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A Holistic Approach for Promoting the Rule of Law

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A Holistic Approach for Promoting the Rule of Law

Josef Bucher

Introduction

The world has become smaller as a result of globalization tendencies, making the establishment of a global order more important than ever. Nations have become closer. Hence, the intensive relations between countries must be increasingly protected by legal security. In order to stabilise this global order, also intra-state relations must be subjected to the protection of the law. The rule of law has thus become a central element of successful globalisation on two different levels.

The link between these two levels is based on the idea that a country with an intact legal system is more likely to accept the international legal order, and that countries that disrespect the law internally, are less likely to comply with an international legal system.

No single government or group can control the process of globalization. Many players contribute to its force, but no one is capable of controlling it. The process is driven by innumerable individual and collective decisions, but the sum of rational decisions does not necessarily result in a rational direction.

There are visible trends in today's globalization, such as the economic resurgence of Asia, which will inevitably result in a relative decline of power for the West. Interestingly, it is the civilizational achievements of Western societies which made this rise of non-European powers possible. In addition to the revolutionary technological progress of recent centuries, the idea that all human beings are entitled to the same basic rights and to human dignity have had a lasting impact. Particularly in Asia, this perception has freed large sections of the population from their feudal restrictions, and has strengthened these nations' confidence that they can shape their fate autonomously. Evidently, the same cannot be said of Africa.

The resurgence of Asia shows that in the long run we are headed toward a multi-polar world, in which the West will not be able to maintain the extent of its present dominance. Globalization has led to increased calls for a new international order, which ultimately will diminish the West's leading geo-political role. A global system will only be sustainable if all the major actors buy into its legitimacy. However, it is very difficult to surmise what might currently be considered legitimate globally, and even more difficult to foresee what might carry this legitimacy a century from now. The question on what principles a sustainable international political order could be based, must nevertheless be asked.

Western societies have done invaluable pioneering work in this area. Roman law, the notion of popular sovereignty and the separation of powers are examples which remain central elements of any lasting legal order. But these achievements matured in a specific cultural environment. They are not equally firmly anchored in all cultures, and history shows that they can all too easily be lost in Western cultures as well.

Since the Western hemisphere will have a diminishing influence on the new world order, it must concentrate its efforts on those aspects which can have a lasting global impact. Therefore, it is important to understand the following dynamics.

First, for laws to be effective and enforced, various conditions must be met, including, above all, working *institutions* and the *legitimacy* of the law. The institutional vacuum in failed states illustrates the obstacles that inhibit the consolidation of the rule of law.

Secondly, the effectiveness of laws in changing human behaviour must be carefully analysed. Do more legal rights necessarily result in greater justice? Everything cannot be done at once, and not everything is equally urgent. Hence, when establishing and implementing the rule of law in a country, it is crucial to follow natural *sequencing* as well as to take *demand* into account.

Finally, the anchoring of the rule of law is a pre-requisite for just and peaceful globalisation. To use a sports metaphor, different disciplines are being played by their respective rules, but fair and transparent rules have to be agreed on and followed in each of them. It is of great importance to create at the national level the understanding of playing by the rules.

Parallel to the rule of law taking hold nationally, conveying specific legal content and legal entitlements is taking place internationally. However, this is a very different issue, and it is no longer part of the core concept of the rule of law. Difficulties have arisen, because the conveying of specific legal content (adaptation of the rules) is often confused with the fundamental concept of the rule of law (playing by rules). This *confusion poses a danger* to the establishment of a global legal order.

Expecting too much of the Law

The essential function of laws is to enable transactions and changes to take place according to fair and transparent rules, and thus protect participants from arbitrariness. But laws do not exist in a vacuum. They function in a complex network of institutional balances and cultural roots. Without the restraint of power, the rule of law cannot take effect. In "The Spirit of Laws" Montesquieu explains how this works: power contains power, "le pouvoir arrête le pouvoir".¹

Institutions contain and channel power. This role becomes especially clear in the context of conflict management, where the rule of law can only be established if institutions protect it.

Institutional Vacuum

Abstractly speaking, there are two main developments in conflict situations. First, institutional failure triggers conflicts, when the unequal distribution of power drives parts

¹ Montesquieu, „De l’Esprit des lois“, livre XI, chapitre IV

of a society to violent rebellion. Second, these conflicts further damage the institutions, either deliberately or through neglect. As a result, societies emerging from civil wars suffer severely from an institutional vacuum.

Institutions limit and contain power, and this faculty is making them enormously important. They can be compared to canals or dams built to prevent floods, cascades in mountains streams that break the force of the water. Civil wars destroy the institutions that are meant to contain power. The resulting *institutional vacuum* is the largest challenge facing a country in a transition from war to peace. This is the vicious cycle of violent conflicts: the institutional failure to contain power is their cause, and the further destruction of institutions is their effect. Hence, filling institutional vacuums is an extremely urgent, but also a very difficult task.

The Reform or Import of Institutions

Institutions can be defined in various ways. They embody a number of formal and informal rules, norms, and processes that regulate individual and collective behaviour. Individual and collective behaviour is also influenced by culture. Hence, institutions must reflect the cultural background and be rooted in the cultural understanding of societies to be successful. Otherwise, they will not be able to withstand power and the violence of a storm.

Stated dialectically, institutions can regulate individual or collective behaviour only because individual and collective behaviour endows them with meaning and legitimacy. Heart transplants fail if the new organ is incompatible. The body rejects it, and the patient dies. Institutional transplants also fail if there is insufficient compatibility. The results are failed states.

While medical science has made huge progress in this area, there is still very little knowledge around successfully transferring institutions from one country to another. Deploying humanitarian aid or military forces rapidly around the world is possible, but institutions require a certain mindset, and function in very complex ways that impede such transfers.²

An illustration of this dilemma is the Loya Jirga in Afghanistan. This gathering of leaders from all over the country was briefly revived in 2002 to ratify the form of government established by the United States. Once this task had been performed, the Loya Jirga had served its purpose and it was immediately disbanded. Five years later it is clear that the regime imposed by outsiders did not achieve through general elections the necessary legitimacy to stabilize the country. Now NATO troops are on site to fill this institutional gap.

It makes more sense to rehabilitate local institutions than to import new ones. In principle, few dispute that institutions need to evolve organically. However, the willingness to cultivate local institutions remains very limited because of the time required for this growth to take place.

² Francis Fukuyama, „State-building, governance and world order in the 21. century“, Cornell University Press, 2004, page ix.

Many experts stress that the process is just as important as the goal in the search for peace. While true, the process also takes time. The temptation to take a short cut or to attempt to speed it up with the import of ready-made institutions is enticing. Under this time pressure, unrealistically high expectations are created for damaged societies, especially regarding the effectiveness of the legal system.

Expecting too much of the Law

Every society and every community functions on the basis of rules, of norms and regulations. The focus here is formal, written law created by formal institutions in the capitals, and influenced by international standards. In Western countries this formal law is the most common, but also a very abstract institution. Understanding of law has developed over time, and is based on various philosophical trends and of a long history of secularisation.

However, in many regions outside Europe, particularly in societies with an oral tradition, informal laws and informal institutions prevail. Foreign and abstract law is not relevant where behaviour is primarily determined by tradition. How could formal law protect people and guide their behaviour without legitimacy? Where modern laws are not accessible to people, they are unlikely to achieve much.

But there is more at stake. Laws themselves provide neither protection nor justice. Alone they are not effective tools, as they cannot enforce themselves. They require an institutional framework that gives them the power to affect behaviour. In an institutional vacuum, this framework is missing, creating unrealistically high expectations regarding possible achievements of the legal system, ultimately discrediting the notion of the rule of law.

Poor societies can be just and fair as well. However, in order to do so, a poor state must distribute its goods with particular care. According to a World Bank study³, the poor states most susceptible to civil wars are those with extreme discrepancies in their income distribution. It is not easy to distribute the very limited goods fairly, but by preventing civil wars such fair distribution is a prerequisite for prosperity. *Distribution is the central challenge*, which reinforces the crucial role of institutions.

Overcoming an Institutional Vacuum

In an institutional vacuum power is not restrained, which is a cause of violent conflicts. Frequently, this vacuum is worsened by the violent conflict. How can this vicious circle be broken, how the institutional vacuum be filled? Since the wholesale export of institutions has not led to the desired results⁴, efforts must be made to find alternatives.

³ A World Bank policy research report: "Breaking the Conflict Trap", 2003

⁴ Patrick Chabal & Jean-Pascal Daloz in: Africa works, Disorder as political instrument. 1999, page 10: „The wholesale transfer of the Western state to Africa has *failed* very largely because of cultural factors.“

One method is to save what can be saved on site. However, that is a complex enterprise:

- *Save local institutions.* Even ostensibly archaic and informal institutions are just as relevant as modern ones. Institutions that have developed within tribal and clan societies continue to be very useful in stabilizing communities.⁵ Moreover, since they were developed locally they are less likely to be corrupted and eroded. The natural symbiosis between previously established and modern institutions varies from country to country, which is why the optimum integration of traditional institutions into a modern system is a distinct challenge in every society.
- *Rehabilitate customary law.* Unwritten law is effective, especially where it is well known and considered legitimate. It makes sense to adopt existing customary law and to reform it carefully.⁶ This is important for multiple reasons. Customary law contains the essence of the rule of law. Hence, it is a necessary precursor to establishing a lasting legal order. Also, in many parts of Africa customary law is the only available instrument with which some legal protection for the poor can be achieved.
- *Mobilize local knowledge.* Every society has issued a number of basic rules designed to sustain its survival, to ensure a balance with the environment and to guarantee social order. If this knowledge is mobilized and applied to new needs, reforms can be carried out more effectively. Local knowledge also includes local culture and an understanding of history, which constitutes the core of most communities' identity. Through diligent work, modern laws can be derived from local knowledge. Ultimately, the legal system gains an enormous amount of legitimacy by being perceived as the product of existing knowledge and values.

The Importance of Sequencing

As part of a holistic approach, peace policy and human rights policy are often linked together. They are in fact closely interrelated, but since only modest benefits are achieved by turning human rights into a legal issue in failed states, it is advisable to separate these two policy areas.

In principle, the protection of human's innate dignity and the respect for people's inalienable rights is the ideal the United Nations has committed itself to uphold. The preamble to the Universal Declaration of Human Rights states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

The Rule of Law

⁵ Jeffrey Herbst in: *States and Power in Africa*, Princeton university Press 2000, page 176: „The failure of the African leaders to develop a theory of rule hurt the new states ... because there was no theoretical or ideological perspective that would allow for the incorporation of traditional authorities.”

⁶ Jeffrey Herbst, *idem*, page 183: „...it is more likely that measures that seek the wholesale replacement of local practices will simply be futile.“

This fundamental commitment to the rule of law is nurtured by a growing global consciousness and shared by many nations, international organisations and NGOs. As a fundamental principle of human civilisation it is a beacon in many areas of international cooperation, including in peace and human rights policy.

At the specific policy level, the question arises how to best achieve this ideal, and operationally, the relationship between peace policy and human rights policy appears in a quite different light. It is essential not to confuse the programmatic goal with its operational implementation, i.e. not to confuse goal and instruments.

Peace policy aims to achieve political stability that is perceived as legitimate by the citizens affected by it, as well as to create conditions that make it possible for those citizens to bring about change non-violently. It seeks to recreate institutions and to bring them to equilibrium so there is space for the rule of law.

Therefore, it is important to resist the morality-based temptation to demand immediate respect for human rights. It is an illusion to believe that a legal order will create itself automatically as a result of making human rights a legal issue. *Legalizing human rights* is just one of many instruments used to establish the rule of law.

Thinking about Sequencing

Observance of appropriate sequencing is crucial for the effectiveness of peace and human rights policy. In failed states, conflict management usually precedes human rights policy, because the former must create the conditions for the success of the latter. The appeal to respect for this sequence is not meant to imply anything about the importance of either. Rather it follows the logic of construction, where, e.g., windows are not installed until the load-bearing walls are standing, although it is an indisputable fact that houses without windows would be almost uninhabitable.

However, in the political discourse there is an unwillingness to recognise this need for sequential separation. Our familiarity with the law tempts us to take its basic principles for granted and to overlook their absence in other societies. Countries that function very differently are not easily understood, and there is a natural temptation to cling to what is known.

The Limits of the Law

Justice exists independently from legal clauses, and there are central systems of order that lie outside the domain of the law. Customary law itself often lies outside internationally codified law, and many elementary principles of order lie beyond the scope of any legalized realm. The basic patterns of these systems are derived from religion, culture, taboos and morality. However, laws can regulate only what is accessible to them, and the legal approach can only support the rule of law within a clearly demarcated area.

Also, the capacity of written law to bring about change should not be overestimated. In fact, the law is often only the formal approval of a social process designed to resolve social conflicts peacefully. This is easily forgotten, particularly in post-war

societies. As a result, attempts are made to create peace and order through hastily developed laws. This is then called the 'rule of law', with the belief that the formulation of laws will solve the problem.

According to Nietzsche⁷, the law tells us less about what people observe, and more about what they don't obey, since societies use laws to enforce that which is not already perceived as right and just, and therefore would not be obeyed without the threat of punishment.

For an Economy of the Law

Clearly, it is much easier to proclaim laws and to demand compliance than to eliminate the structural deficits of a nation regarding the rule of law. When the situation on the ground is cause for despair, human rights policy activism at least gives actors a clear conscience. It feels morally safe to embrace the "legal perspective", which enables a virtually unlimited field of activity for governments and NGOs.

The process eventually develops its own momentum, protecting its funds and benefits. The promotion of human rights becomes a legal industry in which the amount of law produced becomes an end in itself. Because of the resulting over-supply, the most diverse conflict situations are all treated equally – with a little bit of everything. This approach, however, cannot make up for the deficits in the rule of law, and the over-production of legal instruments becomes less and less effective, based on the law of diminishing returns.

Hence, it is necessary to outline the basic principles of the economy of the law. Its purpose would be to deploy only those legal instruments that are relevant and can be implemented in specific conflict situations. This is a demanding task and a considerable amount of research must still be done in this field.

Demand-Driven Human Rights Promotion

If the goal is to create and to offer legal instruments that are in demand, the challenge is to ascertain what would be particularly beneficial in particular phases of conflicts, and what would most likely enable affected populations to seek and receive legal protection. This brings back the question of how the rule of law can locally take hold. The demand-driven promotion of human rights allows for a more realistic approach.

It is crucial to maintain a reasonable relationship between established laws and their enforceability. In fact, new rights can be like snowflakes. Each law is a small miracle, but if introduced at the wrong time, they will only combine to a slushy mess.

The Evolution of the Rule of Law

⁷ Friedrich Nietzsche in: Fröhliche Wissenschaft, par. 43: "Was die Gesetze verraten."

How can these ideas be put into practice? Clearly further research is required. As a contribution for the discussion I would like to make some suggestions on the morphology of the emerging legal order.

- First, efforts must be made to achieve greater flexibility of legal instruments. More variable forms should replace one-size-fits-all approaches. The conventions of the Council of Europe are an interesting example. However, war-torn and impoverished societies need simpler and more easily comprehensible legal instruments. Such instruments do not currently exist, and hence must be created. Since they would be only temporary, these instruments need neither to claim universal validity, nor be geared toward the international standard, but instead would have to reflect genuine local demand.
- Second, the entire dynamic of the international legal construction might be reversed. Today, unwilling states are often urged to ratify international conventions, in the hope that once ratified, respect for these conventions would be achieved gradually through international pressure. But this is precisely how the legal system gets corrupted and undermined. Conversely, the promotion of human rights might increasingly follow the model of the WTO. Instead of insisting that countries ratify conventions, joining should be made *more difficult*, and should be dependent on the extent to which a country actually can observe the rules. This would lead to a more demand-driven promotion of the rule of law.

A New Separation of Church and State

For any global legal order to take hold, an understanding and fundamental acceptance of the rule of law is indispensable. The notion that a law should apply equally to all, regardless of religion, caste or tribe, can neither be taken for granted, nor do all schools of thought or systems of government support it. This highest goal of political civilisation might never be fully achieved, and the improvements that are made are never absolutely secured. However, growing consensus around this issue is a measure of progress in peace and human rights policy.

The rule of law cannot fully take hold if it is solely considered an abstract and philosophical ideal. Specific content and effective implementation of the laws are required to make them politically relevant. Although conveying legal content naturally follows the notion of the rule of law, the two are very distinct. The previously used sports metaphor helps illustrate this difference. The consensus that all competitions should be governed by fair and transparent rules is the crucial foundation (playing by the rules). The formulation of the actual rules and their timely adaptation is of secondary importance. Hence, conveying *specific* legal rights does not constitute the core of the rule of law.

As the world becomes multi-polar, the content of legal vessels develops into a very delicate topic. Consensus and tolerance are key. If disputes arise among cultures and civilisations due to differences of this content, an unnecessary, but nonetheless serious danger to the global legal system may result.

It is useful to remember why it is necessary to subordinate a country's internal system to the rule of law in order to ensure just globalization. The legitimacy of this demand is based on the assumption that a nation with an intact legal system is more likely to accept the international legal order, and that countries that disrespect the law internally are less likely to comply with an international legal system. This, however, does not legitimize a demand for value-based harmonization of national legislation.

In some cases, Western countries are allowing legal rights to become part of an ideology, by striving for the harmonization of their content which is unnecessary for a functioning global order. The export of values under the cover of harmonization may actually disrupt peaceful globalization, when it is not perceived as equally legitimate in all cultures and societies.

The Need for Restraint

It is not easy to compellingly answer the question, which values and legal rights can currently be globalized, and which should not be internationalized until a later date. It is neither possible nor desirable to reach an exact consensus on this issue. However, wisdom, vision and patience are necessary. Rome and the Roman legal system were not built in a day. Furthermore, any new global legal order must be more consensus-oriented than the establishment of the Roman system, since in the future, neither Rome nor the West will have sole control. Against this background the importance of great care and restraint in the export of values becomes visible.

On close examination, however, it becomes clear that it is not the different cultures or religions, but the ideologies, which exploit the values politically that clash. Often these collisions occur between fundamentalist philosophies, which raises the difficult question of the extent to which human rights policy, as a secular ideology, has become susceptible to fundamentalist tendencies.

The Distinction between Legal Order and Legal Content

A fundamental disentanglement of legal order and legal content is necessary. On the one hand, there is the notion that the law applies equally to everyone. This notion is no small achievement. On the other hand, there is the right of every community to enact rules for its own purposes, as long as these rules have been formulated in a transparent and consensual manner.

The responsibility to maintain political order lies primarily with governments, which have a vital interest in ensuring that the rules of the game are observed, both nationally and globally. By contrast, conveying legal content does not primarily belong in the public domain. The dissemination of values or of ideologies – a missionary activity in the strict sense – is left to civil actors. In other words, an effective separation between the effort to establish the rule of law and the conveying of legal content requires a new definition of roles for the state and civil society.

New Definition of Roles for the State and Civil Society

The government, as an actor at the international level, should concentrate mainly on the maintenance of the legal system, i.e. on measures that can strengthen the rule of law. This would provide a clearer focus for reflecting on the conditions for a effective rule of law, such as its legitimacy through cultural roots and the institutional balance to restrain power.

Governments would also be confronted with ascertaining the actual need for legal harmonization. Much needs to be reconsidered, since the broader the agenda for harmonization, the smaller its legitimacy.

The political imperative must be prioritized over the moral imperative, because the long-term safeguarding of legal order is a greater public good than the export of specific values. The acceptance of a global legal order with fair and transparent rules is more important than the modernisation of antiquated rules. Harmonized rules are suitable only in those areas where it is functionally indispensable (for example in world trade) or in cases where this harmonization has been freely accepted by those concerned.

In all other areas, countries should follow an institutional approach, in which recognition of the equivalent status of national solutions is the rule, provided they were reached by transparent and legitimate means. States and governments would be well advised to refrain from being involved in a global cultural struggle.

Demands on Civil Society

This global definition of roles affects civil society as well. It would have to take on the task of disseminating moral imperatives and legal content within the framework of the existing legal order. In this situation, the often-quoted 'clash of cultures' would no longer degenerate into a conflict between nations, but would instead lead to competition between civil actors. Competition would thus take place under the aegis of a global legal order, without governments being drawn into the conflict.

This disentanglement of roles requires an unscrambling of interests. Civil society would have to become more independent of the public sector, and of its subsidies, in order to avoid being politically instrumentalized. In terms of their financing and internal democracy, civil organisations would have to meet stricter standards. These changes would have to apply equally to churches, sects, political parties, print media, television, aid organisations, mosques, foundations, think tanks and NGOs. This requirement is in fact the familiar separation between church and state, the only difference being that the actors for secularized ideologies within civil society are grouped with the church.

Conclusion

The holistic approach in the promotion of law and of peace does not involve lumping everything together, but rather requires taking better account of relations between the components and the whole system in order to draw practical conclusions. It is not a matter of blending. Contrarily, greater differentiation in thought and in action is necessary.

Hence, it is essential to first create conditions, in which laws can be effectively implemented. This requires institutional balances that restrain power. Conflict management underlines their importance. Local legitimacy of laws is equally important, and its establishment will be more necessary than ever in a multi-polar world. Unless both conditions are fulfilled, the promotion of the rule of law will be built on an unsteady foundation.

Both objectives, the institutional restraint of power and the efforts to achieve local legitimacy of the law, require greater contemplation of, and respect for, local realities. Specifically in the context of Africa, this reflection on social and cultural roots should make a valuable contribution to the renaissance of the continent. Abolishing their traditions will not restore the battered self-confidence of African peoples.

Furthermore, correct sequencing is crucial for an effective promotion of the rule of law. If new legal instruments are produced without regard for local demand, this waste of resources will ultimately erode the credibility of the legal order itself. The point is not to comply with network plans or data sequences, but than to understand that the rule of law grew out of various cultures, and that its promotion must take this evolutionary history into account. T. S. Eliot illustrates this notion: "You cannot put on a new culture ready made. You must wait for the grass to grow to feed the sheep to give the wool out of which a new coat will be made."

Finally, there is a need for a clearer distinction between the acceptance of the rule of law per se, and the conveying of legal content. This differentiation is crucial because the public sector should primarily be responsible for the former, while civil society should be the main actor in the latter. This separation enables governments to concentrate more on the strengthening of the rule of law and to leave the communication of values to civil actors. As a result, the rule of law becomes better suited for globalization.

This new interpretation of the secularisation of the state also extracts governments from the clash of civilisations, and thus benefits not only the global legal system specifically, but also world peace in general.