



THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

**The Voice of
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profession juridique**

Sustaining Democracy through the Rule of Law

CANADIAN BAR ASSOCIATION

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865 Carling Avenue, Suite 500, Ottawa, Ontario K1S 5S8
Tel/Tél: 613 237-2925 Toll free/Sans frais: 1 800 267-8860 Fax/Télécop: 613 237-0185
Home Page/Page d'accueil: <http://cba.org/abc> E-mail/Courriel: info@cba.org

TABLE OF CONTENTS

Sustaining Democracy through the Rule of Law

PREFACE.....	i
I. INTRODUCTION.....	1
II. DEVELOPMENT AND GOOD GOVERNANCE.....	2
III. DEMOCRACY AND THE RULE OF LAW.....	3
IV. THE RULE OF LAW AND THE LEGAL SYSTEM.....	5
V. BEST PRACTICES IN PROMOTING THE RULE OF LAW.....	6
1. Exercise caution.....	6
2. Local engagement and ownership.....	6
3. Engage strategically.....	7
4. Use both “top-down” and “bottom-up” approaches.....	7
5. Keep a long-term outlook.....	8
6. Develop better evaluative techniques.....	8
VI. CANADA’S ROLE.....	9
VII. SUMMARY OF RECOMMENDATIONS.....	10

PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the International Development Committee of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the Canadian Bar Association.

Sustaining Democracy through the Rule of Law

I. INTRODUCTION

The Canadian Bar Association (CBA) appreciates the invitation to appear before the House of Commons Standing Committee on Foreign Affairs and International Development. The CBA commends the Committee for undertaking a study of Canada's role in international support for democratic development abroad.

The CBA's perspective on Canada's role in promoting democracy abroad is guided by the work of its International Development Committee (IDC). The IDC's mission is to promote the rule of law in developing and transitional countries. Since 1990, the IDC has delivered legal and justice reform and capacity-building projects in 29 countries across Asia, Africa, Central Europe and the Caribbean.

Our projects have included support for constitutional building and human rights advocacy, development of legal aid and public legal education programs, reviews of justice systems, promotion of policy development and law reform, improvements in the administration of justice, and implementation of alternative dispute resolution mechanisms to increase access to justice. The CBA has also assisted in strengthening the capacity of legal institutions, including the legal profession and the judiciary. To implement these projects, the CBA has worked collaboratively with governments, legal institutions, legal advocacy groups, international organizations, donors and non-governmental organizations (NGOs).

Through our own knowledge, research and experience, the CBA believes that Canada's efforts to promote democracy will be most successful if its assistance is centred on supporting good governance, which includes a significant focus on building the rule of law. In this submission, we discuss the links between the rule of law, democracy, good

governance and development. We also discuss international best practices on how to promote the rule of law and draw implications for Canada's future work in this area.

II. DEVELOPMENT AND GOOD GOVERNANCE

The purported benefits of promoting democracy abroad are numerous and include improved economic opportunities, strategic foreign policy interests, strengthened national security, and protection of individual human rights. However, the CBA believes that Canada should approach the decision of how to support democracy principally through the lens of development.

Nobel Prize winner and economist Amartya Sen has said that development should be seen as the process of expanding the real freedoms that people enjoy. According to Sen, "development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states."¹ In recent years, the international community has adopted a comprehensive conception of development, one that stresses a diversity of goals that include reducing poverty and hunger, protecting the environment, improving health and sanitation, and tackling illiteracy and discrimination against women.²

The prevailing view among international donors, practitioners and academics is that good governance provides the enabling environment for achieving this wide array of development goals. In general, governance is a broad term that "encompasses the values, rules, institutions, and processes through which people and organizations attempt to work towards common objectives, make decisions, generate authority and legitimacy, and exercise power."³ More specifically, the characteristics of good governance include participation, transparency, responsiveness, accountability, equality, inclusiveness and efficiency.

¹ Amartya Sen, *Development as Freedom*, (New York: Anchor, 1999) at 3.

² United Nations' Millennium Development Goals (MDGs) in September 2000, which have been agreed to by almost 190 countries, including Canada, as well as the world's leading development institutions.

³ "Governance", Canadian International Development Agency (CIDA), online: <<http://www.acdi-cida.gc.ca/CIDAWEB/acdicida.nsf/En/JUD-121132928-PPH>>, (date accessed: 5 December 2006).

RECOMMENDATION

The CBA recommends that Canada's efforts to promote democracy abroad be focused on supporting *good governance*.

III. DEMOCRACY AND THE RULE OF LAW

The twin principles of democracy and the rule of law are the two most important pillars of good governance. Furthermore, each is not truly sustainable without the other.

Democracy is widely accepted as the best form of government that embodies the characteristics of good governance. Free and fair elections – the hallmark of democracy – provide for greater political participation, increasing the chances that national development goals will reflect broad societal aspirations and priorities. Similarly, a democratic government is more likely to be accountable since it is more responsive to popular concerns and more transparent in its decision-making. Democracy provides the only long-term, peaceful basis for managing competing ethnic, religious, and cultural interests in a way that minimizes the risk of conflict, one of the primary causes of underdevelopment.

But democracy alone is not sufficient to support good governance. Good governance is a wider concept than democracy, and includes much more than political party development or free and fair elections. Importantly, it requires the commitment to the rule of law. Without the rule of law, democracy is not sustainable. The dual importance of democracy and the rule of law is witnessed in the United Nations' Millennium Declaration, in which world leaders undertook to “spare no effort to promote democracy and strengthen the rule of law.”⁴

Although the phrase “rule of law” has many different conceptions, at its most basic, it concerns the fundamental relationships between law and government. The Supreme Court of Canada has identified the concept's two basic principles. First, everyone is subject to the same law – government officials, legislators, judges, businesses and private individuals. Second, the government is bound by law. No person should be punished or interfered with

⁴ United Nations Millennium Declaration, GA Res. 55/2, UN GAOR, 55th Sess., Supp. No. 49, UN Doc. A/55/49 (2000) at para. 23, online: <<http://www.un.org/millennium/declaration/ares552e.htm>>.

by the authorities unless it has been authorized by law. Put another way, all government actions must be authorized by the law.⁵

In addition to these two elements, which focus on restraints on government action, a basic conception of the rule of law also means that laws must be publicly available and readily accessible. They must also be more than “on the books” – they must be effectively enforceable and fairly applied. Laws must also be clear, consistent, and stable; once adopted, they must be enforced in a predictable way, free from arbitrariness, corruption, cronyism, and patronage.

These minimal elements of the rule of law underpin the basic fundamentals of a democracy. For example, an election could hardly be considered free or fair if electoral rules were not applied equally, fairly and consistently, or if voting procedures were not publicly accessible and openly debated. Similarly, disputes over voting irregularities must be heard and decided by independent courts with judges that are free from political interference.

But these basic elements are not sufficient to support a robust and sustainable democracy. As noted, a democracy must embody the elements of good governance. For example, in order to ensure full participation in a democracy, civil and political rights – such as freedom of thought or freedom of association – must be protected. Enabling legislation such as beneficial tax rules for NGOs or civic education promotes substantive participation. Transparency in government is encouraged by a strong and independent media, which may require particular legislation or regulations, such as freedom of information rules. A responsive government is likely to require some sharing of power with other levels of government, particularly at the local level. Accountability and efficiency are assured through parliamentary scrutiny and legally enforceable standards. Equality and inclusiveness may be protected by anti-discrimination laws and human rights bodies.

In sum, a strong, sustainable and meaningful democracy requires a commitment to an expansive conception of the rule of law, not merely a superficial one. This perspective on the rule of law explicitly equates the concept with something good and desirable. In, short,

⁵ *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 748; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 71.

the rule of law must mean the rule of good law. The implication is that good governance can only be improved by supporting reforms that advance the substantive rule of law.

RECOMMENDATION

The CBA recommends that Canada's efforts to promote good governance include a significant focus on building the rule of law in its expansive conception.

IV. THE RULE OF LAW AND THE LEGAL SYSTEM

An expansive conception of the rule of law implies a correspondingly wide conception of what constitutes a legal system. In turn, this suggests that efforts to promote the rule of law must correspondingly address weaknesses in a wide array of interconnected legal and justice institutions. For example, the basic elements of a legal system might include institutions such as the courts, justice ministries, and prisons. In contrast, a comprehensive definition of a legal system would include not only the vast body of laws, regulations, and procedures, but also the myriad of individuals and institutions that produce, interpret and enforce laws. This includes, most obviously, judges, lawyers and police, but also prison guards, court staff, tax collectors, bar associations, law schools, and public servants. In fact, as one academic has noted, the boundaries of a legal system are unclear:

Most of the definitions come from lawyers themselves; but these may be deceptive. The lawyer's definitions are bounded by his own experience... Logically, however, the phrase "legal system" could just as well apply to all of government, to all of social control, to every institution that makes rules or applies them, to any way in which private persons address themselves to higher authority, to every official response to private behaviour, and to all actions of persons and groups that consciously relate to the law, including deviation or evasion.⁶

Efforts that focus too much on reforming formal legal institutions are unlikely to succeed without deeper engagement with the broader legal system and even broader elements of society. Implicit in this conclusion is the notion that international assistance projects that conceive of the rule of law too narrowly are mistakenly overlooking aspects of reform that encompass a substantive conception of the rule of law.

⁶ Lawrence Freidman, "On Legal Development" (1969) 24 Rutgers Law Review 11 at 56-67.

While no international donor can realistically undertake to assist countries with every element of its legal system, efforts to build the rule of law are therefore more likely to be successful if donors acknowledge the breadth and scope of a country's law and justice system. At the very least, coordination amongst donors is necessary to avoid duplication and ensure that a country is provided with a complete and comprehensive array of assistance.

RECOMMENDATION

The CBA recommends that Canada's efforts to promote the rule of law must engage all elements of a legal system.

V. BEST PRACTICES IN PROMOTING THE RULE OF LAW

Building the rule of law is much easier said than done. Because the importance of the rule of law and good governance have only truly been appreciated in the last decade, evaluating the success of international efforts in this area is difficult. Nevertheless, a few lessons have emerged from the CBA's own experience and the experience of others.

1. Exercise caution

Legal systems are extremely complicated and the risk of unintended consequences is high. Well-intentioned reforms can nevertheless end up having negative effects because different aspects of a legal system are connected in numerous and complicated ways. As a result, we need to approach this work with caution and humility.

2. Local engagement and ownership

Projects and programs supported by Canada must engage all stakeholders, be responsive to local needs, and have local ownership or they are likely to fail. Local expertise must be consulted and involved in all stages of the planning, implementation and monitoring process. The most successful approach is one where local actors and decision-makers are empowered to make choices. Canadian donors and implementers can help by sharing their own experiences about the pros and cons of different choices – overseas partners can learn as much from our failures as from Canadian successes if we are honest enough to admit them.

3. Engage strategically

As the failed law and development movement of the 1960s proved, legal transplantation from one country to another does not work.⁷ There are many different models of legal and justice systems, and different models may work in different places at different times. For example, in almost all countries in the world, the vast majority of ordinary people only ever engage the formal justice system at the lowest level of courts or tribunals (and often avoid courts altogether in favour of non-judicial dispute resolution where possible). Nevertheless, it seems that the majority of justice system aid goes into Supreme Courts, law ministries and other places which have little or no impact on the lives of the poor and disadvantaged.

4. Use both “top-down” and “bottom-up” approaches

Legal and judicial reform cannot be successful without champions in the country. In some cases, support comes from the “top” through strong political commitment and work with government institutions and ministries. In other cases, civil society or “bottom-up” is the better starting point for engagement. In the longer term, neither strategy can be successful without engaging a whole range of actors. “Top-down” approaches, traditionally the domain of international financial institutions and larger bilateral donors, typically provide assistance to government institutions and more formal elements of the legal system, including judges and the courts. The evidence from these projects suggests that activities like training judges, improving management systems, and supplying computers to the judiciary will have limited impact if not accompanied by “bottom-up” approaches. Efforts to build civil society and NGOs, including bar associations, provide a complementary entry point for involvement. Such efforts include activities that improve legal empowerment, which focus on attaining development objectives such as promoting the rights and advancement of disadvantaged populations

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Richard E. Messick, “Judicial Reform and Economic Development: A Survey of the Issues” (1999) 14 World Bank Research Observer 117 at 126.

and furthering social justice.⁸ Organizations and individuals involved in funding, designing and delivering programming need to have both sufficient experience and cultural understanding and sensitivity to know what windows of opportunity exist and what kind of programming will have the greatest impact.

5. Keep a long-term outlook

Building the rule of law in Canada did not happen over the course of months or years, and we should not expect any less in other countries, especially those that have faced conflict or social, political and economic challenges. Building values takes much longer than transferring technocratic skills. Because the impact of donor-supported activities may not be evident for ten years or more, project planning and expectations must be adjusted accordingly. We need to set realistic project goals and ensure that performance measurement reflects this understanding.

6. Develop better evaluative techniques

Much more research, learning and evaluation are necessary in this area. Judging the effectiveness of rule of law aid efforts is difficult simply because of the lack of detailed and timely evaluation of these projects. The development of practical and meaningful measures of the impact of legal and judicial reform projects is still in its infancy. This is primarily because the measurement of outcomes in this area is not easy. Direct measures of law and justice sector performance are deficient in most countries, either not available or available only with a serious lag. In addition, the sector poses certain special measurement problems, such as the lack of agreement on what constitutes a well-functioning legal system, the extent of its impact on other development goals, and the fact that a large part of the rule of law efforts are really about what the rule of law prevents – conflict and illegal behaviour – rather than what it advances. Unlike infrastructure projects, for example, measuring success is extremely complicated and difficult – in fact, the art and science of performance measurement is one area that must

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Programming for Justice: Access for All, United Nations Development Programme, 2005, online: <<http://www.undp.org/governance/guidelines-toolkits.htm>>, (date accessed: 2 September 2006) at 5.

be improved in this field. A good first step would be more sharing of experiences among donors and executing agencies.

VI. CANADA'S ROLE

Canada has both the expertise and the experience to take on a larger role in promoting democracy and building the rule of law abroad. Canada is a parliamentary democracy with a federal system of parliamentary government and strong democratic traditions. The Canadian Constitution governs the legal framework of the country and includes the *Charter of Rights and Freedoms*, which guarantees our basic rights and freedoms. Internationally, Canada's bijuridical legal system (common law and civil law) is well-regarded and Canada's jurists well-respected. Canada's experience with participatory civil and criminal justice reform processes, land registry and aboriginal title issues, and restorative justice issues are all examples of the expertise we can share with the world. In addition, Canada has demonstrated the ability to work successfully in a field that requires significant political and cultural sensitivity. In short, with these assets working in its favour, Canada can and should do more.

RECOMMENDATION

The CBA recommends that Canada increase its efforts to promote good governance and build the rule of law in developing and transition countries.

Building the rule of law and supporting good governance requires engaging in a broad number of areas. No one organization can or should deliver international assistance in every field. In this respect, the best means for Canada to contribute to the overall international effort of democratic development would be to enhance the capacity of existing Canadian organizations to take on a greater role internationally. This also includes improving the knowledge and expertise within the Canadian government to produce effective programming in the rule of law area.

RECOMMENDATION

The CBA recommends that the Canadian government increase the capacity of existing organizations that currently work internationally in the areas of good governance and the rule of law.

The CBA is proud to be the longest standing, most experienced and perhaps best recognized Canadian organization engaged in legal and judicial reform initiatives internationally. The CBA has the ability to draw on its own unique expertise as well as the institutional capacity to access the diverse knowledge of the Canadian legal community to deliver more comprehensive programming in this area.

Although Canada has the potential to do more in this area, Canadian institutions are significantly hampered by a lack of resources. Regrettably, while the need for resources and expertise in this area continues to grow, funding for Canadian organizations like the CBA has remained stagnant or fallen in recent years. Lack of resources makes it impossible to follow through on best practices such as improving research and evaluation, sharing knowledge, and engaging strategically.

VII. SUMMARY OF RECOMMENDATIONS

The CBA recommends that:

- 1. Canada's efforts to promote democracy abroad be focused on supporting good governance.**
- 2. Canada's efforts to promote good governance include a significant focus on building the rule of law in its expansive conception.**
- 3. Canada's efforts to promote the rule of law must engage all elements of a legal system.**
- 4. Canada increase its efforts to promote good governance and build the rule of law in developing and transition countries.**
- 5. The Canadian government increase the capacity of existing organizations that currently work internationally in the areas of good governance and the rule of law.**