Multilayered Governance, Shared Values and Moral Conflict

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I. Introduction

Law requires underlying values of a given society or community upon which its legitimacy relies. Such legitimacy is essential for the operation of the law as it is a precondition for voluntary compliance (Frank 1995:25). Underlying values, in particular fairness and justice, draw upon perceptions of morality which in return relies upon traditions, religion, philosophy, culture, civilisation, and legal feedback, in a dialectical process.

Scholars working on constitutional approaches to international law and the doctrine of multilayered governance, encompassing local, sub-national, regional and global levels of governance face severe theoretical and practical objections. Underlying values and morality strongly differ between nations and societies and do not offer a solid foundation for common legal structures. Pluralism and cultural diversity around the globe implies that a moral consensus exists within a state, nation and people and civilisation (Huntington 1997). They are best protected within the state (Bull 1977). Once we move beyond borders, we enter moral conflict, as different societies pursue different purposes. The morality of international law is distinct from domestic systems with its own principles of international conduct (Nardin 1983: 241 et passim). Moral and legal obligations incurred within a society on fairness and justice under the veil of ignorance cannot be extended to other countries and the world for similar reasons (Rawls 1999). Realists deny the existence of morality in international relations altogether and consider recourse to it as a matter of exercising power. Attempts to build global structures therefore are flawed and vain exercises in idealism and legalism (Morgenthau 1985). Finally, international law clearly remains distinct from the body of national law. It is effective only to the extent that it operates on the basis of coincidence of interests, coordination of interests and coercion (Goldsmith & Posner 2005:12). The two cannot merge. Eric Stein concludes his analysis of international organisations and democratic legitimacy on the level of international law with a sceptical note, despite a disposition towards further democratization and integration. “However, in view of the enormous differences in the persistent, deep-rooted differences in the peoples – cultural-ethnic, economic, and political – there is little evidence that the democracy-legitimacy gap can be filled by “Great and desperate Cures” at the global level at any rate. On the other hand, there is ample evidence that creative, idiosyncratic arrangements commensurate with the respective level of integration are called for in both the national and the international institutions” (Stein 2001: 534).

The reality of international relations lends support to such objections and observations. Politics are based upon nationality and the framework of national constitutions. The public sphere, essential for democracy, is limited to the domestic realm, taking an interest in global affairs mainly from the point of view of nationally defined interests. The law is essentially framed on the basis of national constitutions, while international relations are merely subject
to weak structures of international law and devoid of effective mechanisms of implementation, highly dependent upon voluntary compliance. Power, much more than values and morality, plays a significant role and is exercised on the basis of national interests. Human rights are constantly violated around the world and effective responses are still lacking. They are best protected to the extent that standards are absorbed into domestic law. Millions of people continue to die of famine every year. Big cities in developing countries continue to be overcrowded, attracting the rural poor. The management of natural resources, both at sea and on land, still fails to consider the rights of future generations. The majority of states are authoritarian and not inclined to lend support to democratic values which are at the heart of Western civilisation. Even within the West, existing structures of multilayered governance, in particular the European Union as the most advanced project of this kind, are met with scepticism and barred from adopting the symbols of constitutionalism which public opinion in most countries prefers to limit to the traditional nation state. The world is in constant moral, political and economic conflict, and common values are hard to identify.

These objections cannot undermine the search for multilayered governance and an appropriate theory. The state of play of the world does not allow otherwise. Realists contribute to stabilising existing power structures and relations, but offer little in the way of improving governance and conditions for the majority of people around the world in the process of globalisation. They are important in terms of reality checks and debate. They create an obligation to sharpen the arguments for, and the foundations of, multilayered governance, the life of international law and the long-term realisation of values shared by all humankind. The effort is one of addressing, and coping with, the huge deficiencies of the Westphalian system of nation states in the post-colonial era.

II. Multilayered Governance and Cosmopolitan Values

Multilayered governance (MLG) builds upon the traditions of constitutional law and federalism. It seeks to coordinate different layers of governance, from local to global, and to find ways and means to allocate powers and jurisdictions to these different layers in an optimal manner (e.g. Cottier & Hertig 2004). MLG thus requires common foundations applicable to all these layers. The approach inherently depends upon common and shared values. MLG and the model of constitutionalising international law build upon achievements of the 18th and 19th century Western constitutionalism. It essentially builds upon experience gained within the realm of domestic affairs: the protection of human rights and property rights, fairness, equal opportunities, distributive justice, democracy and accountable government, the rule of law, checks and balances and federalism. Within a wide range of different proposals, these elements all play a key role in one way or another in shaping the future of international law and organizations.

These values, as applied to global affairs and relations, are essentially those of cosmopolitanism, reflecting the liberal and social democratic heritage. The theory is based upon the premise that all humans share common traits (Apphia 2006), and essentially are entitled to be treated alike. It is an egalitarian liberal doctrine which emphasises distributive justice and equal opportunities as a foundation of fairness. Cosmopolitanism is a moral doctrine which extends to legal and institutional dimensions, seeking to shape international
law and global institutions in such a manner as to further the goals of moral cosmopolitanism (Caney 2005).1

While there is no shortage of references to these values in international instruments and rhetoric, the question arises, in light of realities, to what extent these values are shared, and need to be shared and existing, in order to make MLG work beyond a utopian aspiration. The question arises which of these values are pertinent. Some relate to substantive issues. Some relate to process and structures. Not all are likely to be of similar relevance to MLG. Importantly, the question arises to what extent these values tend to be imposed, rather than agreed upon.

We briefly discuss human rights and the doctrine of equal conditions of competition in the field of economic law and related property rights within the WTO. We seek to assess the level of underlying shared values. Both derive from shared principles of liberty, but have been implemented in quite different ways (Cottier 2007).

A. Human Rights

Human rights have been ratified in terms of treaty obligations by a large majority of states. The UN Covenants on Civil and Political Rights, as well as the Covenant on Social, Economic and Cultural Rights today are of practically universal scope. Formally, they provide the foundations of universally recognised and thus shared values. The Covenants essentially address domestic affairs; states are under an obligation to treat humans within their jurisdiction accordingly. It is, however, a different matter as to whether these agreements truly reflect basic values enshrined in countries around the world, given today’s realities of constant abuse and violations. Governments are able to enter these agreements at very low costs. It is an open question to what extent they adhere for convenience and with little consequence on domestic power structures. Implementing human rights values in legal orders has been and remains difficult (Campbell et al 1986). International monitoring and implementation remain weak. Human rights offer guidance on domestic policy making, legislation and adjudication, but implementation remains weak, given widespread authoritarian regimes and frequent allocation of resources for purposes other than the protection and promotion of human rights. In practical terms, the Conventions introduce only

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1 Summarizing his book *Justice Beyond Borders: A Global Political Theory*, Simon Caney characterises his brand of cosmopolitanism as follows: “this book has attempted to justify an egalitarian liberal brand of cosmopolitanism; it has defended the thesis that there are universal principles against cultural relativists. Its general strategy has been to show that many critiques of universalism mischaracterize it and that other critiques are simply unpersuasive. It has defended two universal principles of justice in particular. First: it defends a liberal package of civil and political human rights, arguing that these are necessary to respect persons’ interests in leading fulfilling lives. In doing so, it chronicled five reasons for thinking that liberal civil and political human rights best enable people to flourish. Second: it defends an egalitarian distributive programme, defending subsistence rights, a principle of global equality of opportunity, rules of fair pay, and a commitment to prioritizing the least advantaged. Furthermore, by contrast with many other cosmopolitans … the argument for these universal principles of distributive justice does not depend on whether there is extensive economic globalization or not. .. Drawing on these universal principles of civil, political, and distributive justice, this work then criticized a statist world order and defended a system of global political authorities.” (Caney 2005: 263/264).
weak elements of MLG. This is even true for the European Convention on Human Rights as Members are not obliged to implement rulings of the Court, but are limited to offering compensation to victims of violation of rights.

I argue elsewhere that the main function of the Universal Declaration of Human Rights was in fact to overcome the legacy of colonialism and related racism and to discharge the restricting notion of civilised nations in the wake of decolonisation. The main obligation from this evolution was thus incurred by former metropolitan powers and industrialised nations (Cottier 2007). It was a response to state failure of so called civilised nations and established long-term responsibilities vis-à-vis developing countries in terms of supporting human rights protection around the globe. Yet, development assistance and efforts have remained at relatively low levels. It is therefore fair to say that human rights values are agreed upon in principle, but remain weak and controversial in terms of implementation and specification. There is wide and considerable disagreement on the extent to which resources should be allocated to these values both internally and in foreign relations.

B. Equal Conditions of Competition (WTO)

In international trade relations, the principles of non-discrimination of the WTO amount to an important value. Other than human rights, they do not offer easy access, and membership of the WTO is accompanied by substantial concessions of liberalisation which have not lacked impact on domestic structures. The willingness to adhere to the GATT and the WTO, as the successor organisation, may therefore be considered as evidence of a true commitment to underlying values of equal conditions of competition. Both MFN and national treatment principles enshrine this principle of fairness. They qualify the principle of sovereign equality of states and introduce key elements of MLG as these principles introduce vertical checks and balances against protectionist policies disregarding the interests of those not represented in domestic legislative processes (Cottier & Oesch 2005: 346-427). Structurally, the principles operate in the same manner as constitutional rights relating to commerce (Wirtschaftsfreiheit, interstate commerce clause) as well as the Four Freedoms and the principle of non-discrimination in EC law. These principles are subject to WTO dispute settlement, compensation or trade sanctions in the case of failure to comply with rulings. Equal conditions of competition thus amount to a key principle of MLG. Historically, both in federality and integration, it has been at the outset a long-term process which eventually turns to include additional policy areas beyond trade regulation. It is thus fair to say that as a value, it is taken seriously and well established in international relations. Variations between states, however, continue to exist in terms of market access which depends upon levels of tariff protection, other non-tariff barriers and discrimination in the field of services under the GATS Agreement. These measures strongly distort equality of opportunity and render it a matter of degree.

International trade law moreover is of interest in assessing property rights and related values. Property protection amounts to a key feature in market economies, and the way it is addressed offers interesting insights as to what extent it amounts to a shared value.

1. Intellectual Property

While real property is weakly protected in customary international law, essentially limited to arbitrary expropriation and compensation (subject to disputed levels and standards of full or equitable compensation), intellectual property is subject to strong protection within the TRIPS
Agreement. While, in principle, protection may be accepted, whether the levels of protection offered by the TRIPS Agreement are appropriate for developing countries is a highly controversial question. TRIPS is widely conceived as an imposed agreement, to which developing countries were forced to adhere within the package deal of the Uruguay Round. It is perceived as an imposed value by developing countries. I argue elsewhere that in practical terms levels of protection operate under the doctrine of benign neglect and are subject to graduation. They become of practical relevance in international relations once an industry achieves competitiveness (Cottier 2007). Patent protection is an important ingredient of equal conditions of competition and thus of competition law and policy at large. It thus forms part of the overall values enshrined in WTO law. Future evolutions should formalise graduation with a view to achieving better legal security and predictability. But it would seem wrong to argue that private property protection is not legitimate as a long-term investment within the WTO system. They form an important part of cosmopolitan values.

2. AGRICULTURAL PROPERTY AND HERITAGE

Another area of strong property protection is agriculture in the sense that existing structures are essentially maintained, much more than in any other sector of the economy. Other than in the field of IPRs, equal conditions of competition are strongly distorted by enhanced levels of border protection and domestic support on the part of industrialised countries. These levels of protection do not take into account the impact on producers and farmers in other countries, in particular in the developing world. I submit that the protection of property in terms of preserving traditional perceptions and values of cultural diversity and identity and sentiments of heimat depict nationalism and do not sufficiently take into account cosmopolitan values (Cottier 2007). Market access for those in need of it is largely denied at high costs to consumers and foreign producers alike. The close relationship of poverty in developing countries with conservative patterns of traditional agriculture in industrialised countries is not sufficiently clear to the public at large.

III. Conflicting Values and Moral Disagreement

As a result, human rights values are often compromised in state practice, and the WTO shows a mixed bag of underlying values within the broadly agreed value of creating equal conditions of competition for imported and domestic products (goods and services) alike. They are partly cosmopolitan, partly nationalist. They are partly agreed upon and partly highly controversial and refuted. And even where they are agreed in principle, they remain controversial when it comes to specific contours and implementation. The difficulties in concluding the current Doha Development Agenda prove the point. There is no agreement as to the amount and degree of distributive justice in the allocation of resources.

Cosmopolitan values underlying MLG therefore are highly controversial. They are partly shared, and partly imposed. When it comes to specifics, actors disagree and agreement is difficult to achieve. There is more disagreement than agreement. We are left with substantial divergence. Realists will tend to see their theories confirmed. Does this exclude further progress on MLG?

Theories of international relations tend to ignore the fact that disagreement is not unique to international relations and law. They tend to look at the nation state as a uniform subject and actor. Theories of justice assume basic coherence in a given society as a basis of distributive
justice and fairness (Rawls 1972). Values, however, are equally controversial within the nation state. Pluralism essentially builds upon disagreement. Samantha Besson elaborated on this point in her seminal work *The Morality of Conflict: Reasonable Disagreement and the Law* (Besson 2005). People agree only on general concepts, but inherently disagree on specific contours of basic values such as freedom, democracy or equality. These values are “essentially contestable concepts” (Besson 2005: 156, 331). Values and principles in law are “essentially incomplete theorised agreements” (Sustain) which need further concretization. Disagreement is the normal state of affairs in domestic polity. People have different views and perceptions of justice. Thus, people at home disagree on the scope of human rights, in particular relating to distributive justice but even on matters like freedom of speech. People disagree, to take comparable examples discussed above, on equal conditions of competition and the scope Wirtschaftsfreiheit and its limitations, as much as on the contours of the Four Freedoms. People disagree on the particular contours of patent rights, e.g. in relation to genetic engineering or parallel imports.

On these premises, Besson develops a theory which essentially focuses on appropriate procedures relating to discourse and decision-making. Different from ideals of consensus and deliberate democracy, she re-emphasises the need for voting ethics and majority rule (Besson: 254) in order to cope with conflicting values. She recognises the need for mainly procedural constitutional restraints for the very benefit of the democratic process (id: 317). She emphasises the need for a carefully balanced dialogue between judiciary and the legislator (id: 333) within what she calls a model of “weak constitutionalism” in the sense that constitutions also need to be subject to revision in accordance with qualified rules (id. 323 ss). The main function of the law amounts to coordination of competing moral values upon which the authority of law relies, and the moral obligation to comply as well as resistance to compliance are developed on that basis (id. 466 ss).

These findings are immensely relevant for MLG. Disagreement on values is present on all levels of governance. Theories claiming a special status of values within the domestic polity are refuted and conceptual barriers between domestic and international law fall apart. The theory offers the potential for a coherent and uniform approach to values and their indeterminacies on the basis of a state of basic rational disagreement and pluralism. On all levels alike, the emphasis is on process, rather than on substance. Indeed, traditional dichotomies between constitutional law and international law may be found in the tradition of perceiving constitutions as material foundations of society, rather than as an instrument of government the focus of which is on procedures.

In her conclusions, Besson discusses the potential of her theory of international relations – an angle she is committed to investigating further in coming publications – as a matter of reasonable legal pluralism beyond the state level (Besson 2005: 534). The theory offers the foundation of what she calls cooperative sovereignty (id: 535) entailing an understanding of meaningful co-ordination of different levels of governance, from local to global levels. She expounds the principles of cooperative sovereignty and of global coherence:

First of all, a revised conception of cooperative sovereignty could arise from a more elaborate approach to global legal pluralism. … Sovereignty should be conceived as a reflexive concept whose correct use is to reflect on and disagree over the values protected by sovereignty, ie mainly democracy and fundamental rights. … The protection of the values underlying those contestable concepts would therefore benefit more from cooperation between different competent authorities and entities and how best to protect their common values and hence on when to give up sovereignty to
others, than from the mere declaration of primacy of one sovereign over the other. As it is at once open and closed, cooperative sovereignty could both frame and stimulate the debates that go deep into the heart of what should be the best allocation of power and this not only in Europe, but also on a more global scale. …

Secondly, cooperative sovereignty could give rise to a principle of global coherence in conditions of reasonable post- and supranational pluralism. When conflicting sovereign positions are understood as being in a cooperative relationship rather than an adversarial one, it is easy to see how a principle of respect for others’ reasonable albeit different positions should be developed on the model of the principle of legal coherence at the infra-state level. … None of the conflicting sources of legality should be primarily subordinated to others and local governance should be able to coexist and flourish alongside global governance, provided conflict becomes a source of mutual learning and principled consistency in the cooperative venture of providing the common subjects to these different legal orders the values and certainty which the rule of law aims at securing for them (Besson 2005: 535/536).

The concept thus supports what cosmopolitans seek in terms of appropriate multilevel structures with a view to optimally achieving their values (Caney 2005: 163). It essentially corresponds to the doctrine of compensatory constitutionalism (Peters 2006), the doctrine of sovereignty modern (Jackson 2006), the doctrine of a five storey house (Cottier & Hertig 2004). While supremacy of global law is the rule as an organising principle, the latter allows for exceptions based upon the protection of human rights and fundamental values. Primacy should be defined on substantive rather than formal hierarchy (Peters 2007). They take into account the experience of failures of different layers of government which need to be remedied in a system of checks and balances. All the theories share the view that allocation of powers should be looked at within an overall coherent framework with a view to bringing about the best results for the underlying values they stand for.

IV. Lessons and Conclusions

The lessons to be learnt from Besson are that that emphasis of MLG needs to be placed on structures and procedures, rather than content beyond broad and thus incomplete theorised agreements. Once we accept pluralism of moral values within and outside national borders as a normal state of affairs, the bridge to overcoming traditional divides is conceptually built. We need to limit the concept of shared values to very basic precepts and allow ample room for pluralist variations in different contexts. We cannot expect more than very basic agreement on human values on all levels of government alike. At the same time, the challenge of democracy and democratic accountability and legitimacy, due process, checks and balances, the relationship of legislative and adjudicative bodies both within a layer and between layers, thus horizontally and vertically, and the issue of compliance, deserve significant attention and elaboration in furthering the doctrine of multilayered governance. It is here that the main efforts towards coherence need to be made and achieved in institutional terms.

Despite the harsh realities of a power-driven world, it is fair to say that some basic values are shared among people who, after all, share a broad range of activities and experiences in their lives (Aippha 2006). Wherever people go on their journey, not knowing their fate (Rawls) they are likely to concur with the following values and moral obligations: respect of basic
human rights, the idea of distributive justice and equity (*suum cuique*) and in particular the satisfaction of basic needs in terms of food, shelter, clothing and education, the idea of fairness and equal opportunity, the protection of good faith and legitimate expectation at whatever layer and form of governance they are exposed to. These values can be found in all of the world’s legal cultures and religions in one expression or another. Operation and implementation of these values, however, differ markedly. They remain controversial within societies and among societies. They are subject to different outcomes, sometimes disrespect, and depend upon structures of government, decision-making processes and legal protection.

Determination of the basic values underlying governmental structures may perhaps best be approached by way of exclusion. Nobody today morally endorses tyranny, dictatorship, terror, or recognises the morality of such regimes. In some areas, legitimacy is still derived from deity, and the authority of power remains highly centralised. Yet, it is fair to assume that most people subject to any form of governance subscribe deep in their hearts (which often cannot be read) and, in addition to the protection of human rights, to the prevailing universal ideals of governance in the 21st century: democracy and the ideal of legitimate power originating in delegation by the people and for the people within a constitutional framework. Structures of good governance and MLG are thus bound to be built upon the precepts of democratic constitutionalism. The basic values of democracy and majority ruling, separations of powers and checks and balances, the rule of law, and transparency are generally agreed upon and offer solid foundations to build upon. They have proven to provide the most stable and least unfair systems of government. They have offered the best record as foundations for economic growth and welfare. The principles of non-discrimination can be found on all levels of government, including global law, and provide the backbone for structuring limitations to governmental discretion in the pursuit of cosmopolitan values and the protection of the interests of those who do not form part of a particular constituency and polity.

Putting all these values into operation remains a matter of politics, negotiations and the exercise of power in building structures of MLG. There is ample room for differences and cultural diversity. General values agreed upon do not define allocation of powers, degrees of redistribution or levels of taxation. Moral disagreement offers the starting point in addressing these issues, and compromise and coordination will need to be settled in the law of the different layers of government.

References


