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POLICY BRIEF

SDG 16: The rule of law at a crossroads

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Although Sustainable Development Goal 16 (SDG 16) recognises that the rule of law is fundamental to sustainable development, the rule of law is at a crossroads. The formulation of SDG 16 takes a narrow view of the rule of law. This is particularly worrying during the current wave of autocratisation and closing space for institutions. It is time for rule of law actors to lead the rule of law down the right path by tackling the bigger principles neglected by SDG 16.

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The year of SDG 16

This year is the first time that Member States have reviewed SDG 16 since the adoption of the 2030 Agenda for Sustainable Development in 2015. SDG 16 aims to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. Although obscured in its aim, SDG 16 is meant to be the Goal that encompasses the widely accepted notion that rule of law is fundamental for sustainable development. In fact, SDG 16 is now often referred to as SDG 16+ as it is considered an accelerator for the whole 2030 Agenda.

With SDG 16 under review, rule of law actors have engaged in policy dialogue, collected data, released numerous reports and called to accelerate action to achieve the Goal both at the United Nations High-level Political Forum (HLPF) in July and at the SDG Summit on September 24-25. Yet, there is much at stake for the rule of law under SDG 16. This brief discusses the formulation of SDG 16 and the resulting dangers of the Goal as a rule of law report card. Under SDG 16, the rule of law is only graded on two narrow criminal justice issues. This creates a safe space for autocratic governments to report rule of law progress and provides no framework for how to push back against closing space for institutions. This brief also discusses that it is up to rule of law actors to tackle the more difficult rule of law principles and fight for the independence of institutions.

Key Points

- The review of SDG 16 this year is a positive step towards accelerating action to achieve the Goal, but the formulation of SDG 16 takes a narrow view of the rule of law.
- SDG 16 is a safe space for autocratic governments to report progress on criminal justice and provides no framework for pushing back against closing space for institutions.
- Rule of law actors are concentrating their efforts on improving access to justice, but should similarly tackle protecting the independence of institutions.
- Target 16.6 should not be forgotten as a tool to grade what really matters about the rule of law -- ensuring accountability to the law through independent institutions.

What about "the rule of law"?

According to the United Nations Secretary-General, the rule of law is "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of . . . separation of powers . . .".[1] Notwithstanding, Member States have never agreed upon a single definitive definition of the rule of law, as doing so is a threat to authoritarian regimes and autocratic governments that rely on their own definition and interpretation. During the negotiations of the 2030 Agenda, Member States did nevertheless generally agree that an SDG should embody the vital role that the rule of law plays in sustainable development (which was previously missing from and one of the major downfalls of the Millennium Development Goals). An initial formulation of SDG 16's aim was to "Achieve peaceful and inclusive societies, rule of law, effective and capable institutions," and its targets covered several rule of law principles.

The whole negotiations process, however, was eventually delayed as certain Member States objected to including the rule of law in the Goal's aim, claiming it as a matter of domestic jurisdiction, amongst other objections. Ultimately, "the rule of law" was replaced with "provide access to justice for all" in SDG 16's aim and "the rule of law" was relegated to a target. This compromise oddly reversed the conceptual ordering with the rule of law, the broader concept, being subsumed by one of its principles, access to justice.[2]

It is not particularly surprising that the rule of law was relegated to a target given the makeup of Member States involved in the negotiations. Although it was a political compromise, at least Member States that are rule of law champions ensured "the rule of law" and some of its principles appear somewhere in the Agenda. What is more troubling though is that with SDG 16 under review, rule of law actors are also taking a narrower view of the rule of law by primarily focusing on access to justice.

SDG 16's Targets – avoiding the elephant in the room

In addition to the conceptual confusion of the rule of law within the SDG 16 framework, the rule of law is also practically under attack during the ongoing wave of autocratisation. Currently, 2.5 billion people (one-third of the world's popluation) live in countries undergoing autocratisation, which is defined by the V-Dem Institute as "substantial de-facto decline of core institutional requirements for electoral democracy".[3] Simultaneously, according to a recent report by the Pathfinders for Peaceful, Just and Inclusive Societies, of which ILAC is a Justice Partner, 1.5 billion people have justice problems they cannot resolve.[4] Despite these stark numbers, SDG 16's targets and indicators allow for autocratic governments to measure

and report progress on promoting the rule of law. Target 16.3, which rule of law actors are mainly concentrating on this year, is a prime example.

Target 16.3 seeks to "promote the rule of law at the national and international levels and ensure equal access to justice for all." It has only two indicators, which are the "proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms," and "unsentenced detainees as a proportion of overall prison population." Neither of these indicators actually measure progress on what really matters. In fact, these indicators are a safe space for autocratic governments. Progress can be reported on the rule of law by merely improving crime statistics and decreasing pretrial detention periods, something even autocratic governments strive to do. This is problematic, especially as this can all be done without requiring the executive be held accountable to the law or calling into question separation of powers.

Neither of these indicators actually measure progress on the true meaning of the rule of law. In fact, these indicators are a safe space for autocratic governments.

Further, although Target 16.3 only aims to measure criminal justice issues, the Justice for All report highlights that 1.4 billion people have unmet civil and administrative justice needs. Rule of law actors have begun to turn their attention to improving access to civil and administrative courts and tribunals and the delivery of justice to resolve people's everyday justice problems. This has resulted in a call for an additional indicator to measure whether people with civil legal problems can obtain legal advice, assistance, or representation, and ultimately resolve their problems. It is a step in the right direction, but still misses what the rule of law is really about – ensuring accountability to the law through independent institutions.

The closest that SDG 16 comes to doing so is Target 16.6, which aims to "develop effective, accountable and transparent institutions at all levels." Although there is no direct mention of independent institutions in the target, effective, accountable and transparent institutions are essential to achieving SDG 16's other targets, such as ensuring access to justice for all, and the Agenda as a whole. Target 16.6's indicators, "primary government expenditures as a proportion of original approved budget, by sector (or by budget codes or similar)" and "proportion of the population satisfied with their last experience of public services," also are ways to measure why people have unmet justice needs. Additional measurements are of course needed, particularly in relation to accountability. Is there judicial review? Do you have the right to appeal a decision against you? Is there compensation for a taking? Does the government ever lose in court? Such measuring tools would also need to be adapted to the context and shifting power dynamics in each setting.

Despite the fact Target 16.3 is the rule of law target, Target 16.6 is a better measuring stick, and even the more so during the current wave of autocratisation where institutions are under attack by the executive.

Stay out executive!

At ILAC, we can practically see how autocratisation is threatening the rule of law through our recent work in Guatemala, Palestine, and Liberia. In each of these countries the executive is interfering in the administration of justice, attempting to undermine or weaken judicial independence and hindering bar associations and other legal professionals from operating freely.

ILAC's recent rule of law assessment in Guatemala concluded that the lack of an independent justice sector prevents the right of access to justice and fosters mistrust of the courts. The recommendations included that the executive uphold the commitment to guaranteeing the rule of law by supporting the independence of justice actors and relinquishing powers in the selection process of high judicial and prosecutorial officials. The recommendations also called for the executive to support and cooperate with the work of the International Commission against Impunity in Guatemala (CICIG).[5] Since the release of the assessment, the executive has attacked the legitimacy of CICIG, deciding to not extend its mandate beyond September 2019. The legitimacy of the Constitutional Court has also been questioned since its rulings against the executive's attempts to undermine CICIG. Such interference has directly weakened the independence of the Guatemalan judiciary and is an ominous precedent leading up to the judicial elections set to take place this October.

Judicial independence is also under great threat in Palestine. Most recently, the executive has issued decrees dissolving the High Judicial Council and reducing judges' retirement age to 60, forcing a quarter of judges into retirement. ILAC is currently working with Palestinian judges to support their independence in response to encroachments by the executive through a professional exchange between a group of judges from the West Bank and Central Europe, along with legal professionals from Tunisia. The aim is to define potential paths forward to preserve judicial standards of independence in a rapidly closing space for institutions.

ILAC's ongoing assessment in Liberia has found that the perception of the independence of the judiciary was recently further weakened by the impeachment of a Supreme Court Associate for politically motivated reasons by the executive. This adds to the already low levels of trust in the formal justice system. The assessment report will include recommendations to the government about how it can best restore public trust in the judiciary.

These countries are all poignant examples of states moving towards autocratisation with a rapidly closing space for institutions and rule of law backsliding. Yet, SDG 16 neglects to provide a framework for how to push back in these and other contexts, particularly where the executive has threatened institutions by legal means. A pressing issue is to grade

and measure the executive's failure to respect the independence of judicial institutions and actors. As the rule of law industry centres its attention on access to justice while reviewing SDG 16 this year, the independence of judicial institutions and actors has been left by the wayside. When judicial independence is included, it is usually in relation to promoting trust in justice systems and combating corruption. This is reflected in the call to add an indicator on trust in public institutions. But, trust is forward looking and is not achieved without first having impartial and independent institutions. Respecting judicial independence is also not just an end, but also a means. For example, it is central to achieving changes in attitudes by justice actors and the expectations among justice seekers.[6]

States may of course localise and complement SDG 16 with additional national indicators to measure the rule of law. This is unlikely in states where the rule of law is weak by design and ideology. Each state determining its own indicators to measure the rule of law also risks further weakening the meaning of the rule of law.

Conclusion

The flurry of activity around SDG 16 throughout the year is a step forward in raising awareness around the need to accelerate action to achieve the Goal. Even so, with rule of law actors often following the the selective formulation of SDG 16 and a worrying number of countries moving towards autocratisation, the rule of law is at a crossroads.

As rule of law actors are doing with access to justice, they should also tackle protecting the independence of institutions from the executive. Target 16.6 is the closest SDG 16 gets to the heart of the rule of law by ensuring the institutional qualities that matter to achieving the Goal and the Agenda as a whole. Under the remaining period of the 2030 Agenda, rule of law actors should use Target 16.6 to reinforce the fact that institutions with specific qualities are vital to the rule of law. If rule of law actors do not guide the rule of law down the right path, who will?

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The views and opinions expressed here do not necessarily reflect the views and opinions of all ILAC members.

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