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# Report on the Conference of the International Commission of Jurists on »Development and the Rule of Law« held at The Hague, 27 April - 1 May, 1981

By *David Kennedy*

## Introduction

The quadrennial meeting of the International Commission of Jurists (ICJ) held at The Hague from April 27 - May 1, 1981, coincided with a Commission conference devoted to »Development and the Rule of Law«. The conference was meant to culminate a series of regional seminars and meetings sponsored by the ICJ over the past several years which had considered topics in the human rights field of particular interest to third world nations. As such, the 1981 meeting not only formalized a pre-existing commitment to development related issues by the Commission, but signaled a fundamental shift in the way the organization envisions the role of lawyers and the »Rule of Law«. More than a simple change in organizational focus or tactic, the increased concern for development as a human rights problem amounts to a fundamental realignment of ICJ thinking about the meaning of human rights and law\*.

The ICJ conference sought to reorganize the constellation of human rights law to de-emphasize civil and political rights, recognize the importance of economic, social and cultural rights, and elevate a rather loosely defined notion of »development« to some, also rather hazy legal status. The de-emphasis of civil and political rights seemed fueled by at least an unconscious appreciation of their increasing irrelevance outside the developed world. Generally a luxury, often elitist and arguably a palliative diverting attention from the need for thorough social reform, this bundle of legal notions, while conceived internationally by the last generation as a response to the brutal inhumanity of fascism, has seemed increasingly beside the point in the face of what must be considered the greatest contemporary threat to human dignity: the perpetually grinding poverty of underdevelopment.

Economic, social and cultural rights would at first glance seem to fully cover the territory left unprotected by civil and political rights. What, after all, might development be, except the achievement of these rights? For a number of reasons, however, appealing variously to both progressive and traditional members of the ICJ, the contemplated shift seemed different from a simple replacement of political with economic rights. Those who sought the status of »legal right« for development were hesitant to attach it strictly to the

\* The roots of this shift are very ably as well as very readably described in Philip Alston's excellent work »Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy« which was prepared as a background paper for the conference and is available from the ICJ Secretariat in Geneva.

political	-----	economic
individual	-----	collective
national	-----	international

The first brush attempt at relating these tensions to one another accords with our initial sense of what went on at the ICJ conference. One might say that the old view is on the left (political, individual, and national) and the »new« Rule of Law is on the far right (economic, collective and international).

Such a simple explanation is insufficient, however, for the old view had something to say about both sides of the structure.

This first intuitive connection, then, does not tell the whole story because the pairs can also be related in other, opposite ways. For example, economic rights can reside in individuals, and, as in one strand of minority protection doctrine, political rights could be collective. Moreover, if the nation is the relative group, a national scheme can be seen as internationally giving deference to the achievement of collectively viewed rights. An international scheme, however, by bypassing the nation, can be seen as profoundly individual in its interpretation of rights. Leaving out the middle step, it is clear that political and economic rights can both be either national or international. The key, however, is that while each notion is compatible with either half of each other opposition, it can never be both at once. The appearance of complementarity is achieved by manipulating this flexibility. The structure of these conflicts is extremely fluid, and although the oppositions seem related, they do not seem related in any one fixed way.

It seems that the »old« view did when it adopted the rosy view that the Rule of Law could be all these things simultaneously, was not simply to deny one or the other or to emphasize their complementarity. They are not really so much complementary, after all, as reversible. What the old view did was to exploit precisely this fluidity between the various oppositions to move among them until the conflict seemed to disappear. When one opposition seemed in conflict, it was possible to shift to another which then seemed complementary. For example: economic and political rights (in conflict) could be internationally a matter of national interpretation (complementary). Or: the Rule of Law could be both national and international (in conflict) because it provided for collective solidarity in choosing rights for individual consumption (complementary). The old view, then, was able to remain wholistic by exploiting the connections between these conflicts to make them seem complementary.

In the old view the Rule of Law could ensure human dignity because it could provide economic, collective, international security without denying political and individual or national freedom. But, paradoxically, it achieved this by exploiting the fact that political rights were also collective, international schemes and economic rights were also individualistic, and so forth. That being so, the achievement of each single goal denied as well as affirmed itself. That is, it was not that a wholistic Rule of Law needed to conquer conflict to preserve a wholistic dignity, but that these conflicts repeatedly mirrored the dual nature of human dignity; as, for example, something to be achieved alone and with

others. The old view, then was doomed either to obscure a conflict which could not be resolved, or to deny half of what it tried to protect.

The ICJ's current initiative is significant because the »new« Rule of Law recognizes and moves beyond this failure. The conference found the traditional view that economic rights covered everything political rights left unsaid insufficient. Development meant more than the simultaneous achievement of economic and political rights for individuals and groups nationally and internationally. These old conflicts seemed both irrelevant and yet unavoidable in the old vision. The conference seems to have recognized that these conflicts resulted from an inadequate understanding of human dignity which missed much of the richness of what development might achieve. Dignity was all of these things also in their contradictory manifestations. The time had come to embrace and transcend these contradictions, not to obscure them.

Participants described this reorientation in a number of ways of which perhaps the most characteristic was the use of the term »solidarity« or »third generation« rights in a »structural« approach to the achievement of human dignity. On the one hand these ideas fully embraced past notions of economic and political rights, and one might well understand the view that they added nothing new, but merely reemphasized the ICJ's commitment to the full realization of both. But one had the feeling the conference wanted to draw on deeper, older notions of fraternity and solidarity to avoid discussion of the alternative dimensions of the old Rule of Law. »Solidarity rights« means never having to say that a rule of law can simultaneously achieve the various forms of rights previously envisioned or that their achievement was the essence of human dignity. This amounts to a profound, if unrecognized, rejection of the Rule of Law as previously understood. That is the meaning of the new Rule of Law. It refuses to pretend that political and economic rights can be rendered compatible simply by argument. In a significant way this is the end of an understanding of the Rule of Law as a system of »rights« altogether. In the new view, law does not structure claims between people or connections between goals and outcomes, but focuses on conditions themselves. It is a more active approach. It leaves the idea of neutral distance behind as unrealistic, for the attempts to neutrally resolve conflicts compatible failed to apprehend the nature of the conflict in our social vision. The new view would deal directly with development and dignity without the intermediate step of economic or political rights. Moreover, the new view would deny law's separation from other modes of thinking and other social structures. Law's special status, after all was based on its purported ability to resolve through neutral argument, in contrast to moral or political discussion, basic conflicts inherent in the search for human dignity. As this has turned out not to be possible, the justification for law's special status disappears. Legal thinking, then, is just thinking. If our hearts and minds are touched by the indignity of underdevelopment we must respond, as lawyers as well as people.

### Development and the new rule of law: New tasks for lawyers and institutions

The notion of the Rule of Law initiated by the ICJ conference could alter our understanding of the development process and the role of both the Rule of Law and of Lawyers. The ICJ has done more than switch tactics or reorder priorities.

At the very least, the Conference de-emphasized the importance of »rights« in the international legal fabric. Some might argue this occurred by diluting existing rights with a very fuzzy notion of a right to development. Others might argue that the switch was more profound: that the creation of »rights« seemed inappropriate in the development area. The point of the new Rule of Law is that lawyers can no longer respond to hunger by debating a »right« to food.

Although much of the conference's attention was devoted to consideration of whether there was a »right to development«, this discussion had an air of irreality about it. The conference as a whole emphasized the inappropriateness of responding to the threat underdevelopment posed to human dignity with traditional discussions about legal rights and duties. By moving to an approach focusing on solidarity, the conference implicitly recognized that the law, so as also lawyers, should be judged by action in producing development, not resolution of abstract conflicts. But if the discussion of a »right to development« seemed ironically without the spirit of the new Rule of Law, it succeeded in drawing attention to the importance of solidarity concerns. If calling it an international »right« helps get lawyers over the hurdle of failing to develop the sort of international solidarity taken for granted within Western societies, so be it.

Just as the role of a distant law in bringing about development was deemphasized, the role of an active community law in building self reliance and solidarity was strengthened. The task of law seems no longer reconstruction of a Western institutional or conceptual structure to guarantee either process rights or substantive conditions, internationally or within third world societies. Rather law seems a tool of communication for building the kind of solidarity larger models of development represented by economic and political rights in fact denied.

Deep within the view that political, economic and social rights were not all there was to development, then, lurks the notion that their pursuit in fact misunderstood development. Basic to the notion of development discussed at the conference was the view that both Western and Soviet models were inappropriate. The goal of an action oriented new Rule of Law is to provide the communication tools necessary to build a model of development appropriate for local communities based on solidarity rather than upon either individualism or communalism.

It remains to be seen how the Commission will implement its new conception. Beyond pointing the direction such a new orientation in thinking about the Rule of Law might take development work, the conference did little more than recognize the contribution lawyers may have to make. Some hints about the nature of that contribution did emerge. Fundamental is abandonment of Western municipal models. One could expect the ICJ to urge the legal profession to stop thinking about development and human rights on the

international level as another outlet for domestically tested legal roles. That is, international institutions should get out of the business of developing opinions about what counts as a »right«, of judging violators and focusing on punishment of the victim. Rather, the law should be concerned with communication between victim and violator, support for the victim, and reestablishment of the conditions under which human dignity could be respected. In providing legal service in developing countries, we should de-emphasize application of the old Rule of Law to more and more levels of society with its emphasis on adversarial proceedings, rights, duties, and judgement. Spreading such a structure fools clients that justice or dignity in its contradictory senses can and in fact has been achieved. Moreover it encourages growth of inappropriate institutional structures and conflict rather than cooperation. The provision of legal service should be concerned to develop localized structures for communicating about and overcoming conflicts by developing solidarity, rather than encouraging the principled conflict resolution familiar from Western legal structures. If lawyers want to focus on developing codes of conduct, they should be codes for measuring development which could provide the basis for agitation, investigation and promotion.

The 1981 Conference of the International Commission of Jurists began a transformation from an ethnocentric western model on the Rule of Law to an approach compatible with building the solidarity necessary for human development. In doing so it has both threatened notions of the meaning and value of the Rule of Law and begun to define new tasks and goals in the legal profession internationally.

Werner Draguhn  
Peter Schier (Hrsg.)

### INDOCHINA: DER PERMANENTE KONFLIKT?

Die Permanenz des Indochina-Konflikts über Jahrzehnte hinweg offenbart die Komplexität der in dieser Region existenten Probleme und die Schwierigkeiten ihrer Lösung. In dem vorliegenden Sammelband wird versucht, sowohl die aktuellen als auch die historischen Aspekte des Indochina-Konflikts herauszuarbeiten. Dargestellt und analysiert werden die historische Entwicklung und die kommunistische Bewegung Indochinas der kambodschanisch-vietnamesische Konflikt, das vietnamesisch-laotische Verhältnis, die Politik der VR China gegenüber Indochina, die Interessenlage der UdSSR, die Haltung der ASEAN-Staaten zum Indochina-Konflikt und Lösungsmöglichkeiten anhand von verschiedenen Szenarios.

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### Hans Jürgen Mayer (Hrsg.) DER JAPANISCH-SOWJETISCHE TERRITORIALSTREIT

Die sowjetische Japanpolitik ist mit ihrer doppelten Zielsetzung - Auflösung des Japanisch-amerikanischen Sicherheitsvertrages, Verhinderung der japanisch-chinesischen Annäherung - bisher nicht zuletzt wegen ihrer Unnachgiebigkeit in der Kurilenfrage erfolglos geblieben. Die UdSSR benutzte die Verhandlungen über die japanischen Fischereirechte innerhalb der sowjetischen 200-Meilen-Zone als Druckmittel, um Tokyo zum Verzicht auf die Südkurilen zu zwingen. Gleichzeitig demonstrierte die Sowjetunion ihre Fähigkeit, Japans Versorgungsrouten zu unterbrechen, und verstärkte ihre militärische Präsenz auf den umstrittenen Inseln. Hierdurch zwang sie Japan geradezu zum Abschluß des Vertrages mit China, stabilisierte den Sicherheitsvertrag und baute die Vorbehalte der Japanischen Öffentlichkeit gegen eine hochwertige Aufrüstung ab.

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### JAPAN 1980/81 Politik und Wirtschaft

Manfred Pohl, Hrsg.

Diese Handbuch für alle, die sich intensiver mit der asiatischen Wirtschaftsgeschichte befassen, erscheint nun im vierten Jahrgang. Es analysiert die Innenpolitik, die Außenpolitik, die binnen- und außenwirtschaftlichen Probleme und insbesondere auch Fragenkreise, welche 1980 von besonderer Brisanz gewesen sind. Der Anhang bringt die Wirtschaftsdaten des Landes in Form von statistischen Tabellen bis zum Ende des Jahres 1980.

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Die Szene in China verändert sich noch immer in atemberaubendem Tempo. Die monatliche Zusammenfassung und Analyse dieser Entwicklungen in allen Bereichen, jedoch mit Schwerpunkt auf Politik und Wirtschaft, ist die Aufgabe von CHINA aktuell. Die wesentlichsten Entwicklungen werden ausführlich in Themen behandelt, einzelne wichtige Ereignisse werden in Form von kurzen Nachrichten berichtet. Daneben werden Aspekte der Regierungs- und Parteifunktionen in tabellarischer Form zusammengefaßt.