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The Rule of Law – a central conceptual Tool for globalisation of Law

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Teaching law for students from the social sciences among others include some difficulties in finding the most relevant textbooks. My most recent course is an introductory course aimed at students from the study programme Global Studies. The basic idea in this study programme is obvious – and related to the central concepts on globalisation in the invitation to this workshop, which is why I very gladly accepted the invitation.

These ideas are however different from more common approaches to law outside the national scene. We are thus used to talk about a difference between national law, international law and supranational law showing that we still regard the nation state as the primary provider of legal structures; i.e.: legal institutions, legal procedures and legal norms. This threefold distinction is of course even more well established because it builds on historical models, namely law of the land; law of the emperor; Roman law; Canon Law and natural law (it is well known that the historical distinctions can be formulated in different terms -).

It is thus easy to find textbooks on International Law, also for students from the social sciences, building here on the concepts of international relations and thereby still on the concepts of the national state.¹ Question is however to which extend law is tracking its legitimacy back to states and national identity as its sole or primary legitimacy or at least to which extend it is possible to identify normative structures that transgress these dimensions and become true global, paving the way for an idea of globalisation of law. In this paper I want to focus on the concept *the Rule of Law* as a possible mean to identify a global approach to law; but also as a concept used in order to globalise a certain understanding of what law is.

My paper has the following structure: first I want to deal with the concept *globalisation* and its relations to possible concept of law including not only institutional, procedural and normative dimensions, but also questions regarding legitimacy of law. Next I focus on the concept *the Rule of Law* and ask to which

¹ Such as Basak Cali: International Law for International Relations, OUP 2010

extend this concept in itself is globalising law. And finally I suggest a couple of research questions to discuss.

2.

Globalisation and conceptual understandings of law:

It is of course correct as underlined by Sten Schaumburg-Müller in his paper that the European national states and their understanding of law in many periods have been based on a global context. Still, my understanding is that our conceptual understanding of law is related to a national starting point: EU law is legitimate because and in so far as the national states as member states have conferred competences to formulate and uphold supranational law; international law is law because of its link to member states of e.g. the UN. We are used to understand relations between parochial national; common European and international law through drawings of circles that are overlapping or interrelating.

Maybe I am pushing through open doors when arguing these pictures ought to be changed since now not only politics but also law is transgressing these figures.

Globalisation of law has to do with a transnational migration – travelling – of normative ideas based on transnational institutional and procedural settings. We are in the global world not only forcing each other in a dominating way to change our normative, procedural and institutional understanding (as could be said about change of law in Germany and Japan after WWII). We are also not only deciding in collective global institutions what the normative, the institutional and the procedural content of law should be (as could be said about UN human rights, e.g.). And we are finally not only imitating each others on a comparative learning basis (as is the idea in comparing normative legal traditions, thinking that national institutions and structures could decide or not decide to learn and copy) – even though it maybe is in the context of comparative law, I have seen most scholarly thinking over globalisation of law-tendencies.²

As far as I can see, legal norms are simply travelling as legitimate with the help of not only official, but also non-governmental and scholarly based institutional structures (such as expert groups), and on basis of that presented as *the law*.

² See e.g. Horatia Muir Watt: Globalisation and comparative law in Reimann and Zimmermann (eds): Oxford Handbook of Comparative Law, OUP 2006, p 579-607; Mark van Hoecke: xxx

Sten mentions in his paper an example from freedom of speech, I could mention a lot of examples from freedom of religion: discourse simply changes in a certain context at a certain time and a changed hegemonic understanding appears even though nobody has decided this changed understanding; nobody can identify the unofficial bodies arguing a changed discourse; and nobody has the power to discuss it.

However, to put just one maybe more well known example, I could refer to general concepts, mentioned in preambles and value articles in the Treaty of the European Union changes status and become arguments in concrete court cases informing concrete solutions in concrete conflicts e.g. in relation to a right to remain on the territory of a member state based on european citizenship (the Zembrano case).

3.

One of these general concepts, mentioned in the first articles in the Treaty of the European Union is the concept *The Rule of Law*, a concept also dealt with in a UN general assembly resolution from 2006,³ deciding that the concept shall become mainstreamed into UN activities, that a yearly report should be delivered, a Rule of Law Unit is set up to support a Rule of Law Coordination and Ressource Group (ROLCRG) etc.

What does it mean? Institutionally, procedurally, normatively – and methodologically? Does it entail any consequences to talk about the rule of law as binding for all member states in the European Union or as a global concept, to which all members of the UN should adhere?

As far as I can see, the concept ‘the rule of law’ originally stems from legal optimistic approaches to international development, meaning that good governance of a country includes that the country is based on politics changed into law, applied by governmental officials on an equal footing and interpreted by judges in cases of conflict.

The rule of law is thus the opposite of the rule of politics, that is: day-by-day changes; but also in opposition to the rule of politics understood as rule of majority or any other sort of power over minority. Rule of law thus also includes a certain

³ A/RES/64/116, see Stefan Barriga & Georg Kerschischinig: The UN General Assembly Resolution on the rule of law resolution: ambition meets pragmatism in Hague Journal of the Rule of Law 2: 253-258, 2010

element of binding and limiting state or firm powers through e.g. constitutional or globalised fundamental rights for individuals, for groups, for non-physical values, for nature... Basically it is fair to say that the very concept the rule of law is linked to an understanding that it is both possible and worth while to decide norms before conflicts arise and to identify structures and procedures for conflict resolution before conflicts explode, that is: the rule of law-thinking somehow is opposite to a pragmatic approach to life, based on the understanding that pragmatism is good for those who are fit to fight their case, but not necessarily for the widows, for those with no parochial structure behind them, for the foreigners among us – to quote the Jewish bible and hereby revealing and referring to a common understanding among book religions: that it is good for man to have norm coming before man (even though a Christian and especially a protestant understanding would argue that law is law and law is secular and man-made then the argument is still a rule of law argument).

Rule of Law is an anglo-american concept, covering however also dimensions from the german Rechtsstaat and the French Etat de droit.⁴

Adriaan Bedner, who has written a central article on the concept, takes as a starting point two central dimensions: the core idea is that not only the citizens, but also the sovereign is bound by the law. The other central dimension is to protect citizen's property and lives from infringements or assaults by fellow citizens. Included herein are thus elements of independence of judiciary, e.g. but also public knowledge on the content of the law; upholding political and civil liberties; not least the habeat corpus rule; establishing central institutions and trying to keep them fair, competent and efficient as well as impartial and independent; combined with governmental powers being embedded not only in politics, but in legal frameworks, that is: governments that are law-abiding.

All good, is it not? One could however change the question from asking about the rule of law to becoming a question on the rule of which law.⁵ That is: adhering to a formal and substantial concept of the rule of law as a globalized norm tend to become an instrument to suppress political decisions, being they as democratically legitimized as they might, no matter whether local, regional or international. Question is whether the concept of the rule of law has become a tool for globalisation in the hands of law firms serving big firms with a capital huger than any national state – or whether it is

⁴ Adriaan Bedner

⁵ Jiri Priban

actually possible to keep up a protection of the individual, of the employees, of the private land owners etc on basis of this concept.

4.

Many research questions could be formulated in order to investigate globalisation of law questions. One obvious of course databased analyses of the use of the concept rule of law as tools for globalisation of powers. That could be done by analysing concrete court cases, especially from ECJ, but I think it is more relevant to follow the money and see how the concept rule of law is used by global capital.

Another way of analysing globalisation of law through a conceptual approach such as this on the rule of law could be to analyse journals and text books in two different manners: impact of general journals such as the new Hague journal on the rule of law – and to analyse discursive changes in a certain field with the help of a conceptual tool such as the rule of law. In my law of religion field a relevant example could be to see how arguments from different national, regional and international settings are globalised with the conceptual help of rule-of-law-norms. I am sure same type of analysis could be done within your fields - .

Thank you.