

Meeting of the IDLO Assembly of Parties

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Transcribed as delivered

Thank you very much Secretary General.

I am quite pleased to be here today to share some experiences of what we are doing in Kenya, especially in the justice sector.

Let me take a step back. I should begin by saying that when we talk about sustainable development - at least from our perspective - I think I hear two distinct things. First, there is sustainable development in the sense of talking about future generations, which our first speaker Giovannini spoke eloquently about. But there is also sustainable development in a second sense which is related but is distinct, which is the distribution of resources for the present generation, so as to prevent a rupture of the society today, because if you don't have a fair and equitable distribution of resources, then it is unlikely to be a future to talk of. Then, let me go quickly, baring in mind those two prominent definitions of sustainable development, I think it is true that for most recent constitutions - most of which I call transformative constitutions (that includes the constitution of Kenya, but also includes the recent constitutions of South Africa, Colombia, South Sudan and many other Countries) - they now very explicitly contain provisions dealing with sustainable development. The constitution of Kenya 2010 has at least

no less than 7 articles that deal explicitly with sustainable development. In its preamble, for example, it quotes “we the people of Kenya are respectful of the environment, we give our heritage and determine to sustain it for the benefit of future generations”. In article 42 - and I will just to make it clear why I am citing these articles in a minute - it says that every person has the right to a clean and healthy environment which includes the right to help the environment protected for the benefit of present and future generations, through legislative and other (unknown), particularity those contemplated in article 69. And to have the obligation relating to the environment fulfilled. In article 43, it explicitly includes all social and economic rights including the right to higher sustainable standards of health, access to adequate housing, freedom from hunger, adequate food of acceptable quality, clean and safe water, such a security and education. These are just some of the articles that talk about sustainable development. So the question for us has been "how do you then animate these explicit provisions of the constitution in the face of (unknown) and in the face of inadequate resources. In the second part: “how do you ensure that the resources that are available are equitably distributed to all members of the society so that you have a peaceful and inclusive society that is referred to in SDG 16?

So I think the answer that has been provided by SDG 16 for doing this, is the rule of law where the rule of law is defined both as an enabler and an outcome of sustainable development.

I read this literature by IDLO with a lot of glee and delight. I just picked it up yesterday but at the same time one of the things that I realized was that I think it has messed up the lives of many graduate students because for the first time it has answered very explicitly the question of what is the rule of law. This is a question that has been very elusive for a long time, and as an academic I have to say that I made a career out of trying to answer that question without answering it. So I wrote a lot of articles about it but I think now the question seems to have been answered, and I think that in IDLO's style of answering these questions I see five different elements to the rule of law and then I'll talk about how we have been trying to answer these questions. First of all, in speaking about peaceful and inclusive society one of the aspect of the rule of law that we have to think about is the relationship of trust between the governing and the governed. Secondly, is the aspect of state officials and members of society being bound by and to comply with a system of laws. Thirdly, that justice and security institutions and systems and actors have legitimacy, I think all these are key. Fourthly, again justice and security institutions act as systems that are inclusive, recognizing and responding to the justice and security needs of all persons in society. That is the idea of inclusivity. Lastly, that the ideal rule of law vision is grounded in the reality of the context. I think that is very important. So we have decisively removed from a thin definition of the rule of law to a thick definition of the rule of law that has certain substantive qualities to it. In a sense, in Kenya, since the passage of the constitution of 2010 - and specifically in the judiciary - we have been

trying to animate these as our reality in our context, and therefore transform a program in the judiciary, a very ambitious reform program. There is the tagline that we are trying to transform the judiciary to be the true engine of societal change. So we are moving again from the idea that rule of law should only focus on procedural aspects of law or procedure at the most substantive elements of ensuring social equity for the whole society. Now how do you transform a judiciary to prime it to ensure that this definition of rule of law is animated and put into practice, and at the same time ensure that there is a peaceful and inclusive society that is envisioned in the SDG 16.

So let me begin by saying that for the transformative constitution to take route, I think there are four key elements that have defined our transformation path and also have revealed to us some of the challenges in bringing it to life. First of all for a transformative constitution or law to take route, of course the first thing that you need is a right framework. A framework that ensures rights are clearly defined, and that those rights can ensure social justice. Secondly, you need a knowledgeable and a willing judiciary, and this is an aspect of some of the changes we have been trying to do in judicial education. Thirdly, and importantly - I think this, I will just finish with the fourth one because I think in a sense it creates a menu of some of the things IDLO should be focusing on - you also need in place litigators or (unknown) interlocutors who have the capacity to frame social problems as rights violations and then design appropriate cases to bring to court for resolution. Lastly, you need a civil society that is willing and able to

leverage some of the opportunities that are raised by litigation to shape public opinion and mobilize society for the inclusive rule of law that is required. if you look at all those four prerequisites for transformative constitutions to take route, I think it gives you a clear idea about some of the reforms that are needed in concrete action. I think when we get to the questions and answers prior, we can probably talk about now some of the concrete things that we have been trying to do and some of the challenges that we face in doing so.

Thank you.