

RULE OF LAW, ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

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Rule of Law is essential to protecting the environment and achieving sustainable development. To understand why that is so, it is helpful to begin by reviewing what is at stake in environmental protection. Put another way—why does environmental protection merit the resources required to achieve Rule of Law?

Environmental protection involves protecting interests at the very heart of the modern State: protecting human health from air, water, and soil pollution; protecting the food supply—both domestically produced and imported—from contamination; protecting plant and animal health, including agricultural crops; and protecting places of aesthetic beauty, cultural sustenance, and spiritual sanctuary, such as national parks like Great Falls in the Washington, DC area, the Grand Canyon, Voyageurs, Yellowstone, and the Everglades.

In fact, human civilization could not survive without the ecosystem services provided by nature for free. These include, for example: providing food, fuel, and fiber; purifying water; protecting us from ultra-violet rays; pollinating crops; and providing opportunities for spiritual, aesthetic, and recreational activities. We now know that the natural environment is the true infrastructure of human society. We therefore do not have a choice about whether to protect the environment. This was the conclusion of the 1987 Brundtland Report,¹ and that conclusion has only been reinforced, as we have learned more about the complex interdependencies of nature and the critical importance of ecosystem services to human society.

This discussion also matters because environmental protection is an essential component of sustainable development. There is no

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1. U.N. Secretary-General, Development and International Co-Operation: Environment: Rep. of the World Commission on Environment and Development: Note by the Secretary-General, Annex, U.N. Doc. A/42/427 (Aug. 4, 1987).

agreed-upon definition of “sustainable development.” All countries agree, however, that—to quote the Copenhagen Declaration on Social Justice—“economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people.”² It is thus perfectly clear that environmental protection is worth considering in terms of Rule of Law.

It is also clear that environmental protection will not occur automatically (i.e., without the Rule of Law) as a result of market forces. Conceptually, we need only consider the undeniable existence of externalities that are not reflected in market prices, and the phenomenon of the tragedy of the commons. But we need not stop at concepts. The need for Rule of Law is also clear from real-life experiences both here and abroad, from rivers that catch on fire, workplaces that cause cancer, dirty air that causes asthma, and industrial pollution and drugs that cause birth defects.

Moreover, whatever approach is taken to deal with these environmental problems—criminalization, regulation, private causes of action, even incentives or voluntary codes of conduct—requires observance of the Rule of Law. For example, criminalization requires an effective and just criminal justice system. Regulation requires transparency, standards and robust monitoring and enforcement. Private causes of action require an accessible and effective judicial system. Incentives and private codes of conduct require standards of accuracy in public reporting or else incentives will be misapplied and voluntary codes will have no meaning whatsoever.

Rule of Law is also essential for environmental protection because history has demonstrated the critical importance of the roles that civil society plays with respect to environmental protection. These roles include identifying environmental threats, catalyzing political action about those threats, helping shape laws to deal with those threats, and monitoring enforcement of laws. In order to ensure that civil society has the space to fulfill these roles, the procedural human rights of access to information, participation, freedom of opinion, freedom of assembly, and access to justice must be protected. That will only occur if there is effective Rule of Law.

2. World Summit for Social Development, Copenhagen, Den., Mar. 6-12, 1995, Report of the World Summit for Social Development, ch. 1, Annex I, ¶ 6, U.N. Doc. A/Conf.166/9 (Apr. 19, 1995).

Rule of Law is also essential for environmental protection to prevent corruption. The existence and content of environmental laws, the accuracy of environmental inspections, and the vigor with which environmental regulations are enforced may be destroyed by corruption. Corruption is the Joker to the Rule of Law's Batman, and combating corruption requires robust Rule of Law, including strong institutions.

Indeed, the UN General Assembly's 2012 resolution on Rule of Law both emphasizes the importance of Rule of Law in addressing and preventing corruption.³ It also states "that the advancement of the rule of law at the national and international levels is essential for . . . sustainable development,"⁴ which, as I already noted, includes environmental protection as a central component.

In addition, Rule of Law will likely be promoted in the UN's post-2015 Development Agenda through the upcoming Sustainable Development Goals (SDGs).⁵ Within the current proposed SDGs is 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."⁶ The various targets of SDG 16 address Rule of Law: Target 16.3 seeks to "promote the rule of law at the national and international levels, and ensure equal access to justice for all"; Targets 16.5, 16.6, 16.7, 16.10 and 16.b include, respectively, "substantially reduce bribery and corruption"; "effective, accountable and transparent institutions"; "responsive, inclusive, participatory and representative decision-making"; "public access to information and protect[ion of] fundamental freedoms"; and "enforce[ment of] non-discriminatory laws and policies."⁷

An appointed Open Working Group (OWG) drafted the proposed SDGs. In the discussions regarding the goals, it was clearly recognized that Rule of Law touches sustainable development directly and indirectly because, for example, it sought to address the "trans-

3. G.A. Res. 67/1, ¶ 25, U.N. Doc. A/RES/67/1 (Nov. 30, 2012).

4. *Id.* ¶ 7. In the report, the General Assembly thanked the United Nations Commission on International Trade for its influence on international trade to assist with sustainable and equitable development. *Id.* ¶ 8. The Assembly also acknowledged the need to eradicate crime that undermines sustainable development and the efforts from the Economic Social Council for its efforts to eradicate poverty in support of sustainable development. *Id.* ¶¶ 24, 30.

5. 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).

6. *Id.*

7. *Id.*

formative change needed to realize our shared vision of poverty eradication and universal human development in the context of sustainable development, respecting human dignity, protecting our planet, and living in harmony with nature for the well-being and happiness of present and future generations.”⁸ The OWG also acknowledged that the SDGs require a focus on the social, economic, and environmental dimensions. Though the SDGs do not have a pillar or goal on peace and security, Rule of Law was found to be relevant because development is undermined by conflict and violence.

Which brings us to the question of—what does “Rule of Law” mean? It certainly does not mean simply enforcing the laws, as was argued by ancient Greeks. They had not witnessed the Nurnberg laws of the Third Reich and their application. If they qualify as “Rule of Law,” then rule of law is not worth discussing. Nor is it enough to add equal protection and due process of law in the application of laws because that leaves the content of the law still untouched. South Africa’s apartheid laws would qualify as Rule of Law under that definition.

With the recognition that human rights exist, Rule of Law has acquired a substantive element: a whole series of procedural and substantive human rights must be contained in the law and its enforcement for there to be Rule of Law. And for certain of those rights—such as the right to life—environmental protection re-enters the picture.

Suppose, for example, noxious air pollution seriously endangers a person’s health and she claims that her right to life is being violated. What standards are to be applied to determine whether the right has actually been violated?

All three regional human rights systems have recognized that environmental harm can violate human rights,⁹ and all have turned to domestic and international environmental law to provide precise standards.¹⁰ Even protecting other societal interests, therefore, requires Rule of Law with respect to the environment.

8. General Assembly, Letter Dated 19 July 2013 from the Co-Chairs of the Open Working Group of the General Assembly to the President of the General Assembly, ¶ 16, U.N. Doc. A/67/941 (July 23, 2013).

9. John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Preliminary Rep.*, ¶ 24, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012).

10. Dinah Shelton, *Developing Substantive Environmental Rights*, 1 J. HUM. RTS. & ENV’T. 89, 92 (2010); see Daniel Barstow Magraw, *Environmental Protection and Rule of Law*, 44 ENVTL. POL’Y & L. 201, 205-07 (2014).

In closing, let me point out that today's discussion is very timely. In June 2015, we will commemorate the 800th anniversary of Magna Carta, the symbol of Rule of Law around the world. Several provisions of the original Magna Carta dealt with environmental matters.¹¹ Those dealing with forests were spun off in 1217 to create the Carta de Foresta¹² (Charter of the Forest), which contained strong Rule of Law provisions that have served since then to protect England's forests, many of which are now national parks.¹³ This is an exact example of Rule of Law regarding protecting the environment—an effort that was required 800 years ago and remains necessary today.

11. MAGNA CARTA, chs. 33, 44, 47-49 (1215), *reprinted in* ENGLISH HISTORICAL DOCUMENTS, 1189-1327, at 320-22 (David C. Douglas & Harry Rothwell eds., 1975).

12. CHARTER OF THE FOREST (1217), *reprinted in* ENGLISH HISTORICAL DOCUMENTS, 1189-1327, *supra* note 11, at 337-40.

13. See Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, in MAGNA CARTA AND THE RULE OF LAW 311 (Daniel Barstow Magraw et al. eds., 2014).