

EPILOGUE: RULE OF LAW AND THE 2015 UN SUSTAINABLE DEVELOPMENT GOALS

*Don Scott De Amicis**

At the 2014 World Bank’s annual Law Justice and Development week, seven thought leaders from diverse legal backgrounds were asked to make the case for including the Rule of Law in the upcoming United Nation’s Sustainable Development Goals (SDGs). Their topics were diverse—from technical issues of definition and measurement to substantive areas of the environment, gender equality and empowerment of women, non-proliferation, and the protection of foreign investment. Their individual analytical threads combined to weave a rich tapestry, and made a strong collective case for the inclusion of the Rule of Law in the 2015 UN SDGs.

Daniel Magraw’s analysis of Rule of Law noted its procedural and substantive components. Pointing to the experience of the Third Reich, he posited that merely adhering to the law is insufficient as a Rule of Law principle. Concepts of justice and fairness are inextricably bound to a Rule of Law framework, and the international law of human rights supplies at least a portion of the substantive content. He contended that in the environmental area, the Rule of Law was needed to balance the rule of the markets, since the markets have not sufficiently protected the public commons.¹ Environmental law was also the focus of Alexandra Dunn’s and Sarah Stillman’s contribution. They claimed that there has been an evolution in the role of Rule of Law: From ensuring security and property rights to promotion of broader societal goals such as sustainable development. In their view, there has been an “exponential increase in the collective knowledge of

* Adjunct Professor of Law, Georgetown University Law Center; Senior Lecturer, Leiden University; Senior Adviser, International Law Institute.

1. Daniel Barstow Magraw, *Rule of Law, Environment and Sustainable Development*, 21 SW. J. INT’L L. 277, 278-81 (2015).

the general legal community. . . which has led to a broader understanding of the rule of law as applied in practice.”²

Aileen Pisciotta presented the case for aggressively incorporating Rule of Law indicators on gender neutrality into each SDG, focusing on participation in governance, sector-specific legislation and access to enforcement tools. In her view, use of these Rule of Law indicators along with strong, separate standalone goals specifically addressed to the empowerment of women and girls should be viewed as “twin force-multipliers”³ that will empower women, which is “the quickest and most cost-effective means to achieve dramatic and sustainable progress in all development goals.”⁴

The Investor-State dispute system (ISDS) was the topic analyzed by Timothy Feighery. He observed that sustainable development in developing countries requires foreign investment, and the current ISDS based on thousands of bilateral investment treaties “offers clear benefits”⁵ to those countries. He noted important criticisms about ISDS failing to adhere to certain Rule of Law principles appearing in the World Justice Project definition of Rule of Law, and suggested that while the international community had a role in “advocating a balanced approach,” the ISDS remained an important Rule of Law component to sustainable development.⁶

The central thesis of Jonathan Granoff’s article was that “nuclear weapons pose a unique existential threat to human survival,”⁷ and, therefore, to sustainable development. In his view, eliminating this threat requires adherence to a fundamental Rule of Law concept—*pacta sunt servanda* (agreements must be kept). Examining the obligation of State parties to the Nuclear Non-Proliferation Treaty obligation “to pursue negotiations in good faith on effective measures relating to . . . nuclear disarmament,”⁸ he argued that the United States must comply with its obligations. He also posited that the de-

2. Alexandra Dapolito Dunn & Sarah Stillman, *Advancing the Environmental Rule of Law: A Call for Measurement*, 21 SW. J. INT’L L. 283, 285-6 (2015).

3. Aileen A. Pisciotta, *Post-2015 Development Goals for Gender Equality and Empowerment of Women*, 21 SW. J. INT’L L. 303, 308 (2015).

4. *Id.*

5. Timothy J. Feighery, *Rule of Law in the Emerging Development Agenda: On Finding the Optimal Role for Investment Treaties*, 21 SW. J. INT’L L. 297, 300 (2015).

6. *Id.* at 301.

7. Jonathan Granoff, *Pacta Sunt Servanda: Nuclear Weapons and Global Secure Sustainable Development*, 21 SW. J. INT’L L. 311, 313 (2015).

8. *Id.* at 318.

velopment of international human rights law represented a significant limitation on a state's ability to use nuclear weapons.⁹

Chris Marshall noted the lack of certainty and clarity in the definition of Rule of Law, and the challenges coming up with measurement standards and methodologies. While he also acknowledged that the 2015 SDGs themselves will be no magic bullet, in his view securing a Rule of Law SDG was a once-in-a-lifetime opportunity for law and development practitioners to achieve significant and lasting change.¹⁰

Lastly, Elizabeth Anderson and Gowri Janakiramanan offered a pragmatic approach: The Rule of Law should be defined *sufficiently* so that Rule of Law goals can be articulated; there is no need to agree on all aspects of the Rule of Law to proceed. They suggested that monitoring and evaluation—key components of measurement—should not be limited to a “numbers game.”¹¹ Local surveys that not only reflected, but also included, the voices of underserved communities, and revealed the extent of people's trust in governance institutions were also of critical importance.¹²

As is evident from the brief summaries, common themes and challenges emerge in these seven articles. Despite a substantial focus on the Rule of Law over the past 15 years, with a cadre of researchers, academics and consultants at international organizations, research institutes, national governments, and NGOs, broad agreement on a precise *definition* remains elusive. To be worthy for inclusion in the SDGs, critics contend the Rule of Law cannot be an amorphous, nebulous, and imprecise concept—all things to all people and states. But this criticism fails to address the *universality* of the Rule of Law principle, the recognition that across the globe there is, in Christopher Marshall's words, a “shared and positive understanding of the Rule of Law.”¹³ However, because “culture and context play a major role”¹⁴ in underpinning that shared understanding, extensive research still needs to be undertaken to refine the definition of Rule of Law to account for its cultural and contextual aspects.¹⁵

9. *Id.* at 329.

10. Christopher Marshall, *Making the Case: Rule of Law in the Emerging Development Agenda*, 21 SW. J. INT'L L. 331, 332-3 (2015).

11. Elizabeth Anderson & Gowri Janakiramanan, *The Case for Rule of Law and Development: Issues of Definition, Methodology, and Measurement*, 21 SW. J. INT'L L. 271, 275 (2015).

12. *Id.* at 275-6.

13. Marshall, *supra* note 10, at 333.

14. *Id.*

15. *Id.*

Several articles identify the Rule of Law as inextricably intertwined with other governance and societal objectives. This *interconnectedness* is evident in the U.N. member States determination that “democracy, good governance and the rule of law, at national and international levels, as well as an enabling environment, are essential for sustainable development”¹⁶ The Rule of Law is an essential operating and governance system of society; when poorly designed and ineffectively utilized many system deficiencies result.

A number of the articles addressed the centrality of the Rule of Law in specific areas: environment; women’s rights; nuclear non-proliferation; and ISDS. This interplay of Rule of Law principles and important policy areas helped expose the tensions inherent in the *process and substantive elements* of the Rule of Law. While there appears to be widespread acceptance of the process component, it is the substantive component that continues to be troublesome. Importantly, international human rights law is contributing to the development of the substantive element of the Rule of Law.

Practically all of the thought leaders addressed the challenge of crafting *measurement* standards to be used in determining whether a Rule of Law goal has been achieved? Many Rule of Law supporters are bedeviled by the management gurus’ mantra—“you can’t manage what can’t measure.” However, while it is frustrating, difficult and time-consuming to develop measurement tools that can address effectiveness and enhance accountability, it is imperative that more work be done in this area if Rule of Law advocates are seeking substantial state and private sector financial resources that will be made available to advance a Rule of Law SDG.

An important advance has been the focus on breaking down the Rule of Law into *discrete components*, which may be more susceptible to measurement. Anderson and Janakiramanan write about “critical building blocks of rule of law.”¹⁷ Many of the definitions of Rule of Law have been constructed by focusing on individual factors that are part of the Rule of Law. For example, the World Justice Project definition focuses on four universal principles, each of which has component elements.¹⁸ The UN Secretary-General’s definition starts with a single “principle of governance”, but then states that the single princi-

16. Rio+20: United Nations Conference on Sustainable Development, Rio de Janeiro, Braz., June 20-22, 2012, *The Future We Want*, ¶ 10, U.N. Doc. A/CONF.216/L.1 (June 19, 2012).

17. Anderson & Janakiramanan, *supra* note 11, at 273.

18. THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 4 (2014).

ple requires adherence to nine other principles.¹⁹ Deconstructing the Rule of Law into its component parts is also evident in the proliferation of indexes, focused on different substantive or process areas.²⁰

Finally, all of the articles reveal important gaps in knowledge, and the need to engage in further extensive research and analysis. While the last 15 years have seen major advancements in understanding the dimensions of the Rule of Law, much more work needs to be performed by international and national development institutions, academic institutions, NGOs and others to gather and analyze empirical evidence, to evaluate and improve the definition of Rule of Law, to make progress in our understanding of how to monitor and evaluate projects and initiatives, and to develop a fuller understanding of the ways the Rule of Law connects with and promotes economic and social development underlying all of the other important sustainable development goals.

Placing the Rule of Law squarely and prominently in the SDG framework as a 2015 UN SDG will underscore the fact that the Rule of Law is embedded in the fabric of sustainable development and is an essential part of society. It will also focus and unleash the energies of the law and development community to undertake research, and design and lead initiatives that will advance sustainable development on a global basis.

19. 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).

20. The World Justice Project Rule of Law Index measures the Rule of Law using forty-seven indicators organized around nine themes: constraints on government power; absence of corruption; open government; fundamental rights; order and security; regulatory enforcement; civil justice; criminal justice; and informal justice. THE WORLD JUSTICE PROJECT, *supra* note 18.