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Towards a Global Rule of Law – Global law in the Context of Law and Development Studies

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Abstract

Recent developments in legal and social theory have rendered it necessary to define what we mean by justice and rule of law. Marcelo Neves has contributed to the theory of a rule of law state, for instance, by assessing the merits of Habermasian thought using, a. o., tools of the social systems theory. In this article I will discuss the problem, identified by Neves, that a rule of law state does not always emerge naturally. He talks about the deficiences known in 'peripheric modernity'. As regards development studies, legal issues have made their way onto the agendas since rule of law, democracy and human rights are relevant for realizing almost any social development goal. I will discuss the recent developments on a global level by using materials also from law and development studies. Even more than the Rawlsian or Habermasian concept of justice, the work of Amartya Sen has been influential in these debates. Sen has presented his pragmatic and comparative view about justice as an alternative to the comprehensive theoretical models which cannot be met in the context of the developing countries. The role of rule of law and justice in the development of the societies is further underlined when taken into account of the grand challenges of today. In this article we discuss the role of rule of law as part of UN Sustainable Development Goals (Agenda 2030) and also present the work done by the so-called Venice Commission in this area. One important observation is that the rule of law needs to be embedded in the culture of the society. We face a paradox: in order for the law to work properly, we need to develop a non-instrumental approach towards it.

1. Setting the Scene

In the 1970's and 1980's new winds were blowing in legal theory in Europe. The theory of legal argumentation gained lots of attention as the patterns of legal reasoning were being researched. Neil MacCormick worked out his institutional theory of law, building on H.L.A. Hart's work (MacCormick 1978). In Finland Aulis Aarnio coined the approach he called analytical hermeneutics, which tells that the ideas presented drew both on analytical philosophy as well as the new rhetoric, and a reading of the understanding of the so-called life world in Wittgenstein, as mediated by G.H. von Wright (Aarnio 1987). The point was not only to elaborate

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the conditions for well-reasoned legal decisions, but also to understand under what conditions the decisions deserved to be called rational. In a human setting, the light of reason could never fully expose all that we believe in and take for granted.

The interest in legal reasoning grew out the understanding that legal decisions not only are technical items which need to be formally correct, but which also incorporate an understanding of justice. People expect the courts to apply legal norms in a decent manner, thus showing that they deserve the position of authority granted to them. Giving well-reasoned decisions addresses the community of the people in a particular way and enables a debate about justice and legitimacy of the legal system. In the Continental-European legal tradition the courts are not strictly bound by case law but seek to make the best out of the pieces of legislation and other legal sources, and further contribute to systematic nature of the law. Legal research, if it adopts the internal point of view as suggested by H.L.A. Hart and many others, shares this starting point and seeks to interpret the legal system as a whole. Legal research serves thus in its way the same goal of promoting justice.

Towards the 1990's the ambit of the legal theory scholarship was further extended to be looked within the broader frames of a theory of a democratic state which would deserve the name *Rechtsstaat*. We could say that Robert Alexy's, who first treated the theory of legal argumentation followed by a study on the application of constitutional rights provision, laid the ground for this work in Europe (Alexy 1989; idem 2002). Jürgen Habermas, who got interested in the role of law in the governance of society, presented a comprehensive synthesis of this view in his *Between Facts and Norms* (Habermas 1996). Discourse ethics gave the frame for discussion on rationality and legitimacy. John Rawls updated his view on the nature of political community in his Political Liberalism, introducing the term overlapping consensus (Rawls 1993). The topics of law, democracy and justice were very much at the heart of the debates. Law was understood to incorporate and express basic societal values at the same time as it also serves instrumental policy purposes. Law is both an institution and a medium.

Theory of legal reasoning became more and more looked at in the larger setting of a state (MacCormick called it a law-state) which was in the need of legitimizing its exercise of authority over its citizens, and the theory of a constitutional rule of law state could explain how all this had become possible.[2] Both democratic participation rights as well as the guaranteed basic rights were equally important as granting the legitimacy of state power. Niklas Luhmann, who regarded law as a system also presented his comprehensive view of the role of law in a society (Luhmann 2004).

[2] MacCormick revised his former theory slightly, as the good legal reasoning now was supposed to happen in the context of the fundamental values that we impose on the legal order. See MacCormick 2005: 1.

The move towards theorizing legal argumentation in the context of political philosophy forced the legal theorists to make explicit their underlying presumptions about how much we can build on shared values, and how deep the disagreements may reach. Marcelo Neves, to give an example, criticized Aulis Aarnio for reading too much out of the Wittgenstein's concept of life world; a shared life world does not yet include that the values would be shared, only the rules of the game of how language is being used (Neves 2000: 158-159).

In the Nordic countries, including Finland, the theoretical discussions concerning the legal reasoning could in some sense be carried out without any bigger debates about what rule of law is. The Nordic countries had established themselves as democracies at an early stage and were building their legal systems following an evolutionary path (Jaakko Husa / Kimmo Nuotio / Heikki Pihlajamäki 2007; Pia Letto-Vanamo / Ditlev Tamm / Bent Ole Mortensen 2019). The link to any substantial concerns about whether or not the existing structures were good and suitable for building the context of good legal reasoning was, if I get it correctly, the so-called expectation of the citizens that the authorities would give them legal protection. This, in fact, included that the courts and administrative decision-makers would have to be able to communicate to the people the substantial reasons for applying the law in a certain way. As times had changed, we could no longer just presume that people would regard themselves as simply recipients of paternalistic legal protection. Instead, the legal authorities had to show that they deserved the confidence of the people. And in order to deserve the confidence, convincing legal reasoning was expected.

I would say that in the Nordic countries it was regarded as a fact that the necessary principles of accountability, democratic legitimacy and the protection of the rights of the people already had been established. It was so natural that serious questions were not even raised. As for Finland, the joining of European Convention on Human Rights in 1990 brought to the surface, rather as a surprise, in quite a few areas of law needs for reform. In Germany the situation was different, probably also due to the history of the country, since the Nazi regime had shown how vulnerable a *Rechtsstaat* may be even despite of very strong legal-cultural traditions of legality.

Marcelo Neves has studied the theory of *Rechtsstaat* from the points of view of both Habermasian discourse theory and Luhmannian system's theory, giving the Habermasian theory a more Luhmannian reading (Nuotio 2010). Neves made the observation that the Habermasian *Rechtsstaat*, with its regulated procedures for introducing legislation as well as for applying the legal system in particular cases, may stand for a model in the central modernity, but unfortunately in the so-called peripheric modernity (Brazil) we only find a much weaker version of the constitutional state. The loss of traditional moral views and the increase of complexity in the society has neither triggered a functional differentiation of law nor the emergence of a public sphere which would rest on institutionally generalized citizens' rights. The state has become privatized and its law

instrumentalized as various societal forces may have a say in the legal system which is lacking the necessary autonomy vis-á-vis the other social systems. As a result, the legal system does not follow the processes as they have been designed on the level of the Constitution (Neves 2000: 183-186).

In peripheric modernity forces such as corruption erode the systemic guarantees of enclosure of the legal system (and the political system) since sinister economic interests find their ways into the operations of the legal system. In peripheric modernity constitutionality only remains at a symbolic level serving as a façade legitimation. Such states share most of the legal and political structures with states of *central* modernity, but the lack of actual autopoiesis of the legal and political systems results in grave shortcomings as regards the access to citizens' rights (Neves 2000). Therefore, features of states should not be taken at face value, but tests should be developed to see if they in fact work.

In his later book Neves has offered another look at the issues of shortcomings of rule of law states: transconstitutionalism (Neves 2013). Transnational constitutional orders may create links between legal orders and directly or indirectly help address relevant issues and, at least to some extent, compensate for inadequacies in the domestic order. Constitutional law elements of international or transnational character may be helpful in this regard. For Neves, legal rationality refers to consistency, this is, rules which enable consistent decision-making. Justice, however, adds another layer to the legal rationality since law also will have to be socially adequate. These two features would have to be covered for. Constitution has a special function since it couples structurally politics with law. Neves interprets this structural coupling as a manifestation of transversal entanglement, which makes transversal rationality possible.

The topic of peripheric modernity is today more important than ever. Countries are struggling with problems of rule of law, and not even in Europe, the region of central modernity, can we be sure that a high level of rule of law standards will be met.[3] The issue of ensuring that the principles of rule of law are lived up to has grown to be a major concern for the European union, for instance.

Neves has continuously discussed the merits and limitations of Western legal-theoretical ideals when analyzing law in a setting which is different. A third study, not yet published in English, discusses the role and the abuse of constitutional principles in constitutional law theory and practice in Brazil. A systems-theoretical reading points out that an effort to resort to Dworkinian principles entails risks under such conditions, since the judiciary may adopt a too prominent role, and such practice will not take into account the need for having a debate from a multitude of angles, a demand which is rather natural in a complex modern society (Neves 2019).

[3] As regards the concept of modernity in the European and global context, please refer to (Björn Wittrock 2002: 31-60).

Abandoning the Dworkinian solution along the lines of 'law as integrity'[4], however, does not mean that Neves would be happier with what Alexy has developed, namely, the view that principles should be weighed and balanced, and when they collide, optimizing would be the answer. According to Neves, even this way of dealing with the principles does not solve the problems, since constitutional principles serve to influence rules. He even speaks of a 'diabolical' nature of constitutional principles. Constitutional principles may, for example, weaken constitutional rules. An optimizing and balancing model of competing constitutional principles gets underway "from a subjective or intersubjective superordinate instance, which is able to determine what definitely fits each sphere of life". It thus reduces the perspectives from which constitutional questions are being looked at and simplifies the structure of normative expectations that lie behind them. Neves does not wish to exclude the use of constitutional principles but calls for a moderate use of them.

In Neves's approach, the systems-theory background is becoming rather dominant, since it is precisely this feature which enables him to construct the context in which legal reasoning takes place. A systems theory approach renders it possible to present the historical paths and procedures that have led to the current situation, in which the legal order needs to stand alone, without getting an immediate backup from other sources and systems, such as religion, which would grant the exercise of state power its authority. A "constitution in a modern sense cannot be present in any type of the premodern hierarchical social formation" (Neves 2013: 14). This is the so-called *Ausdifferenzierung des Rechts*. An overtly principle-oriented dealing with constitutional interpretation would risk a de-differentiation of the constitution. Constitutional judges need to face the paradox of the relationship between legal consistency – the argumentation based on rules – and social adequacy of law, based on principles.

The discussion on peripheric modernity is helpful also in another sense. The legal and political traditions outside Europe may namely be in a variety of ways different from what has been the case in Europe. Legal theory and legal philosophy have a long time been rather Europe-centered and mainly only considered Western law. Rule of law, democracy and human rights are all Western ideas, and today we will find states which challenge view that legal and social development should serve a universal goal. An authoritarian model of democracy prevails in Russia, and China defends its legal and political system as having its own characteristics.[5]

2. Theorizing Justice or Rather: Addressing Injustice in Practice?

[4] See Ronald Dworkin 1986.
[5] See, e.g., Christer Pursiainen and Minxin Pei 2012: 114-180.

Rule of law is, as a concept, not innocent. Critical legal studies have attacked rule of law since it cannot provide the justice it claims to be fostering. “While respect for the rule of law is of course not a guarantee of the good society, it is hard to have the good society without it”, writes Sionaigh Douglas-Scott (Douglas-Scott 2013: 274). After having contemplated the dilemma of rule of law and justice after modernity, she makes the move towards Amartya Sen and his idea of justice as a way to address issues of injustice in a non-perfect world. Surely, this approach is rather different from a systems-theory analysis (of law), since within the systems theory, the question of justice would have to be framed as being internal to the legal system (consistency), or if not internal, then it would deal with communication about law, observed as issues of social adequacy.

At the end of the day, the two perspectives may not be completely mutually exclusive. Amartya Sen emphasizes that his views present an opposite approach to a Rawlsian theory of justice, and we could see that much of Western theorizing about justice has been following that originally Kantian path. Even Habermas’s theory of a democratic constitutional state has similar traits, and a Kantian ethos is present in Habermas: law is about self-government of a society.

Sen sees his effort as pragmatic, since it’s not so much about theorizing about perfect institutions, but it is rather of comparatist nature. We can learn from others by means of comparison, and a comparative outlook may help us find solutions to our problems. But it is not completely pragmatic, since the people should always be granted not only food and shelter, but freedom. Maybe Sen is not requesting a completely general list of rights and duties for the people, but the ethos points out to that direction.

Even though Sen emphasizes that he departs from the contraction tradition and also wishes to overcome the limitations of a mere institutional analysis, in fact the difference to what Neves is suggesting may not be that radical. Sen stresses that “Institutions and rules are, of course, very important in influencing what happens, and they are part and parcel of the actual world as well, but the realized actuality goes well beyond the organizational picture, and includes the lives that people manage – or do not manage – to live” (Sen 2009: 18). It seems that Sen indeed talks about justice more in terms of social justice, or, for that matter, social injustice, than about justice as predictability and consistency of legal rules. Be it what it may, in any case the question of social adequacy of legal rules (and principles) brings into the debates the voice of different groups and members of society – and their reflections on law.

Accordingly, we do not even have to have a complete theory of justice, if we only can identify injustices. Such a more modest task sounds in fact reasonable, since rule of law, democracy and human rights all seem to be able to contribute to increased justice, albeit in a rather uncertain way. Douglas-Scott links rule of law to justice and sees its ultimate merit in the ability to set limits to abuse of state power. This is an important point and undeniably this is pretty much what rule of law should be able to deliver.

Sen's approach has met with fierce criticism, which deserves to be mentioned. John Gardner has pointed out that Sen's position is in fact difficult to defend. The accusation that a Rawls-Dworkin type of transcendental institutionalism leads to theorizing about a fully just society but loses the sight of pragmatic and incremental addressing of injustices, may in fact be an overstatement. Not only is it wrong to claim that Rawls or Dworkin would only be perfectionists who cannot discuss incremental improvements. But equally the question could be raised: how do you identify injustices without a theory of justice.[6] It has as well been pointed out that Sen's work does not give room for understanding why justice is not developed, that is, what makes it so hard to be realized (Chimni 2008: 3-22).

We do not have to elaborate our stance here in detail. Against the background of Marcelo Neves' theorizing we could point out that in terms of a modern secular society the expectations of justice are highly diverse and are difficult be met. As in the theory of Habermas, this is one of the reasons why procedural theories of justice are tempting. Be it how it may, a comparatist and a development-focused theory which looks incrementally at issues of justice has some obvious merits. If we think of major problems of today's societies, such as corruption or other abuse of power, they are clearly diffuse and gradual problems that can hardly be made to disappear. A comprehensive theory of justice might be able to be helpful in identifying them, but probably in the most cases we are already aware of the ideals, but just do not how to get there.

3. The Perspective of Law and Development

César Arjona et al make a valid point in claiming that the comparative approach is actually very helpful in avoiding the parochialism and opening our eyes towards the experiences of other societies. A realist comparatist approach enables learning, and it is very helpful in legal scholarship and legal education, since most often we narrow ourselves to the limited experiences concerning our own society. "Sen's efforts to de-parochialise political theory – perhaps the most proximate discipline to legal theory – ought therefore to resonate with those in the legal academy who seek to reform legal education and shift legal scholarship away from its Eurocentric focus" (Arjona 2012: 157). This observation could be linked with the idea that injustices may be experienced by anyone, but lawyers are the profession which has developed a sharp eye on injustice. Thus, even in addressing injustices, in a comparative setting, or even more broadly, lawyers cannot be avoided.[7]

In this current article I wish to make the claim that certain efforts to support the development of the legal orders have triggered an increasing interest in Sen-type of thinking, in which the pragmatic interest to do

[6] See John Gardner 2012.

[7] See Neil Walker's remarks on the role of jurists and legal experts in the making of what we could call global law (Walker 2015).

better dominates. This approach clearly also builds on the comparatist view instead of imposing a straight-jacket, or one-size-fit-all, conception of justice. A pragmatic and development-oriented view also has the advantage that it is easier for us to loosen the ties of our findings and discussions with the Western legal and political history. It deserves also a notice that Sen's understanding of economics is broad, not only covering the narrow field of microeconomics, informed by the theory of rational action. Also, in here we find a pragmatist and realistic approach, which does not exclude the real reasons for our actions, including the role of emotions. Injustice is itself not only a breach of the principle of justice, since it is also deeply felt. We talk about a sense of justice.[8]

One aspect of Sen's thought is that it should make sense to raise the issue of global justice, even though such an idea remains vague, without having to enter into (unrealistic) discussions about a global state, or the like. Even here the approaching of justice through injustice makes sense: the people of the world simply expect that certain biggest issues of injustice should be dealt with, one way or another, and cannot be excluded from the discussions. A pragmatist approach has the advantage of leaving room for such discussions.

A doctrine on the relationship of law and development is, in a modern context, still a rather recent topic. Trubek and Santos, whom we follow here, have drawn a picture of the main lines of how this has been worked out (Trubek and Santos 2006: 1-18). A doctrine was born out of necessity: the experts involved in the international development agencies had to explain for themselves what they were actually doing. This has sometimes been called reverse engineering: legal theory has to be extracted from development projects and from the attitudes of the development experts in running these projects (David Kennedy 2006: 102).

After the World War II, when such activities started in the new setting, the idea was to strengthen the state structures of developing countries. Thus, development of public law was the main target, since a state intervention was regarded as crucial for the general social and economic development. The aim was still to get the economic development underway.

As the second stage, in the 1990's, when the volume of the efforts had raised and the ideological motives became clearer, the emphasis was rather set on supporting the market structures and limiting the state intervention. This phase can be called neo-liberal. Dirigiste economies were instructed to be transformed into market economies, and the emerging market economies would become part of global markets. As regards the need for legal development, the private law was now seen as the priority. Contracts would have to be enforced, IPR protected, etc.

Since 2000, the neo-liberal model has been increasingly contested. The economic legal and reforms, such as the shock therapy in Russia, triggered criticism that neo-liberal reforms did not deliver what they promised.

[8] Cf., for example, Markus Dubber 2006.

It became clear that "markets do not create the conditions for their success" (Trubek and Santos 2006: 6). But it remained still unclear, what the next model could and should be. It had, in any case, became obvious, that the development itself had to be understood in a broader manner.

The third Moment of law and development doctrine seems also to have a link with developments in legal thinking, especially when read together with the famous analysis of the phases of development of law and legal thought since 1850's as this has been presented by Duncan Kennedy in his influential article (Duncan Kennedy 2006: 19-73). The idea is that the core legal ideas represent a mode of legal consciousness, and the development has followed in three partly overlapping phases. The first of them, termed classical legal thought, in the 1850's, was celebrating legal formalism and institutionalized both protection of the autonomy of people as well as the regulation of the market. In the second phase, a consciousness of the consequences of legal practice become more important, and the law was also regarded as a tool for steering society. Social law was introduced and developed. This was indeed a trend in the legal theory of early 20th century. The critique of legal positivism and legal formalism had started, of course already earlier.

The third mode, again, was a reaction to the too dominant instrumentalism, which led to a half step backwards. Thus, the third phase could be characterized as a mode of consciousness which recognizes the policy-relevance of law, but which combines law with non-instrumental concerns, mainly the protection of the human rights of the people as well as an interest in constitutionalism. Such an understanding fits rather well with the rethinking that is necessary in the field of law and development doctrine: instrumentalism had to be complemented with a perspective of rights.

The theoretical approaches seem to indicate that law and development would need beginning to get involved in issues of distribution. The challenge is to elaborate alternative models of development and explore the role law could play in them (Trubek and Santos 2006: 18).

We could here refer back to Sen's ideas. A mere narrow perspective of economic growth clearly cannot measure the real social development which has to include qualities of life that go beyond the most basic needs of having food, shelter and some safety. Whereas Sen had built on his experiences of famine in Bengal in the 1940's, today we face global challenges that need collective action, such as the climate change, pollution, loss of biodiversity, diseases, poverty and many others. Also injustices are linked to the dealing with such global challenges. Some countries may face the consequences much harder than the others. And there may be serious challenges in defending the weakest in societies which have shortcomings in policies of inclusion and in granting of participation rights to the groups being mostly affected. Injustices may appear in smaller contexts as well. We could name domestic violence as an example. An understanding of the various harms that individual freedom could face becomes necessary.

Sen is well aware that human rights if taken as binding legal rights may be problematic since what we actually need is a vocabulary to discuss certain ethical issues in a society. Human rights as legal, universal rights would presuppose global values, but we see that approaches to human rights may differ in various parts of the globe. According to Sen human rights are best to be seen as a set of ethical claims rather than legislated legal rights (Sen 1999: 229).

Much of the law and development theory and practice follows still today pretty much the logic of operation of the Western approach. A market-orientation dominates. Besides the fact that the grand challenges have emerged, or have taken a new shape, we also have new actors who may have a very different agenda. We could name the new foreign policy of China as an interesting example, since also this setting entails a kind of law and development view, albeit somewhat less articulated. Here we mean especially the Belt and Road Initiative launched in 2013.[9] The Chinese alternative seems not to be much less economically driven than the Western counterpart. The development of Chinese law would in itself be a highly interesting example to look at, since China did not much change its political system when it introduced a socialist market economy (Jiang Zemin). In terms of legal developments, the result is a rather complex and diverse legal system which fits only with difficulty any Western traditional model.[10]

Trubek points out that in some sense the law and development movement died out in the 1990's and was replaced by a rule of law movement and a democracy movement. It had become obvious that neither the democracy nor protection of human rights would appear automatically together with economic growth or cultural development, a thesis which comes close to the findings of Marcelo Neves cited above (Trubek 2006: 84).

If at the first stage rule of law was a formalist patent solution which could be imposed top-down, over the years the development agencies started realizing that a more diverse approach be needed. Labor rights, women's rights, environmental concerns would have to be added as well as an access to justice point of view. In general, and a more adaptive and flexible approach aiming at long-term development was to be preferred (Trubek 2006: 91-92). Rule of law became itself an end of development, not just a means for development (David Kennedy 2006: 158). The rule of law emphasis in development may even have been an easy choice – even too easy. Clearly legal issues are more "objective" to handle than economic or political issues, but this is of course not the entire truth. Economics and politics come back if we start thinking about societal development in terms of alternatives, taking into account the distributive effects of various legal regulations.

Since the so-called reverse engineering may be helpful in reconstructing the necessary legal theory behind what the development agencies are doing and believe they are doing in terms of law, and the rule of law,

[9] See, e.g., Lutz-Christian Wolff / Chao Xi (eds.) 2016; Wenhua Shan / Kimmo Nuotio / Kangle Zhang (eds.) 2018.
[10] See, for example, the useful presentation of Ignazio Castellucci 2012.

some observations made by Alvaro Santos on the different conceptions in use by the World Bank are illuminating. He divides the four option by using two criteria for differentiation. First, we have the institutional theory in two versions, one instrumental (exemplified by Weber), one intrinsic (exemplified by Dicey). And second we have the substantive theory in two versions, one instrumental (exemplified by Hayek), one intrinsic (exemplified by Sen). Santos points out that traces of each and every of the views can be seen in the massive practice of the rule of law development projects run by the World Bank (Santos 2006: 257-266).

This analysis is very telling concerning the difficulties to find the right model within an institution which also has considerable economic power to exercise influence on the target countries that receive loans for their development. A formal-institutional approach prevailed in the earlier period, but since mid-1990's, more substantive concerns have been included. The starting of fighting corruption was the first sign of the new era. Corruption was regarded harmful in so many ways that fighting it simply had to be covered by the mandate of the World Bank. Strengthening rule of law was, so to say, a way of fighting corruption (Santos 2006: 273-275).

We do not have to take this brief look at law and development further. It seems that a flexible approach is being called for, if we think about law as a tool for development. The experience tells us that law is central for development, but together with law comes a lot more. For that reason, the local context is so important. Change comes, if it comes, from the inside. Development agencies which have economic power also have the ability to influence the legal developments, but, at the same time, having such influence would require that we really knew what legal development is and how it links with general social development. Many of the discussions circle around the varying definitions and understandings of the rule of law. Even though it does not seem realistic that a truly universal definition could be agreed upon, it seems to be increasingly important have some working definitions as well as some indicators that would tell about progress.

4. Rule of Law in a Global Context

In a time when media wants to have it all, and have it fast, easily comprehensible information sells and distributes well. In 2006, World Justice Project was launched. The world Rule of Law Index has since then become at least one reference telling about where a country stands in terms of international comparison. If one's country does very badly terms of this index, it gets increasingly difficult to claim that the index has it all wrong. Like similar indexes in other fields, the methodologies applied in gathering and measuring the data may be contested, but it seems that rule of law has been taken in a rather broad sense. We read in the most recent report that the rule of law has been understood as a framework of laws and institutions embodying four universal principles: accountability, just laws, open government, and accessible and impartial dispute

resolution. It is also rather worrying that we have at the moment more countries with trend to decline than ones with a trend to improve.[11]

Projects such as this one striving at support and acceptance all over the world risk being seen as Western initiatives. Such worries have some ground, since the key academic expertise on these issues has been found in the leading universities of the US and Europe (Rajah 2015: 360-361). Rule of law as understood by World Justice Project is, however, a dynamic concept which will be developed during the course of the studies. This development has meant, for instance, that the texts are being directed increasingly to the media and to the rule of law promotion industry. Rule of law is being seen as a modifier (Rajah 2015: 365).

We should also note that in fact Amartya Sen's studies have played a role in the formulation of another global index which has its background in the development economics, namely the Human Development Index. Sen has tried to gear the approach to economic development away from the mere measuring of the GDP. The human development relates to a broader notion of human freedom and human capabilities.[12]

A comparatist and developmental approach to law and injustice quite has quite obviously a taste of modernism. At least a strand of discussions of modernity sees Europe as a point of reference for the rest of the world. What happened, when European thought was embedded in local and regional traditions outside Europe, was not a straight-forward reception, but something more complicated. Dipesh Chakrabarty has launched the term Provincializing Europe. For him, "[n]o country… is a model to another country, though the discussion of modernity that thinks in terms of "catching up" precisely posits such models" (Chakrabarty 2008: xii).

It seems natural that the law and development, or, rule of law, agenda has also become part of the discussion on sustainable development (Soininen 2018). United Nation's Global Sustainability Development Goals cover rule of law issues as part of the Goal 16: Promote Just and inclusive societies. The various sub-goals deal directly with issues related to rule of law. We find references to combating of organized crime as well as corruption. Effective, accountable and transparent institutions should be developed at all levels. Decision-making should be responsive, inclusive, participatory and representative, etc.

> **Goal 16: Promote just, peaceful and inclusive societies**
>
> **..**

[11] World Justice Project. Rule of Law Index 2020. https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020, last visited March 12th 2020.

[12] See, e.g., Elizabeth Stanton, Human Development Index: A History. February 2007. Available online: https://scholarworks.umass.edu/peri_workingpapers/85/ , last visited March 12th 2020. On the various approaches to development, see, Trebilcock and Mota Prado 2014, 3-16.

16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all

16.4 By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime

16.5 Substantially reduce corruption and bribery in all their forms

16.6 Develop effective, accountable and transparent institutions at all levels

16.7 Ensure responsive, inclusive, participatory and representative decision-making at all levels

The scope of rule of law seems very broad. The concepts have not been defined, which gives the opportunity to different readings. But what is maybe even more important, reaching almost any of the mentioned goals will require a legal response, one way or another.

We should briefly mention the earlier development on the level of UN policies. Namely, the Millenium Development Goals from 2000 which originated from the UN Millenium Declaration asserted that every individual has dignity, the right to freedom, equality and a basic standard of living that includes freedom from hunger and violence. The targets were set for the year 2015. Reduction of poverty was a priority. The MDGs were of rather typical development policy type. The agenda had been prepared top-down, and law was not on the agenda (Wiik / Lachenmann 2014: 286-288).

In the preparations for the Global Sustainable Development Goals the developing countries had more say, and the drafting procedure was heavier and more carefully designed. Rule of law issues were much debated, and the outcome was more meagre than what many countries had expected. It had become obvious, anyway, that “any integrative and holistic approach to sustainable development required consideration of good governance and rule of law as part of human rights-based approach to sustainable development” (Wiik / Lachenmann 2014: 295). As everyone can imagine, this exercise was not an easy one since there were countries which saw a reference to rule of law as problematic in the sense that it would open up the internal structures for external criticism. Russia, for instance, brought up such concerns (Wiik / Lachenmann 2014: 304, 307).

On the table were three options. The most far-reaching was that rule of law would have been defined as a goal in itself. The second option was to mainstream it as a target or general enabler within other goals or use it as an indicator or tool for implementation. The third option was to treat it as an overarching driver or enabler of development. As there was no general definition of what rule of law means, a mainstreaming of it became challenging. It seems to me that all such problems did not, in fact, prevent many states from insisting on the significance of rule of law, even taken into account that it was difficult to be measured. Indicators would and could be developed.

In some sense the emergence of the rule of law, and the difficulty in establishing it firmly as a goal of itself, reflects the discussions within the law and development studies. Rule of law still is still being approached rather as a means to reach other goals than something worth pursuing by itself. Anyway, it is still an achievement that rule of law has made its way onto the agenda, and the awareness of its significance has grown. Even though this development has not been rapid, it has been substantial. And I regard it important that the pressure to keep it on the table has also come from the developing countries. The level of expectations has simply been raised.

The underlying idea of development as expressed in the UN SDGs is still based on the capabilities approach as was suggested by Amartya Sen, among others. It seems that the capabilities approach, sustainability and rule of law represent a kind of super triangle. Sustainability serves as the main goal whereas rule of law serves as a means to an end. The capabilities approach, again, serves as the ground securing that development is being measured on the level of the wellbeing and quality of life of the individuals.

Since combatting crime was also identified in the UN SGDs as issues to be addressed, it is interesting to see how criminologists see such goals and targets. We need to be mindful of the fact that crime is a political issue and fighting crime may also be abused. Fighting crime lends itself to political manipulation and moral entrepreneurship. For that reason, not everything that bears the name of fighting violence or corruption or terrorism works for the benefit of the people. Criminologists could be helpful in two ways: they could act in a supporting role, instructing the various stakeholders on how to deal with crime in a sustainable way. The other role would be a critical one: help development actors and local stakeholder and policymakers identify attempts to politicize crime issues for self-interested and strategic purposes.[13] Even criminological insights support the idea that a capability approach would be helpful, if the criminologists wish to make the most impact (Blaustein / Pino / Fitz-Gibbon / White 2018: 774).

Fighting crime requires understanding and trusted institutions: “While strengthening democratic institutions and accountability mechanisms may in theory help governments of less-developed countries increase state legitimacy and citizenship participation in co-productive activities to proactively reduce crime, the idea that strengthening the power of criminal justice systems will necessarily reduce crime or promote social cohesion is misplaced. Rather, increasing the state’s coercive control may undermine the rule of law…” (Blaustein / Pino / Fitz-Gibbon / White 2018: 776) Such observations are rather important. Fighting serious crime, such as terrorism or international organized crime calls for particular sensitiveness due to the risk of obvious abuses. It also stresses the need to build on a thick version of rule of law, one which includes effective protection of human rights. This could be understood as meaning that the tougher the agendas for development, the more we need the substantial rule of law commitments. It deserves to be mentioned that

[13] Cf. Blaustein / Pino / Fitz-Gibbon / White 2018: 767-786.

also the Venice Commission has seen thin versions of rule of law rather as distorted interpretations of rule of law. [14] Criminal justice institutions provide, indeed, a crucial testbed for the measuring of the rule of law. It is, in fact, not surprising to see that the first UN document on rule of law indicators focusses solely on issues concerning criminal justice institutions.[15] The approach of the United Nations builds on targets and indicators. On the UN webpages we find annual reports which give details about the development.[16]

5. The Venice Commission Setting the New European Standard

Since 1990s, the Council of Europe body European Commission for Democracy through law, better known as the Venice Commission, has established itself as an influential high-level expert organization supporting the development of constitution law issues on a broad scale. The Commission has an increasing number of members and its services have been used by countries beyond the borders of Europe. We could mention the Central Asian states and some Northern African states as examples. The Venice Commission of the Council of Europe, which started as a consultative body supporting the necessary transformation of the constitutions of the East-European so-called new democracies, has grown almost to become a universal actor in the field, with having a reach beyond Europe.[17]

In 2011, the Venice Commission published its first Rule of Law Report. The aim of it was to be a pragmatic, practical guide which is not connected to any specific theoretical understanding of the State be it German, French, or British idea. "The rule of law is not a theory of the state but a simple, practical guide to the bare essentials power is to be exercised." (Jeffrey Jowell 2012: 14). Remove the essentials, and you will see what follows.

After continuous work, in 2016 the Venice Commission adopted a more extensive document which had the aim to present universal features of rule of law. It follows the line of the UN Global Sustainable Development Goals. The Venice Commission observes that the above-mentioned Target 16.3, committing States to Promote the rule of law at the national and international levels and ensure equal access to justice for all, offers a unique opportunity for revitalizing the relationship between citizens and the State. "This Checklist could be a very important tool to assist in the qualitative measurement of Rule of Law indicators in the context of the SDGs."[18]

[14] See The Rule of Law Checklist, para. 15.
[15] See The United Nations Rule of Law Indicators. Implementation Guide and Project Tools. https://www.un.org/ruleoflaw/blog/document/the-united-nations-rule-of-law-indicators-implementation-guide-and-project-tools/ last visited March 12th 2020.
[16] https://sustainabledevelopment.un.org/sdg16 last visited March 12th 2020.
[17] Cf. Paul Craig 2017): 57-86; Maartje De Visser 2015: 963-1008.
[18] Rule of Law Checklist. Adopted by the Venice Commission at its 106th Plenary Session.

The "present checklist is intended to build on these developments and to provide a tool for assessing the Rule of Law in a given country from the viewpoint of its constitutional and legal structures, the legislation in force and the existing case-law. The Checklist aims at enabling an objective, thorough, transparent and equal assessment." The Checklist is intended to provide a tool for assessing broadly the rule of law developments of any country, with the aim of enabling an objective, thorough, transparent and equal assessment.[19] Although the Rule of law Checklist is tailored for a European context, the ethos of the Venice Commission is also to serve a more universal interest. Therefore, the document refers to developments at global level as well as other regions of the world.[20] A full achievement of the Rule of Law will require efforts even in the more developed democracies.[21]

It is rather interesting to see that the rule of law not only depends on formal legal structures, but also of the legal cultural embeddedness of the commitments that make rule of work real:

> 43. The Rule of Law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture.[22]

We will later come back to this observation that rule of law would have to be embedded in the culture. I would first raise especially another very interesting feature concerning the rule of law Checklist. There is namely a specific mention of that there should legal safeguards against arbitrariness and abuse of power.[23] What are then the safeguards against arbitrariness and abuse of power? The Venice Commission refers to the duty of the public authorities to provide adequate reasons for their decisions, especially when these affect the rights of the individuals. This comes rather close to the expectation to grant legal protection and thus also to earn the respect of the people, that is, the legal community *sensu largo*.

It should have become visible that the development towards defining rule of law in a pragmatic fashion seems, to my mid, interestingly serve the interest of what was earlier called law and development. There is even a Senian touch in it since the approach of the Venice Commission has been precisely tailored to assist in the qualitative measurement of rule of law.

(Venice, 11-12 March 2016), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e last visited March 12th 2020, para 23.

[19] Ibid., para 24.

[20] Ibid., para 32.

[21] Ibid., para 29.

[22] Ibid., para 43.

[23] Ibid., at paras 17, 29.

The law has different faces, and it is important in a variety of ways. Different understandings of rule of law are relevant and continue to be relevant. What is striking that merely instrumental views on law are getting weaker. Rule by law simply is not enough, it presents itself as a distorted version of Rule of Law.[24]

The Venice Commission catches something very important when it says that in fact the most important aspect of rule of law is that it prohibits abuse of power. It is much that just a matter of formal following of rules, or the like. The work of Venice Commission is comprehensive since it also includes considerations regarding how rule of law relates to protection of (human) rights as well as questions of democratic governance. The only aspect which one could regard missing in the Checklist is that there is no discussion about how law relates to sustainability, and only very limited remarks concerning how law relates to development. Venice Commission raises, which is natural, the question of Rule of Law from the constitutive point of view. Venice Commission also indicates that it would be updating its Checklist, which means that new dimensions could appear in the future updates. This corresponds to what we saw in the UN context, with the development goals.

6. Towards Rule of Law and Development in a Global Setting

As regards an understanding of justice I would again refer to Amartya Sen and his proposal of seeing the building up of justice as an incremental project, in which we improve our societies and regulation by reacting to observed injustices. He proposes that freedom and human development would be the ultimate goals and measures of true development. This comes close to what Martha Nussbaum has been talking about it in terms of a capabilities approach.[25] Capabilities and freedoms point out beyond mere utilitarian concerns, and therefore also development of the society cannot be measured solely in economic terms, as GNP.[26]

I believe there is much in this. If we would relate these seemingly separate tendencies to each other, we would see emerging contours. This is in many ways important. It brings about a global justice approach which makes it easier to discuss issues such as climate crisis and how to face it. But I believe it gives a boost to views that human and societal development are indeed very much dependent on what kind of laws we have. And even more so, even dependent of what is our relationship to the laws. The expectation of justice runs through the idea of rule of law if we regard the abuse of power to be its true content.

Rule of law could even be regarded as part of transnational legal order, or, rather, as an object regulated on transnational level. The UN Declaration of human rights could be seen as an expression of such a will. More

[24] Ibid., para 15.
[25] See Martha Nussbaum 2011.
[26] See Amartya Sen 2009.

recently, we could refer to the World Justice Project which has sought to formulate general criteria for rule of law. We should also remember that the UN SDGs even address rule of law at international levels.

The authorities should see their role in a particular way. Jeremy Waldron took up this point in the context of US interrogating suspected terrorists in ways amounting or being close to amounting to torture. State authorities should not seek to maximize their use of powers, but rather be considerate in the ways they treat citizens and human beings more generally. It is about decency, about rule of law. State is different from an individual human being. We should request more from a state.[27]

Since the link between development and law has been highlighted, and the legal system has been seen as significant in development, the debates about rule of law have won a new attention. Marcelo Neves certainly has it right, when he claims that in central modernity the development towards a democratic *Rechtsstaat* has occurred rather naturally – which is not to claim that the development has been easy and predictable.

Working out a globally valid definition of rule of law has proven a difficult exercise, like a search of the Holy Grail. But even though we may not share a detailed view of what rule of law consists of, we recognize certain features that matter. Independence of judiciary, for instance, is clearly not only a precondition and a constitutive element of rule of law, but also a structural condition for the judiciary to carry out its tasks according to the law. It, for instance, does not make sense to reconstruct law on the basis of the way the judges identify and recognize law, if, in fact, other factors are decisive in legal decisions-making.

I interpret the situation so that a social-theoretical understanding of democracy and rule of law have highlighted the structural interdependencies of law as a democratically legitimate form of (self-)governing of the society. This understanding has been rather well compatible with the idea that the rights of the individual, as specified in the constitution and in other legislation, are a necessary element of the legitimate use of centralized of state powers, an element which also works as a feedback mechanism and a control of the exercise of state powers, including the exercise of legislative and judiciary powers.

We should, however, also be mindful of an aspect which is much less obvious, and which is vaguer and more difficult to express. I mean the more humanist aspect of what it means to work as a judge, or as an administrator in a system which deserves the name of rule of law. In some sense, namely, rule of law is also a mindset. This is very much in line of what the Venice Commission was suggesting above when it referred to the necessity to make rule of law part of the culture of the society. Rule of law is, accordingly, at the bottom of it, a commitment to perform one's decisions and actions according to the requirements of law. Jeremy Waldron has spoken about of the dignity of legislation in this same spirit: jurisprudence would need

[27] Cf. Jeremy Waldron 2005.

a normative theory of legislation (Waldron 1995: 644). The rule of law culture needs to be present on the level of the activities of the judges, prosecutors, as well as the administrators who decide on issues concerning the rights and duties of the individuals. This we could call the legal community in the narrow sense.

But this is surely not enough, since the culture of respecting rule of law needs to penetrate the entire culture of the society. A rule of law culture actually becomes manifest only indirectly: it is a culture in which people respect the law and regard the decisions of the courts and others as systematically legitimate, even though they may disagree on the relevant issues in individual cases.

The point is clear: it would namely be very difficult to guarantee a full legal protection without an established and shared culture which stresses the commitment of the actors of the legal system to the basic values of the system itself. This is in fact not to claim that everyone would just have to be moral, or the like. Rather, what I mean is that the final closure of the legal system vis-á-vis sinister interests can only with difficulty be achieved as a product of control or through external rules of conduct. A rule of law when the crucial actors do not share a real commitment to the law with its values and purposes will in any case remain rather vulnerable. I would thus emphasize the constitutive role of law and a non-instrumental approach to law since this will be needed to foster a culture of operation which again can be made to serve utilitarian goals. It may be the case that cultivating the cultural premises is in fact the difficult part of the exercise, if the legal system has deficiencies as concerns its closure due to lack of independence by reason of corruption or political interference, for example.

Rule of law as a mindset may be important in terms of laws functionality. It is precisely the attitude that law can be used as an instrument for the promotion of private interests which threatens the closure of legal system. Law as an institution serves of course the purpose of letting the individuals exercise their guaranteed freedoms and has thus a great value for the individuals. It is, however, important that the public at large also recognizes the merits of legality and rule of law. We could relate this finding also to the way democracy works and becomes real: people need to respect the democratic political procedures as fair and just, since if they lose trust in them, the legitimacy of the entire political system may be questioned.

Relating this discussion back to the issue of law and development gives food for a further thought, which tells something about why strengthening the rule of law frame is not that simple. It may namely be that the general public lacks confidence in the legal system and the judiciary rendering it operational for the right reasons: a lack of rule of law mindset on the side of key legal actors may lead to an even less legalistic culture amongst the citizenry. In a mature and developed rule of law culture the legal actors take the responsibility of cultivating a high and professional standard of legalism, and this enables the development of respect for legality amongst the broader public. In that sense the introduction of formal structures for the promotion of

rule of law is only a first step towards developing a richer and full-blown rule of law, in which the way lawyers act and decide expresses a commitment to rule of law values.

We face in fact a paradox: in order for the law to become functional end efficient as a regulator, we need to develop an attitude in which we see it in non-instrumental terms.

We can now summarize our finding: it may be important, even when we operate on premises of a social theoretical analysis to be mindful of a certain humanistic core experience in the legality and rule of law. The internal perspective of a judge, and also of a legal scholar, contains more than just technical skills in mastering the legal system. This is precisely also the reason why rule by law is not enough. Rule by law lacks the grounding on human rights, democracy, and the culture of the people.

Individual legal decision such as those made at the courts are expected not only to be predictable and consistent with the legal system, but also just in a more material sense. This is the tension every judge has to face. In the setting of a developed rule of law State the courts are able to handle these expectations. In the strong rule of law States, we usually find a long tradition of legalism to further build on. In the developing countries the situation may be different, and it would be unfair just to ask for the people to wait for 200 years to build a similar strong tradition.

Thus, the question is, can such a development be accelerated? This is an empirical question that cannot be answered her. We might be able to monitor the development of certain countries now that international bodies are collecting a lot of data for to know the details of development. What I would suggest is that we should be mindful of the nature of the exercise. Developing a respect for legality is not a simple task, but one which requires time, education, and effort. The good news is, however, that development psychology tells us that we learn law as part of our human development. Learning law is this not something like learning a separate skill. We might thus say that living in a society which is committed to promoting justice and addressing injustices renders it possible for us to develop ourselves as full human beings (Engel 2004).

The grand challenges such as climate change require collective action by many, if not all of the countries of the world. One of the obvious advantages of strong rule of law orientation is that it increases the effectivity of government interventions without hampering the legitimacy of the governance. We may rather say the opposite: governments which fail to address such issues risk the future of their people, and not only them, but also harms the conditions of life of future generations.

In terms of Senian logic of development we could say that the grand challenges also point out new constellations in which injustices may occur. When working further to incorporate questions of sustainability into our basic legal categories and vocabularies we will also have to define more clearly how Rule of Law sits in the requirements of sustainability. One way of thinking of it would be to say that Rule of Law as an enabling

concept enables States to address pressing issues. Rule of Law, democratic participation, and the protection of the rights of the individuals forms a triangle which needs to be promoted. And not only be promoted, it has to be backed up by a belief in justice and a better world. Probably it is not a coincidence that the two discussion, one on development, the other on justice and injustice, both point towards the relevance of rule of law. In order to conceptualize all this, we will have to use some tools of social theory, but we should not forget about the power of thought, and the necessary cultural underpinnings of rule of law.

Our analysis points to the same direction as how the governance scholar Francis Fukuyama sees it. States are needed, and states need to have capacity to deliver. He stresses that institutional development has to grow rather from the inside. He advices: "Policymakers in the development field should at least swear the oath of doctors to "to do no harm" and not initiate programs that undermine or suck out institutional capacity in the name of building it" (Fukuyama 2004: 42). True development comes from the inside. But by learning from the own experiences as well as from others, steps can be taken. The sustainability challenges further underline the capacity requirement as the relevant regulations not only have to be introduced, but also have to be enforced. In terms of state functions, a minimum level is simply not enough, even for the developing countries.[28]

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[28] See the helpful mapping of the state functions, in Fukuyama 2004: 9.

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