In memoriam
Kari S. Tikka
1944–2006

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Rule of law principles in international reconstruction

Introduction

This article is based on my latest book, *Prospects of the Rule of Law* (2005), on a keynote speech delivered in New York on 5 May 2006, and on my personal experiences of international judicial cooperation. I have chosen this subject for two reasons. The first reason is that the multitalented professor, our deceased friend *Kari S. Tikka* participated frequently in many international congresses and published comparative studies. The second reason is that he very often visited New York and especially liked Manhattan as his "home island".[1]

It is worthwhile to begin with a definition of the rule of law. Underlining the principle of legality is too technical an approach to the concept. In the same way, respect for human rights is only one element of the rule of law. Therefore, it is necessary to look into the legal developments of society more analytically.

Although we are familiar with the principle of the rule of law, it is not easy to define as a concept. The rule of law should not be defined too narrowly, by referring only to specific sectors of activity, such as the police, legislation, or free competition. A more balanced approach to the concept is needed, taking into account the different stages of development of the rule of law. In an address to the UN General Assembly on 21 September 2004, Secretary-General *Kofi Annan* noted that the rule of law starts at home and that the concept is not enough; laws must be put into practice as well.

In respect of the development of the theory, it is sufficient to note that three stages may be distinguished: 1) *classical rule of law*, referring to the emergence of the principles, 2) *democratic rule of law*, underlining the role of participation and common laws, and 3) *the rule of law in social context*, paying attention to the social functioning of the law.[2] We do not need theories, but a functioning legal system. This concerns taxation as well, and serves as the vision of my article.

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[1] I have discussed the issues in my latest books, The Rule of Law (2004) and Prospects of the Rule of Law (2005), Helsinki, Edita.

[2] Kaarlo Tuori: "Four Models of the Rechtsstaat", in The Finnish Constitution in Transition, The Finnish Society on Constitutional Law (1991), p. 29, argues that the democratic Rechtsstaat presupposes a constitution based on democracy and fundamental rights but, in addition to this constitutional demand, also requires an active and independent civil society.

H.D. Tjeenk Willink, the Vice-President of the Raad van State, estimates the development of the rule of law in the Netherlands as follows. He divides the subject into three topics: The classical liberal concept of the rule of law, democracy and the rule of law, and the social dimension of the rule of law. See a report published by the Dutch Scientific Council for Government Policy (2002).

The concept of the rule of law

A modern legal system can be presented as a multilayered pyramid: Changing legal norms at the top, supporting principles in the middle, and common values on the bottom. The principle of legality has been considered a distinctive mark of the rule of law. A symbolic functional model of the rule of law is like "a house built on solid ground". The rule of law can be analysed on the basis of four variables – the four corners of the house:

– the principle of legality
– the balanced separation of powers
– the implementation of fundamental and human rights
– the functionality of the house from the point of view of its "residents".

It is not enough to speak highly of the rule of law, but the requirements of clear laws, good administration, and access to justice must also be reality. It is essential to look at things from the perspective of the people, and not from that of the institutions. Modern constitutional law and political science do indeed highlight the significance of human rights and fundamental rights, and of rights and obligations.

The State, power structures and institutions are relevant tools for the purpose of constructing a balanced and functional legal system. In the light of my experiences of international cooperation, I would say that the symbolic reference to a house, with its four corners, provides a good basis for the analysis of the legal development of society, and a lasting foundation for various development programmes.[3]

The development of the rule of law is tied to its national, historical, and cultural background, and there are significant differences in legal thinking between different regions of the world. The influence of religious and social circumstances is of great importance. Islam and the Koran are still at the core of the religious and social identity of Muslims. We can also see differences between the Nordic pragmatic, the American federal liberal, the British Parliament-oriented, the Continental European normative constitutional, the Eastern European post-socialist formal, the Russian "democratic federal-governed", the Chinese hierarchical, and the African poverty- and instability-related systems.[4]

These rough descriptions also reflect differences in the attitudes towards the principle of the rule of law. One worldwide change can be seen in the attitudes towards terrorism. In some countries, the recent legal reforms, aiming at supporting the fight against terrorism and security arrangements, have switched the focus of legal thinking from the traditional ideology of liberty and citizens' rights towards a security-oriented approach.

In order to understand the differences, it is important to examine cultural and social conditions, to place the development of the rule of law in a social context. In certain studies, for

[3] See Prospects of the Rule of Law (2005) p. 5.
[4] For regional differences in the development of the rule of law, see The Rule of Law (2004) pp. 108 ff.

example, an interesting conclusion has been drawn concerning Africa where there are countries with both statutory law and common law traditions. In the combat against corruption and misadministration, education and access to information have more relevance than the basic differences of the legal systems. I believe, however, that it is easier to export elements of statutory law systems than common law systems to developing countries, e.g. because common law systems are based on long traditions of case law.

The concept of the rule of law has also been used in several international contexts, as a criterion for accession to human rights conventions, and for membership of certain international organisations, for example the European Union, and also as a precondition for several development cooperation programmes.

In connection with the latest enlargement of the EU, it was interesting to see how the original, very general political criteria (democracy and the rule of law, human rights, respect of minorities), a part of the so-called Copenhagen criteria, were given more concrete contents during the progress of negotiations. In the end, the issues discussed included deficiencies in legislation, the functioning of the administration, the structure of the judiciary, the length of proceedings, corruption, etc.

Maybe the rule of law is now addressed in more practical terms even in Europe, in the place of birth of the rule of law principles. However, some scholars have raised the question of whether some kind of a double standard applies in Europe: New Member States of the EU are subject to strict scrutiny, while there are even greater deficiencies in some of the old Member States, in their treatment of minorities, for example.[5]

Significance of the rule of law under special conditions

Before discussing rule of law principles in international reconstruction, I wish to draw attention to another pertinent issue, that is, preparedness for crises. In a state of emergency, the authorities must be equipped with legal powers to carry out exceptional measures. Various legal provisions may be needed. In order to find balanced solutions, it is essential that legislation and procedures are planned and prepared under normal conditions.[6] This way, it is possible to avoid arrangements that would be inconsistent with international human rights obligations or rule of law principles.

Terrorism constitutes a great threat to the development of the rule of law. However, even in this respect, it would be regrettable if action against terrorism were to lead to the neglect of human rights duties or otherwise impede the addressing of human rights violations.

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[5] Peter Vermeerch: "Ethnic mobilisation and the political conditionality of European Union accession: the case of the Roma in Slovakia", in Journal of Ethnic and Migration Studies (2002), pp. 85–89, assesses that in this way the EU implicitly signals that not even the applicant countries have to take the protection of minorities seriously.

[6] Kaarina Buure-Hägglund: Suomen kriisilainsäädäntö (2002), Helsinki, WSOY, p. 4–13, has examined the emergency legislation of Finland.

The UN, recognising that human rights violations often generate support for terrorism, has prepared a three-part programme to counter terrorism, to be followed in UN operations (2002). The three parts of the programme are 1) to dissuade disaffected groups from embracing terrorism, 2) to deny the groups or individuals the means to carry out acts of terrorism, and 3) to sustain broad-based international cooperation in the struggle against terrorism.[7]

Post-conflict peacekeeping

These are also activities of the United Nations Development Programme (UNDP). Although that organisation is not as such responsible for peacekeeping, post-conflict stabilisation is an essential goal of its activities. The need for crisis management has increased significantly during the past decades (Cambodia, El Salvador, Namibia, the Balkans, Afghanistan and Iraq). Today, there are two quite extensive UN post-conflict governance operations in place: In Kosovo (UNMIK) and in East Timor (UNTAET).

Finland has wide experience of peacekeeping operations. We have also been able to follow closely the operations and mediation efforts (e.g. in Aceh) of the Crisis Management Initiative (CMI) led by a former President of the Republic of Finland, Mr *Martti Ahtisaari*. For the CMI, it is important to limit its own role consciously to the facilitation of talks, as it wishes to uphold the quality, impartiality and transparency of its own actions. The capacity, skills and resources of a larger base of organisations and governments would also be available. An outside facilitator can help the conduct of the negotiations, but little can be done if the parties do not have enough willingness to find a peaceful solution.

I will now address *the Aceh negotiations* on the basis of information I have received from the CMI. The Government of the Republic of Indonesia and the Free Aceh Movement (GAM) signed a peace agreement in Helsinki on 15 August 2005 after a negotiation process facilitated by the CMI. The agreement provides hope that a lasting peace can be achieved in the tsunami-ravaged Aceh, where the conflict had been going on for nearly three decades.

Aceh has seen various episodes of conflict since the establishment of the Republic of Indonesia. The Free Aceh Movement first emerged in 1976. The CMI-led process was not the first time for the parties to come around the same table. The previous negotiation process to end the conflict, facilitated by the Swiss NGO Centre for Humanitarian Dialogue, started in 1999 and led to a ceasefire ("Humanitarian Pause") in 2000 and to the signature of a Cessation of Hostilities Agreement in December 2002. The process broke down in May 2003, and the CMI-led talks starting in January 2005 were the first since then. The previous efforts contributed to the success of the Helsinki peace process.

The negotiations covered issues such as self-governance, political participation, economic relations, amnesty, human rights and justice, security arrangements and external monitoring.

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[7] See United Nations – General Assembly/Security Council 2002.

The commitment of the parties to implement the agreed compromises on these issues was codified in a Memorandum of Understanding (MoU) that was signed in August 2005. The implementation of the MoU is monitored by the Aceh Monitoring Mission (AMM), established by the European Union, Norway, Switzerland and five ASEAN contributing countries (Brunei, Malaysia, Philippines, Thailand and Singapore).

The agreement has already brought about significant developments in Aceh, including the Indonesian Government withdrawing considerable military and police forces from the region and facilitating the establishment of Aceh-based political parties. In a parallel process, the Free Aceh Movement (GAM) undertook the decommissioning of all armaments and the demobilisation of troops.

The agreement also foresees the promulgation of a new law for the governance of Aceh (at the moment under debate in the Indonesian Parliament in Jakarta), the granting of amnesty to GAM members and political prisoners (concluded for the most part, some disputed cases exist), the reintegration of former combatants into society, the establishment of a human rights court and a truth and reconciliation commission for Aceh.

The key factors contributing to success, as I have understood, were the following:

An important principle of the negotiations was that the process aimed at "a peaceful solution with dignity for all." The parties as well as the CMI as the facilitator believed that a lasting and workable solution has to be based on a win-win situation and be dignified for all the actors.

Furthermore, it was crucial that the peace agreement was followed by a credible international monitoring mission ensuring that both parties implement their obligations. The Aceh Monitoring Mission (AMM) was, in the MoU, given quite wide powers to rule on breaches of the agreement and to settle disputes. It was important that the parties did not have a de jure or de facto veto over the decisions made by the AMM.

Bosnia and Herzegovina

Let us take another example, Bosnia and Herzegovina, whose constitution was adopted as an annex to the Dayton Peace Agreement (General Framework Agreement for Peace), which ended the hostilities between the Bosnians, Serbs and Croats in 1995. This setting was unique in terms of constitutional law, as the constitution is not only a constitution, but at the same time it is part of an international agreement. *Kaarlo Tuori* has pointed out[8] that the constitution, as an element of the peace agreement, has not undergone such a democratic process as is usually required for the legitimacy of a constitution. I think this is an essential comment.

The Dayton Peace Agreement provides for the mandate of a High Representative to monitor its implementation. The mandate of the High Representative includes, among other things, the

[8] See Kaarlo Tuori: "Bosnia Herzegovinan valtiosääntö: ristiriitoja ja jännitteitä", in Juhlakirja Teuvo Pohjolainen (2005) pp. 80–90.

competence to facilitate the resolution of any difficulties arising in connection with civilian implementation, with regard to both the central state and its two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. The country is, however, still divided along ethnic lines, which weakens the central administration. In the long term, it would be important to give up the ethnic divisions, and to create a stronger central administration and a constitution based on national legitimacy. In addition, a system of protection of minorities based on human rights considerations would be needed.

East Timor

Let us take a third example of even more topical interest, "Strengthening Accountability and Transparency in Timor-Leste". The Report of the Alkatiri Initiative Review Mission of Experts was published in January 2006. The president of the Mission represented the UN Department of Economic and Social Affairs, and the UNDP, the World Bank, the Finnish Government, and Transparency International were also represented.

The building of a democratic state is now at a demanding and critical phase. National elections are due to be held in 2007, and there are many related issues to be considered. The elections provide an opportunity to strengthen the role of Parliament. It seems to me that there are still many problems.

The legal system needs to be strengthened considerably. An important aspect of this is to ensure access to justice for ordinary citizens, in a language that they understand. The public defence system also has to be improved.

In respect of the police service, a crucial aspect is transparency in the relations between civilian officials and the national Police Council. Operational authority over police officers in normal police operations should rest exclusively with the Commissioner of Police. In this respect, it is also important to remember the division of competence between the police and administrative authorities, political decision-makers, and military authorities, for example.

The Ombudsman (Provedor) is an independent office provided in the Constitution of Timor-Leste. The Provedor has been given a comprehensive mandate to lead the implementation of the national anticorruption strategy, including the investigation of all complaints concerning corruption. The mandates of the Provedor and other public institutions should not be overlapping. In the long term, it is indeed important that the mandate of the Provedor institution is restricted to the monitoring of compliance with laws, and that the other competent authorities assume responsibility for regular administration.

The report contains an interesting element, worth some discussion. It concerns the Civil Service. It is necessary to have good leadership at all levels of society. The new Civil Service Act (2004) includes a code of ethics and contains provisions on conflict of interests, as well as on disciplinary procedures. There are still supplementing regulations to be adopted, to govern

recruitment and selection, career development, safety, gender equality, and remuneration. A "three-pillar model of capacity building" has been developed. This consists of knowledge and skills, systems and procedures, and attitudes and behaviour. I believe it is a convenient division for the purposes of personnel management programmes.

There is one more issue of general importance, the delegation of decision-making competence. Pilot projects for a limited form of decentralisation have already been initiated. This has led to greater downward accountability through local level committees dealing with such matters as health, education and agriculture. It would further be important to increase the participation of the local people in the administration. This requires, however, development of systems of participation.

Prospects of international reconstruction

In the light of these examples, we may generally conclude that after crises and disasters, reconstruction is a demanding and extensive process, the conditions of which essentially depend on local conditions and resources. We can distinguish four dimensions in reconstruction: Security, the restoration of economic development, the creation of political stability, and the achievement of reconciliation. Recently, increasing attention has been paid to the importance of rule of law principles, security, a functioning court system and good governance as components of reconstruction.

If no functioning administration exists after a disaster, or where the old power structures have collapsed, efficiency should be a primary objective, while bureaucracy should be avoided in so far as possible. But if the local people are left with the status of outside observers, the duration of the responsibility of the temporary administration or other foreign actors will be considerably longer.

Within the framework of the UN, the so-called *Brahimi* report[9] is a well-known analysis of the development of the importance of the rule of law principles. After the restoration of order and the stabilisation of the situation, it is necessary to construct a system of governance based on participation. Among such systems, a rough difference is often made between democratic governance and effective governance which has its origins in the doctrine of New Public Management.

The exercise of public power obtains its legitimacy from the increase of local-level participation, the hearing of interested parties, the reasoning of decisions, and the openness of administration (transparency). Finland, being a small country, could be characterised as a laboratory of strong traditions of the rule of law and good governance, where democratic electoral systems, local self-governance and participation, administrative procedures, transparency and a general right of appeal against the decisions of authorities to courts of law have an established status.

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[9] See Brahimi report (Report of the Panel on United Nations Peace Operations, 2000) perspectives concerning peace-building (paras. 35–40 and 47 b).

This leads me to raise the question of whether it is, on the basis of the examples and my own experiences, possible to develop functioning models of administration and principles to be applied in crisis situations, also in developing countries. There hardly is one single model for a basic civilian administration, to be exported, but it is possible to present certain principles, on the basis of which pragmatic models can be modified and adapted to the local needs.

To present a general observation on international reconstruction projects, it seems that these projects usually focus on the creation of military security, or security systems founded on the police force and punishment systems. This is in contrast with the Nordic rule of law thinking, which stresses the functioning of the public administration. Firstly, the functioning of everyday administration, e.g. the provision of services and issue of permits, is key when trying to settle the situation. Secondly, I would argue that reconstruction programmes are often of a theoretical nature when, in fact, in order to ensure the commitment of the local people, the projects should be organised from a grass-roots perspective, by using the method of learning-by-doing, for example. Such a bottom-up perspective to the functioning of the rule of law principles is also strengthened in the context of reconstruction.

Legislation, administration and justice

Legislation plays a key role in the development of the rule of law. As legislation develops, the rule of law gains substance. Conceived of this way, the rule of law is a dynamic principle. Therefore, we shall see law as a means – and not as the outcome. According to an old Finnish tradition, "the land shall be ruled by laws".

However, the law of today is not unambiguous building material. The legislation has become more fragmented and in a sense more indirect, as, instead of rights and duties, more and more regulatory instruments concern the interests of limited groups of persons and the duties of authorities. This is not a problem of "written law" systems only. The same complexity is also apparent in "common law" systems and in their increasingly casuistic character.

Generally speaking, the problems of legislation lie in achievement of reality. Laws that are real are also easier to take in. My intention is not to aim at significant legal policy guidelines. I only wish to note that one of the greatest problems in legal policy today is that laws are too often prepared short-sightedly and in individual sectors of administration. Is legislation turning into "deficit legislation" which merely addresses current, acute problems, instead of constructively guiding the long-term development?

There have been different projects to decrease the amount of legislation and to improve its quality. For example, the OECD follows and prepares comparative studies on the regulatory policy of its member countries. The OECD Recommendation on Improving the Quality of Government Regulation (1995) includes the following ten-item checklist for regulatory decision-making[10]:

[10] See also Paremman sääntelyn toimintaohjelma, Valtioneuvoston kanslian julkaisusarja 8/2006 p. 196–218, Summary and recommendations.

1. Is the problem correctly defined?
2. Is government action justified?
3. Is regulation the best form of government action?
4. Is there a legal basis for regulation?
5. What is the appropriate level (or levels) of government for this action?
6. Do the benefits of regulation justify the costs?
7. Is the distribution of effects across society transparent?
8. Is the regulation clear, consistent, comprehensible and accessible to users?
9. Have all interested parties had the opportunity to present their views?
10. How will compliance be achieved?

This checklist is still relevant and may also be applied to various development projects. On the basis of my own experiences, I would add that the solutions should be as simple as possible. Where sanctions for non-compliance with laws are considered, more attention should be devoted to administrative law means, and systems of permits, incentives and financial sanctions, instead of criminal sanctions. Such means and systems have preventive and guiding effects.

The functioning of the administration and good governance also play an essential role in the development of the rule of law. Everybody has to have dealings with administrative authorities. In a way, there are two distinct, competing approaches to the definition of good governance. First, we may talk about the tradition of democratic governance, in which good governance shows itself as a method of governance that serves democracy, respect for human rights and equality. Another tradition in this context is that of effective governance. Within this approach, good governance is viewed more narrowly, as a set of administrative principles that contribute to efficiency and reliability.

This division of two approaches to good governance is only a rough one. However, in my view, particularly at the stage of post-crisis reconstruction, it is important to aim at such a model of democratic governance as allows the local people to participate in decision-making as soon as possible. At the same time, the quality and productivity of services provided by authorities as well as legal protection and non-discriminatory administration must be enhanced.

In order to create a solid basis for good governance, it would be important to adopt a general legislative instrument concerning administrative procedure, providing for the basic principles on the institution of administrative proceedings, the obligation of authorities to give advice, the possibility of using the services of a counsel, the examination and processing of cases, the hearing of parties, the openness of the proceedings, decision-making and the obligation to give a reasoned decision, and the correction of errors.

In addition to such general legal provisions, it is also essential that the competence of authorities is based on the law, and that any exercise of public power be based on the law. Thus, the development of legislation in all sectors of administration is important.

The guarantees of the protection of citizens by law in the context of the exercise of public power are an essential element of the rule of law development. The question is, in particular, about the right to submit a decision of an authority to judicial review by an independent court.

Many countries have paid particular attention to the importance of administrative judicial procedure and also established administrative courts separate from civil and criminal courts. In this connection, I do not wish to go into details about the benefits of administrative courts, although such courts are usual in the Member States of the EU and are also becoming more usual in other parts of the world.[11]

It is relevant to pay attention to the de facto conditions for legal protection, and to the fact that active management of proceedings by the court is necessary for the examination of cases. This does not only refer to the basic principles of procedural law and the allocation of the burden of proof, but also to the responsibility of the court for ensuring that the facts of the case are established. Individual persons are not always in an equal position with the authorities, insofar as their knowledge and capacities are concerned. It is also important to ensure that the legal costs are reasonable, and that money does not constitute an obstacle to access to court.

The legality of governmental measures is not only in the interests of the parties, but it is a basic requirement for the legitimacy of all exercise of public power. The right of appeal against the decisions of authorities contributes to the strengthening of whole society. Instead of access to court, one should perhaps speak of access to justice. Particularly in developing countries, it would be important to ensure that the judicial system is not made too complicated with unnecessary formal requirements. As a matter of fact, there are such unnecessary problems in several industrial countries, as well.

Conclusions

The rule of law must be assessed as a functional entity, in a social context. Therefore, the strengthening of the rule of law requires a common value basis for the channels of citizen participation, and for the communal character of the law. It is important to underline the connections between the law, democracy and openness. Social capital plays a key role.[12]

The approach adopted in my analysis starts from the root level, i.e. from the immediate surroundings (bottom-up approach). It is relevant that the rule of law principles become established at the national level, and it is also important to remember the role of nation states

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[11] The International Association of Supreme Administrative Jurisdictions (*AIHJA*) was established in Paris in 1983 in order to co-ordinate the provision and exchange of information.

[12] Francis Fukuyama: "Social capital, civil society and development", in Third World Quarterly, 22 (1), pp. 7 ff., suggests a short practical definition: "social capital is an instantiated informal norm that promotes co-operation between two or more individuals".

R. Putnam: Making Democracy Work. Civic Traditions in Modern Italy (1993), p. 170, argues that one special feature of social capital, trust, norms, and networks is that it is ordinarily a public good. Social capital, unlike other forms of capital, must often be produced as a by-product of other social activities.

in decision-making, instead of cosmopolitan models. It would be of great benefit for this approach if a specific entity was established within the framework of the UN to systematically compile rule of law principles and experiences. A permanent unit to collect resources and studies in this field would be necessary.

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