

THE CASE FOR RULE OF LAW AND DEVELOPMENT: ISSUES OF DEFINITION, METHODOLOGY, AND MEASUREMENT

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INTRODUCTION

Imagine a slightly-built man peering at you through the bars of an overcrowded holding cell in a Kankan, Guinea police station.¹ His name is Amadou, and he is in police custody on trumped up theft allegations mounted by a jealous neighbor. Even though the law requires that defendants be brought before a judge within two days, he has been waiting for six to be charged. He is the sole breadwinner for a family of eight, and his wife, four children, and aging parents rely on him for support. His wife is already contemplating selling the family's small refrigerator to help pay for travel to and from Kankan—their small village—for the food and medication that Amadou will need to survive the inhumane conditions in the holding cell, and for the bribes and legal fees that will inevitably arise. In a country where pre-trial detention can stretch weeks or months, Amadou's family has no idea when he will be able to appear before a judge and begin to receive closure on this ordeal. Now multiply this scenario by the estimated fifteen million people who annually pass through pre-trial detention worldwide—many spending months and even years behind bars—at untold human and economic cost.²

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1. All examples in the Introduction are fictionalized accounts derived from the American Bar Association Rule of Law Initiative's (ABA ROLI) experiences working with justice actors and civil society organizations in more than fifty countries around the world.

2. MARTIN SCHÖNTEICH, *OPEN SOC'Y JUSTICE INITIATIVE, PRESUMPTION OF GUILT: THE GLOBAL OVERUSE OF PRETRIAL DETENTION 1* (David Berry & Kate Epstein eds., 2014).

Or shift the gaze of your mind's eye to Shahir, a Tajik shopkeeper eager to invest in upgrades to his store, new products, or a new location to create opportunity for his son and to support his growing family. Despite a brisk business and the careful husbanding of his resources, Shahir finds he cannot amass the savings in the face of recurrent bribe demands from local police and city officials. There is no legal recourse to right these wrongs. Or think of Alina, a Roma child born in Europe with odds overwhelmingly stacked against her by systemic racism and discrimination that will affect nearly every aspect of her life and will confound efforts to lift her and the millions like her out of poverty.³

Here, at this conference, in these halls of the World Bank, the connection between rule of law and economic development is uncontroversial. Fifteen years ago, when we hatched the Millennium Development Goals, the World Bank's landmark *Voices of the Poor* study had already made clear that a fundamental dimension and challenge of poverty is "powerlessness."⁴ The study encompasses a host of rule of law problems, including discrimination, corruption, physical abuse at the hands of private and public actors, and governmental institutions that provide no legal recourse for any of the above problems.⁵ Since then, evidence of the relationship between governance and poverty reduction has become all the more abundant and clear.⁶ We know that rule of law is essential to sustainable long-term poverty alleviation. Moreover, we know that it is a critical strategy for avoiding con-

3. See, e.g., *Access to Justice and Human Rights: Partnership for Roma Protection, Prevention and Promotion*, A.B.A., http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/regional_roma/programs.html (last visited Mar. 14, 2015) ("The Roma are the most marginalized group in Europe. They face widespread, deeply ingrained institutional and social discrimination.").

4. 1 RAJ NARAYAN ET AL., *VOICES OF THE POOR: CAN ANYONE HEAR US?* 266 (2000).

5. See generally *id.* (including chapters and case studies on state institutions, civil society and NGO involvement, gender relations, and social fragmentation). "Poor people . . . describe poverty as . . . the helplessness to protect themselves from exploitation and abuse because of their dependence." *Id.* at 266. The report also notes, "Poor people experience the state as effective, irrelevant, and corrupt," and that local elite reify conditions of poverty by "act[ing] as effective gate-keepers to government-provided assistance, either diverting resources to their own use, or further deepening their power over the poor by becoming the resource distributors." *Id.* at 269-70.

6. See, e.g., James A. Goldston, Exec. Dir., Open Soc'y Justice Initiative, Remarks to the President of the General Assembly's High-Level Event on "Contributions of Human Rights and the Rule of Law in the Post-2015 Development Agenda" (June 10, 2014), available at <http://www.opensocietyfoundations.org/sites/default/files/goldston-unga-2015-06102014.pdf> (enumerating the practical consequences that weak rule of law systems have for poverty reduction initiatives: "Without secure property rights or means for claiming them, poor people cannot invest . . . Without legal identity, one cannot access services [or] open a bank account . . .").

flict and responding effectively to natural disasters⁷—the kinds of system shocks that can swiftly set back a decade of development gains.

The challenge is not so much to make the case that the rule of law matters, but that we can do something meaningful to advance it—that we know what it is, that we have strategies that work to build it, and that we can measure our progress in doing so. Nobody likes to set a goal that cannot be achieved, and this is where some of the push-back around rule of law in the post-2015 agenda comes into play. This is the case to be made: first, that we can define the rule of law sufficiently to articulate rule of law goals; second, that such goals can galvanize effective action that will make a difference; and third, that we will be able to see and claim that difference by 2030. This piece aims to make that case.

I. DEFINING THE RULE OF LAW

The rule of law has a broad conceptual reach and is thus susceptible to heated debate about its meaning. This is part of its appeal and importance. Indeed, its conceptual reach does not distinguish the rule of law from some of our other proposed goals, such as those relating to health, decent work, or meaningful action to curb climate change.⁸

Meaningful goals do not require that we achieve perfect rule of law, in all its dimensions, in fifteen years. In 2015, we celebrate the 800th anniversary of Magna Carta, a rule of law promise that is still a work in progress. Rule of law is a long-term endeavor, and we should not confuse that long-term challenge with what we can and should do in the short term. What is important is that we be able to identify some critical, identifiable elements of the rule of law to prioritize and work toward. Here, the answer is clear—we can, and we already begin to see these emerging in the debate about the post-2015 goals. Let us aim for those critical building blocks of the rule of law like securing identity for all; prohibiting discrimination of all kinds; guaranteeing access to information and participatory governmental decision-making; prohibiting and ensuring accountability for torture and police abuse; and prohibiting and ensuring accountability for public and pri-

7. U.N. DEV. PROGRAMME, STRENGTHENING THE RULE OF LAW IN CRISIS-AFFECTED AND FRAGILE SITUATIONS 2 (2011).

8. For an in-depth analysis on these distinct but crosscutting goals, see generally U.N. TECHNICAL SUPPORT TEAM, *Issue Brief 10: Health and Sustainable Development*, in TST ISSUES BRIEFS, 66 (Oct. 2014); U.N. TECHNICAL SUPPORT TEAM, *Issue Brief 7: Employment and Decent Work*, in TST ISSUES BRIEFS, *supra*, at 44; U.N. TECHNICAL SUPPORT TEAM, *Issue Brief 23: Climate Change and Disaster Risk Reduction*, in TST ISSUE BRIEFS, *supra*, at 175.

vate corruption, to name a few.⁹ We need not agree on all aspects of the rule of law or on the ideal legal system, structure, and process in order to identify such goals and paths to achieve them. This is an essential conversation that is taking place. Fortunately, the process of developing the post-2015 development goals is facilitating that conversation and yielding valuable input from the world over regarding our rule of law priorities.¹⁰

II. ADVANCING THE RULE OF LAW

Once we define our rule of law goals, we face a second challenge of identifying effective strategies to reach them. Critics argue that rule of law assistance is ineffective, that reform is illusory and fleeting, and that reform projects directed by foreign and other external actors are a waste of time and resources.¹¹ They are right to insist that rule of law development be effective, and it is true that it can be exceedingly difficult to design effective interventions to advance the rule of law. However, we should not confuse these difficulties with futility. Over the past several decades, the rule of law development community has come a long way in terms of its understanding the factors of change.¹² We know that the rule of law is more than skin deep. Just as we will

9. Report of the Open Working Group of the General Assembly on Sustainable Development Goals, in letter dated Aug. 1, 2014 from the Permanent Representatives of Hungary and Kenya to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/68/970 (Aug. 12, 2014) (“Goal 16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”); U.N. HIGH-LEVEL PANEL OF EMINENT PERSONS ON THE POST-2015 DEV. AGENDA, A NEW GLOBAL PARTNERSHIP: ERADICATE POVERTY AND TRANSFORM ECONOMIES THROUGH SUSTAINABLE DEVELOPMENT 50-52 (2013) (“Openness and accountability helps institutions work properly - and ensures that those who hold power cannot use their position to favour themselves or their friends. Good governance and the fight against corruption are universal issues. . . . The need for transparency extends to all institutions, government entities as well as businesses and civil-society organisations.”); U.N. TECHNICAL SUPPORT TEAM, *Issue Brief 29: Conflict Prevention*, in TST ISSUE BRIEFS, *supra* note 8, at 239 (highlighting areas where assuring non-discriminatory access to rights and services is a priority).

10. See U.N. DEV. GRP. MILLENNIUM DEV. GOALS TASK FORCE, A MILLION VOICES: THE WORLD WE WANT, at v (2013) (A Million Voices is a crowd-sourced project reflecting the views and opinions of over a million people worldwide on what a post-2015 development framework should look like).

11. See Richard Cohen, Op-Ed., *We Need the Realist's Vigilant Cynicism*, WASH. POST (Sept. 1, 2014), http://www.washingtonpost.com/opinions/richard-cohen-we-need-the-realists-vigilant-cynicism/2014/09/01/8955ac58-2fca-11e4-9b98-848790384093_story.html.

12. See William C. Hubbard, *A Realist's Road to Democracy*, NEWSDAY (Nov. 9, 2014, 12:00 PM), <http://www.newsday.com/opinion/oped/a-realist-s-road-to-democracy-william-c-hubbard-1.9596179> (arguing that “we can always get smarter. And indeed, we have seen the assistance community respond to its critics by developing more effective strategies that emphasize bottom-up approaches, local buy-in and sustainability of reforms.”).

not resolve hunger by delivering food, we will not establish the rule of law with shiny new laws and courthouses. We have honed proven strategies that help ensure that reform is locally-owned and matched with capacity of public and private actors to implement and enforce it—in short, to make it sustainable.¹³ We should not be satisfied; we need to continue to innovate and learn. But today, we, as a rule of law development community, have the tools to realize our agenda.

III. MEASURING THE RULE OF LAW

Related to the challenges of defining the rule of law and identifying effective strategies to build it is the challenge of measuring it. Critics suggest we should skip goals that we cannot measure.¹⁴ On this score, those who criticize the inclusion of the rule of law in the post-2015 agenda are sadly off-target. Indicators like the World Justice Project's Rule of Law Index¹⁵ and the World Bank Group's Worldwide Governance Indicators¹⁶ are very useful when it comes to finding quantitative indicia for rule of law development monitoring.

More importantly, monitoring and evaluation should not be (and increasingly are not) limited purely to engagement in a “numbers game.” We use local surveys to better include the voices of underserved communities in the development process¹⁷ and to discover the extent of people's trust in governance institutions.¹⁸ We engage in par-

13. See, e.g., *ABA ROLI Hosts a Criminal Law Reform Symposium*, A.B.A. (Oct. 2014), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/regional_balkans/news/news-balkans-criminal-law-reform-symposium-1014.html; *Legal Clinic to Serve Women and Girls in Guinea's Rural Communities*, A.B.A. (Oct. 2014), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/guinea/news/news-guinea-women-rural-legal-clinic-1024.html. For a historical summary and synopsis behind the evolving state of reform for the rule of law movement, see RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM* (2012).

14. See, e.g., JIM PARSONS ET AL., *VERA INST. OF JUSTICE, DEVELOPING INDICATORS TO MEASURE THE RULE OF LAW: A GLOBAL APPROACH 4* (2008) (noting that it is difficult to develop summed-up indicators that are both precise and accurate, particularly in a field where “even superficially simple terms . . . mask a great deal of variation in definition.”). Others argue that badly-designed indicators produce poor bases for practical policy-making, and that as a result we should be cautious in how we use rule of law indicators to measure development. See Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 *HAGUE J. ON RULE L.* 269, 270 (2011).

15. THE WORLD JUSTICE PROJECT, *RULE OF LAW INDEX* (2014).

16. Daniel Kaufmann et al., *The Worldwide Governance Indicators: Methodology and Analytical Issues 2* (The World Bank Dev. Research Grp. Macroeconomics & Growth Team, Policy Research Working Paper No. 5430, 2010).

17. See A MILLION VOICES, *supra* note 10, at 1-5 (articulating the methodology used to comprise such a large report).

18. See Martin Gramatikov et al., *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology*, 3 *HAGUE J. ON RULE L.* 349, 372 (2011).

ticipatory development processes that ultimately help communities to help *themselves* out of poverty in ways that are local, sustainable, and culturally meaningful.¹⁹ Methodologies that capture the extent of their satisfaction with reform efforts are invaluable measures of the rule of law.

CONCLUSION

Given that the world will spend 1.4 trillion dollars on development aid in the next fifteen years,²⁰ we—as a global community, speaking with one voice—need to think carefully and cautiously about what targets will ultimately be included in our long-term development programming. Those targets are the ones that will get the most money and should therefore be those that end up having the greatest impact. Specific, attainable rule of law building blocks need to be among them because we know they make a difference in poverty outcomes; because we have the know-how to develop strategies to advance them; and because we can measure the progress we make to hold ourselves accountable.

19. See, e.g., U.S. AGENCY FOR INT'L DEV., COMMUNITY PARTICIPATION IN TRANSITIONAL JUSTICE: A ROLE FOR PARTICIPATORY RESEARCH (2014) (providing an in depth analysis on why communities should participate in promoting, among other things, governmental accountability and reconciliation).

20. U.N. CONFERENCE ON TRADE & DEV., WORLD INVESTMENT REPORT 2014: INVESTING IN THE SDGs: AN ACTION PLAN, at 140, U.N. Sales No. E.14.II.D.1 (2014).