

TIJ Public Forum on the Rule of Law and Sustainable
*“Integrated Approach to the Rule of Law for Implementing the 2030 Agenda
for Sustainable Development”*
11 January 2017

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Before I begin, I would like to take a moment to extend my gratitude to Dr. Kittipong and to the Thai Institute for Justice for inviting me to participate in this public forum on the rule of law and sustainable development.

It is a great honor for me to help kick off this important gathering and to share the podium with as esteemed a scholar as Professor Kennedy.

And this discussion could not be more timely.

In the past, Americans have often traveled abroad lecturing developing countries about the importance of the rule of law and holding ourselves up as an example to follow.

At the present moment, however, we have begun to cede that high ground. It is fair to say that the rule of law is under threat both within the United States and around the world.

Increased political polarization and the rise of authoritarian populism – both in the United States and elsewhere -- jeopardize the institutions essential to sustaining the stable rule of law.

The didactic stance that Americans tend to take has always bothered me.

But in light of recent developments, however, it has become particularly appropriate for Americans discussing the rule of law to approach those conversations with a degree of humility and with the goal of reminding OURSELVES of its importance . . . to approach the discussions with an openness to the possibility of LEARNING from the experience of others, and not just TEACHING.

The decision for this forum to discuss the rule of law in connection with sustainable development is a wise one, though not without controversy.

Some people – of various political and intellectual persuasions – reject the notion that the law is crucial to economic development, or even particularly meaningful as a concept.

On the one hand, it is fashionable to deride the rule of law as an empty slogan; or to identify it as regressive formalism that merely obscures the mechanisms by which the law merely serves as a vehicle for the interests of the powerful.

On the other hand, many share the view of libertarian tech entrepreneur Peter Thiel – who

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understands law and economic development as more often than not set against one another. On this view, the danger is too much law, too much state interference with the economy. From this perspective, the law becomes an obstacle to economic creativity, something that gums up the work of entrepreneurship by interposing inefficient regulations.

The requirement of a taxi license to pick people up on the street in your car or a hotel license to rent out a room; the laws governing the relationship between employer and employee; these are merely inefficiencies for Uber or AirBnB to circumvent with their technology.

This kind of facile libertarianism is disdainful of democratic decision making and of the social values embedded in law and regulation. It also tends to denigrate the role of law in fostering development.

Although this work is also not without controversy -- economists have observed a correlation between respect for the rule of law and a society’s level of economic development.

What might be the mechanisms that link the rule of law to successful development?

It seems to me that freedom and security (or predictability) are leading contenders.

The stable rule of law is crucial to human beings’ ability to maintain a free society – and a free society is the kind of society in which individuals have the space they need to take economic risks.

The rule of law also fosters freedom and development by increasing the predictability and intelligibility of the regulatory landscape within which citizens operate and by constraining officials from exercising unfettered and arbitrary discretion.

Lots of ink by people more intelligent than I am has been spilled on the question of what constitutes the rule of law. I am not going to conclusively resolve that issue here.

Nevertheless I think a good starting point for discussion is Fuller’s classic account of the formal criteria for the rule of law: the law, he said, must be public, it must be intelligible, it must be minimally stable, it must operate prospectively, it must be applied equally, it must be internally coherent, and so on.

To those formal criteria, I would follow Jeremy Waldron in adding certain institutional features, such as basic procedural safeguards as well as an independent and efficient judiciary. As he put it, “no concept of law is adequate if it fails to accord a central role to institutions like courts.”

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And, while the act of judging is never wholly separate from politics and ideology, the rule of law requires judges to be insulated from political pressure or interference.

This complex web of legal practices and institutions facilitates economic development by creating a social framework within which individuals feel free to pursue their most creative ideas and within which they feel secure enough to plan ahead with some assurance that they will not be caught up in the shifting sands of arbitrary state action or private violence.

John Rawls argued that the rule of law “constitute[s] the grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men’s liberties.”

Without the rule of law, an already uncertain world becomes even more so. And people’s willingness to undertake new risks on untested business ideas suffers accordingly.

The rule of law is so important to freedom and security not only because of the way it constrains the state.

That is certainly crucial, and it tends to get the most attention.

But the rule of law is perhaps even more fundamentally valuable because of the way the law constrains other PRIVATE actors.

An important threat to men’s and women’s liberties comes from the arbitrary (and sometimes violent) interference of other private parties.

Within Lockean political theory, it is this threat of private violence that motivates the creation of the state and of the instruments of the rule of law. If there were no private violence, the case for the coercive power of the state – and of the law – would be much diminished.

But, despite the prominence of private violence in justifications for the state’s power to make and enforce law, we tend to fixate on the predations of the STATE ITSELF in thinking about the rule of law. There are good reasons for this, but we risk distorting the conversation if we pay insufficient attention to private violence and the importance of the rule of law in protecting individuals from it.

It is the vulnerability of the poor and powerless in particular to these private threats that makes it so important that they have the protection of law. The rich and the strong can usually protect themselves, even in conditions of disorder.

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And so access to justice for the poor – access to the material resources necessary to enjoy the protection of the rule of law (such as the assistance of counsel) – constitutes an important and frequently overlooked element of the rule of law.

It is therefore fitting that one of the panels later today will focus on that issue in the context of criminal justice. I would only add my suggestion that access to justice is also important in the context of civil law, particularly if what we are talking about is the connection between the rule of law and economic development.

And this is why the UN was correct when it says the following in its Sustainable Development Goals resolution:

Sustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development. The new Agenda recognizes the need to build peaceful, just and inclusive societies that provide equal ACCESS TO JUSTICE and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.

The promotion of the rule of law is correctly a central element of sustainable development goal number 16, and access to justice (civil AND criminal) is a key part of the rule of law.

A complex modern society -- and a complex, developed economy – requires legal infrastructure that is up to the task of organizing and regulating human behavior at the necessary scale.

One strongman and a twitter account cannot produce economic development on the scale we require, no matter how smart he is.

The rule of law is fragile and always at risk of being eroded.

To paraphrase a former dean of Professor Kennedy’s law school, our commitment to the rule of law must be stable and enduring, but it cannot stand still.

Countering contemporary threats to the rule of law is a challenge in which all of us – lawyers and laypeople, even tech entrepreneurs – have a stake.

When we do our jobs well, practicing lawyers contribute directly to the health of the rule of law in our society. We also reaffirm the continuing importance of the legal profession to a society’s success – to society’s ability to accomplish widely shared goals, such as economic growth, innovation, equality of opportunity, environmental protection...

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Law Schools have an important role to play in this regard.

So does civil society – groups like the Thai Institute for Justice; the Bar.

That is why events like this one are so important.

And so, once again, I am delighted to help you to kick off this wonderful and important day, and I look forward to the discussions.

Thank you.