

How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?

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1. SETTING THE SCENE

Justice Charles Doherty Gonthier is remembered around the world for his commitment to sustainability. As a renowned Canadian jurist, he brought to the notion of legal justice a new perspective of global justice through his championing of sustainable development and fraternity, or solidarity. We recall the legacy of Justice Gonthier on the eve of Canada's 150th anniversary and at a time when Canada's longstanding tradition of multilateralism and international solidarity are in ever greater demand.

Justice Gonthier's call for solidarity and sustainability has gained new urgency in our dangerous and endangered world of growing inequalities, sharp ethnic, racial and religious divisions, entrenched conflicts, and violent extremism. Peace negotiations are paralyzed, conflicts are uprooting millions of people, and Western leadership is in turmoil. Populist politicians are exploiting the discontent and anger of those who feel left out and left behind, sowing seeds of intolerance and polarizing society. There is widespread disaffection and disillusionment with established institutions. And all the while, the time bomb of global warming ticks on relentlessly, even as the Paris Agreement is trashed by its key polluter.

The international consensus on sustainable development is a lifeline for humanity's survival in this gloomy context. On September 25, 2015, world leaders adopted what is, arguably, the most ambitious global development program ever: the 2030 Agenda for Sustainable Development (the 2030 Agenda). Comprised of 17 universally applicable Sustainable Development Goals (SDGs) covering a comprehensive range of economic, social, and environmental priorities for all countries in the world, the 2030 Agenda seeks to align the objectives of eradicating poverty and reducing inequality among present generations with the objective of preserving fragile ecosystems and limited natural resources for future generations. It makes the bold assertion of "leaving no one behind."

The 2030 Agenda's goals apply universally and all countries in the world—Canada as much as Cameroon—are expected to report on progress. It reflects a paradigm shift in international cooperation.

A distinct feature of the 2030 Agenda is the acknowledgement of access to justice and the rule of law as outcomes and enablers of sustainable development. That understanding is made explicit in SDG 16 and embedded implicitly in various other goals and targets across the entire

2030 Agenda through references to equality, inclusion and equity, rights, legal frameworks, and accountable institutions. This could be a game changer for sustainable development.

The provision on access to justice and the rule of law (SDG 16) was hugely controversial and took many months to negotiate. But in the end, world leaders agreed that the balancing of competing inter-generational and intra-generational interests—the eradication of poverty today and the preservation of the planet for the future—requires transparent, inclusively developed, rule-based processes and mechanisms that can ensure equity for all.

The rule of law is relevant to all three dimensions of sustainable development. By ensuring stable, transparent legal regimes, the rule of law promotes economic development. By ensuring equal opportunity and equitable access to basic services, the rule of law promotes social development. By strengthening the legal framework to protect the environment and ensure the fair, sustainable management of natural resources, the rule of law protects the planet.

While the debate at the United Nations (UN) was settled with the adoption of the 2030 Agenda, there remain many pertinent questions and challenges for practitioners, policymakers, and academics. What does the rule of law mean in the context of sustainable development? How can the rule of law advance the agenda for equality and social justice? What should we do to promote the rule of law in countries striving towards democracy and development? These are some of the questions which I will seek to address—in a rather imperfect way, I hasten to add—in the limited time I have this evening.

Allow me at the outset to make a confession—and I make it with some trepidation in this August gathering of judges, lawyers, and budding lawyers. I am a lapsed lawyer. Rather like a lapsed Catholic who has not been to church, I have not worked in a chamber of lawyers nor argued a case in front of a tribunal. My experience of law comes from practice on the ground and interaction with policymakers as a humanitarian worker, a human rights advocate, and a development practitioner. That experience has taught me both the power of the law and its limits.

I spent 21 years, from 1980 to 2001, working for the United Nations High Commissioner for Refugees (UNHCR), and during those years I saw governments shut down borders, push back refugees into danger, fine airlines to deter them from carrying asylum seekers, and detain asylum seekers on remote islands in harsh conditions. There were plenty of treaties and national laws, but refugees and asylum seekers often found themselves in a legal no-man's land without access to justice or the protection of the rule of law.

Determined to tackle the humanitarian problem upstream, I turned to human rights advocacy. From 2001 to 2009, I was the Secretary-General of Amnesty International at its London Headquarters. Very early in my mandate, I was confronted with the human rights abuses of the War on Terror, in which the world's most powerful governments locked people up indefinitely without charge or trial, engaged in water-boarding and other torture tactics, and carried out extraordinary renditions with impunity. While US Supreme Court decisions like *Rasul v Bush* sustained our faith in the integrity of the judicial system, they made little practical difference to the victims of terrorism or counter-terrorism.

Now let me tell you the story of Rosie. I never met Rosie, but in September 2001, I visited a counselling centre for women victims of violence just outside Durban, South Africa and learnt

about Rosie from a counsellor who worked there. A new law to combat domestic violence had just been adopted in South Africa. The centre was set up by the provincial government of Natal to help women who wished to submit their complaints to the police and get protection orders from local magistrates. The counsellor explained the process: simple, no hassle, low cost. Then she told me about Rosie, a poor woman with five young children and no job or education. On pay day each week, her husband would get drunk, come home, and beat her up. She was hospitalized with injuries several times. Then, one day, he beat her so badly that she died. I could not understand why Rosie had not sought a protection order from the magistrate. “What is wrong with the law?” I asked the counsellor. She replied, “There is nothing wrong with the law. Rosie didn't have the money for the bus fare to get to the Magistrate's Court.”

If my experience with UNHCR and Amnesty International showed me that the law often bends to political will, Rosie's case taught me that even good, well-meaning laws and institutions can fail to provide justice if they are disconnected from the lived experience of people. That is why, if the rule of law is to contribute to sustainable development, it must be sensitive to the needs and demands of justice seekers and deliver substantive justice.

2. DEFINING THE RULE OF LAW

Justice is people-centered. It is about creating fair outcomes and an inclusive society. Rule of law, on the other hand, is state-centered. It is about institutions and governance, and the application of norms, procedures, and regulations.

Legal literature is replete with articles on whether the rule of law is “thin” or “thick”, about form or function, due process or substantive justice. At a minimum, the rule of law is defined as a system of rules and institutions to constrain the arbitrary exercise of power. Laws must be clear, prospective, and capable of being followed, impartially applied, and equally enforced by institutions. Those who see the rule of law primarily as a tool for economic development often define it in this way, focusing on the predictability, clarity, legality, and due process guarantees that it provides.

But should the rule of law only be preoccupied with due process, and remain silent on whether the law itself is fair or not? As you know, in the *Dred Scott* case (1857) US Chief Justice Roger Taney held that due process protected a slave owner's property rights. Even today, laws that discriminate against women and minorities are upheld by courts in many countries. Often poor people are excluded from the courts because the legal costs are exorbitant. Such a system of the rule of law cannot enable sustainable development for all.

The UN Secretary-General has defined the rule of law as:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publically promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.

The UN's understanding of the rule of law is also what we follow in the International Development Law Organization (IDLO). It contains procedural elements, such as legal supremacy, certainty and due process, but also important substantive elements, requiring an independent judiciary and laws consistent with international human rights norms and

standards. I believe that it is only through such a substantive understanding of the rule of law that the ambition of the 2030 Agenda to “leave no one behind” can be properly realized.

3. EQUALITY AND THE RULE OF LAW

Reducing inequality is a major objective of sustainable development, and at the core of the rule of law lies the principle of equality: that everyone is equal in the eyes of the law and equally accountable before the law.

Equality can be formal; in other words, everyone is treated in the same way. As Anatole France famously noted in 1894: “The rich as well as the poor are forbidden to sleep under the bridges of Paris.”

Indeed, there are those who believe the principle of equal protection before the law is threatened by any attempt to go beyond formal equality and rectify real inequality, for instance, through affirmative action. According to the economist F. A. Hayek,

formal equality before the law is in conflict, and in fact, incompatible with any activity of the government aiming at the material or substantive equality of different people and ... any policy aiming directly at the ideal of distributive justice must lead to the destruction of the rule of law.

When the law purports to promote formal equality and ignores the asymmetry of power, it may endorse inequality and entrench injustice. Remember *Plessy v Ferguson* (1896), where the US Supreme Court upheld state laws on segregation on the basis of the argument of “separate but equal”. In his dissenting opinion Justice John Marshall Harlan pointed out that the US “constitution is colorblind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal.”

“Legal blindness” can be disadvantageous to minorities and the marginalized. The women’s movement accused the Universal Declaration of Human Rights, adopted by the United Nations in 1948, of being gender blind because in professing equality, it makes no concession to the different ways in which men and women experience their lives. It took more than 30 years for the Convention on the Elimination of Discrimination against Women to correct that lacuna in 1979. It was another 15 years before the World Conference on Human Rights in Vienna in 1993 acknowledged that human rights are women’s rights. Today, we know that a commitment to gender equality requires gendered analyses of laws and policies.

True justice looks at reality, not simply rules, to find out whether a particular group is being disadvantaged and discriminated against. As Amartya Sen, the Nobel prize-winning economist, says in his book, *The Idea of Justice*:

The question to ask is whether the demands of justice must be only about getting the institutions and rules right? Should we not also have to examine what does emerge in the society, the kinds of lives that people actually lead?

... justice cannot be indifferent to the lives that people actually live.

Let me give you two examples of court decisions that show what happens when you focus on rules rather than reality.

In 2013, the Supreme Court of El Salvador considered the request for an abortion by a woman whose life was endangered by her pregnancy and whose fetus at 26 weeks had been detected to be severely deformed. If born alive, the doctors said it would not survive for more than a few days. El Salvador’s law forbids all abortions. The Supreme Court ruled, four to one, that El Salvador’s ban on abortion was absolute, and that the woman could therefore not have an abortion.

Compare that to the decision of the Supreme Court of India in March 2013 (*Novartis v. Union of India & Others*) to reject the patent application by Novartis for its cancer drug, Gleevec, on the grounds that the company was merely “ever-greening” an earlier drug. Further, the court took the position that the Indian legislation and the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”) agreement allowed the court to take into account the social objectives of the healthcare of Indian people. As a result of this court decision, millions of poor people in India are able to access a drug that they badly need at an affordable price.

In the first case, the Supreme Court of El Salvador applied the law with impeccable legal precision and full respect for the principles of due process—but with no regard to the consequences. In the second case, the Supreme Court of India took a broader look at all circumstances to provide justice. If I may repeat Amartya Sen’s words: “justice cannot be indifferent to the lives that people actually live.”

Is the life of a pregnant woman equal to that of her unborn child? Should the needs of those who are too poor to buy essential medicines be put on the same footing as the interests of a large multi-national pharmaceutical company to continue to make profit out of essential medication? Such dilemmas of justice cannot be resolved, nor can the ideals of the rule of law be realized, without a commitment to human rights. That is why a proper understanding of the rule of law must have human rights at its core.

Human rights are constraints on state power (for instance, by prohibiting torture or restrictions on free speech), and they are enablers for state action (for instance, providing access to education or health care or housing). They are claims that the weak advance to hold the powerful to account. They empower and confer dignity on the poor and marginalized.

If the rule of law is to be a pathway to sustainable development, then, in the words of Professor Harold Berman, “justice based on law must give way to law based on justice.”

4. APPLYING THEORY TO PRACTICE

The rule of law is both a legal concept and a political construct. It is about how societies are organized and power is exercised. Depending on whether we take a “thin” or “thick” approach to the rule of law, whether the focus is on form or function, the rule of law can be an instrument for empowering poor and marginalized people or it can be used as a tool for maintaining the status quo in favor of the rich and powerful.

Understanding the political economy of the rule of law—the nature of legal and institutional reforms, their impact on diverse interests, and the power dynamics that drive or hinder the reforms—is essential if we are to advance sustainable development for the benefit of all. Too often, international actors have erred by promoting “legal implants” from other

countries or treating the changes as a technical exercise, or by failing to invest sufficient time, resources, and understanding in the process. Donors often want to rush results and measure what cannot be measured in a short time.

The rule of law takes decades, if not centuries, to take hold in a society, as Canada's own experience shows. The 2030 Agenda creates an opportunity for all countries to share their experiences and invest in institutions as well as the empowerment of their citizens.

Allow me to share with you a few lessons drawn by law and development practitioners, including the organization I now head, the International Development Law Organization (IDLO). We work in some of the poorest and most insecure parts of the world to support legal and constitutional reforms and build local capacity to empower justice seekers. Over thirty years of our existence, what have we learned about the rule of law and sustainable development? Let me pick out three key points.

Firstly, if legal reforms are to be sustainable, they cannot be dictated by outsiders, but must be locally owned and locally driven. Justice Gonthier did not use the language of local ownership but he expressed the same view when he said,

Fraternity is at the heart of sustainable development. It calls for not imposing solutions determined by one's own agenda but rather regard for the needs as experienced and perceived by the recipients. Where there is no fraternal impulse in the development endeavor, there is no true understanding and commitment to the problems of those in need.

The justice-making effort of each country is unique, deeply rooted in its specific history, politics, jurisprudence, values, customs, and traditions. Understanding the local context and ensuring local ownership are therefore critical to successful legal reform for sustainable development, whether in the justice sector or more broadly in the economic, social or environmental field. To give you an example, in Mali, a country recovering from years of armed conflict and burdened with severe poverty, IDLO has sought through innovative methodology ("program-driven iterative adaptation") to bring together the local justice providers and communities, help them to identify the gaps in the justice system, agree on what needs to be done and then support them to implement the solutions—all while also coordinating with the central authorities to ensure appropriate support from the State.

In building local ownership it is important to ensure inclusive participation. This can be politically sensitive in post-conflict societies, and therefore very challenging, but it is essential if people are to have trust and confidence in the justice system. It is an important component of peace-building.

Secondly, successful legal reforms for sustainable development require a top-down bottom-up approach. That means simultaneously pursuing legal empowerment strategies as well as institutional and legal reforms. This approach is most evident in programs for women's access to justice. In Afghanistan, for instance, IDLO is working with the Attorney General's Office to build legal units to prosecute gender-based violence. We are also working with local legal aid providers and women's shelter organizations to strengthen their capacity to ensure women's access to justice, protection, welfare and jobs. We are just one of many actors who are working to support women and girls and we are acutely aware that our collective efforts make only a modest difference in a strongly patriarchal society with extremely high levels of gender

discrimination and gender-based violence. Access to justice alone will not be enough to ensure women's and girls' rights without major political, social and economic changes. The rule of law cannot grow in a vacuum.

Thirdly, state laws and institutions are not the only means by which people access justice. In Canada, as you know, 75 percent of disputes are settled by other means, outside of courts. For most people around the world, courts are expensive, remote, complex, and time-consuming. Not surprisingly, most poor people in developing countries turn to informal or customary forms of justice. Indigenous peoples have their Indigenous justice concepts and mechanisms. Informal and Indigenous systems are used to settle not only family disputes, but also entitlement to land and natural resources at the community level. This latter application makes engagement with informal and Indigenous justice systems particularly relevant for sustainable development. However, informal and Indigenous systems, while valuable in many ways, can be defective and unfair, especially towards women, and we need to be alert and responsive to that factor.

IDLO has done extensive research on informal justice systems, and it is engaged in community justice programs in several countries, including Uganda, Burundi and Somalia. Our approach is to engage with informal systems, empower justice seekers, and encourage communities to bring about change from within. This is a complex area of law and development, and there is a lot to learn.

5. CREATING A CULTURE OF JUSTICE

Reforms to improve access to justice take many forms and are complex and fraught with challenges because the rule of law is about justice, but it is also about politics. This is true of both developed and developing countries. Just think for a moment about what is happening in the United States and the enormous political ramifications of the cases that may soon reach the Supreme Court on issues such as electoral districts, travel restrictions, health care, executive power and privilege.

The recent World Bank Report on Governance and Law masterfully sought to depoliticize an issue that is inherently political by speaking of the *role* of law, rather than the *rule* of law. The Report focuses on the role of law as a tool for coordinating policies, for creating a culture of compliance, and for ordering change through constitutional and legal reforms and litigation. I can understand why the World Bank prefers to emphasize the role of law rather than the rule of law. Such a pragmatic approach appeals to policymakers, the key audience of the World Bank, and avoids ideological arguments about political systems that are fundamental to a proper understanding of the rule of law. But I fear that the approach propounded by the World Bank will only take us so far and no further.

As a human rights advocate, I believe the rule of law in the context of sustainable development is about creating a culture of justice. Judges and lawyers play a big role in it, but so do lawmakers and ordinary citizens. People must mobilize to create public pressure for legal and institutional changes, as well as political will for upholding the principles of the rule of law and human rights. Can you get people out on the street to march for "the rule of law"? No. For "the rule of law"? Maybe only lawyers and law students. For "justice"? Yes. Everyone understands justice. Ordinary people know what is at stake.

As Justice Gonthier understood so well, sustainable development is a matter of justice. That is why we must strive to create a culture of justice, based on the rule of law and human rights, no matter how hard that might be or how long it takes.

Thank you.