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“Investing in the Rule of Law, Justice and Security for the Post 2015 Development Agenda”

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Rule of Law and Economic Development after 2015: The Importance of Choices

Your Royal Highness, Princess Bajrakitiyabha Mahidol,
Madame Prime Minister, Excellencies, Ladies and Gentlemen.

Let me begin by thanking The Thailand Institute of Justice and the Ministry of Justice for their hospitality and their vision in convening this Dialog.

We are discussing the relationship between the Rule of Law and economic development at a time when there is little consensus among development economists and policy professionals about what “sustainable economic development” means and how to bring it about. Forty years ago – or twenty years ago --- there was a consensus about economic development. Governments around the world formulated their development policy in similar terms. We now know that one size does not fit all. Nor do economists agree about where to focus attention.

Nevertheless, the cacophony of voices that have replaced “import substitution industrialization” and “export led growth” as well as “neo-liberalism” and “shock to the market” do agree on one thing: you need “strong” institutions and the “rule of law.”

This new consensus is right, on two counts.

First, law provides the foundations for economic activity: money, credit, property, corporations, capital, labor, contract: law doesn’t just regulate these things – it creates them, and they could be created in different ways.

The crucial point is that *how* you create them matters 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. In the legal construction of economic activity there are choices.

At the same time, whatever your development policy, you need an effective public institutional structure to carry it out. Effective public institutions are rare, expensive and difficult to build and easy to unravel. They have many parts, each of which may be more or less effective.

Their effectiveness may not be easy to change when it depend on their links with the complex economic and social fabrics within which they are embedded. Efforts to strengthen rule of law institutions can backfire, opening new institutional opportunities for economic or political forces to instrumentalize the state in ways which impede development.

Setting priorities is crucial. Just *which* public institutional structure you will need for development depends on what you are trying to do. Overcome market failures, strategize your relationship to the global economy, support national champions, attract foreign capital, overcome internal dualism – each of these requires a somewhat different state. In the institutional construction of an effective public hand, there are also choices.

In short: it makes a lot of sense for the international community to focus on strengthening the legal and institutional framework for economic development as we look beyond 2015. As we do, though, it is crucial to remember that supporting the rule of law is not a *substitute* for hard choices about what development is and how to bring it about. It is an arena within which those choices can be debated and implemented.

Lots of talk about the Rule of Law obscures this point – the powerful consensus that the ROL is crucial makes it hard to remember that this doesn't tell us a great deal. The search of universal indicators and comparative rankings can make us lose sight of the common wisdom that one size really does not fit all.

We need to know what kind of a rule of law, empowering whom, strengthening which entitlements, to what, with which institutions? On this score, there remains a great deal we don't know about the relationship between specific legal institutions and particular development paths. It will take a lot of work to sharpen our appreciation for the relationship between choices among development paths and choices among legal priorities.

We know what kinds of thing you need law for – we are a lot less clear how building law one way or the other will put us on different – potentially more or less sustainable-- development trajectories.

Three points on which there is a lot of consensus in the policy community illustrate the challenge.

First: the idea that the legal foundations for market activity must be transparent and effective. To generate development, it is said, a market economy requires strong property rights and a reliable judiciary to enforce them.

This sounds right. But we also know that rights and statutes and judges don't make markets. The institutions and social arrangements markets require are far more complex. Titling programs do not get you collateral without financial intermediaries.

The formalization of entitlements is also a *redistribution* of authority over resources and a redistribution of transparency. Access to resources will already have been shared in some way and will have been transparent to some. We would need to know more about the particular development consequences of one or another distribution to understand the impact of allocating formal entitlements.

Indeed, you can't "strengthen and clarify" property rights without becoming entangled in economic and social choices. Legal entitlements – formal as well as informal – are the stakes and instruments for political/social and economic struggle. One person's entitlement is another person's duty – and different economic interests have different views about rights. Some benefit when the state rigorously enforces their exclusive entitlement -- for others (think of new media start ups) less exclusive entitlement regimes open economic opportunities.

Legal rules structuring economic actors – corporate law, competition law, banking and finance, bankruptcy – can encourage consolidation or 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. It is the *choices* that matter for development.

As a result, legal background rules – including property rights – are crucial policy instruments precisely because their allocation and enforcement distributes access to resources. The result can put you on one development path rather than another. But the policy is all in the details: how they are allocated, when they are enforced. "Strong and clear" entitlements tells you very little about the path to take for sustainable development.

Second: the idea that development requires "good governance" – an effective public administration, a reliable police and security establishment, and the elimination of corruption.

In some sense, of course: where law is the instrument of one or another development policy, the policy can only be as effective as the public hand that wields it.

But an effective public hand is itself 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? Prosecutors and administrators have, must have, discretion in allocating scarce enforcement resources.

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 development policy.

A great deal has been written about "corruption" and development. It turns out to be far more difficult than one might think to link the toleration of one or another kind of corruption to

different development paths. Or to compare its impact to the costs of its eradication. The jury, as I read the literature, is still out.

The word “corruption” covers a multitude of sins: reducing any of them requires social, cultural and institutional transformation. As social practices, the many forms of corruption are notoriously resilient. Anti-corruption initiatives and institutions can themselves become sites for the pursuit of political objectives and the settling of economic scores.

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

Choices also matter here. 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.

Third, and finally, the idea that development means or requires human rights.

Human rights frees and empowers people – liberating a nation’s economic potential. Or, put less instrumentally, human rights may be the very definition of development. In this view, development ought not to be about GDP. By implementing human rights, you can go about achieving development directly.

But again there are costs and trade-offs. Framed as “human rights”, it is hard to know how to prioritize the right to food, to health, to freedom of speech, and so on. All of these are expensive and difficult to promote – placing the emphasis here or there will change the development path.

More could be said about each of these ideas. There is no question law and institutions are central pieces of the development puzzle. Placing the Rule of Law at the center of the post 2015 development agenda could not be more timely. Doing so, however, is an opportunity to discuss hard choices, not a recipe for escaping them.

I look forward to the discussion.