

A CALL TO ACTION FOR RULE OF LAW AND DEVELOPMENT

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The Rule of Law has a long and illustrious history in which, many would argue, Magna Carta in 1215 was a key turning point. We have the potential to mark a similarly important turning point 800 years later in 2015 should Rule of Law be enshrined within the newly emerging Sustainable Goals (SDGs).

There are many reasons that can be put forward as to why Rule of Law is so critical to development.¹ For instance—how it underpins the delivery of all other goals, how it enables the democratization of development, and how critical it is to commercial enterprises and economic growth. Important though these are, I would argue that there is an even more compelling reason why Rule of Law should be featured within the SDGs. To put it simply, Rule of Law practitioners and the four billion people globally living outside the protection of the law need it to be.²

Why is that? A key achievement of the UN Millennium Development Goals (MDGs) was to bring clarity to the development debate. The MDGs have brought focus to extreme poverty and disease by having a limited range of goals, fixed and clear indicators, and actually realizing the need to make practical progress against them. It is because of this that we have seen extreme poverty reduced by half, an estimated 3.3 million deaths from malaria averted, and improved ac-

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1. See *Justice and Development: The Post-2015 Agenda, Why Add a Justice Goal?*, OPEN SOC'Y FOUNDS., <http://www.opensocietyfoundations.org/projects/justice-and-development/justice-action> (last visited March 24, 2015).

2. COMM'N ON LEGAL EMPOWERMENT OF THE POOR & UNITED NATIONS DEV. PROGRAMME, 1 MAKING THE LAW WORK FOR EVERYONE 3 (2008).

cess to drinking water for 2.3 billion people, amongst other things.³ The MDGs have also brought together the international community, as well as the not-for-profit sector and business—creating a consensus among them to achieve these objectives together.

Against this, let us set the Rule of Law and see how it compares. Certainly there is a long and illustrious history from Aristotle commenting, “The Rule of Law is better than that of any individual,” through Magna Carta and on to theorists such as Dicey. However, is there much clarity? It is telling that for all that Dicey is seen, particularly as one of the founding fathers on the concept of the Rule of Law, he himself actually noted that “whenever we talk of Englishmen as loving the government of law, or of the supremacy of law as being characteristic of the English constitution, we are using words which, though they possess a real significance, are nevertheless, to most persons who employ them, full of vagueness and ambiguity.”⁴ His reasoning remains true today. As a leading law and development commentator noted, the Rule of Law “concept emerges looking like the proverbial blind man’s elephant—a trunk to one person, a tail to another.”⁵

Many steps have been taken by the UN among others, such as the promotion of the Rule of Law within the General Assembly, the Security Council, as well as the Secretary General and Deputy Secretary General. In particular, the Secretary General defined Rule of Law as:

[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.⁶

Notwithstanding this effort, a tension remains: At a high level, is Rule of Law focused on institutional characteristics and institutional

3. U.N. Dep’t of Econ. & Soc. Affairs, *The Millennium Development Goals Report 2014*, at 4 (2014).

4. ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 110 (1915).

5. RACHEL KLEINFELD BELTON, *CARNEGIE ENDOWMENT FOR INT’L PEACE, COMPETING DEFINITIONS OF THE RULE OF LAW: IMPLICATIONS FOR PRACTITIONERS* 5 (2005).

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

change, such as legislative reform and judicial training, or does the Rule of Law serve within a State such that citizens are viewed equal before the law? This tension can be critical in determining the support provided to a country on Rule of Law issues, as well as the level of attention that is paid to the real underlying need and political economy. Beneath this, is the Rule of Law actually measurable, and if so, what would our targets be?

Each of the schools of thought regarding Rule of Law has its attractions, and indeed the current breadth of definitions means that most people welcome the *idea* of the Rule of Law—something that I experienced first hand through my various roles in the pro bono sector. While travelling across Latin America, Africa, and Asia to meet with lawyers, judges, and those working for and in government, it was striking how on each of the occasions when Rule of Law had been mentioned, the reception was good. Whilst this may have been because we all had a shared and positive understanding of the Rule of Law, I would argue that it was due more to each person being able to make the Rule of Law what he or she wished. In each situation, culture and context played a vital role.

This lack of certainty and clarity can be a challenge. It also goes against the grain of what we as lawyers are used to dealing with. It also goes against the grain of one of the things that development funders value—the ability to measure, and for that matter, potentially the ability to deliver real change.

So what change could we hope to see if Rule of Law is within the SDGs? Well certainly, the SDGs will be no magic bullet. However, having Rule of Law at their heart would first require proper recognition for the role that Rule of Law plays in delivering the broad range of goals within the SDGs. It would also give additional momentum (if not an imperative) to drill down and agree what we mean by “Rule of Law.” Finally, it would raise Rule of Law up in the development and donor agenda. Such a focus, if handled well, offers law and development practitioners a once-in-a-lifetime opportunity to achieve significant and lasting change. It is an opportunity we cannot afford to miss.