From Rule of Law Promotion to Rule of Law Dynamics: Conclusion

Randall Peerenboom
Michael Zürn
André Nollkaemper, University of Amsterdam
If one instead understands the rule of law as a latticework of ideals, the findings are as mixed a bag as the definition of rule of law itself (see also Kleinfeld 2006: 59). The ICC’s intervention unleashed dynamics in Uganda that are in synergy with some aims of the rule of law (supremacy of law and accountability), while in tension with others (equality before the law, separation of powers, fairness, and legal certainty).

Many of these rule of law dynamics have not been brought about by the ICC alone. Contrary to what some advocates say it should be doing, the ICC has refrained from engaging in rule of law promotion activities, for instance “capacity building,” in Uganda. Rather, the ICC’s involvement has triggered the attention of, and created space for, organizations with normative agendas. Local organizations used the national controversy around the ICC to push for transitional justice in Uganda. International NGOs, in turn, sought and built alliances with Ugandan organizations, which they supported financially in exchange for promotion of their agenda on transitional justice or, more specifically, international criminal justice.

However, hardly any of these norm entrepreneurs aimed at promoting the rule of law in its broad definition. Rather, they emphasized the importance of one element of the rule of law: accountability to law. In fact, their focus was more on the preferred means, namely the ICC regime, than on the aim of accountability itself. For these norm entrepreneurs, the ICC regime is an end in itself and an end that is so important that its pursuit justifies almost all means, even downplaying constitutional provisions.

If it is genuinely desired to enhance synergies and reduce tensions between the ICC’s operations and the promotion of the rule of law in the states in which it intervenes, a first prerequisite would be to drop the assumption that ICC intervention by definition enhances the rule of law at the domestic level. A second prerequisite would be to shift the focus from instruments to aims: Rather than assuming that an ICC Act and a new court will address impunity, the first question must be what the real causes of impunity are in the situation concerned. The next question must be how in the situation concerned such impunity is best addressed. Finally, it must be recognized that the promotion of an ideal that in itself contains several ideals may result in the promotion of some ideals to the detriment of others, at least in the short term. This recognition is no apology. It does make the procedure by which rule of law ideals are prioritized all the more important. Because the rule of law is a latticework of ideals that will never be secured if not continuously pursued, the pursuit itself should respect the values embodied in the ideal.

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