

CAN EXTERNAL PROGRAMS INFLUENCE INTERNAL
DEVELOPMENT OF THE RULE OF LAW? SOME OBSERVATIONS
FROM THE EUROPEAN UNION PERSPECTIVE

*Esa Paasivirta**

I. INTRODUCTION

There has been growing interest in rule of law programs in recent years. External rule of law programs now operate in a broader political context towards the countries that they benefit. This paper first describes the role of external incentives in the light of European Union (EU) practice and addresses the question of local ownership; it then takes up the example of the Venice Commission (Council of Europe Consultative body) as a collaborative forum for providing constitutional advice. Finally, it sums up some of the key lessons learned from justice related programs.

The concept of rule of law figures in different shapes and forms in international financial institutions and is a growing interest at the level of the United Nations. This interest can be seen in the UN's addressing of post-conflict societies dealing with crimes of the past while concurrently building new institutions. However, rule of law related programs have also become a central part of normal peace time development policy. In practical terms, this includes an independent judiciary, competent legal profession, and legal education. Today, rule of law programs engage a multitude of actors, from host governments to donors, including national governments and their development agencies, international organizations, and a large number of non-governmental organizations (NGOs) which are often central to rule of law promotional efforts.¹

* European Commission, Member of the Legal Service, Brussels, Belgium. LLM, Lic. Law (Universities of Turku and Helsinki, Finland), PhD (Cambridge, UK), Visiting Professor (part time) College of Europe, Bruges, Belgium. The views expressed in this article are personal. The author wishes thank Morgan Kronk for her assistance in the preparation of the final draft.

1. See Thomas Carothers, *The Rule-of-Law Revival*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 3–13 (Thomas Carothers ed., 2006); David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29 (2006).

Independent judiciary and a competent legal profession are at the heart of a well operating modern legal system where rule of law prevails. The historical origins of “rule of law” in common law, and *rechtsstaat* in civil law have had somewhat different emphasis, the latter being broader and more related to the State, yet in essence both pursue similar aims: to prevent arbitrary use of government power. However, the rule of law concept also goes beyond the legal profession.² It refers to a multitude of factors, processes, and institutions, covering both formal and substantive aspects, and indeed, opens up a whole culture of governance. The Secretary General of the United Nations has defined rule of law as follows:

It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.³

The definition given by the UN Secretary-General is broad, as it incorporates substantive principles in the rule of law concept. It points to a variety of elements which bear on the rule of law and make it part of a broader legal culture. Such an expansive concept is illustrative of its current use. The reference to human rights norms and standards, including principles such as equality before law, right to a fair hearing, and access to justice is useful for cross-cultural purposes. It offers a common universal reference point and thereby enhances the legitimacy of rule of law promotion activities. The international human rights instruments offer a common starting point for dialogues between governments, and in that sense, offer unique potential for future work. The most useful definitional work on the Rule of Law is the recent Report by the Council of Europe’s Venice Commission, adopted in March 2011.⁴ It outlines the key elements of Rule of Law in a highly analytical manner, including principles of legality, legal certainty, prohibition of arbitrariness, access to justice, respect for human rights, and non-discrimination.

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

3. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

4. Report on the Rule of Law. CDL-AD (2011)003, available at <http://www.venice.coe.int/docs>.

II. TWO POLES: EXTERNAL INCENTIVES—LOCAL INSTITUTIONS/OWNERSHIP

Rule of law is partly a question of the will of governments and partly a matter of locally prevailing legal and institutional culture. In this latter respect, local forms of governance are influenced by history, interests, and values of the societies concerned. The offering of external incentives can bear on the political will of governments, assuming that rule of law is a matter of choice for governments. This is one element in the EU policies affecting this area. It is clear, however, that creating conditions for rule of law culture cannot merely rely on the will of individual governments. While it is crucial for many operational purposes, for rule of law to succeed in a sustainable manner, it inevitably takes time and thus necessitates that it can be embraced by local institutions, practices and customs.

A. External Incentives: Examples of EU Enlargement Process and Trade Policy

The EU enlargement process is a useful example to recall in this context, as it highlights the role of external incentives. In terms of its political importance, the EU enlargement process is comparable with to the Post-War developments of Japan and Germany.

There is no doubt that the EU enlargement has been highly successful in transforming European societies. It is a prime example of how “soft power” can work. It has dramatically changed the 20th century European map and will continue to do so in the 21st Century. The EU enlargement process toward Central and Eastern Europe has brought ten new member countries to the EU between 2004 and 2006, with a profound impact on the legal, institutional, and administrative structures in these countries. Currently, the EU has opened accession negotiations with four “candidate countries” (Croatia, Turkey, former Yugoslav Republic of Macedonia, Iceland), which are in fact at very different stages, and five other “potential candidate countries” in the Western Balkans are promised a “European perspective,” which can lead to EU membership in the coming years. As such, all of these countries must introduce fundamental changes into their legal and administrative systems in order to make them compatible with future EU membership. The progress in these countries is being monitored on a continuous basis by the European Commission, and they also receive funding and technical support.

The EU accession process requires that the candidate countries introduce across-the-board institutional, legislative, and administrative changes in order

to have the capacity to comply with the necessary EU law membership requirements. This entails the fundamental political conditionality—the so-called “Copenhagen criteria”—which requires *inter alia* that a candidate country has achieved certain core values: “stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities, the existence of a functioning market economy. . . .”⁵ These values for EU membership have since been incorporated in the Lisbon Treaty.⁶

The incentive for the countries to initiate the EU accession process and comply with requirements for entry is that, on the fulfilment of conditions, they are promised the possibility to “come inside.” The incentive is clear: concrete economic, social, and political frameworks that can benefit these countries. This is also a strong ingredient for positive rule of law related developments.

The EU trade policy, like the enlargement process, makes use of external incentives. Since 1995, so called “human rights” clauses that make respect for human and democratic principles an “essential element” of the agreement have been included in EU trade and related agreements with others countries (today 45 agreements, covering 120 countries).⁷ These can serve as a basis for positive advancements in rule of law related matters, in particular human rights and democracy, and provide grounds for regular dialogues between the contracting parties. They also serve as a basis for measures to suspend the agreement in case of violation of those principles. Such measures have been taken with regard to several African countries, especially in the case of *coup d'états*.⁸

Another external trade policy incentive that can be mentioned in this context is the use of General System of Preferences (GSP), relating to trade benefits given to developing countries. Special trade incentive arrangements (GSP+) can be given to countries which ratify and effectively implement certain core UN Conventions like the International Covenant on Civil and Political Rights, The UN Convention Against Torture, or Conventions of

5. Presidency Conclusions, Copenhagen European Council 13 (June 21–22, 1993).

6. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1.

7. See Barbara Brandtner & Allan Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, 9 EUR. J. INT'L L. 469 (1998); Esa Paasivirta, *Human Rights, Diplomacy and Sanctions: Aspects to “Human Rights Clauses” in the External Agreements of the European Union*, in NORDIC COSMOPOLITANISM: ESSAYS IN INTERNATIONAL LAW FOR MARTTI KOSKENNIEMI 155 (Jarna Petman & Jan Klabbers eds., 2003).

8. *Id.*

Child Labour.⁹ Today, there is a conscious effort to more thoroughly monitor the effective implementation of these conventions. For instance, in the case of Sri Lanka, it was decided in February 2010 to temporarily suspend GSP+ benefits because the International Covenant on Civil and Political Rights, The UN Conventional Against Torture, and The UN Convention on the Rights of the Child have not been effectively implemented. It was also decided that the incentive arrangement should be re-established if the reason for justifying temporary withdrawal no longer prevails.¹⁰

With regard to external incentives, it should be mentioned that there has been a shift of emphasis in EU funding from project based management to direct budget support of other countries. In parallel, this has been connected with the important process of implementing policy dialogues with the countries concerned. Such an approach is also in line with advancing a sense of “ownership” in establishing rule of law by the host country of projects concerned.¹¹

B. The Importance of Working with Local Institutions

In a globalized society, some external incentives are almost always present, at least in some shape and degree. However, incentives designed to impact the will of governments may not be sufficient or concrete enough to trigger favorable rule of law developments, especially in the case of big states, such as China. Also, the rule of law is a process that takes a long time to progress and its viability depends on many factors.

This shifts attention to local circumstances. Rule of law is a multifaceted concept, pointing to a variety of institutional balances and legal values, which often resist an easily transferable concrete form. All societies function on the basis of some rules and norms, be they formal or informal. Laws do not produce justice in a vacuum, but operate in broader institutional settings and processes which incorporate formal and informal rules, norms, and processes that regulate human behavior in a society. The role of law and its practical

9. See European Commission, *Generalised System of Preferences*, http://europa.eu.int/comm/trade/issues/global/gsp/memo201004_en.htm (last updated Mar. 2, 2010) [hereinafter GSP].

10. See Council Regulation 143/2010, Temporarily Withdrawing the Special Incentive Arrangement for Sustainable Development and Good Governance provided for Regulation (EC) No. 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka, 2010 O.J. (L 45/1) 7, 11.

11. *Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: Governance and Development*, at 13, COM (2003) 615 final (Oct. 20, 2003).

functioning in society is extremely complex, and promotion of legal development goes beyond mere external incentive or sanction.

Activities successfully promoting the rule of law through external programs call for sufficient understanding and respect of local realities, operation of legal and political institutions, as well as an understanding and respect for the interests and values they reflect. For rule of law reforms to succeed in a sustainable manner, it is important to consult local institutions and to know local needs. It requires a holistic approach to create and strengthen institutions, to build complementary links between them, to sequence the reforms appropriately, and to address local demand.¹²

It is clear that close cooperation with local political institutions is necessary, especially as aid increasingly aims to address sector-wide areas but does not focus on individual projects. In this regard, the “justice sector” is treated as any other sector (health, environment, etc.), and considered as a whole with inter-locking institutions. Such programs involve capacity building and strengthening institutions, which are the responsibility of governments. Such sector-wide programs require policy dialogue to conform to national development plans and strategies.

It is true that there are sensitive areas where local government may show resistance. For instance, it is one thing to address inefficiencies in a court system by introducing electronic filing, whereas it may be quite another thing to address the independence of the judiciary, which may have a more political dimension.

For some issues, the natural allies in rule of law promotion are civil society organizations. They can generate local demand for rule of law. In the EU context, there is specific funding for human rights and democracy promotion, which is awarded directly to NGOs. These projects do not, in principle, involve government consent.¹³ A larger amount of aid for rule of law related support goes via governments through geographic budget lines on the basis of annual and multi-annual programs. These regularly include support for good governance and other rule of law related aid programmes across the whole field of EU external aid.

12. See Joseph Bucher, *A Holistic Approach for Promoting the Rule of Law 3* (Human Rights & Human Welfare Working Papers, Working Paper No. 49, 2008), available at <http://www.du.edu/gsis/hrhw/working>.

13. European Instrument for Democracy and Human Rights (EIDHR Strategy Paper 2011–2013, C (2010) 2432 of 21 April 2010, <http://ec.europa.eu/externalrelations/humanrights/index>).

III. COLLABORATIVE FORUMS CAN HELP: THE EXAMPLE OF THE VENICE COMMISSION

International collaborative frameworks can offer additional support by offering expertise, sharing of experience, and the exchange of views. One of the most interesting and successful examples is the work done by the Venice Commission, an independent consultative body of the Council of Europe, known by the official name “European Commission for Democracy through Law.” The Venice Commission deals with issues of constitutional law including the functioning of democratic institutions, fundamental rights, electoral law, and constitutional justice. As of September 2010, it had 57 members representing all Council of Europe Member States (i.e. EU member states, other Western European states, and the former Soviet Union countries), with growing Latin American presence. Mexico acceded in 2010, joining Brazil and Peru (members since 2009), and Chile (a member since 2005).¹⁴ The United States is an observer, and the EU is not a member either, but the European Commission is regularly present in the Venice Commission meetings.

The prime function of the Venice Commission is to provide constitutional assistance to states. For that purpose, it primarily issues opinions, most frequently at the request of the governments themselves, but the Council of Europe organs can also request such opinions. The aim is to provide objective analysis of the compatibility with European and international standards of draft laws, often constitutional texts, and also to advise on the practicality and viability of solutions in light of common experience.

The unique thing about the Venice Commission is the degree of trust and influence that it clearly enjoys amongst participating governments. Governments typically ask the Venice Commission for an opinion on draft constitutional amendments, electoral laws, or legislation affecting freedom of assembly and minority protections. The most striking feature of the Commission is that such key constitutional or legislative drafts are voluntarily subject to comments by participants who come from other states. It is this voluntariness which perhaps most strongly highlights the trust that governments feel with regard to the Commission. Generally, it has been the “new” democracies, mostly from former Union Soviet Socialist Republic countries, that have submitted their laws for the Venice Commission’s

14. Venice Commission, *Presentation*, http://www.venice.coe.int/site/main/presentation_E.asp (last visited Nov. 17, 2010).

scrutiny. As of yet, only four times has an “old” EU member state submitted a law to the Venice Commission for scrutiny. Finland, Luxembourg, UK, and Norway have asked for opinions on their constitutional and public law changes, but there are some indications that this may become a more common practice for other old democracies.

The Venice Commission has no formal power, its opinions are not binding and it cannot impose solutions with regard to the draft laws submitted to its examination. Yet, its opinions are highly respected and are regularly taken into account in constitutional processes and reflected in the laws that are subsequently adopted. An important normative reason for this is that the Venice Commission’s opinions are based on the analysis of draft laws in the light of the European Convention on Human Rights, including the practice of the Court of Human Rights, and other European and international standards. This gives the opinions a clear legal basis which bears on the submitting governments, most of them parties to the European Convention.

Another key reason for success seems to be that it is not governments as such that are represented in the Venice Commission, but it consists of independent experts from member countries. They are typically Supreme Court Judges, constitutional law professors, and high civil servants from justice ministries. This ensures top quality academic and practical expertise, plenty of experience, and no political games.

A third reason for success seems to be the working method of the Venice Commission. It involves thorough preparation which normally includes a field mission and dialogue with the authorities of the submitting government. The work starts by setting up a small group of reporters who present their personal observations on a draft text under consideration. The group then draws up, with the help of the Secretariat, a draft common opinion on the conformity of the draft text with European and international standards, and on how the text could be improved on the basis of common experience. The draft opinion is then discussed and adopted in the Venice Commission’s plenary session, normally in the presence of the representatives of the State concerned. Once the opinion is adopted, it is sent to the State that has requested it and it then comes into public domain. The Commission remains at the disposal of the State until the constitution or the law is adopted. Every plenary session also includes a follow-up session during which the Secretariat reports on how the Commission’s opinions have been implemented or taken into account, and what has happened with the opinions issued by the Commission. Once adopted in the plenary session, the opinions of the Venice Commission become publicly available on its website.

The approval by the Venice Commission has become important for governments. The Commission's opinions have also become frequently referenced by other international bodies, including the European Court of Human Rights and the EU.

It is true that the Venice Commission's work is, in a sense, focused on the law in books, as it normally issues opinions on individual draft laws without necessarily having expert knowledge of the national legal system as a whole. Nevertheless, the positive point is that governments initiate the process voluntarily and thus place a high degree of trust in the work of the Commission.

IV. LESSONS LEARNED FROM EU EXTERNAL PROGRAMS PRACTICE

A brief comment should be added on key lessons learned from the EU practice of external rule of law programs. In broad terms, these can be summed up as follows:

National/local ownership is considered a key condition for a rule of law reform to succeed. This implies that the rule of law programs address the locally felt needs based on national development plans. This engages national parliaments and citizens in the ownership of those policies. At operational level, this means, for instance, that the strategy papers, multi-annual, and annual programs are co-signed by the EU and the partner country.

Accordingly, the goal is for the partner countries to exercise effective leadership over their development policies and strategies and to coordinate development actions. The commitments are two-fold. The first is for partner countries to develop and implement their national development strategies and turn them into operational programs, as well as to ensure coordination at all levels in dialogue with donors and encourage participation of civil society and private sector. Donors, in turn, commit to respecting partner country leadership and helping to strengthen their capacity to exercise it.

The need for national ownership has become widely recognized. This fact is reflected, in the Paris Declaration on Aid Effectiveness (2005)¹⁵ and the accompanying Accra Agenda for Action (2008),¹⁶ both of which have been endorsed by a large number of donor and partner countries as well as international financial institutions.

15. Organization for Economic Co-Operation and Development, *The Paris Declaration and Accra Agenda for Action*, http://www.oecd.org/document/18/0,3343,en_2649_3236398_35401554_1_1_1_1,00.html (last visited Nov. 17, 2010).

16. *Id.*

Dialogue with the partner countries is an essential element of EU assistance in establishing rule of law. This covers objectives and results, and it also applies institutional and financial sustainability of reform and corresponding reform measures to be adopted by the government. The EU is actively seeking to promote human rights as an integral part of in-country dialogue on governance in areas such as anti-corruption, public sector reform, access to justice and reform of the judiciary. This is considered essential to building country-driven reform programs in a context of accountability and an institutional environment that upholds human rights, democratic principles, and the rule of law.¹⁷

Donor coordination mechanisms need to be led by the beneficiaries—even though one or the other of the donors can act as a temporary coordinator so long as the capacity to coordinate these mechanisms is not established.

Institutional and financial sustainability need to be fully considered at the program identification stage, not later in the process.

In designing rule of law programs the following approaches have proved to be useful:

- Assessment of the institutions, legislation, traditional, and customary judicial practices of the country through a process which involves both donors and stakeholders in partner countries, before starting the identification of any program. The facilitation of an all-inclusive national dialogue should involve all stakeholders, including non-state actors, prior to envisaging the support to broad reforms in the rule of law sector.
- Assistance to partner governments to elaborate on a strategy for the reform of rule of law related institutions (judiciary, police, prisons), an action plan, and a medium term expenditure framework; these national plans and budgeting policies can subsequently be supported by donors. This ensures a global approach to rule of law sector reform, as opposed to the piecemeal approach, and also promotes ownership of the project.
- Assistance to the overall chain of the rule of law system, taking into consideration the linkage between institutions such as the judiciary, the police, and the penitentiary.

17. Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the Commission on European Union Development Policy: "The European Consensus," 86, Annex 1 14820/05 of Nov. 22, 2005.

- Adjustment of the choice of stakeholders, objectives, and activities of the rule of law programs to the local legal and jurisdictional system.
- Ensuring institutional and financial sustainability, i.e. foreseeing that personnel, equipment, maintenance, and other recurrent costs are secured under the state budget and/or will be financed under the state budget at the end of the program.
- Making sure that the various support instruments at disposal complement each other: in the EU's case for instance, while the so-called "geographic" (country focused) instruments privilege the capacity-building of rule of law institutions, such as the Human Rights Commissions, or the Ombudsman offices, the so-called "thematic programs," such as the Human Rights and Democracy, support the same strategy by the provision of funding to NGOs and other civil society actors that monitor the state institutions.

Current experiences express a general preference for a sector-wide approach away from isolated projects. Such an approach enhances partner government's leadership in the dialogue with donors. The experience has shown that isolated programs, which promote partial improvements such as those focused on new equipment, building renovation, and ad hoc training in the context of a weak legal system, do not bring sustainable results. A Sector-wide approach promotes a comprehensive analysis and strategy and ownership of the process.