

Rule of Law and the Post-2015 Sustainable Development Agenda – It’s About Justice!

Background

In 2000 the international community under the auspices of the UN adopted eight Millennium Development Goals (MDGs) that ranged from halving extreme poverty rates to achieving universal primary education by 2015. The MDGs shifted the development discourse from a focus on economic growth to poverty reduction and mobilized donors and recipient countries to achieve common goals and targets. Evaluation of the impact of the MDG’s is ongoing. While significant progress has been made on many fronts the work remains unfinished. Discussion of a post-2015 development agenda began in 2012 with the Rio+20 Conference and has involved broad consultations with governments of developed and developing countries, international and national organizations and civil society. Recommendations from the evaluation and discussion process informed *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet, Synthesis Report of the Secretary-General on the Post-2015 Agenda*¹ (the “Report”), which will be formally introduced in January 2015 and will provide the basis for the post-2015 global discussions moving forward.

The Report is both visionary and ambitious. It advances the MDG’s envisioning a future free from poverty and built on human rights, equality and sustainability.² To accomplish this overarching goal the Report strives to set out a transformative agenda that is both universal and adaptable to each country and that places people and planet at the centre. The Report also attempts to reflect the call for democracy, rule of law, civic space and more effective governance and capable institutions; for new and innovative partnerships, including with responsible business and effective local authorities; and for a data revolution, rigorous accountability mechanisms, and renewed global partnerships³ that came out of the consultation process. To that end the Report proposes a Sustainable Development Agenda that incorporates the 17 Sustainable Development Goals (SDGs) developed by the Open Working Group on Sustainable Development Goals⁴ within a framework of 6 key Elements that the Secretary-General deems essential for delivering the SDGs and for supporting the universal, integrated and transformative nature of the proposed Agenda. Those Elements include the following:

1. Dignity: to end poverty and fight inequalities
2. People: to ensure healthy lives, knowledge, and inclusion of women and children
3. Prosperity :to grow a strong, inclusive, and transformative economy
4. Planet: to protect our ecosystems for all societies and our children
5. Justice: to promote safe and peaceful societies and strong institutions

¹ United Nations Secretary-General, *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet, Synthesis Report of the Secretary-General on the Post-2015 Agenda*, New York, advance unedited 4 December 2014

² Ibid 1 at page 6 para 18

³ Ibid 1 at page 7 para 23

⁴ United Nations, *Report of the Open Working Group of the General Assembly on Sustainable Development Goals* (A/68/970), New York, 2014

6. Partnership: to catalyse global solidarity for sustainable development

Rule of Law Matters

The proposed Sustainable Development Agenda recognizes that rule of law is essential to achieving equitable economic growth, inclusive social development and environmental sustainability. While in the preamble to the 2000 MDGs the international community undertook to strengthen democracy and rule of law no specific rule of law goals were set within the MDGs. Subsequent resolutions of the UN General Assembly, most recently in 2012⁵, have recognized that “the advancement of rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development all of which in turn reinforce the rule of law”⁶. These high level international policy commitments to rule of law have been buttressed by experience at the national level within developing countries. A review of MDG country reports highlighted the importance of addressing rule of law, including having enabling legislation, effective enforcement mechanisms and grievance resolution processes, to achieve MDG targets across the identified development sectors.

In the discussions leading up to the development of the post-2015 agenda, the importance of rule of law has been recognized as an end in itself as well as an enabling factor and element of the process that affects a wide range of development outcomes. While the evidence for the relationship between specific elements of the rule of law and development is growing, it has been recognized that improved measurement tools are needed moving forward. Further, research has shown that development practice is changing to reflect a more nuanced and complex understanding of the rule of law that is rooted in local context and addresses particular development challenges in a variety of sectors.⁷

The experience and success of the MDGs demonstrates the value of setting global targets to steer attention and resources towards translating commitments into practice. Not surprisingly therefore several policy discussion papers, including a background paper specifically prepared to inform the global dialogue on rule of law and sustainable development⁸, added voice to a chorus of countries and international and civil society organizations recommending the incorporation of rule of law into the goals of the post- 2015 development agenda. The proposed SDGs and the UN Secretary-General’s proposed six core elements to frame the Sustainable Development Agenda do exactly that.

Rule of Law as a Goal and Enabler of the Sustainable Development Agenda

⁵ Declaration of the High-level meeting of the General Assembly on the Rule of Law at the national and International levels, A/67/L.1*(2012); UN General Assembly, “the Future We Want,” A/RES/66/288(2012)

⁶ Ibid 5

⁷ Louis-Alexandre Berg and Deval Desai, *Background Paper: Overview on the Rule of Law and Sustainable Development for the Global Dialogue on Rule of Law and the Post-2015 Development Agenda*(2013)p38, available on the UNDP website

⁸ Ibid 7; IDLO, *Doing Justice to Sustainable Development, Integrating Rule of Law into the Post-2015 Development Agenda*, Rome, June 2014

The proposed SDG's incorporate rule of law as a specific goal. Goal 16, to "promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels"⁹, appears to address rule of law broadly, as an end in itself, with a focus on safety and security, social and economic justice, access to justice and, in referring to accountable and inclusive institutions, strong governance. The goal recognizes the importance of peace and security; of equitable allocation of opportunities and services; and, of access to credible processes for resolving grievances and disputes to achieving poverty reduction. While the goal appears to be adaptable to different contexts, developing, monitoring and evaluating contextually relevant international and national targets may prove to be a challenge.

"Justice" is one of the six core elements proposed as a framework for the Sustainable Development Agenda. The inclusion of justice as a core element recognizes that the rule of law is not just an end in itself but that it also enables a broader range of development goals and outcomes. Within the justice element access to fair justice systems; accountable institutions of democratic governance; measures to combat corruption and curb illicit financial flows; and, safeguards to protect personal security are all specifically referred to as being integral to achieving sustainable development.¹⁰ Rule of law is also seen as facilitating and supporting free, active and meaningful engagement of civil society including the voices of women, minorities, LGBT groups, indigenous people, youth, adolescents and older persons.¹¹

Further, rule of law is envisioned as integral to the implementation of the other elements set out in the Secretary General's proposed Sustainable Development Agenda. Rule of law can be an enabler in fighting inequalities, ensuring inclusion of women and children; in facilitating equitable economic growth through private sector regulation, fair employment opportunities and labour practices, transparent and enforceable investment and property regimes, sustainable natural resource development; and in protecting the environment. Enabling facets of rule of law include fair legislative frameworks, effective enforcement mechanisms, accessible grievance and dispute resolution processes and the accountability of duty bearers.

In addition, with respect to each of the specific SDG's, rule of law can potentially be used as a process to achieve the development outcomes of the goal. By way of example the goal to ensure healthy lives and promote well-being for all ages¹² could include targets on equitable access to primary health services and include indicators on the adoption of a legal framework establishing rights to service that include mechanisms to enforce those rights and handle grievances fairly and equitably.

Within the Report rule of law is therefore put forward as a specific SDG access to justice goal, as an enabling framework to achieve results on the other SDG's and Elements and as a process which will support the achievement of specific development outcomes.

A Canadian Perspective

⁹ Ibid 4

¹⁰ Ibid 1 para 78

¹¹ Ibid 10

¹² Ibid 4, Goal 3

The proposed Sustainable Development Agenda is a universal one. It is intended to engage and apply to all nations, including Canada, while at the same time recognizing the realities of differing national needs, contexts and capacities.

Canada has a legacy and culture of rule of law with a constitutional democracy including a charter of rights and strong independent institutions. Yet a 2013 Canadian Bar Association (CBA) Equal Justice Report¹³ and a 2013 Report of the Action Committee on Access to Civil and Family Justice¹⁴ identified major access to justice gaps in the Canada which the current justice system is unable to respond to without fundamental changes. The justice system is generally felt to be too complex, too slow and too expensive.¹⁵ While inaccessible justice hurts everyone the poor and vulnerable are disproportionately impacted. According to the CBA Report over the next three years, 45 per cent of Canadians will encounter a legal problem and many will not get the help they need because of perceived or actual barriers. Further, unresolved problems tend to escalate, and to exacerbate problems in other areas – health, social welfare and economic well-being, social exclusion and poverty.¹⁶ Both reports provide frameworks for action which include public engagement; collaboration and leadership; institutional reforms; research; and funding. The Sustainable Development Agenda as a universal agenda provides an additional incentive and opportunity for Canadians to address the access to justice issues and move forward with the recommendations proposed in the reports.

The Secretary General's Report importantly introduces a broad array of potential public and private funding sources for the implementation of the Sustainable Development Agenda. With respect to the role of Official Development Assistance (ODA), the Report urges all countries to meet the 0.7% target and agree to concrete timetables to achieve their ODA commitments including the Istanbul commitments to Least Developed Countries (LDCs) of 0.15% of GNI by 2015. It also stresses the importance of ensuring that the proportion of ODA going to LDCs continues to increase, be better targeted, more efficient, more transparent and leverage additional resources¹⁷. In addition the Report advocates that efforts to increase the effectiveness of development cooperation more broadly need to be enhanced based on basic principles of country ownership, results focus, inclusive partnerships, transparency and accountability.¹⁸

For the Canadian government this would mean a significant increase in its ODA commitments and a refocus of its priority ODA countries to direct more support to LDCs. Out of the 48 UN listed LDC's the Canadian government has currently identified only 12 as priority ODA programming countries.

The Aid Effectiveness Agenda (AEA) launched by the Canadian government in 2009 does not set out any specific development goals. Rather it simply aims to make Canada's ODA more effective, efficient and accountable. To that end the AEA sets out 6 programming priorities: increasing food security; securing

¹³ Canadian Bar Association, Envisioning Equal Justice Project, *Equal Justice Report: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, August 2013)

¹⁴ Action Committee on Access to Civil and Family Justice, *Access to Civil and Family Justice, A Roadmap for Change* (Ottawa Canada, October 2013).

¹⁵ Ibid 14 p8

¹⁶ Ibid 13 p2

¹⁷ Ibid 1 para 98

¹⁸ Ibid 1 para 93

the future of children and youth; stimulating sustainable economic growth; maternal, newborn, child health; promoting stability and security; and advancing democracy. Increasing environmental sustainability; promoting gender equality; and strengthening governance institutions and practice are envisioned as cross cutting programming priorities. These programming priorities would seem to advance several of the proposed SDGs although the priorities themselves are much narrower and specific.

While the existing Canadian government priorities do not specifically mention the rule of law, all the priorities appear to envision the possibility of rule of law initiatives to advance the priorities and achieve results. Examples include providing legislative frameworks for health systems; laws and justice systems to protect children and advance their rights; business regulations, investment and trade laws for economic development; promoting equality; protecting the environment; and assuring security and stability. Strengthening governance institutions and practices would also presumably include strengthening institutions such as the judiciary, the legal profession and the police and dispute resolution processes. In this respect rule of law can facilitate good governance and hold duty bearers accountable. The current Canadian priorities therefore appear to recognize the rule of law as an enabler, much as the proposed Sustainable Development Agenda, albeit perhaps in a more indirect and limited way.

Although the Canadian government priorities do not currently consider rule of law in terms of access to justice or imbue rule of law with a concept of “Justice” that can empower the poor and the marginalized as is set out in the Sustainable Development Agenda, over the last decade the government has supported a limited number of access to justice projects that have included legal empowerment initiatives (public legal education, advocacy, law reform, legal aid).

In fact Canadian ODA has been supporting international rule of law development initiatives since the late 1980s. Although the number of projects has been relatively few they have been broad in scope and have engaged a range of actors. Projects have supported constitution building, the development of legal aid regimes, institutional strengthening (the legal profession, the judiciary, ministries of justice, the police, the prosecution, corrections), legislative reform, improving the administration of justice and introducing alternative dispute resolution, professional training (the bar, the judiciary, prosecutors, police, corrections), criminal justice reform, juvenile justice reform, rights advocacy and others. The projects have demonstrated the important role that rule of law plays in development. They have also shown the capacity of Canadian institutions and civil society organizations to effectively engage with, and support a range of development partners working within their national jurisdictions, to strengthen democratic processes and institutions, to promote and protect basic human rights, to support equitable and inclusive economic and social development, to encourage peace and facilitate security and to empower the poor and the marginalized.

Moving Forward

In the coming months, the Member States of the United Nations will negotiate the final parameters of the Post-2015 Sustainable Development Agenda. The Canadian government will be part of those discussions.

The intent of the Secretary-General's Report is to provide a transformative global development agenda for post-2015 that is not only universal but places people and the planet at its center. In doing so the Report recognizes the fundamental importance of rule of law, integrating it into the SDG's as a specific access to justice goal and incorporating it within each of the Elements that enable the broader SDGs. This reflects a growing body of evidence and practice, including Canadian experience, which demonstrates that rule of law is key to realizing equitable growth, inclusive social development and environmental sustainability¹⁹. As succinctly set out in the conclusion of a recent International Development Law Organization (IDLO) report," It is the rule of law which empowers the poor by giving them a voice in law making, which allows them to hold institutions accountable for delivering rights and services and which creates avenues of redress when services are denied and rights violated. As well as certainty and predictability the rule of law provides for substantive justice. By ensuring the rights of communities as well as business and by strengthening institutions to curb corruption, the rule of law enhances economic sustainability. By focusing on economic opportunity and non-discrimination, the rule of law promotes social development. And by strengthening participatory frameworks to protect and manage resources, it nurtures environmental sustainability." ²⁰

Given the recognized importance of rule of law, the question is whether the treatment of rule of law within the proposed Sustainable Development Agenda is sufficient to achieve the underlining purposes of the Agenda to end poverty, transform all lives and protect the planet. Although the rule of law is incorporated as a specific goal, it is included as an aspect of a larger security and governance goal and expressed as to "provide access to justice for all". Advancing a stand-alone and broader rule of law goal may notionally better reflect the growing understanding of the importance of rule of law to development. However the inherent risk is that the goal may not survive the upcoming negotiations. It may be difficult to draft a specific and broader goal that is sensitive to local conditions and does not appear prescriptive. Incorporating the goal within a larger security and governance goal and framing the goal as a seemingly narrower access to justice one may help ensure its political survival. In fact, access to justice as envisioned by the United Nations Development Programme (UNDP) is a broad concept. It is defined as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice and in conformity with human rights standards" ²¹ which envisions a wide array of approaches which can be adapted to particular capacities and contexts. Moreover, focusing on the equality of access helps ensure that the poor and vulnerable directly benefit from these approaches. Couching the rule of law as an equal access to justice goal may not only be more politically palatable than a broader rule of law goal, but more importantly, focusing on the equality of access directly supports the underlining purposes of the Sustainable Development Agenda. As a specific goal, countries will be

¹⁹ Ibid 7 at page 5

²⁰ Ibid 7 at page 47

²¹ UNDP, *Programming for Justice: Access for All, A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*, Bangkok, 2005, p.5

encouraged to prioritize access to justice and dedicate the resources necessary to achieve the desired results.

Incorporating rule of law as a justice element that frames the implementation of the SDGs recognizes and prioritizes rule of law as an enabler of other development goals and as a process to achieve the desired development outcomes. This is critical. To be achieved the proposed education, health, environment, economic growth, innovation and equality SDGs all require legislative frameworks informed by public engagement; effective and efficient regulations and implementation mechanisms; accessible, fair and transparent dispute resolution processes; reliable enforcement mechanisms; and, the accountability of duty bearers.

The post-2015 agenda provides a unique opportunity to build upon the global political commitments to the rule of law and to demonstrate the transformative potential of the rule of law by supporting the inclusion of rule of law as a SDG and an enabling Element that will support the achievement of the broader range of SDGs, including the overarching goal of poverty reduction. In the upcoming discussions we should be encouraging Canadians and the government of Canada to engage in the dialogue; to support the inclusion of equal access to justice as a SDG and justice as an element framing the Sustainable Development Agenda; and, through Canada's ODA program, to build on our existing experience and to prioritize support to rule of law initiatives that promote equal access to justice and enable the other SDGs.

As Nelson Mandela reminded us, "Overcoming poverty is not an act of charity; it is an act of justice"²². Ultimately incorporating rule of law into the Sustainable Development Agenda must be about facilitating justice.

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²² Ibid 1 p17