

Spring 1999

Introduction: The Rule of Law in the Era of Globalization Symposium

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Recommended Citation

Fidler, David (1999) "Introduction: The Rule of Law in the Era of Globalization Symposium," *Indiana Journal of Global Legal Studies*: Vol. 6 : Iss. 2 , Article 2.

Available at: <https://www.repository.law.indiana.edu/ijgls/vol6/iss2/2>

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Introduction

The Rule of Law in the Era of Globalization

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INTRODUCTION

Discourse on globalization often revolves around whether this phenomenon strengthens or weakens the sovereignty of States. Many writers have argued that the processes of globalization, such as liberalized trade, global capital flows, and new information technologies, erode State sovereignty. Others believe that globalization generally, or particular processes thereof, actually foster a stronger image of sovereignty for States, particularly developed States. At the center of these debates about the relationship between sovereignty and globalization is the role of law. Sovereignty is at the heart of concepts of both national and international law. National law is the expression of sovereign power over a territory and a people. International law emanates from sovereign States, making sovereignty central to the substance and dynamics of international law.

Thus, the potential for the rule of law nationally and internationally often finds its way into the analysis of globalization and its consequences. Efforts by international organizations, such as the United Nations and the World Bank, to improve laws and legal systems around the world have heightened the practical and theoretical importance of rule of law analysis in the global age. The Articles written for this Symposium contribute to the ongoing discourse about the future of national and international law in the era of globalization.

THE ARTICLES

The first Article, by Kanishka Jayasuriya, argues that the traditional distinctions between national and international law are breaking down through

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the development of global regulatory networks between governments and between agencies of governments.¹ Jayasuriya believes that the erosion of traditional concepts of national and international law can be seen in the phenomena of the nationalization of international law and the internationalization of domestic law through the dynamics of global regulatory networks. Globalization is, thus, stimulating fundamental changes to the rule of law nationally and internationally. Jayasuriya also thinks that underneath these changes to the notion of the rule of law are more profound transformations underway in the nature of sovereignty and statehood. Globalization forces, particularly economic ones, are erecting a polycentric global legal order that is replacing the conceptions of law prevalent in Westphalian notions of sovereignty and State interaction. The polycentric global legal order is being built through global network governance not through traditional international law. Jayasuriya believes that the rules emanating from these global governance networks cannot be easily accommodated by traditional notions of national and international law. Under this perspective, globalization is working revolutionary changes in the nature of law that necessitate similar conceptual transformations to understand the relationship between globalization and law.

Susan Marks's Article focuses on international law.² She notes that the end of the Cold War produced a movement of renewal for international law after that dark age when it was a victim of superpower rivalry. This renewal movement seemed to promise a new era where the rule of law would be a more meaningful concept in international relations. Taking her lead from analysis by David Kennedy,³ Marks turns a skeptical eye on international legal renewalism in connection with the promotion of worldwide democracy. According to Marks, embedded within international legal renewalism are ideological preferences for capitalism and democracy that are advanced through international law primarily at the behest of powerful liberal democracies, such as the United States. However, the result is often what Marks calls pseudo-capitalism and low intensity democracy, both of which represent superficial turns toward the prevailing ideology influencing

1. Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 *IND. J. GLOBAL LEGAL STUD.* 425 (1999).

2. Susan Marks, *Guarding the Gates with Two Faces: International Law and Political Reconstruction*, 6 *IND. J. GLOBAL LEGAL STUD.* 457 (1999).

3. See David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 *HARV. INT'L L.J.* 373 (1991).

international law. Underneath the rhetoric about the renewal of international law and the democratic rule of law domestically remain vast economic inequalities, neo-authoritarian rule, and the deepening influence of hegemonic power. Marks analyzes how international legal renewalism constructs and applies international legal principles in the context of countries in transition toward market democracy. Formalism, ambiguity, and mystification characterize the use of international law in the renewalist vision of market democracy. Rather than accept this renewalist vision, Marks explores whether an alternative to prevailing renewalism can be found for international law.

Bruce Markell takes us in yet another direction by looking at the rule of law in the era of globalization from the perspective of someone involved in law reform efforts in Indonesia.⁴ Markell notes how deeply ingrained the rule of law concept is to American lawyers, but his experiences working on international commercial law reform projects in Indonesia taught him that the rule of law concept is not as prominent globally. He begins by setting out what he calls the principles of the rule of law: the need for textual rules of law, the need for the applied rule of law, and the need for the rule of law to be a cultural norm. Markell then focuses on the penchant of the World Bank and the International Monetary Fund to require loan and aid recipients in the developing world to adopt Western-style commercial law as a condition of receiving help. This emphasis on Western-style commercial law contains assumptions about the importance of establishing the rule of law in developing countries in the face of the pressures exerted by global economic and capital markets. Key to this emphasis on Western-style commercial law is the transparency, certainty, and efficiency it promotes in economic transactions. In addition, “[c]ommercial law reform . . . signals not only legal and economic certainty but also commitment to the rule of law more generally.”⁵

But, as Markell’s experiences in Indonesian law reform suggest, the mere existence of textual rules of law based on Western models does not produce the rule of law. Corruption remains a huge problem in many societies because it undermines the rules and produces legal and economic uncertainty, which global markets punish. Corruption is not, however, an easy problem to eliminate as cultural assumptions and dynamics often support practices that are corrosive to the rule of law.

4. Bruce A. Markell, *A View from the Field: Some Observations on the Effect of International Commercial Law Reform Efforts on the Rule of Law*, 6 *IND. J. GLOBAL LEGAL STUD.* 497 (1999).

5. *Id.* at 504.

The specific focus on commercial law reform reveals the deep cultural assumptions built into the concept of the rule of law that simply do not transfer easily to non-Western nations. Even so, Markell thinks that the harsh disciplines on governments imposed by the operation of global capital markets may do more in the long-run to promote the rule of law than anything else. The rule of law attracts capital; and processes of globalization, such as new information technologies, allow people in developing countries to access more information, models, and precedents on which to build rule-of-law economies and societies. As Markell observes, “[w]hile ‘making the world safe for securitization’ is not a ringing slogan, the seemingly obscure realm of commercial law might provide fertile ground for planting the seeds necessary for the creation of the rule of law.”⁶

CONCLUSION

The Symposium’s Articles raise and analyze a myriad of issues flowing from consideration of the rule of law in the era of globalization. The Articles ask us to think carefully about how globalization affects national and international law. While Jayasuriya sees some radical changes in the making, Marks wants us to consider how much rule of law thinking masks continuing problems and divisions within international relations. In addition to the important theoretical aspects of the fate of the rule of law, Markell reminds us that rule of law initiatives are also intensely practical in confronting very basic questions about law, its application, and its cultural foundations. Markell’s view from the field captures both Jayasuriya’s theme of exciting change and Marks’s theme of disturbing continuity. None of the authors who contributed to this Symposium pretend that their individual or cumulative analyses exhaust this important topic. It is our hope that this set of Articles encourages others to focus more analysis on the fate of law in the global era.

6. *Id.* at 510.