

ARGUMENTS

James A. Goldston: New Rules for the Rule of Law

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New Rules for the Rule of Law¹

Tens of thousands have been killed in Mexico since 2006, and many more disappeared, as a war between narcotics gangs and government security forces has engulfed civilians. Few perpetrators have been brought to justice. In Equatorial Guinea, a country with per capita GDP greater than Italy or South Korea, 60% of the population survives on less than \$1 a day, as oil revenues are siphoned off by widespread corruption. Throughout Central and Eastern Europe, Roma children are condemned to second-class education because of the color of their skin. On New York streets, police stop hundreds of thousands of young men of color annually, most of whom have not committed a crime.

A common problem underlies each of these tragedies: the failure of the rule of law.

In recent years, the concept of the “rule of law” has been gaining increased attention in academic and political circles. A “rule of law revival” was identified 15 years ago.² The trend has only accelerated since.

Over the past decade the rule of law has achieved talismanic status as the answer to many of the international community’s greatest policy challenges – from armed conflict to poverty, from corruption to dictatorship. According to the United Nations’ High Level Commission on Legal Empowerment of the Poor, “four billion people around the world are robbed of the chance to better their lives and climb out of poverty, because they are excluded from the rule of law.” For Robert Zoellick, former President of the World Bank, “The most fundamental prerequisite for sustainable development is an effective rule of law....”³

Just last September, heads of state and government from around the world came together to “reaffirm our commitment to the rule of law...” According to the Declaration of this UN gathering, the “rule of law...is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built.”⁴

In short, the rule of law is a concept whose time has come.

A Reinvigorated Rule of Law Bolsters Human Rights and Human Development

Many reasons underlie the growing ascendancy of the rule of law as a concept capable of commanding consensus in a divided world. To be sure, not everyone promoting the rule of law shares the same goals. And yet, even with its

mixed messages and the varied motivations underlying it, the recent rhetorical turn to the rule of law is an unparalleled opportunity to strengthen human rights, advance human development, and help bridge the often yawning gap between the rights and development worlds.

On the one hand, the rule of law offers a conceptual framework, and a range of tools and constituencies, that together can help translate rights discourse into concrete results. For example, a core rule of law principle – that the judgments of duly-constituted judicial bodies be respected and followed – can help address a principal weakness of the contemporary international human rights system: the dismal record of state implementation of, and compliance with, the judgments of regional human rights tribunals, the “views” of UN treaty bodies and the orders of international criminal courts.

At the same time, the rule of law can enhance human development, by incorporating rights consciousness and principles of accountability into development projects in fields from health to education to the environment. Empowering members of marginalized communities to know and utilize legal tools in their organizing and advocacy has been reported to help decrease the size and frequency of illegal dowry payments in Bangladesh,⁵ address physical violence against women in Ecuador,⁶ and improve the responsiveness and effectiveness of public health dispensaries in Uganda.⁷

In short, whether the policy goal is improved laws and institutions capable of protecting rights; more inclusive and effective human development; or both, the rule of law can help.

The Road Ahead: Putting a More Meaningful Rule of Law into Practice

Now that the rule of law is achieving rhetorical recognition, what are the principles which might guide practitioners, policymakers, donors and others who seek to promote it in practice?

First, there has been much discussion about whether the rule of law is thick or thin. I would argue that, however you see it, experience shows the rule of law is not so much a fixed, unchanging concept as a set of cultural understandings and practices. Over time, the repeated recourse to law and legal institutions as a source of redress will, it is hoped, increase respect for, and the legitimacy of, law itself. The process will be more successful in some places, less in others. But wherever it is pursued, this struggle must be at least as much about the way people think and act, as it is about the adoption of laws and the building of institutions, important though those are.

Second, a holistic vision of the rule of law rejects the false but common perception that rule of law promotion “abroad” – that is, in countries other than where donor institutions are based – is fundamentally different from the search for rule of law “at home.” The rule of law is a work in progress everywhere. No country or region has a monopoly on the rule of law – or its absence.

Third, in this field, doing is often the best way to teach and to learn. While training, skills-building and institutional modeling can, when undertaken with adequate attention to context, be useful, some of the most effective rule of law promotion occurs through the demonstrative effect of direct action – monitoring, litigation, and advocacy – in support of the rule of law. The arrest and charge of former Chilean dictator Augusto Pinochet in London, the adoption of a national law guaranteeing public access to government-held information in Nigeria, a US Supreme Court decision affirming the judiciary’s purview to rule on the constitutionality of military tribunals, were all events of significance in their own right, which simultaneously communicated to justice actors and the wider public both what the rule of law means, and that it is possible to achieve.

Fourth, a vigorous, enabled, and secure civil society sector is often a key factor in sustainable rule of law promotion over the long term. Government is far from monolithic, and numerous well-intended, highly capable persons enter public service. But they often require assistance from external allies – in business, labor, religion, the bar and the NGO sector – in contending with the shifting vagaries of political reality to foster enduring rule of law reforms.

Fifth, to enable a vision of the rule of law grounded in practice and local context to have impact, governments and other donors must put their money where their mouths are. And while more resources are needed, investment in justice need not be expensive. In the Democratic Republic of the Congo, mobile courts have fairly tried and convicted army soldiers for mass rape in far less time and at a fraction of the cost of international tribunals.⁸ In Nigeria, recent law graduates placed in police stations have freed hundreds of persons who otherwise faced months, if not years, languishing needlessly in pre-trial detention.⁹ In Sierra Leone, members of rural communities trained as paralegals for far less than the price of a lawyer have resolved land disputes and won community access to roads, electricity and environmental clean-up.¹⁰

Sixth, rule of law reformers must address the growing perception of double standards in the application of the rule of law – i.e., that there is no one rule of law impartially applied, but rather two – one for the powerful, and another for everyone else.¹¹

Finally, and relatedly, rule of law promotion requires attention, not just to capacity-building – though that is essential – but also to the generation and maintenance of political will. If the rule of law is fundamentally about constraining the exercise of power, technical fixes will not be sufficient. The fight for an independent judiciary, for the right to counsel, for the presumption of innocence, is a political act.

Conclusion: The Rule of Law Post-2015

The pursuit of a rule of law grounded in the reality of everyday problems, animated by universal aspirations, yet capable of curbing the exercise of arbitrary power by the highest officials, must take place at many levels. From a police stop to a courthouse hearing, from town halls to UN headquarters, from Sidi Bouzid to the streets of New York, the rule of law is present – both as it is, and as it could be. Though frustration with law's impotence and unfulfilled promise is widespread, it's impossible to say precisely when or where the next explosion of collective anguish will erupt – only that it will. And yet, a major opportunity to capitalize on the recent fascination with the rule of law is on the horizon: the post-2015 generation of Millennium Development Goals.

In September 2000, world leaders came together to proclaim, in the Millennium Declaration, that “the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people.”¹² The Declaration pledged the UN General Assembly's commitment to a set of ambitious, time-bound, measurable goals to promote development and reduce poverty. But it also identified a number of other “key objectives,”¹³ including to further peace and security, protect the environment, and “promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms.”¹⁴

In 2001, when the Declaration was operationalized into a set of Millennium Development Goals, the rule of law, human rights, democracy, and the environment were left out. Nonetheless, the MDGs, as they have become known, have had a substantial impact in their respective fields. As of 2010, five years before their deadline, the overarching goal of halving extreme poverty had been met. In part as a result of MDG-linked funding, primary education enrollment rates have increased measurably, particularly in south Asia and sub-Saharan Africa. MDG-related health gains in respect of malaria and HIV/AIDS have led to big reductions in child mortality, from Cambodia to Rwanda to Senegal.¹⁵

At the same time, the absence of the rule of law has been telling. No low-income country experiencing armed conflict has achieved a single MDG.

To the contrary, conflict-affected states – those, by definition, where the rule of law is lacking – account for disproportionately high percentages of the developing world’s poor, uneducated, and infant deaths.¹⁶ In advanced economies too, those portions of the population denied access to justice suffer from higher levels of discrimination in education and other public services.¹⁷

The debate over the next generation of MDGs is underway. A high-level UN panel, co-chaired by British Prime Minister David Cameron, Liberian President Ellen Johnson Sirleaf, and Indonesian President Susilo Bambang Yudhoyono, will issue its recommendations by June, and the Secretary General will make his report to the UN General Assembly this September. Then it will be up to the States to decide.

There are many good reasons to include the rule of law – whether under its own name or that of a sister moniker such as “access to justice” – in the next generation of MDGs. These include its contributions not just to more effective implementation of human rights – though they are genuine – but also to sustainable development, poverty reduction, and citizen security and empowerment. And not unimportantly, bringing the rule of law back into the MDGs would go a long way to reviving the unified framing of rights and human development which, with such promise, underpinned the Millennium Declaration.

And there are many ways to do so. It could be a goal in its own right, reflecting the fact that, as world leaders reaffirmed just last September, the rule of law is of “fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development.”¹⁸ The rule of law also could be integrated into concrete and measurable targets, such as doubling over the next decade the number of people who enjoy access to legal advice at low or no cost, or halving the number of people who have no legal identity. In addition, rule of law-related indicators – measuring, for example, whether national legislation authorizes provision of medication necessary to treat certain health conditions or education of all children of a certain age; whether legal frameworks are in place to resolve disputes over access to medicine or education; and whether provisions guaranteeing access to health care or schooling are enforced equally without discrimination – could be used to facilitate progress toward other goals, whether with respect to education, health care or poverty reduction.

But perhaps the most important reason to include the rule of law in the post-2015 development framework is that it’s the right thing to do. A culture of respect for the rule of law remains both an essential foundation for human well-being and a distant goal in many places. Since the first MDGs were promulgated a dozen years ago, rule of law emergencies have continued to arise – from the

terrorist violence of 9/11 to the overreaction of rendition and torture; from civil war in Syria to the collapse of social order in parts of Iraq, Pakistan and the Democratic Republic of the Congo; from worsening under-development in parts of the developing world to growing exclusion and inequality in the global north. Failure to incorporate the rule of law into the post-2015 MDGs would send the unacceptable message that these phenomena are acceptable. As the idea of a more vibrant and resilient rule of law gains currency, states must chart a new course.

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² T. Carothers, "The Rule of Law Revival," *Foreign Affairs* (March/April 1998). Carothers called the rule of law "a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization."

³ Daniel Dombey, "World Bank Chief Calls for rethink over failed states," *Financial Times*, September 12, 2008.

⁴ U.N. General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, U.N. Doc. A/67/L.1 (Sept., 19, 2012). In November 2012, in the Wall Street Journal, British Prime Minister David Cameron, co-chair of the High Level Panel on the post-2015 MDGs, chimed in, calling for "a radical new approach" to combating poverty grounded in support for "the rule of law, the absence of conflict and corruption, and the presence of property rights and strong institutions." David Cameron, "Combating Poverty at Its Roots." *The Wall Street Journal* (Nov. 1, 2012) available at <http://online.wsj.com/article/SB10001424052970204712904578090571423009066.html>. And in its most recent survey of global trends, the premier official political forecaster of the United States government – the National Intelligence Council – projected that, over the next two decades, the "global middle class" is likely to expand throughout the now developing world, and with it, "demand for rule of law and government accountability is likely to increase." National Intelligence Council, *Global Trends: 2030* (Dec. 2012), p. 48 available at <http://www.scribd.com/doc/116258792/Global-Trends-2030>.

⁵ *Legal Empowerment: Advancing Good Governance and Poverty Reduction, Appendix 2: The Impact of Legal Empowerment on Selected Aspects of Knowledge, Poverty, and Governance in Bangladesh: A Study of Three NGOs* (Asian Development Bank, 2001) pp. 135, 141, 145, available at http://www2.adb.org/documents/others/law_adb/lpr_2001_Appendix2.pdf.

⁶ Marcela Rodriguez, *Empowering Women: An Assessment of Legal Aid Under Ecuador's Judicial Reform Project*, World Bank (2003), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/04/25/000090341_20050425113552/Rendered/PDF/321400Empowering1Women.pdf.

⁷ Björkman, Martina, and Jakob Svensson. "Power to the people: evidence from a randomized field experiment on community-based monitoring in Uganda." *The Quarterly Journal of Economics* 124.2 (2009): 735-769.

⁸ *Justice in DRC: Mobile Courts Combat Rape and Impunity in Eastern Congo*, Open Society Foundation, 2012, available at <http://www.opensocietyfoundations.org/publications/justice-drc-mobile-courts-combat-rape-and-impunity-eastern-congo>.

⁹ Stanley Ibe, *Making Legal Aid Work in Nigeria's Police Stations*, Open Society Foundation, 2012, available at <http://www.opensocietyfoundations.org/voices/making-legal-aid-work-nigerias-police-stations>.

¹⁰ *Fact Sheet: Pretrial Justice and Paralegals in Sierra Leone*, Open Society Foundation, 2013, available at <http://www.opensocietyfoundations.org/fact-sheets/fact-sheet-pretrial-justice-and-paralegals-sierra-leone>.

¹¹ According to a recent study, “Elites and publics in the emerging power countries believe the post WWII international system has been skewed to favor the West....” (National Intelligence Council, *Global Trends 2030: Alternative Worlds*, CreateSpace Independent Publishing Platform, 2012, p. 54.).

¹² Millennium Declaration, para. 5.

¹³ *Id.*, para. 7.

¹⁴ *Id.*, para. 24.

¹⁵ John W. McArthur, “Own the Goals: What the Millennium Development Goals Have Accomplished,” *Foreign Affairs* (March/April 2013), p. 160.

¹⁶ Mary Robinson, Kevin Rudd and Judy Cheng-Hopkins, “Same Millennium, New Goals: Why Peace, Security, Good Governance and the Rule of Law Must Be Included in the New MDGs,” *Huffington Post*, March 12, 2013.

¹⁷ Legal Services Corporation: [Documenting the Justice Gap 2009](#)

¹⁸ UN Declaration on the Rule of Law, September 2012 (preamble).

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