INTRODUCTION
The International Rule of Law: European and Asian Perspectives

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The majesty of law is to achieve what centuries of blood and iron were not capable of

The concept of rule of law was originally developed in the context of domestic legal systems characterised by a high degree of centralisation, institutionalisation and hierarchisation. This is particularly true if we have regard the European traditions of the rule of law and its variants: the French État de Droit, the German Rechtsstaatlichkeit and the English Rule of Law. In these three legal traditions, the rule of law mainly served as a principle to discard the “unbridled, unaccountable royal power” of the Monarchs. (2) The rule of law implies that the society is governed by law and that the ruler can only make his decisions according to the law while also being submitted to the law, himself. It functions therefore as the ultimate barrier against the rule of man, the arbitrary power of the ruler as well as unlawful violence. It furthermore provides the citizens with concrete instruments to force state organs to act in the limits set by the law.

During the last decade, international practice and scholarship has increasingly seen efforts to apply the concept of rule of law to the international legal order. (3) When considering the linkage between the rule of law and

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(1) Walter Hallstein, Die Europäische Gemeinschaft (5th ed.), Econ Verlag, 1979, p. 53. In the text: “Die Majestät des Rechts soll schaffen, was Blut und Eisen in Jahrhunderten nicht vermochten.”


(3) See for instance Michael Zürn, André Nollkaempfer and Randall Peerenboom (eds), Rule of Law Dynamics. In an Era of International and Transnational Governance, Cambridge University
the international rule of law, it quickly appears to be important to highlight the very different nature of the state and international orders. Contrary to states the international order has, in fact, a weak degree of institutionalisation, lacks a centralised and hierarchical set-up and is rather of a horizontal nature. (4) Scholarship has therefore focused on the relationship between the rule of law and the international rule of law and has tried, in this process, to identify the components of the international rule of law. (5)

Focusing on the international rule of law, this dossier follows the distinction endorsed by the United Nations (UN) since 2006 between the rule of law at the national and international levels. (6) On the one side, debates on the international rule of law relate to the international community’s concern to tackle rule of law shortcomings within states more particularly in the context of post-conflict situations. (7) On the other hand, the international rule of law relates to the enhancement of the rule of law in inter-states’ relations (8) and the compliance of international organisations to the rule of law. (9)


(5) See for instance: Chesterman distinguishes three core elements of the international rule of law: (i) the government of laws and the absence of discrimination in the application of international law; (ii) the supremacy of law, which comprises the recognition of the jurisdiction of the International Court of Justice (ICJ); and (iii) the equality before the law, which implies the necessity of equality in the decision-making process of international organizations. See for another attempt to define the requirements for the international rule of law, Stephane Beaulac: (i) The existence of a system of positive laws; (ii) the promulgation and publication of the laws; (iii) the application of the universality and sovereign equality principles and (iv) the adjudicative enforcement of the norms of the international system.


In that context, it is arguable that a consensus on what Tom Bingham calls “one of the greatest unifying factors” (10) in a world of diversity, has now emerged. The elusive nature of such international consensus becomes nevertheless clear, though, when one notes the absence of a common understanding of the concept. As argued by S. Chesterman, “the content of the term ‘rule of law,’ (...) remains contested across both time and geography”. (11) In this respect, the difficulties to reconcile the so-called “Western” understandings of the rule of law with other conceptions appears to be a major impediment to the emergence of a common/universal perspective on the rule of law. (12) Regional or country relativism would therefore partly explain the differences in understandings of the rule of law. The diversity in understanding the rule of law was moreover recognised by the UN General Assembly in September 2012 when it adopted by consensus the High Level Declaration on the Rule of Law at the National and International Levels. (13) The Declaration indeed refers to “the broad diversity of national experiences” in the area of the rule of law. (14)

In order to understand this diversity, rule of law theories generally use classification tools to describe and explain the stage of rule of law development within a given country. Essentialist perspectives on the rule of law draw a distinction between formal and substantive versions of the rule of law, in other words, between “thin” and “thick” versions of the rule of law. (15) In the words of Hans Corell, the former UN Under-Secretary General for Legal Affairs and Legal Counsel, the distinction between thin and thick understandings of the rule of law can also be applied to the rule of law at the international level. (16) It will therefore be part of the analytical toolbox of this dossier. “Thin” rule of law is limited to a minimalist version of the rule of law and includes the primary conditions to have a legal system. The eight principles of legality emphasised by Lon Fuller are often the fundamentals that are referred to. They include a need for general rules (1), publicity (2), non-retroactivity (3), understandability (4), consistence (5), pos-

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(12) R. E. Brooks shows that recent attempts to promote the rule of law have not proved very successful because they failed to take enough into account the local norms and culture. Rosa Ehrenreich Brooks, “The New Imperialism: Violence, Norms and the ‘Rule of Law’”, 101 Michigan Law Review 2275, 2003, p. 2322.
(14) Ibid., para. 10.
sibility for practical implementation (6), stability (7) and good enforcement of the norms (8). (17) Thick rule of law incorporates “elements of political morality” (18) that vary depending on the specificities of the legal, political and social structures of a state. In the West, this political morality is closely connected to the foundations of liberal democracies: “it is a morally cherishable expression of commitments to the dignity and equality of individuals”. (19) Thick understandings of the rule of law in the European Union (EU) and the United States, in fact, tend to mirror the connections and interdependence between rule of law, democracy and human rights. (20) In addition, the definition provided in the Report of Secretary General Kofi Annan on the “Rule of law and Transitional Justice in Conflict and Post-Conflict Societies” in 2004 also incorporates a thick version of the rule of law. It reads as follows:

“A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” (21)

The purpose of this dossier is to take stock of the European and Asian (Japanese, Chinese and Indian) perspectives on the rule of law at the national and international levels. It addresses therefore both the promotion of the rule of law within domestic legal orders and the rule of law as being applied in the relationship between states and by international organisations. Endorsing a legal pluralist approach, the articles describe the various understandings of the rule of law at the national level in order to understand the European and Asian perspectives on the rule of law at the international level. It takes a comparative perspective to identify the differences but also the similarities between the various perspectives on the rule of law. Every chapter includes a case study focusing on a specific field of law and/or international organisation. In addition, every contributor relates its specific focus to the general debates and emerging consensus on the rule of law at the national and international levels. In a context where the notion has become a “buzzword” in legal discourse and is used without any conceptual rigor, this special issue

(20) The “Holy TRINITY” formed by the rule of law, human rights and democracy is recognized as the three constitutional pillars of the European Union (Art. 4 TEU) and as the three main strategic priorities of the EU External Action (Art. 21 TEU).
aims at conducting further research on the theoretical concept of rule of law from different legal perspectives and cultures and applying it to international law and international organisations.

1. — WHAT ELEMENTS OF THE RULE OF LAW CAN BE PUT TO USE AT THE INTERNATIONAL LEVEL?

The concept of rule of law, as well as the normative principle which embodies it, were developed in the context of the formation of the modern state. In light of the foregoing, the question arises whether and to what extent a concept such as the rule of law can simply be extrapolated from the national to the international levels. An extrapolation of the national to the international levels must confront the horizontal character of the current international legal system against the vertical character of modern state legal systems. Against this backdrop, Nicolas Hachez explains why the attempts to translate the rule of law, as understood at the national level, to international affairs have proved unsatisfactory. He points to the necessity to take a more flexible approach that views the rule of law as “the reunion, within a rule system claiming to govern a given social order, of the dimensions of legality, effectiveness and legitimacy”.

2. — THE EU AND THE PROMOTION OF RULE OF LAW IN POST-CONFLICT SITUATIONS: THE CASE OF KOSOVO

The rule of law is a cross-cutting issue in both EU internal (Art. 2 TEU) and external policies (Art. 21 TEU). On the one hand, the rule of law acts as one of the three constitutional pillars on which the organisation was funded after the Second World War. (22) The importance of the rule of law as one of the fundamental values of the EU was recently reaffirmed in the European Commission Communication “A new EU Framework to Strengthen the Rule of Law”. (23) This communication testifies to the ongoing reflection to answer the systemic rule of law crises that have hit several EU Member States, namely France, Romania and Hungary. On the other hand, the rule of law is a strategic priority in EU external action and simultaneously constitutes a good entry point to reach other central EU external action objectives such as the promotion of democracy, the protection of fundamental rights


but also the promotion of sustainable development, social stability, peace and security. (24) In this context, it is arguable that the EU promotes a substantive version of the rule of law, that goes beyond the simple protection of the principle of legality and is also closely intertwined with the promotion of democratic principles and the protection of human rights. (25) In her article, Dr. Joëlle Hivonnet provides a practical guide of the EU’s rule of law promotion in post-conflict situations. Taking Kosovo as a case study, she highlights the challenges of shifting from flexible rule of law promotion mechanisms in the context of post-conflict situations to more stringent rule of law promotion mechanisms in the context of Kosovo’s accession process to the EU.

3. — China in the UN Security Council: What are the Implications for the International Rule of Law?

At the global level, the United Nations (UN) has increasingly become pre-occupied with the rule of law. Since 2004, the UN Secretary-General has delivered several reports; the General Assembly and the Security Council (UNSC) have adopted several resolutions on the subject. The 2005 UN World Summit Outcome document identified ‘human rights and the rule of law’ as one of four issues deserving closer attention in UN actions. (26) During the summit, UN Member States repeatedly referred to the importance of the rule of law, from the area of development and investment to human rights. Discussions on the rule of law at the UN led to the organisation of the High-level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels at the United Nations Headquarters in New York in September 2012. It is during this meeting that the 193 UN Member States adopted by consensus a Declaration on the rule of law at the national and international levels after several months of complex negotiations. (27) This Declaration reaffirms the commitment of the international community to support and defend the rule of law and the international rule of law. Taking stock of the Chinese understanding of the rule of law at the domestic level, Matthieu Burnay and Jan Wouters aim at studying the Chinese perspective and contribution to the rule of law at the national and international levels in the context of the UNSC. They argue that

the Chinese stance mirrors the complexity and ambiguity of China’s foreign policy as well as a growing commitment to the international rule of law.

4. — Exporting the Rule of Law in East Asia: Japan’s Experiences from the 1990s to Present

Following a long period of soft legal transplants from Western legal orders, (28) Japan has now become an important promoter of the rule of law in the international sphere. (29) The specificities linked to its history and de facto constitutional order, more particularly article 9 of the Japanese Constitution which states “the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes”, explain to a certain extent the great emphasis put by Japan on the rule of law in its foreign policy. In this whole process, Japan might be appealed to play a central role in a region which is now increasingly challenged by the rise of China. In his article, Dimitri Vanoverbeke explains the background for the “pragmatic, pluralistic and trade-related” Japanese approach towards rule of law promotion in East Asia. He argues that the rule of law promotion contributes to the profiling of Japan as a ‘soft power’ in the region.

5. — The Indian Perspective on the International Rule of Law: Through the Lens of International Agreements on Free Trade

India is a central player in the international trade arena. At the multilateral level, India is a very active contributor to the World Trade Organization Doha Development Round (DDR), the most recent round of international trade negotiations. India is, in fact, portrayed as a “process driver” (30) and


(29) See for instance the statement of the Japanese Ambassador to the UN: “Japan firmly believes that the rule of law is the basic concept for the maintenance of international peace and security and it plays a pivotal role in the prevention of and attainment of peaceful solutions to international disputes. In this regard, Japan continues to attach great importance to the role of the international courts such as the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and the International Criminal Court (ICC).” Statement by H.E. Mr. Kazuo Kodama at the Open Debate of the Security Council on “The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security”, 17 October 2012, available at http://www.un.emb-japan.go.jp/jp/statements/kodama101712.html.

even plays a leadership role in the negotiations. (31) At the same time and in
the context of a stalemate of the DDR, India actively participates in the
international dynamics of negotiating Regional Trade Agreements. (32) It has,
for instance, notably engaged in difficult negotiations of a Free Trade Agree-
ment with the EU. (33) In her article, Rohini Sen identifies the application and
impact of the rule of law concept in India’s Free Trade Agreements, more
particularly in the field of labour rights. She argues that the involvement of
multiple stakeholders and the recognition of legal pluralism are important
drivers “to better integrate international standards and domestic practices
as a step towards the creation of a more diverse, ‘global’ legal system.”


(32) For an overview of the existing RTA’s and those that are still under negotiation, see
ments.php.

(33) On the EU-India Free Trade Agreement, see Jan Wouters, Idesbald Goddeeris, Bregt
Natens and Filip Ciortuz, “Some Critical Issues in EU-India Free Trade Agreement Negotiations”,