

The Nexus Between the National and the International Rule of Law

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Abstract

The rule of law at the national level and the rule of law at the international level are inextricably connected. While to some extent both levels raise their own questions, the UN so far has failed to recognise the connection, and should to a much greater extent aim its policies at the nexus between the two levels. The international rule of law depends on the national rule of law and vice versa. Moreover, it is increasingly difficult and pointless to identify what is national and international. A holistic approach is needed to move beyond the slow progress of the past decades.

Keywords: international rule of law – national rule of law – role of courts and other domestic actors – rule of law in international organisations

Introduction

Rule of law promotion faces a number of key challenges, relating to the nexus between the national and the international level.

One challenge is that without a strong rule of law at the national level, attempts to strengthen the rule of law at the international level are significantly hampered. One of many examples is the problematic compliance with the UN Convention on the Elimination of Discrimination against Women. As a result, all of the familiar problems of promoting the rule of law domestically also hamper the rule of law internationally. In particular, attempts to promote the rule of law at the national level should deal with a variety of forms of lack of support or even resistance from the recipients of rule of law promotion. Rule of law promotion still can be criticised for reliance on one-size-fits-all solutions that fails to distinguish between post-conflict situations and different stages of development.

A second challenge is that as international law pervades more deeply into the domestic legal order, international law should conform to rule of law requirements that we tend to pose for domestic law. International organisations should meet the standards that they prescribe for others, if only because the failure to do so undermines the credibility of its external rule of law policies and the willingness of norm-addressees to accept the prescriptions and ambitions of the UN.

However, the question what this actually means, and what is required in terms of a rule of law at the international level that addresses the problems caused by the subsequent entry of international law in national legal orders remains an open one, and urgently requires more thought and discussion.

A third challenge is one of agency: both the promotion of the rule of law at the national level and at the international level, and at their interface, involves a wide variety of actors (states, institutions within states, regional organisations, international courts, the UN etc.). Despite the work done in the UN, mainstreaming and coordination remains a key challenge.¹

Innovations, insights and/or positive trends in the past 5-10 years which (promise to) address these challenges

In the past years, several international institutions have increasingly emphasised the need for a strong domestic rule of law that entails opening of national legal orders for the application of international law. Notable examples are the European Court of Human Rights and the Inter American Court of Human Rights. In this way, not only the international rule of law is strengthened, but the national rule of law as well.

The rule of law has increasingly become a part of the prescriptions of international law pertaining to the way in which states should organise themselves. 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. The support for rule of law as a form of governance, inextricably linked to human rights, has grown.

In particular as a result of the UN sanctions dispute and the invasion in Iraq, states and international institutions have increasingly recognised that international institutions, including the Security Council, should be subjected to rule of law requirements. The rule of law agenda has increasingly targeted international organisations, transnational actors and non-state parties that now play a more significant role in rulemaking and governance. The newly established Ombudsperson for the Sanctions Committee is a step in the right direction, but that it is still far removed from due process standards common in domestic legal systems.

Ways in which the international policy community, in particular the UN, can contribute to increase the impact of these innovations/insights/trends

In support rule of law reform domestically, more attention should be given to specific approaches that strengthen reception of international law, not only by strengthening the courts, but by addressing all relevant actors. Policies to strengthen the domestic prosecution of international crimes, in conjunction with the ICC, are an example.

However, in so doing rule of law promoters should better recognise and address diversity and resistance on the receiving side. Any reform produces winners and losers. National and international donors are not well-positioned to address these types of local political contests. Mandates, but also information of local situations should be improved, and one-size fits all approaches prevented.

There is a need to recognise the potential impact of approaches that go beyond rule of law promotion in the narrow sense. There is a correlation between liberal states and support for the international rule of law, and ways to strengthen liberal states, for instance by conditionality and (non)recognition of governments, may be more influential than processes like constitutional assistance.

For the rule of law at the international level, traditional means require continuing support (such as compulsory jurisdiction of the International Court of Justice, reform of UN human rights bodies), but new ways need to be explored, including the role of internal checks and balances and controls over international institutions.

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Endnotes

¹ Bruce Jones's Shaky Foundations-report on the weak UN organizational structure for dealing effectively with rule of law.