

# The Concept of Rule of Law : Some Reflections from an Asian- African Perspective

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## I. Introduction

The importance of rule of law both at the national and the international level can hardly be exaggerated. We are witnessing a host of challenges in our contemporary era. These include: Environmental degradation, rapid urbanization, increased conflicts, severe income inequalities and exclusion of vulnerable groups which pose major challenges to human development and security. Clear and robust principles are needed to underpin the management of our future. The rule of law is a core principle of governance that ensures justice and fairness, values that are essential to humanity.

At the *international* level, the rule of law accords predictability and legitimacy to the actions of States, strengthens their sovereign equality and underpins the responsibility of a State to all individuals within its territory and subject to its jurisdiction. Full implementation of the obligations set forth in the Charter of the United Nations and in other international instruments, including the international human rights framework, is central to collective efforts to maintain international peace and security, effectively address emerging threats

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\* This paper is prepared by the Secretariat of AALCO and does not reflect my personal viewpoints.

and close off accountability gaps for international crimes. Accordingly, the rule of law is an important tool for the predictability and legitimacy of international relations.

At the *national* level, the rule of law is at the heart of the social contract between the State and individuals under its jurisdiction, and ensures that justice permeates society at every level. The rule of law guarantees the protection of the full range of human rights, brings citizens and non-citizens alike legitimate avenues of recourse in cases of abuses of power and allows for the peaceful and fair resolution of disputes. The rule of law is ensured by national institutions that can generate and implement clear, public and just laws, and that provide fair, equitable and accountable public services to all people equally. Strengthening the rule of law fosters an environment that facilitates sustainable human development and the protection and empowerment of women, children and vulnerable groups, such as internally displaced persons, stateless persons, refugees and migrants.

Against this background, I am going to explore in this Paper the conceptual aspects and the practical challenges thrown out of the concept of rule of law from the view point of the developing countries. The scheme of the paper is as follows;

The *next* part of the paper would explore the meaning of the concept of rule of law in its historical context. It would go on to deal with the issue of whether and to what extent the concept of rule of law could be applied at the international level.

The *Third* part of the paper would focus on the role of the United Nations in promoting rule of law. This is explored in the context of the efforts of the UN Security Council to promote rule of law and the problems that this generates for the legality of international law. It then goes on to portray the efforts of the UN to establish rule of law in the post-conflict situations.

The *Fourth* part of the paper would highlight some of the concerns that emanate from the concept of rule of law from the view point of the developing States in general and Asian-African States in particular.

The *Final* part offers some concluding thoughts.

## **II. Rule of Law: A Conceptual Understanding**

In recent times, the use of the term “rule of law” has become more prevalent. But the term rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions. Generally, however, it can be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions. In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power.

The modern conception of the rule of law was contributed by the British Constitutional Scholar A.V. Dicey in his famous treatise “Introduction to the Study of the Law of the Constitution” published in 1885, wherein he identified three principles which together establish the rule of law and they are: (1) the absolute supremacy or predominance of

regular law as opposed to the influence of arbitrary power; (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and (3) the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts.<sup>1</sup>

Rule of law as understood thus, has been mostly studied in reference to domestic constitutional orders. The applicability of this concept at the international level has been a matter of intense debate on account of the reason that the international legal system is decentralized as opposed to the domestic legal order wherein there are identifiable institutions to make, apply and enforce the laws. In this regard, the opinion of Judge Rosalyn Higgins that, 'the domestic rule of law model does not easily transpose to international relations in the world we live in. That seems to be an unavoidable reality'<sup>2</sup>is revealing.

There are serious debates in the academic circle with regard to the existence of an international rule of law. Many authors have seriously challenged the possibility that an international rule of law might ever emerge in the current state of international relations, some of them even speaking of a "myth of the international rule of law."<sup>3</sup> A strong

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<sup>1</sup> A.V. Dicey, *Introductory to the Study of the Law of the Constitution* (Macmillan 1st ed. 1885).

<sup>2</sup> Rosalyn Higgins, "The ICJ and the Rule of Law", Speech given at the United Nations University on 11 April 2007, p. 7, available at [http://www.unu.edu/events/files/2007/20070411\\_Higgins\\_speech.pdf](http://www.unu.edu/events/files/2007/20070411_Higgins_speech.pdf)

<sup>3</sup> Jacob K. Cogan, "Noncompliance and the International Rule of Law", *Yale Journal of International Law*, vol. 31, 2006, p. 206.

proponent of such criticism is Martti Koskenniemi, for whom speaking of an international rule of law is an incompetent attempt at ignoring the fundamentally political nature of international relations. According to that view, speaking of an international rule of law properly said is unwelcome and counterproductive, because it negates the particular needs and peculiarities of international relations.<sup>4</sup>

On the other hand the concept has also found its supporters. For example, there were two main approaches identified in the conceptualization of the international rule of law<sup>5</sup>:

- the *rule of law internationalized*, meaning the application of the principles of the rule of law, starting with those identified by Dicey, to the international legal order;
- the *internationalization of the rule of law*, which acknowledges the fact that the rule of law in domestic societies has become an issue in international relations and which promotes the use of international instruments for achieving rule of law values domestically.

This interpretation, in various manifestations, has found its support in the documents adopted under the aegis of the United Nations. For example, in the outcome document of the World Summit 2005, which was convened to mark the sixtieth anniversary of the United

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<sup>4</sup> See, Martti Koskenniemi, "The Politics of International Law", *European Journal of International Law*, vol.1, no. 4, 1990.

<sup>5</sup> André Nollkaemper, Jan Wouters and Nicolas Hachez, "Accountability and the Rule of Law at International Level", available at <http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf>

Nations, the leaders of the UN Member States agreed that the rule of law was ‘part of the universal and indivisible core values and principles of the United Nations.’ They had also acknowledged the need for ‘universal adherence to and implementation of the rule of law at both the national and international levels’ and reaffirmed their commitment to ‘an international order based on the rule of law and international law’.<sup>6</sup>

As Simon Chesterman has rightly pointed out, the content of the term “rule of law” remains contested over time and geography, and it was exactly a *dissensus* as to the concrete meaning of the rule of law that allowed the consensus on this issue at the World Summit, 2005.<sup>7</sup> The attempt of the United Nations, in an on-going process, to strengthen its attention to the rule of law at the national and international levels is dealt with in the following part of the paper.

### **III. United Nations and Rule of Law**

Promoting the rule of law at the national and international levels is at the heart of the United Nations’ mission. Establishing respect for the rule of law is fundamental to achieving a durable peace in the aftermath of conflict, to the effective protection of human rights, and to sustained economic progress and development. The principle that everyone – from the individual right up to the State itself – is accountable to laws that are publicly

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<sup>6</sup> 2005 World Summit Outcome Document, UN Doc. A/RES/60/1 (16 September 2005), available at <http://www.un.org/summit2005>, para. 134.

<sup>7</sup> Simon Chesterman, “An International Rule of Law?”, *American Journal of Comparative Law*, vol. 56, 2008, p. 331. Also available at <http://ssrn.com/abstract=1081738>.

promulgated, equally enforced and independently adjudicated, is a fundamental concept which drives much of the United Nations work.

The General Assembly has considered rule of law as an agenda item since 1992, with renewed interest since 2006 and has adopted resolutions at its last three sessions. The Security Council has held a number of thematic debates on the rule of law and adopted resolutions emphasizing the importance of these issues in the context of women, peace and security, children in armed conflict, and the protection of civilians in armed conflict.

#### **A. The UN Security Council and the Rule of Law**

Human rights treaties since the 1948 Universal Declaration of Human Rights have advocated the rule of law as the foundation of a rights-respecting State; development actors, including donor States, have since the 1960s promoted the rule of law as essential for economic growth; and more recently security actors, notably the Security Council, have promoted the rule of law as a form of conflict resolution.

Apart from a preambular reference in relation to the deterioration of law and order in the Congo in 1961, the Council first used the words “rule of law” in resolution 1040 (1996), where it expressed its support for the Secretary-General’s efforts to promote “national reconciliation, democracy, security and the rule of law in Burundi.” (The French text rendered rule of law as “le rétablissement de l’ordre”.) Many peacekeeping operations have subsequently had important rule of law components, such as those in Guatemala

(1997), the Democratic Republic of the Congo (1999 –), Liberia (2003 –), Côte d’Ivoire (2004 –), and Haiti (2004 –). The mandates for such missions tend to be broad, calling for the “re-establishment” or “restoration and maintenance” of the rule of law, without explaining what this might entail. In practice the dominant activities have tended to be training of police, justice, and prison personnel; assisting institution-building; advising on law reform issues; and monitoring, with the emphasis on the judicial sector and human rights law. Less attention has been paid, for example, to land law despite its importance to economic development and as a potential source of conflict.

In two situations, Kosovo (1999 –) and East Timor/Timor-Leste (1999-2002), the United Nations has had direct responsibility for the administration of territory, including control of police and prison services and administration of the judiciary. Similar powers were exercised in Bosnia and Herzegovina through the Office of the High Representative from 1996.

In addition to supporting or supplanting domestic rule of law institutions, the Council has created international criminal ad-hoc tribunals for trials arising from the violent conflicts in former Yugoslavia (1991–99) and Rwanda (1994). Hybrid tribunals, such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon, represent an attempt to blend international supervision with local ownership and development of national capacity. The Special Court for Sierra Leone was set up at the “request” of the Council in resolution 1315 (2000), while the



Special Tribunal for Lebanon was established with Council authority substituting for agreement of one of the parties. The Council has also exercised its power under the Rome Statute to refer a matter to the International Criminal Court, as it did in March 2005 with respect to the situation in Darfur, Sudan.

This preparedness of the Council to act in support of law within States was endorsed at the 2005 World Summit, which embraced the Responsibility to Protect. Member States cited their preparedness to take collective action, through the Council, where peaceful means are inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing, or crimes against humanity.

There is no question, today, that supporting the rule of law when it breaks down within States is an important function of the Council. Action is needed, however, to consolidate the work of the Council in combating impunity, to affirm the importance of the rule of law in all UN operations, and to ensure the sustainability of rule of law assistance measures through improved coordination with bodies such as the newly established Rule of Law Coordination and Resource Group and its Rule of Law Unit and the Peace building Commission.

## **B. Promotion of Rule of Law by UN in Post-Conflict Situations**

The consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is

confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice. At the same time, the heightened vulnerability of minorities, women, children, prisoners and detainees, displaced persons, refugees and others, which is evident in all conflict and post-conflict situations, brings an element of urgency to the imperative of restoration of the rule of law.

Helping war-torn societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population is a daunting task. It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights, a lack of official respect for human rights and, more generally, a lack of peace and security. Over the years, the United Nations has accumulated significant expertise in addressing each of these key deficits. Departments, agencies, programmes and funds and specialists across the system have been deployed to numerous transitional, war-torn and post-conflict countries to assist in the complex but vital work of rule of law reform and development.

The UN Development Programme's Global Programme on Strengthening the Rule of Law in Conflict and Post-Conflict Situations is an example of initiatives taken by the UN in establishing the rule of law in post-conflict situations and outlines UNDP's efforts and

services to advance justice and security in fragile and transitional societies. This Global Programme establishes close linkages between protection and the rule of law, and between humanitarian action and development principles. Through a sequenced approach tailored for both conflict and post-conflict situations it focuses on:

1. Strengthening the Rule of Law within an early recovery framework and during transitions. National capacities such as government institutions, civil society and displaced populations are empowered to respond to the immediate needs related to security, justice and impunity, while also laying a foundation for capacity development of rule of law institutions in the recovery phase.
2. Addressing Women's Security and Access to Justice. Based on Security Council Resolution 1325 and UNDP's Eight-Point Agenda for Women's Empowerment and gender equality in crisis prevention and recovery, particular emphasis will be placed on ensuring access to justice for victims of Sexual-and Gender Based violence and domestic violence.
3. Supporting capacity development of Rule of Law Institutions. Technical assistance is provided to conduct capacity development of critical rule of law institutions such as the Judiciary, the Ministry of Justice, Prosecutor's Office, Law-enforcement and Corrections.
4. Facilitation transnational justice. Support is provided to national stakeholders in addressing past legacies of violations of human rights and humanitarian law, while also ensuring parallel capacity development of rule of law institutions.

5. Promoting confidence building and reconciliation. Particular attention is given to rebuild trust and nurture reconciliation. Cutting across the full spectrum of assistance, confidence-building activities will seek to promote dialogue, communication and peaceful conflict resolution.

#### **IV. Importance of Rule of law for the Developing Countries**

Even though the concept of rule of law has immense significance, it also raises a number of issues that are of critical concern to the developing states.

*Firstly*, in international relations, the idea of the Rule of Law should prohibit the arbitrary exercise of power by any participant in the international system. Every actor, be it a State or an inter-governmental organization or a non-governmental organization has to act in accordance with the agreed rules of law that collectively constitute international law. As stressed in the report of the UN Secretary-General (paragraph 24, A/65/318), responsibility of all subjects of international law, including States, for fulfilling their obligations is essential to any concept of rule of law at the international level. Hence, any use of force without the authorization of the UN Security Council and that does not fall within the exception would not only be contrary to the UN Charter but also would gravely undermine the international rule of law.

*Secondly*, in order for any notion of Rule of Law to be effective, it also needs to come to terms with the workings of the international institutions. It is well-known that international institutions, most notably, the International Monetary Fund, the World Bank and the World Trade Organization, have assumed a prominent role in global governance. They have intruded into the national sovereign economic space, particularly of the countries of the Third World, without in any way making them accountable to the precepts of international law. Though work on this count has begun, it needs to be carried forward to its logical conclusion: the adoption of an international legal instrument for making them accountable under international law.

*Thirdly*, AALCO shares with the United Nations that the latter has a key and unique role in strengthening the rule of law through a wide array of codification, promotion, dissemination and implementation of international law. We concur with the Secretary-General in his first report on this item in 2009 (A/64/298) that,

“The United Nations continues to be at the centre of global efforts for the promotion of the rule of law at the national and international levels” (Paragraph 2 of the Report), and that “Multilateral cooperation based on the rule of law is essential for effectively addressing current and future global challenges” (Paragraph 5 of the report).

However, AALCO also believes that the writ of Rule of Law should also run through the UN as an Organization itself. In other words, the principal organs of the United Nations, most notably the Security Council which has been playing an important role in strengthening a rule-based international system, also should respect its mandate and competence as embodied in the UN Charter. The Security Council will be most legitimate and most effective when it submits itself to the rule of law. Hence, it is vital that the Security Council itself sets an example by adhering to its own legal foundation: the Charter and international law, vis-à-vis all its operations and activities.

*Fourthly*, given the fact that Rule of Law has become an almost universal prescription for managing post-conflict societies, it needs to be noted here that, in this specific context the concept has to go beyond the narrow confines of the creation and the effective workings of legal system and other institutions necessary for the operation of well-regulated markets. This should also incorporate the language of human rights including the much neglected economic, social and cultural rights. In other words, the concept of Rule of Law should also be understood as laying down the foundations of social and economic justice. This is critical for the developing countries of the Asian-African region.

*Fifthly*, regarding the concept of Rule of Law at the national level is concerned, AALCO feels that leeway should be accorded to the Sovereign States so as to confer on them the right to decide on the appropriate ways and means of developing an efficient and fair legal system for enhancing the rule of law within its own jurisdiction based on its cultural, historical and political traditions. Besides, rule of law activities which are undertaken at

the domestic level should be undertaken at the request of the States. In this regard, AALCO is also of the considered view that the implementation of international standards at the national level should be supported with capacity-building measures and that compliance with treaty obligations is an area where the UN can play a crucial and helpful role in assisting States with capacity building. Hence, AALCO wholeheartedly welcomes the efforts undertaken by the United Nations as reflected in the Report of the Secretary-General.

## **V. Conclusion**

Given the importance that the concept of rule of law holds for the international community as a whole and particularly the developing states, the need to strengthen it can hardly be exaggerated. It lays the foundations not only for the stability of international relations and the maintenance of international peace and security it also is an important component of economic and social justice and in this aspect is vital for the developing countries. Hence, AALCO is of the considered view that strengthening rule of law around the world would reinforce peace, progress and security. Furthermore, AALCO is also of the view that strengthening of international rule of law is in the common interests of all countries and something that would contribute to the maintenance of international justice and fairness as well as the promotion of peace and development. Accordingly, AALCO fully supports the activities of the United Nations in the area of rule of law. We also feel that taking up discussions on the rule of law in the Sixth Committee provides an excellent opportunity to renew a firm commitment to the rule of law and to the purposes

and principles embodied in the Charter of the United Nations. However, even while expressing our support for the concept of rule of law, we also need to be mindful of the concerns that the developing world has expressed in relation to this concept.