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THE RULE OF LAW IN A GLOBALIZING WORLD—AN ASIAN PERSPECTIVE

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I. INTRODUCTION

It is fashionable to speak about the importance in today's world of the "rule of law at the national and international levels." On the occasion of the sixtieth anniversary of the United Nations, the 2005 World Summit declared in its *2005 World Summit Outcome* that "[w]e [Heads of State and Government] acknowledge that good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger."¹ Based on this recognition, the more than 170 heads of state and government assembled at the United Nations headquarters identified

* President, International Court of Justice. This presentation was given as the keynote address at a conference entitled *Law in Japan: A Celebration of the Works of John Owen Haley*, an event sponsored by the Whitney R. Harris World Law Institute and held on May 9, 2008, at Washington University in St. Louis. It is partly based on a speech this author gave at the Rule of Law Symposium, International Bar Association Annual Conference, Singapore, October 19, 2007. The author wishes to express his gratitude to the International Bar Association for allowing the material to be used for the present purpose.

1. G.A. Res. 60/1, ¶ 11, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

“human rights and the rule of law” as one of the four key areas in which to undertake concrete measures so as to provide multilateral solutions.²

What does the “rule of law at the national and international level” signify? Despite the fact that the phrase “the rule of law” is today very much in vogue, the concept itself has been the subject of lively debate in academic circles, as well as among practitioners who are expected to implement the concept in practice. Some even claim that if one were to read “any set of articles discussing the rule of law . . . the concept emerges looking like the proverbial blind man’s elephant—a trunk to one person, a tail to another.”³

The concept of the “rule of law,” and indeed the term itself, has its origin in the constitutional doctrine of the common law. But even in this rather clearly defined area, the concept has become so overburdened in recent years that one eminent authority, Lord Bingham, has suggested that the phrase “the rule of law” has become meaningless thanks to ideological abuse and general over-use.⁴ According to him the concept is described by some as “‘an exceedingly elusive notion’ giving rise to a ‘rampant divergence of understandings’ and analogous to the notion of the Good in the sense that ‘everyone is for it, but have contrasting convictions about what it is.’”⁵ To give an extreme example of this phenomenon, it is well known that in the hotly contested battle before the U.S. Supreme Court in *Bush v. Gore*,⁶ each side tried to argue its own case in the name of “the rule of law.”⁷

This state of confusion, already present in the domestic legal sphere, is further exacerbated when one tries to transpose the concept and apply it to the international system of governance. The transposition of this concept, whose origins lay essentially in Anglo-American constitutional doctrine, to the present-day international system raises a number of new issues. For example, can a principle that was originally conceived to control the exercise of power within the domestic constitutional framework, be

2. The four key areas are: (1) development, (2) peace and collective security, (3) human rights and the rule of law, and (4) the strengthening of the United Nations. *Id.* ¶ 16.

3. Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 31, 32 (Thomas Carothers ed., 2006).

4. Lord Bingham, *The Rule of Law*, 66 *CAMBRIDGE L.J.* 67, 68 (2007) (quoting Judith Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987)).

5. *Id.* (quoting BRIAN Z. TAMANAHA, *ON THE RULE OF LAW* 3 (2004)).

6. 531 U.S. 98 (2000).

7. Bingham, *supra* note 4, at 68 (citing Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept?*, in *THE RULE OF LAW AND THE SEPARATION OF POWERS* 117, 117–18 (Richard Bellamy ed., 2005)).

successfully duplicated in the international legal system where no central power exercises control over the community? If it can, does such a duplication require a reconceptualization of the principle itself in order to adapt it to the different legal conditions of international society? Answering these questions first requires an examination of the proper nature and scope of the rule of law as the concept has been accepted in the traditional context.

Reconceptualization of the rule of law at the international level in turn requires addressing the following two separate but interrelated questions that are especially pertinent in the context of the present-day international system. First, should the rule of law, when applied at the international level, be defined from a formalistic or substantive point of view? In other words, should the concept of the rule of law, when transposed to the international realm, be read narrowly as referring to its formal aspect of “the rule by the laws,” or broadly as referring to the substantive content of the law as well? This question has already been hotly debated in the domestic context, but it takes on a new significance in light of the unique role that the rule of law is expected to play at the international level in the present-day world. Second, what entities should be subject to the rule of law in this international context? Is the international rule of law limited in its application to the interrelationship among sovereign states that constitute the international community, or does its application extend to the rights and duties on an international level of individuals, who, after all, are the ultimate addressees of the legal norms in the global community?

II. THE CONCEPT OF THE RULE OF LAW

In answering these questions, the natural starting point is to examine the traditional conception of the rule of law in the domestic sphere. While the concept may be elusive from a theoretical point of view, everyone would agree that the rule of law must contain certain essential elements. For this purpose, it would be useful to start with the famous definition of the rule of law by A.V. Dicey, the nineteenth-century constitutional authority of England. He explained the salient elements of the rule of law as follows:

When we say that the supremacy or the rule of law is a characteristic of the English constitution, we generally include under one expression at least three distinct though kindred conceptions.

We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary power of constraint. . . .

We mean in the second place . . . , not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. . . .

In the third place, [w]e may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.⁸

What this boils down to in terms of a core definition of the rule of law can be summarized into the following three elements:

- (1) “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power”;
- (2) “equality before the law, or the equal subjection of all classes of people to the ordinary law of the land, administered by the ordinary Law Courts”; and
- (3) the independence of the courts that secure to individuals their rights, which the law of the constitution represents as the result, not as the source, of such rights.⁹

By identifying these components, Dicey presented the rule of law primarily as a constraint on the arbitrary or disparate exercise of sovereign power over the individual. In this situation, his conception of the rule of

8. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183–84, 189, 191 (6th ed. 1902) (footnotes omitted).

9. *Id.* at 198–99.

law could be described as tending to be formalistic or process-focused. His definition, however, has to be read in the political context of nineteenth-century England. Dicey was discussing the issue of the rule of law in the England of his day, a “country governed . . . under the rule of law,” where “security [was] given under the English constitution to the rights of individuals.”¹⁰ His main concern, therefore, was the way in which the law was made, applied, and enforced in relation to individuals, rather than the actual content of the law. The actual substance of the law, presumably, was outside the main focus of Dicey’s thesis. Rather, of paramount importance to him in this process-focused approach was the question of “fundamental principles which are characteristic of a legally ordered community and which provided a . . . framework within which particular rules of law operate.”¹¹ It is natural that with such a formalistic approach to the rule of law, no attempt was made to pass a judgment upon the content of the law itself. There is no need for inquiry as to whether the laws themselves are “just” or “unjust,”¹² so long as the environment for the rule of law is secured, and the arbitrary exercise of power by the sovereign restrained.

This naturally raises the question as to whether such a formalistic conception of the rule of law is appropriate or adequate in the contemporary setting. If it were, then by implication the actual substance of the law would not factor into any determination of how the rule of law in fact is practiced, so long as the procedural guarantee for the rule of law is met. Yet such an approach would lead to the conclusion that Nazi Germany or the Union of South Africa, under apartheid—to take two extreme examples—were societies governed by the rule of law.¹³

As is clear from the passage quoted above, basic in Dicey’s conception of the rule of law is the premise that law is an embodiment of justice in

10. *Id.* at 180.

11. Sir Arthur Watts, *The International Rule of Law*, 36 GERMAN Y.B. OF INT’L L. 15, 22 (1993).

12. See Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467.

13. To this dilemma, Joseph Raz responds as follows:

[T]he rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies.

Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 211 (1979).

society, as reflected in the general law of the constitution as the guarantor of individual freedom in nineteenth-century England. Thus he declares that “some polities, and among them the English constitution, have not been created at one stroke [but] are *the fruit of contests carried on in the Courts on behalf of the rights of individuals.*”¹⁴ Among those rights that form the premise of the rule of law, Dicey refers to the following:

General propositions . . . as to the nature of the rule of law carry us but a very little way. If we want to understand what that principle in all its different aspects and developments really means, we must try to trace its influence throughout some of the main provisions of the constitution [such as] the right to personal freedom; the right to freedom of discussion; the right of public meeting; the use of martial law; the rights and duties of the army; the collection and expenditure of the public revenue; and the responsibility of Ministers.¹⁵

When one attempts to transpose this Diceyan model for the rule of law onto the international system, one has to keep in mind a number of key considerations that distinguish the international legal community from the domestic legal community that Dicey envisaged.

The first such consideration is the absence, in a decentralized system of international society consisting of equal sovereign nations, of a single sovereign authority analogous to the government in domestic society. In a society “where the primary challenge is not the vertical relationship of subjects to a sovereign, but the horizontal relationship of subjects to other subjects,”¹⁶ one cannot compare the legal relations between the state and its citizens in domestic law to the legal relations between the nation-states in international law. The traditional legal framework of the international system, often described as the “Westphalian legal order,” leaves these nation-states, in principle, free to act within their own domestic jurisdiction. In this situation with no “common sovereign power” to which all nation-states are subject, the rule of law framework as proffered by Dicey cannot ensure the guarantee of justice that Dicey’s model assumed as its end result. Since the natural corollary of the internal sovereignty of nation-states is that no single state may exercise power or authority over

14. DICEY, *supra* note 8, at 192 (emphasis added).

15. *Id.* at 199–200.

16. Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331, 333 (2008).

another, some have argued that “the rule of law cannot meaningfully exist in the international arena, where there is no ‘common sovereign power.’”¹⁷

The second, and more important, consideration is that such a process-focused approach to the rule of law cannot perform the legitimate role in the international legal system that it was expected to play in the original, Diceyan conception. A narrow, process-focused approach to the rule of law framework will not secure the end objectives to which the rule of law aspires in the context of the international community as a community of human individuals. Given this situation, it becomes imperative to insist on an ends-focused approach to the rule of law. In other words, the rule of law, when translated to the international context, should be reconceptualized in such a way that it would serve to constrain states from acting in gross violation of the fundamental principles of justice and human rights that should underpin the contemporary international legal order.

For this reason, the conception of the rule of law, when transposed to the international level, should include not only the process of how law is made, applied, and enforced, but also the substantive aspect of what law represents. This is particularly true in the context of norms that cast the fundamental value of human dignity as the basic norm of today’s international community. It is thus my submission that the concept of the rule of law, when applied at the international level, requires a holistic reconceptualization of the principle that incorporates both its process and its substance, taking account of the systemic differences between the domestic and international legal order.

III. RESTRAINTS ON STATE AUTONOMY IN INTER-STATE RELATIONS

Let me begin by briefly reviewing the first aspect of the rule of law in the contemporary international system, namely the constraints upon the exercise of power by sovereigns in inter-state relations. What essentially characterizes this system of governance is the absence of a global sovereign authority and the consequent autonomy of states vis-à-vis one another. This defines the traditional manner in which states interact in the international arena. Nonetheless, an extensive and well-developed corpus of law has arisen through agreement among states, especially since the second half of the twentieth century, to regulate a wide array of state activities in the international arena. The areas covered include

17. Charles Sampford, *Reconceiving the Rule of Law for a Globalizing World*, in *GLOBALISATION AND THE RULE OF LAW* 9, 10 (Spencer Zifcak ed., 2005).

international regulatory regimes on the use of force and disarmament, environment and trade, transport and communications, oceans, and even outer space. What international regime specialists describe as “the process of legalization” is in full swing.¹⁸

Moreover, the effects of globalization have contributed to the birth of an impressive number of legal frameworks, either global or regional, for economic and social activities among states that transgress national borders.¹⁹ This makes it “impossible for States to be wholly unaffected by the consequences, either political or economic, of actions by or confrontations between other States.”²⁰

The result has been a dramatic expansion of the scope and reach of international law through the legalization of these activities among states by numerous treaties and agreements, as well as a remarkable growth of international institutions charged with the task of implementing substantive rules of international law in the name of the public interest of the international community.²¹ Through the legalization of the conduct of states in their international relations, these substantive rules of law contribute to the consolidation of the international public order by balancing the national interests of individual states against the public interests of the international community. This legalization thus restricts the freedom of sovereign states to act arbitrarily on the basis of “asymmetries in [state] power and the potential for political abuse that such asymmetries entail.”²² Building and strengthening the rule-based framework for the conduct of states makes their interactions more predictable and deters unilateral or arbitrary conduct by states.²³

IV. THE INTERNATIONAL RULE OF LAW IN RELATION TO INDIVIDUALS

In today’s world, however, the significance of the rule of law stretches far beyond its application to traditional inter-state relations. I submit that this is the second aspect of the rule of law at the international level.

18. See, e.g., Special Issue, *Legalization and World Politics*, 54 INT’L ORG. 385 (2000) (special issue devoted to the treatment of the issue of legalization of the international regime in international relations).

19. Spencer Zifcak, *Globalizing the Rule of Law: Rethinking Values and Reforming Institutions*, in GLOBALISATION AND THE RULE OF LAW, *supra* note 17, at 32, 33.

20. Watts, *supra* note 11, at 24.

21. Zifcak, *supra* note 19, at 33.

22. Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT’L L. 19, 24 (2003).

23. Watts, *supra* note 11, at 33.

In the current globalizing world, the attention of the international community has been increasingly focused on the impact of the international rule of law on individuals. At the present stage of development of the international system, the rule of law in relation to inter-state relations alone is no longer adequate to characterize the international rule of law. The crucial importance of the rule of law as applied to individuals has to be appreciated in the new context of the international community—where the need to uphold certain inviolable principles of justice and human dignity while protecting the rights of individuals at the international level has come to be recognized. Indeed, international law has developed to such an extent that it has brought about a shift in the international legal order away from the purely state-centric system that once defined it. Nowhere is this more evident than in the rapid expansion and increasing prominence of humanitarian and human rights law.

The dramatic rise in the importance of these fields as pillars of the international legal system has altered the system in two crucial and interrelated respects. First, it has injected into the international legal order substantive rules relating to human rights based on the principles of justice and fundamental human values that transcend the national boundaries of states. Second, it in turn has brought the individual to the center of the international legal system as a subject of international law with internationally cognizable rights. These developments place further legal constraints on the conduct of sovereign states in the international community; they also prescribe international norms to guarantee an international standard of justice that is substantive in character, stretching the rule of law beyond its narrower, more formalistic aspects.

This new development in the international legal landscape has so far been taking place largely within the area of substantive rules relating to international humanitarian law and human rights law. By contrast, the procedural framework for guaranteeing these substantive rules on the international plane has been somewhat slower to develop. It is true that the world has seen some remarkable institutional developments in this respect as well, as demonstrated at the global level by the creation of the United Nations Human Rights Committee, the International Criminal Tribunals (ICTY, ICTR), and the International Criminal Court (ICC), and at the regional level by the birth of the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), and the African Court of Human and Peoples' Rights. Nevertheless, the overall picture of the international legal landscape in this respect is that the procedural mechanisms for guaranteeing the substantive rights of

individuals recognized at the international level remain to be implemented primarily through the national legal system of each state. Against this backdrop, an approach to the rule of law at the international level that would leave the entire issue of substantive rules to the discretion of the domestic legal system of each state would not fully achieve the purpose that the rule of law has historically been meant to serve. An approach to the rule of law at the international level that incorporates certain basic universal values underlying substantive international law thus becomes crucial in order for the rule of law to achieve its main objectives at the international level.

Unlike a more formalistic conception of the rule of law based on the process-focused approach that focuses on the manner in which the law is formed, applied, and enforced, the reconceptualized rule of law at the international level, based on this ends-focused approach, has to look beyond the formal side of the picture to see if the laws themselves are fundamentally just. Needless to say, in doing so the rule of law has to continue to insist on its traditional formal aspects,²⁴ such as the supremacy of the law, equality before the law, and the existence of independent monitoring systems, in its application to the international system. However, these formal elements of the rule of law alone are not sufficient in this new situation to achieve the end objectives that the rule of law is meant to serve in the international community. In the ends-focused approach to the international rule of law as it applies to individuals, the rule of law cannot be said to prevail if the laws themselves are unjust or oppressive.²⁵ Rather, the substantive content of justice in its essential elements has to be incorporated into the rule of law itself; it prescribes that “[individuals] have moral rights and duties with respect to one another, and political rights against the state as a whole.”²⁶

The contemporary international legal system has increasingly done just this. Fundamental justice and human rights, regarded as universal values by the international community as a whole, have thus become entrenched in the international rule of law. Through the process of globalization, “[p]olitical, economic, and technological changes have had globalizing ramifications that penetrate state borders in ways that transformed the core

24. Craig, *supra* note 12, at 478.

25. Watts, *supra* note 11, at 23.

26. Craig, *supra* note 12, at 477 (citing RONALD DWORKIN, A MATTER OF PRINCIPLE 11–12 (1985)).

rule of law values in the international legal order and [have] created a shift away from the previously prevailing state-centric system.”²⁷

The expansion of international humanitarian law and the increasing prominence of human rights law have precipitated a paradigm shift in the international legal system by injecting the essential components of justice into the rule of law at the international level. This is demonstrated by the incorporation of these universal values into new treaties and international conventions as well as through the work of numerous regional and international institutions and tribunals charged with the task of enforcing and monitoring breaches of the law. Among the manifestations of these changes is the dramatic expansion of international criminal law and the international judicial mechanisms associated with its enforcement. The work of *ad hoc* tribunals such as the International Criminal Tribunals for the former Yugoslavia and Rwanda, coupled with the advent of the International Criminal Court, have greatly raised the profile of individuals within international law by extending to individuals judicial accountability at the international level for criminal breaches of humanitarian law and human rights law. Thus, “[c]ontemporary humanitarian law reaches well beyond the parameters of international armed conflict to regulate persecution internal to states.”²⁸ For example, the International Court of Justice, in its recent judgment in the *Armed Activities on the Territory of the Congo* case,²⁹ embraced this approach by holding that the internal situation in the Congo is subject to a conception of the rule of law based on the substantive norms of humanitarian law and human rights law, such as the Hague and Geneva Conventions relating to the laws of war, the International Covenant of Political and Civil Rights, and the Convention on Torture.

V. THE PROCESS OF LEGALIZATION IN THE INTERNATIONAL SYSTEM AND THE RULE OF LAW

These developments in the rule of law at the international level are gaining much more significance as globalization of the international community continues. Thus, as a result of the process of globalization “[i]n many issue-areas, the world is witnessing a move to law.”³⁰ It is

27. Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 CORNELL INT'L L.J. 355, 357 (2002).

28. *Id.* at 360–61.

29. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* 2005 I.C.J. 116 (Dec. 19).

30. Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385,

claimed that “[t]his move to law is not limited to the actions of international tribunals,”³¹ though in recent years there has been a mushrooming of cases before various international tribunals involving state activities in wide-ranging fields, as evidenced by the proceedings of the WTO Appellate Body, the European Court of Justice, NAFTA, and the ITLOS, not to mention the International Court of Justice.

However, this move to law in the international system goes much deeper than the area of those state activities. As human activities expand across national borders and the concern for the public interest of the international community as a whole permeates these human activities at the international level, the process of legalization for such activities through the creation of rule-based regimes has come to play an important role in the international system.

Legalization is a term coined by international regime specialists to describe this move towards rule-based regimes in international relations. Legalization can be said to be “a particular form of institutionalization”³² of international relations. In this sense one can observe a close relationship between this process of legalization and the development of the rule of law in the international community. According to those specialists, the definition of legalization contains three criteria: the degree to which rules are obligatory upon the players of the system; the legal precision of those rules; and the delegation of the power of interpretation, monitoring, and implementation of the rules to a third party.³³ These criteria closely correspond to the three essential elements of the rule of law described in a previous section, i.e., the supremacy of the law, equality before the law, and the existence of an independent judiciary to apply the law. Seen in this way, there is a clear parallelism between the development of the rule of law and the process of legalization in the present-day world, although each tends to approach the same phenomenon from a somewhat different angle.

A significant overlap can therefore be observed between the process of legalization and the development of the rule of law in the international context. What I have discussed at some length earlier as new developments in the international rule of law are matched by the growth in the process of legalizing activities within the international system. We can see that, in turn, the legalization of institutional regimes in many areas of

385 (2000).

31. *Id.* at 386.

32. *Id.*

33. *Id.* at 387.

human activity in the globalizing world is contributing to the strengthening of the rule of law.

In this globalizing world, international institutions are growing in all shapes and sizes, while varying significantly in the contents constituting the sets of rules, norms, and decision-making procedures that characterize them. Legalization tries to describe this move towards the creation of a rule-based international community.

Admittedly, legalization as such, representing a process towards a rule-based society, does not include a consideration of the substantive content of the rules in question. It is also true that legalization as a process in the international system can expand its scope to embrace rules which are commonly referred to as “soft law,” as distinct from “hard law,” on which the rule of law has traditionally tended to focus. As such, progress in legalization may serve more as a measure for analyzing the extent to which the members of the community embrace the rule-based framework to regulate their activities, rather than the intensity in which the obligations involved are to be observed.

Be that as it may, there can be no question that legalization can be said to form an essential part of the process for the creation of the rule-based international community. It helps to regulate relations between actors at the international level and to shape the legal framework for the relations among various players in the system, including individuals, at all levels in this world arena.

Seen in this way, the process of legalization has significant implications for the international rule of law. At the present stage of development of the international system, as I stated earlier, the rule of law in relation to inter-state relations alone is no longer adequate to characterize the phenomenon of the international rule of law. In this situation, the crucial importance that the rule of law plays when applied to individuals has to be recognized in the context of the growing recognition in the international community of the need to uphold certain inviolable principles of justice and human dignity and to protect the rights of individuals at the international level. These developments place further legal constraints on the conduct of sovereign states in the international community; they prescribe international norms to guarantee an international standard of justice that is substantive in character, stretching beyond its narrower, more formalistic aspects. In this sense the process of legalization helps to gauge exactly how much the international rule of law is being implemented in various areas and regions.

VI. THE PROGRESS IN THE PROCESS OF LEGALIZATION IN EAST ASIA³⁴

It is in this context that the issue of legalization in East Asia becomes highly relevant to examining the overall state of the rule of law in that region. Since some have suggested that the pattern of legalization among international institutions is “spatially circumscribed,”³⁵ the Asia-Pacific region presents a particularly interesting case in this picture.

One sometimes hears the assertion that the Asia-Pacific region—to the extent such a “region” can clearly be demarcated—lags behind others in terms of the degree to which the relations among its members are “legalized.” However, I submit that such a simplistic region-by-region approach to the issue of legalization does not provide a fully accurate picture of how the Asia-Pacific region approaches the issue of legalized institutions. A prevailing view tends to argue that, considering the rapidly increasing economic and security interdependence that has characterized the region in recent decades, the Asia-Pacific region still lacks robustly legalized *regional* institutions as compared to regions such as Europe and North America.³⁶ Yet this perspective seems to ignore the degree to which states in the Asia-Pacific region have embraced legalized institutions on a global basis beyond the confines of the region itself. When considered from a global standpoint, states in the region have demonstrated a high degree of cooperation in global organizations and in institutions that are highly legalized in their essential characteristics. This fact contradicts the assertion that the region is averse to the concept of legalization in its international relations.

Some also advance an argument suggesting that despite increased institution-building in the 1990s in the Asia-Pacific region, “those regional institutions constructed with significant Asian participation [have] remained highly informal and explicitly rejected legalization in their design”³⁷ and that this is also a reflection of the uniquely Asian legal culture. In this Asian legal culture, it is contended that “[f]ormal rules and obligations [are] limited in number; codes of conduct or principles have been favored over precisely defined agreements; and disputes have been managed, if not resolved, without delegation to third-party adjudication.”³⁸

34. My view expressed here is close to that of Professor Alvarez (*see infra* note 42), to whom I wish to express indebtedness.

35. Miles Kahler, *Legalization as Strategy: The Asia-Pacific Case*, 54 INT’L ORG. 549, 549 (2000).

36. *Id.*

37. *Id.*

38. *Id.*

Thus, it has been suggested that this low level of regional legalization is a manifestation of an innate aversion to the rule of law throughout the region.

One common explanation of this phenomenon—and one that is sometimes offered in the region itself—is that this state of affairs originates from the traditional mind-set and legal culture of the region. In other words, the theory of a uniquely distinct Asian legal culture, as reflected in the famous assertion of “Asian values,” is offered to explain this asserted aversion to “Western-style” legalized institutions. Asian legal culture is described in its very nature as “less adversarial and [less] litigious, less intent on demonstrating right and wrong, [and] more concerned with avoiding conflict.”³⁹ Deeply held traditional values, it is claimed, are not easily washed away, and associated preferences for “harmony, consensus, informality, and avoidance of legalism,” do not mesh with Western ways.⁴⁰ In this cultural environment, settlement of disputes through legal means is not seen as productive or beneficial, and despite the advent of Western-style legal systems in the region, avoidance of litigation continues to be the dominant social norm.⁴¹ Asian governments and peoples—so the argument goes—prefer talking through disputes among themselves rather than yielding their disputes to a decision on the basis of objective criteria for settlement; as a result, Asians prefer to opt for non-adversarial modes of discourse to resolve their difficulties.⁴² The perceived benefit of avoiding the rule-based settlement of disputes is the reduction of disputes generally and the strengthening of group cohesion;⁴³ disputes are “managed,” not “litigated.”⁴⁴

What is more, there are even those who argue more cynically that the so-called “ASEAN way” of managing disputes by favoring informal institutions “may result from not only the construction of social myths about harmony and a national past untouched by Western influence but also [from] conscious political programs to dampen adversarial conflict internally and internationally.”⁴⁵

39. *Id.* at 560.

40. *Id.* (citing Carl J. Green, *APEC and Trans-pacific Dispute Management*, 26 LAW & POL’Y INT’L BUS. 719, 730–31 (1995)).

41. Carl J. Green, *APEC and Trans-pacific Dispute Management*, 26 LAW & POL’Y INT’L BUS. 719, 730–31 (1995).

42. José E. Alvarez, *Institutionalised Legalisation and the Asia-Pacific “Region,”* 5 N.Z. J. PUB. & INT’L L. 9, 16 (2007).

43. Green, *supra* note 41, at 731.

44. Alvarez, *supra* note 42, at 16 (citing Kahler, *supra* note 35, at 549).

45. Kahler, *supra* note 35, at 561.

I submit that using such a monochrome picture to define the social behavior of people in the region vis-à-vis legalization is clearly a gross oversimplification of reality. The Asia-Pacific region is highly diverse in its ethnic, historical, cultural, and social background, to say nothing of differences in political and economic development. An expert claims that “[m]ost Asian societies, particularly in Southeast Asia, display legal pluralism rather than monolithic legal cultures and homogenous legal institutions.”⁴⁶ The numerous and highly varied religious and colonial histories that characterize this region also tend to contradict such a caricatured generalization. The idea that there exists a single, mainstream cultural aversion to legalized institutions is not endorsed by facts. Categorizing such a diverse group of states and cultures into a single, coherent “region” risks oversimplification and thus blurs the distinct diversity that exists among them.⁴⁷

It may be readily admitted that in general Asian societies are less litigious than some over-litigious societies in the West. Nevertheless, experience shows that Asian states are not shying away from rule-based systems in which the impact of globalization affects the socio-economic framework of the community in question. By way of an illustration, it can be shown that there exists a marked contrast between the level of legalization in regional institutions of East Asia and the level of participation of Asian nations in global institutions with highly legalized regimes. Some further explanations are required for this state of affairs.

It is intriguing to observe that in the case of the European Union, by contrast, highly-developed dispute settlement mechanisms within the Union have not necessarily been matched by the same level of legalization in its relationship with regions outside of Europe. In comparison, countries in the Asian-Pacific region do not appear any less likely to adhere to their WTO commitments, for example, than countries in the EU.⁴⁸ This is demonstrated by the fact that since 1995, East Asian countries have participated in as many as ninety-one dispute settlement procedures before the WTO Dispute Settlement Body. One expert has even noted that Asian-Pacific governments have “embraced legalization in particular issue-areas when it serves [their] national purposes.”⁴⁹ In this picture, the impact of globalization seems to be a major, if not decisive, factor.

46. *Id.* at 560 (citing M.B. HOOKER, A CONCISE LEGAL HISTORY OF SOUTH-EAST ASIA (1978)).

47. Alvarez, *supra* note 42, at 20.

48. *Id.*

49. Kahler, *supra* note 35, at 562.

It is true that some countries in the region have a stronger aversion to legalization in areas such as human rights than to legalization in economic areas. This, however, may just as easily be explained by indigenous political factors peculiar to the countries in question. The United States, for that matter, behaves in very much the same way as any Asian-Pacific country, which can be explained by topic-specific political factors involved. The establishment of regional institutions in Asia, moreover, has coincided with the region's participation in the world-wide institutions of the post-World War II legal order.⁵⁰ Taken together, I submit that these contrasting pictures support the conclusion that this situation, rather than exhibiting some wholesale regional aversion to legalization, may be nothing more than the result of strategic calculations guiding the policy decisions of governments in the region not to engage in legalized institutions in certain issue-specific areas. Such a phenomenon is not unique to the Asia-Pacific region but can be observed all over the world. There may well be greater political considerations guiding the decisions of individual governments in the region as to whether, in particular instances or issue-areas, to shy away from legalized frameworks.

VII. CONCLUSION

As the *Armed Activities on the Territory of the Congo* case⁵¹ demonstrates, the rule of law at the international level increasingly permeates the rule of law at the national level which by virtue of national sovereignty has traditionally fallen within the exclusive domain of the state. In many of the areas where international law regulates the activities of states within their own national borders, the international rule of law prescribes the contents of the internal rule of law.⁵² As the result of this development in international conventional and customary law, the fundamental human rights of individuals are now beyond the power of any single state to determine and confer. In this situation “[t]he position of individuals within the state is increasingly the subject of external scrutiny and, in extreme cases, may be the cause of external intervention.”⁵³

These changes in international legal order acquire particular significance in the context of fostering the rule of law at an international

50. Alvarez, *supra* note 42, at 24.

51. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda) 2005 I.C.J. 116 (Dec. 19).

52. James Crawford, *International Law and the Rule of Law*, ADEL. L. REV. 3, 7–8 (2008).

53. Zifcak, *supra* note 19, at 34.

level. Especially where national institutions are weak, non-existent, or oppressive, as is the case in some developing parts of Asia, the promotion of the international rule of law takes on an enhanced importance.

The former United Nations Secretary-General, Kofi Annan, recognized this link between the rule of law in conflict and post-conflict societies and the requirements of the international rule of law when he made the following statement:

The “rule of law” is a concept at the very heart of the Organization’s mission. It refers to a principle of governance at which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and *which are consistent with international human rights norms and standards*. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁵⁴

This obviously could apply to some individual situations in East Asia, as well as to situations in other regions of the world.

The United Nations sees its role in this field as assisting in the development of the rule of law, especially in transitional and post-conflict societies. According to the former Secretary-General, the United Nations’ efforts to advance the rule of law are normatively based, alongside the Charter of the United Nations, in what he labels the four pillars of the modern international legal system. They are: international human rights law, international humanitarian law, international criminal law, and international refugee law.⁵⁵

It is becoming increasingly clear that states can no longer legitimately be allowed to hide behind the cloak of sovereignty to escape accountability for failing to protect the fundamental human rights of their own nationals. Under international law, states have the “responsibility to protect” their own nationals from oppression and the denial of justice. And this is part and parcel of the rule of law at the international level. When

54. The Secretary-General, *Report of the United Nations Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶ 6, delivered to the Security Council and the General Assembly, U.N. Doc. S/2004/616 (Aug. 23, 2004) (emphasis added).

55. *Id.* ¶ 9.

national institutions are unable or unwilling to uphold such principles of justice in these areas, the claim that they are ruling *by* a system of laws is not sufficient. In this sense, “the rule *of law*” is not synonymous with “the rule *by the laws*.” In such cases, the international rule *of law*—supported by the moral authority of the international community as a whole—fills the vacuum in the domestic legal system and intervenes to require their observance in accordance with the norms of international law.

This takes on a special significance in the context of post-conflict societies, where domestic state institutions are often unable or unwilling to defend the substantive rights of individuals. In such situations, simply to work towards building an institutional framework for the rule of law through creating codes of laws, establishing the judiciary, and training judges and other legal professionals, while important and necessary in themselves, will not be sufficient for the establishment of the rule of law in society. More importantly, the state must foster a socio-political culture that enables the practice of the rule of law as part of social life. This is the essential premise Dicey used to advocate for his construction of the rule of law.

I submit that this is a task many nations in East Asia, and especially those in transitional or post-conflict stages of nation-building, must tackle. Recognition of basic principles of justice and fundamental human rights as part of the public order of society at the international level means that this international rule of law has to be integrated into the polity of these transitional or post-conflict societies, including those in East Asia.