2002). Whereas rule of law implies constraints on arbitrary power, rule of law promotion assumes a functional state, with many reforms aimed at creating national laws and strengthening formal state institutions. Reforms alter existing power relationships, including the balance of power between central and local authorities, between local governments and citizens, and between various groups within society. Although that is often the purpose, and may be for the better, sometimes the result is to throw the baby out with the bathwater.

Moreover, most reform projects emphasize the passage of laws that reflect contemporary human rights standards incorporated in international law but mainly implemented in reasonably wealthy Western liberal democracies. Conflicts are more likely in some areas than others. For example, laws that affect religion, gender relations, and minority rights are more likely to encounter local resistance than commercial laws. Criminal law is another contested area, given the high crime rates in many developing countries and the breakdown of order in failed states. Laws that address socioeconomic issues – labor and environmental laws, land titling and government takings, social security (welfare, medical care, and education) – are also likely to be highly dependent on levels of development and to be hotly contested by interests groups based on how they are affected. Administrative law is another area that is very path dependent and subject to wide institutional variation.

One of the most commonly cited “lessons learned” therefore is that reforms must be “country owned and country led.” Nonetheless, as the chapters in this volume show, most rule of law promotion strategies are developed by international actors with little input from the recipient countries, and especially from citizens within the recipient countries who will be affected by reforms. The reform agenda is then put to state leaders, often with conditions attached in the form of carrots or sticks or both. The lack of “buy-in” by local stakeholders undermines the legitimacy of efforts to promote rule of law, especially when major powers and international actors themselves often do not comply with rule of law principles.

For reforms to genuinely be country owned and country led would require increased participation of various domestic stakeholders at both the international and domestic levels during all stages of the reform process, from planning, to legislation, implementation, monitoring, and assessment. This shift would greatly increase the role and responsibility of domestic actors for reforms, altering the power dynamics between buyers and sellers. But this is as it should be.⁸ Too often local governments cede control over key policy decisions to international actors, with all too predictably poor results.

There is undeniably a greater appreciation that the key to success often depends on the ability to overcome political and cultural obstacles, particularly in MICs. Unfortunately, there is also a growing realization that foreign actors are not well positioned to address such problems, the outcome of which generally depends on political struggle and compromise by domestic stakeholders and interest groups. This is particularly true for problems that result from interest-based conflicts among state organs, between state organs and special interest groups, and within civil society among various interest groups (Zajac-Sannerholm, this volume). However, it also

⁸ Country ownership may, of course, have negative consequences in some contexts, for example when leaders are not genuinely interested in reform, when dominant groups use legal reforms to oppress others, or when interest groups take advantage of collective action problems to defeat welfare-enhancing reforms.

applies to cases in which developing country leaders oppose rule of law reforms for fear of losing their grip on power, particularly given that there is now less support for conditionalities, humanitarian intervention, and regime change. Similarly, although corruption is an additional cause of rule of law conversion, and development agencies continue to explore ways to deal with corruption, including judicial corruption, and to promote transparency, the results have been far from ideal.⁹ Corruption, like politics, is largely a local phenomenon.

Recognizing the local element of rule of law promotion and diffusion, and thus the crucial role of rule of law conversion, also has major implications for attempts to develop international law requirements for rule of law at the national level. For one thing, it simply hampers efforts to achieve meaningful universally applicable standards, which as a result remain rather minimalistic (Aust and Nolte, this volume). To the extent that such standards do exist, international law inevitably will have to leave room for local adjustment and translation, leading to processes of fragmentation of international law. In view of the impact of international law on domestic law, such translation processes are a central manifestation of the fragmentation of international law (Kunzelmann 2008). Even more than fragmentation between different international legal regimes, the fragmentation caused by divergent national receptions of international law is “an ephemeral reflection of a more fundamental, multi-dimensional fragmentation of global society itself” (see generally Fischer-Lescano and Teubner 2004; Jackson 2010).

Even though fragmentation is generally given a pejorative meaning, a multiplicity of meanings in a domestic context is not necessarily a negative phenomenon. There exists an inescapable tension between the universalist aspirations of much of international law, on the one hand, and, on the other, the need to ground interpretation and application of the law in a localized expression (Adjami 2002).

3.3. *Future Areas of Research*

One of the most important challenges for further research therefore lies in bringing in the recipient perspective. The days of one-size-fits-all rule of law promotion are over. Without a better understanding of which type of societies are conducive to which types of rule of law promotion, externally driven reforms will continue to produce lackluster results. Balancing rule of law principles with local practice (which is not necessarily opposed to the rule of law, but which may simply reflect different aspects of the rule of law; see Nouwen, this volume) will remain a major task of the implementing actors on site. There will never be precise recipes that prescribe the use of strategy A when faced with local constellation X, strategy B when faced with local constellation Y, or strategy C when faced with local constellation Z. However, a better

⁹ Again, see Transparency International, “Global Corruption Report 2007: Corruption and Judicial Systems.” Available at http://www.transparency.org/publications/gcr/gcr_2007/#download.

understanding of different types of political and cultural constellations within the recipient countries would help determine which strategies and substantive reforms are more likely to succeed in the particular context, for instance with regard to sequencing. At the same time, it would help to more accurately assess the success of those efforts by use of more refined indices. There is also a need for a better understanding of how seemingly uniform international standards are received and translated at the national level. Moreover, for typologies to be useful they need to go further than the World Bank notion of middle-income countries, which includes the vast majority of countries today. They need to be more differentiated, and they need to include political and cultural criteria as well as economic criteria.

4. CONCLUSION

The rule of law field is relatively new, as evidenced by the underdeveloped state of rule of law indices relative to democracy indices and the more highly developed state of human rights law. Much remains to be researched and learned. But even with additional knowledge and much good will, the future is likely to contain as many failures as successes. Establishing the rule of law is a long-term process that involves many fundamental and many incremental changes, and many unforeseen dynamics created by interactions between the actors involved. It is the result of protracted political struggle on multiple fronts by multiple actors. Rule of law is also an ideal imperfectly realized everywhere. As such, there will always be new challenges and new struggles, and new dynamics.

For rule of law promotion to be successful a more comprehensive analysis of rule of law diffusion and rule of law conversion is required. Understanding these three processes and the dynamic interrelationships among them is a difficult task. Nevertheless, given the important values served by rule of law, it is a challenge that must be met. We hope that this volume contributes to that worthy goal.

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