

January 11, 2017

Thailand Institute of Justice Forum on the Rule of Law and Sustainable Development

Opening Statement for the panel: “Integrated Approach to the Rule of Law for Implementing the 2030 Agenda for Sustainable Development”

David Kennedy
Manley O. Hudson Professor of Law
Director, Institute for Global Law and Policy
Harvard Law School

The Rule of Law: A Terrain of Choices

Ladies and Gentlemen:

Let me begin by thanking The Thailand Institute of Justice for your hospitality and vision in convening this Forum.

Harvard’s Institute for Global Law and Policy has just completed a remarkable collaboration with the TIJ here in Bangkok. Together, we mounted two intensive Workshops to strengthen the Rule of Law. They brought 96 young professionals from 40 countries for five days of collaboration with the mentorship 46 faculty from 21 countries and 36 universities worldwide.

Each nation’s rule of law is incubated in the nation’s universities where tomorrow’s leaders learn what law is, what it can be and what it can do. The IGLP Workshop for young scholars aimed to strengthen the next generation of university teachers through sustained peer-to-peer mentoring in partnership with senior faculty from universities across the world.

The TIJ Workshop for rising policy professionals provided a parallel opportunity for peer to peer engagement for emerging leaders themselves, exploring some of the most challenging policy problems facing this region and the world.

It has been an honor to work with TIJ in this endeavor and I know I speak for the entire faculty when I express our thanks for your steady vision and commitment to improving our capacity to use the law to identify, make and implement wise policy.

A little over three years ago, it was also my honor to be here at the “Bangkok Dialogue on the Rule of Law” organized by the Royal Thai Ministry of Justice in collaboration with the Thailand Institute of Justice. The strong engagement of Her Royal Highness Princess Bajrakitiyabha Mahidol both at that meeting and over many years on the global stage emphasized the significance of the link between law and development for Thailand, for the United Nations, and for the world at large. It is a pleasure to be able to continue the conversation begun then.

The United Nations has again placed the “rule of law” at the center of the world’s development agenda. The Goals and Targets identified by the United Nation’s 2030 Agenda for Sustainable Development can only be achieved, in the words of Sustainable Development Goal 16, by “effective, accountable and inclusive public institutions.”

As we look ahead to 2030, we benefit from decades of effort to strengthen the legal tools and institutions which could enable our development efforts. *What have we learned? And where do we go from here?*

First, we have learned that law and development are natural partners.

Distribution lies at the core of all development policy. The objective is always to direct opportunities and resources – finance, credit, market access, education, security, status – to people who would otherwise not have them – whether foreign investors, national champions, local entrepreneurs or poor families – so that they can in turn contribute to development.

And law is above all an instrument of distribution, allocating wealth, security – even justice – among individuals and groups in society. Legal entitlements allocate: I can use this land, have access to this fund, send my child to this school, and others may not.

Moreover, law provides the foundations for all economic activity: money, credit, property, corporations, capital, labor, contract: law doesn’t just regulate these things – it creates them, sustains them, limits them.

The crucial point for policy is this: law can do so in many different ways – ways which allocate powers and liabilities differently, with different winners and different losers and different consequences for development.

Economies structured differently will operate differently. They may be equally efficient within the constraints of their structure, but may grow and develop at different rates, may leave different losers in their wake and generate different allocations of income. The development they engender may be more or less sustainable.

All this would be straightforward if economists could clearly tell us what development required and legal experts could faithfully say which rules go with which results. Unfortunately, it’s not that simple.

We have also learned that the “rule of law,” like development policy itself, is not a matter of one size fits all. Every nation requires a strong legal culture and legal institutions for effective policy. Law is everywhere the writing hand of power – in law we see the choices authorities have made, choices we can assess to hold power to its promises and plans.

But every nation and every regime will – and should – make different choices.

Today, there is little consensus among development economists about what “sustainable economic development” means or how to make it happen. Economists leave us with choices, alternative strategies, cautions, lessons learned and experiments which must be tried and tried again.

Overcoming market failures, strategizing your relationship to the global economy, supporting national champions, attracting foreign capital, overcoming internal dualism – each of these requires a somewhat different state. And a different set of legal arrangements.

As a result, there is no one “rule of law” for development. Just *which* institutional structure you will need for development depends on what you are trying to do. The necessary “rule of law” depends upon each nation’s development *strategy*.

And it is not only economists who disagree. There is little agreement among legal experts about the detailed choices that go into the institutional arrangements for economic and political life. What administrative capacities are most important? Which laws and institutions are most crucial and how best to sequence their implementation?

What about elections, democracy, human rights – how should we assess their links to development, what tradeoffs can be made between participatory engagement and administrative effectiveness?

How important are courts, what does it mean for them to be independent? How much can – or should – be expected from criminal law? What priorities for prosecution, for anti-corruption efforts?

When are formal and informal normative arrangements most effective, responsive, fair? Property: strengthened for whom, defended against what, enabled and regulated in what ways?

Across the legal system, there are choices, choices which require economic and political strategy, and about which experts disagree.

Legal rules are crucial policy instruments precisely because their enforcement distributes in ways which can put you on one development path rather than another. In every case, the development payoff is in the details.

Looking ahead to 2030, strengthening the Rule of Law for development means strengthening the ability of each nation’s leaders and citizens to identify and make these important choices. To shape their legal regime to reflect their common aspirations, facilitate the priorities they hold most dear, shield those most in need of law’s protective hand.

This is the vision I hope will guide the international community as it re-focuses attention on the legal and institutional framework for economic development looking toward 2030.

To strengthen the rule of law as a terrain for political, social and economic choices is challenging work. It is difficult to remember that law is everywhere important and no where the same. In the search of universal indicators and comparative rankings, we can lose sight of the common wisdom that one size really does not fit all.

Let me briefly offer a few examples to illustrate the difficult choices we must all learn to make wisely in constructing both the economy and the state for sustainable development.

On the economic side, the distributive role of law in property and finance are straightforward and the link to development easily appreciated, if often disputed.

Legal rules structuring economic actors – corporate law, competition law, banking and finance, bankruptcy – can encourage the consolidation or the fragmentation of assets, can empower divergent stakeholders, set the balance between creditors and debtors, labor and capital, local and national or international capital in a variety of ways.

Although it is often said, for example, that a market economy requires strong property rights and a reliable judiciary to enforce them, this general observation obscures the many different ways property rights could be put together. As well as the extent to which rights and judges don't make markets on their own. Legal entitlements must interact with many other institutional arrangements: land titling programs, for example, do not get you collateral without willing financial intermediaries.

To understand the choices involved, more effective public enforcement of newly formal entitlements must be compared to what was going on before. The benefits of formalization must be reckoned against the loss of whatever social, economic, political or cultural production was ongoing previously in the informal or more loosely regulated sector.

For every legal reform, the development question is this: will the proposed legal reallocation generate development alongside the losers it leaves in its wake.

Sustainable development is not only a matter of growth, of course. We will need to learn to assess the *future* impact of legal change, not only on the environment, but on patterns of privilege and inequality across the society, and on the ability of the nation to continue to develop – truly to 'sustain' continuous improvement in the opportunities and life choices available to its citizens.

Here again the rule of law is a primary tool – and potential guarantor that future generations and today's excluded populations will also have development choices. The rule of law is not only our tool for economic management in the national interest: it is also the nation's best promise of emancipation and progress for those who have been left behind, find themselves excluded from the benefits of today's development choices. A rule of law for sustainable development secures the promise of their future as well as ours.

Questions of dynamic inequality – between sectors, regions or nations – are on everyone’s development agenda today. Here also, law frames the available choices. Not only because legal tools may be available to tax and transfer – to reallocate the benefits of development to those who have missed out – but because law provides the links and the obstacles which channel the propensity for growth to cluster here and not there in the first place.

Law underwrites the relative bargaining power of people, firms and nations as they struggle for gains from across a production process. Legal rules can speed or impede flows of capital, goods and persons which allow growth to leave these communities behind while others speed forward.

To use the rule of law for sustainable development – to hold open choices for the future – each society must be clear about whom we wish to empower, whom we must be careful to protect, what flows we wish to speed and which diminish.

So that is all on the economic side – but law is also the primary tool for building an effective and responsible state.

The search for more effective, transparent and accountable public institutions to make and implement all these choices has also been at the forefront of the “rule of law” agenda.

Here also there are choices.

Whatever your development policy, you need an effective public institutional structure to carry it out. But an effective public hand is an enormously expensive resource to build, maintain and deploy. Few nations do it well – none do it comprehensively across the board. Choices matter: which public hand, effective in doing what, in relationship to which economic actors?

Moreover, a comprehensively reliable public hand doesn’t always correlate with more policy space. International rule of law commitments can shrink the space for local or national policy. To navigate the global terrain within which national development can be defended also requires strategy – and an effective public hand.

No developing society can build a model state in a generation – or two or three. Scarce resources must be allocated to the public capacities most significant for national development.

Take two areas favored by many rule of law advocates: criminal law reform and anti-corruption.

Although criminal law reform looms large in rule of law discussions today, criminal law is but a small part of a nation’s legal order, its’ links to development far more tenuous than those of private law, administrative law, the law regulating credit and finance, trade and investment or the use of resources.

In every legal regime, the most effective sanctions are social. And for every nation, the most crucial activities of the state are administrative, the most crucial state vehicle for righting private wrongs the law of obligations, of contract, of tort.

While it is often said that people won't invest without some basic threshold level of state financed security --- in fact, they do, all around the world. They may charge a risk premium, of course. The development policy question is whether the costs of sufficient enforcement to reduce that premium are worth paying.

The first choice to be faced is simply how to prioritize criminal law reform with these other important dimensions of the state's legal authority.

Every criminal law system also makes choices with development consequences. Like other legal regimes, criminal law distributes. It allocates authority, vulnerability and economic security within the society. Security for whom? And relative insecurity for whom? A more robust prosecutorial capability for which crimes, in what regions? What left unattended?

We know there can be tension between a stronger security state and the human rights protection crucial to sustainable development. Whose rights will be protected, whose sacrificed for security?

Like other legal regimes, the criminal law can also be taken over for purposes which impede development. Indeed, a common feature of many countries -- perhaps particularly middle income countries -- is the intense use of rule of law institutions for political or economic advantage at odds with the nation's long term development objectives.

A rule of law for sustainable development must be nurtured carefully, protected, must put down roots in society, be understood to be the means by which a society makes choices together and protects its future.

As we move forward, it will not be clear how legal choices will shape our future development. We will need to remain flexible, open to experimentation, course correction. Indeed, the rule of law may be most important when it protects a society's capacity to change its mind.

A society's development path is sustainable when it can be changed -- when different leaders are able to make different choices, when sectors which lag can find political space to challenge -- or link themselves -- to sectors which lead.

Even choices which appear clear today may be far less so over time. Take anti-corruption efforts. Much has been written seeking to link corruption to development -- and yet the literature remains inconclusive. We do not know, for any society, much less for every society, what corruption impedes what development.

All corruption is annoying to people who pay for it – but the *developmental* impact of those payments differs. It may be benign – it may even be beneficial, particularly when compared with the costs of its suppression. It depends who gets the money, what they do with it and what the alternatives are.

It seems plausible that some things we label corruption divert resources from the public hand or allow some to exclude others from markets in ways which harm development.

But we lack a robust metric for comparing the costs and benefits of tolerated corruption with the costs and benefits of their successful elimination – or their transfer from informal to formal legal practices.

Do things get better or worse when bribes become lobbying costs? When off budget transfers necessary to support a social settlement are moved to the world of tax and spend?

It can be enormously costly – and may be politically impossible -- to move all transfer payments onto the official budget. And yet those payments may be crucial for a sustainable development path.

Let me conclude. The United Nations was wise to include the Rule of Law so prominently on the agenda for the international community as we look ahead to 2030.

Law and legal institutions are central pieces of the development puzzle. They identify crucial choices every society faces as it designs its own development path.

As we strengthen the Rule of Law, we are not implementing a recipe. We are empowering nations and citizens to chart their own course, empower their leaders to act effectively in their interest and hold those leaders accountable.

What could be more important?

Thank you for your attention – I look forward to the discussion.