

# THE RULE OF LAW AND ACCESS TO JUSTICE IN THE POST-2015 DEVELOPMENT AGENDA

Moving forward but stepping back

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## 1. INTRODUCTION

For many months now there has been intense lobbying to shape the UN's forthcoming post-2015 agenda for development. Following criticism that the Millennium Development Goals (MDGs) to be achieved by 2015 were too narrowly framed, there have been [high profile campaigns](#) aiming to influence the place that law and justice will occupy in the development agenda for 2015-2030. The rule of law, in particular, has been widely acknowledged as a missing element in the existing MDG framework.<sup>1</sup>

The inclusion or exclusion of the rule of law has great significance. The identification of new goals and targets for the post-2015 development agenda will be critically important in shaping national and international policies and actions. The goals chosen tell us what nations value and what they should prioritise in their policies. If a topic is included as a stand-alone goal, this implies a focussed commitment on the part of the States and other international actors. It demands more decisive action and prioritisation of the goal by governments when making policies and allocating budgets.

Following recent meetings at the UN, we now know for the first time, that the General Assembly in September will not be asked to include the rule of law as a stand-alone goal in the post-2015 global development agenda. It will, however, be asked to include the goal of "access to justice for all".

The inclusion of access to justice is, without doubt, a great achievement and a substantial step forward from the MDGs. However, we should not be too quick to celebrate. By looking at what other options have been considered along the way, it becomes clear that there were greater aspirations that might have been put to the UN, and which might yet still be pursued.

## 2. ABOUT THE UN'S DEVELOPMENT GOALS

At the UN millennium summit in September 2000 the Millennium Declaration was adopted. The core chapters of the Declaration were later translated into a roadmap of 8 specific [Millennium Development Goals](#) (MDGs) that all the UN Member States and a large number of international organizations committed to strive to achieve by 2015. By 2010, the deadline for achieving the MDGs was on the horizon and, though progress against the goals varied, a UN Summit on the MDGs that year requested the Secretary-General to start thinking and make recommendations on the global development agenda post-2015.

Building on this, the post-2015 development agenda is being designed using various work streams that will inform the discussion before the General Assembly in September 2014. States and NGOs have different degrees of influence in these streams.

One stream was the High-Level Panel of Eminent Persons, co-chaired by UK Prime Minister David Cameron. This was a UN Secretary General multi-stakeholder initiative consisting of

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<sup>1</sup> See also United Nations Development Program, *Rule of Law and Development - Integrating the Rule of law in the Post-2015 Development Framework*, Issue brief, January 2013, <http://www.worldwewant2015.org/node/341332> (All web sites in this report were last accessed on 1 August 2014 unless otherwise stated.)

representatives from civil society, the private sector, academia and local governments, alongside State representatives. In May 2013 the High-Level Panel [reported](#), making recommendations on the content of the post 2015 development agenda.<sup>2</sup>

Another stream flowed out of the UN's environment processes. In 2012 the [UN Rio+20 Conference on Sustainable Development](#) proposed that a new set of goals, the so called Sustainable Development Goals (SDGs), should be prepared by an Open Working Group (OWG) led by governments. The OWG allows representations from civil society but it is at heart a vehicle for States. Those goals, it was said, should build on the foundations of the MDGs, complete them and respond to new challenges.

In September 2013 the UN Member States [concluded](#) that the two processes should be coordinated. Here world leaders agreed on the need to work towards a single framework and set of goals that should feed into the negotiations on a new UN development agenda beyond 2015.<sup>3</sup> The September 2014 UN meetings will be very important in these negotiations ahead of the General Assembly meeting in September 2015 which will agree the final development agenda. It is in this context that the OWG's position is so significant because it will feed very heavily into the negotiations.

On 14-19 July this year at its 13<sup>th</sup> and final meeting in New York, the OWG (co-chaired by Kenya and Hungary) completed its work when it adopted a final compilation of 17 proposed goals and 169 targets on sustainable development for the post-2015 development agenda. Just as the existing MDG framework does, the proposed SDG framework has goals (which spell out the general objectives to be achieved) and targets (which are specific objectives). The idea is that the goals can be realised by achieving the specific, measurable targets, for which indicators will be set in due course.

How, then, do the rule of law and access to justice sit in this proposal?

### 3. DEFINING THE GOALS: THE RULE OF LAW OR ACCESS TO JUSTICE?

Much work has been done to place the rule of law on the agenda and there has been considerable success. Almost two years ago, in September 2012, the [Declaration](#) of a multi-stakeholder High-Level Meeting on the Rule of Law at the National and International Levels, held at the UN General Assembly, called for the interrelationship between the rule of law and development to be considered in the post-2015 international development agenda.<sup>4</sup> This was appropriate. It is generally acknowledged in academic literature that there is an interrelationship between the advancement of the rule of law and the achievement of sustainable development in each of its three dimensions - economic, social and environmental. In keeping with that

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<sup>2</sup> High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, *A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development*, Report, May 2013, [http://www.un.org/sg/management/pdf/HLP\\_P2015\\_Report.pdf](http://www.un.org/sg/management/pdf/HLP_P2015_Report.pdf).

<sup>3</sup> United Nations, *Special Event 25 September*, Outcome document, September 2013, [http://www.un.org/millenniumgoals/pdf/Outcome\\_documentMDG.pdf](http://www.un.org/millenniumgoals/pdf/Outcome_documentMDG.pdf).

<sup>4</sup> United Nations, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, Declaration, November 2012, <http://www.unrol.org/files/A-RES-67-1.pdf>.

Declaration, the rule of law occupied an important place in the work of both the High-Level Panel and the OWG.

The 2013 report of the High-Level Panel of Eminent Persons reflected this in proposing the rule of law specifically and very prominently among the set of illustrative goals that should inspire the post-2015 development agenda. In the same vein, the different versions of the proposed SDGs adopted by the OWG up to the so-called “zero draft version” of 2 June 2014 contained a stand-alone goal on the rule of law.

However, in the last month, there has been a marked change. The rule of law has not disappeared from the debate but its role and significance have diminished. The most stark illustration of this is the substitution of “the rule of law” with “access to justice” in Goal 16, which following the July 2014 meetings now reads, “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”

Canada’s [Institute for International Sustainable Development](#) provides an excellent series of reports that shed valuable light on the ways this came about. The [Reports of the OWG meetings](#) do not always identify which governments took which positions on the substitution but there can be no doubt that the content of Goal 16 proved to be one of the most contentious and divisive issues among OWG delegations at different levels. At least 58 countries, including the UK, and the EU speaking for its Member States, wanted the rule of law in the text of Goal 16. Others, however, did not.

First, [the reports](#) indicate that some governments supported the concepts in Goal 16 but contested the mandate of the OWG.<sup>5</sup> They relied on the [outcome document](#) of the [Rio+20 conference](#) (‘The Future we Want’) where the rule of law was not among the specific topics in the framework for action and follow-up, but was mentioned only as a means of implementation of sustainable development commitments.<sup>6</sup> Moreover, they argued that issues related to the rule of law and governance represent a “fourth dimension” that goes beyond the three-tiered agreed definition of sustainable development – economic, social and environmental – that should inform the selection and definition of goals. As such, they suggested that these topics could not now be addressed by the OWG but should rather be tackled in other UN fora. Rule of law issues, it was argued, should be included within the broader goal on reducing inequalities (Goal 10) or in the Introduction (or *Chapeau*).

Even if one accepts the proposition that there is a procedural logic to this position due to the restricted OWG mandate, that should not override the substantive logic of placing the rule of law – a high level concept, as we explain below – within a goal, which is also high level.

Secondly, it was argued that the rule of law should not be mentioned in the goal because there is no intergovernmentally-agreed definition of ‘the rule of law’. Those governments who sought to include the rule of law in the goal countered that the rule of law does warrant a place because it is

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<sup>5</sup> International Institute for Sustainable Development, *Summary of the Thirteenth Session of the UN General Assembly Open Working Group on Sustainable Development Goals*, report, July 2014, <http://www.iisd.ca/vol32/enb3213e.html>.

<sup>6</sup> United Nations, *Future We Want*, Outcome document, September 2012, <http://sustainabledevelopment.un.org/futurewewant.html>.

a well-established concept and because access to justice, while a part of rule of law, is not sufficiently broad.

This counter-position must surely be correct. Besides access to justice, the rule of law includes other elements such as the principle of legality, transparent and accountable law, fair trials, legal certainty, respect for human rights, non-discrimination, independence of the judiciary and equality before the law. These are of profound importance to sustainable development, inclusive economic growth, eradication of poverty and the full realization of human rights.

Moreover, to say that there is no intergovernmentally-agreed position neglects the extensive recognition of the concept and agreement about its core content. Evidence of this can be found in the works of the Council of Europe's European Commission for Democracy through Law - better known as the Venice Commission – notably in its 2011 [report](#) on the rule of law.<sup>7</sup> The concept of rule of law also forms a cornerstone of the activities of the OSCE, which comprises 57 participating States that span the globe, encompassing three continents - North America, Europe and Asia. Additionally, the African Union has given recognition to the rule of law in its [common position](#) on the post-2015 development agenda.<sup>8</sup>

Thirdly, there is a concern that when the OWG removed the rule of law from the goals, to reach a compromise position, it placed the rule of law into targets. Target 16.3 is: "promote the rule of law at the national and international levels, and ensure equal access to justice for all". This gives rise to a contradiction. It places the rule of law and access to justice the wrong way around. The promotion of the rule of law (i.e. the broader concept) should be a goal that is achieved by, among other things, providing and ensuring access to justice for all (i.e. the narrower concept). The lack of careful consideration seems to be further evident in the ambiguity and inconsistency in the textual formulations of the goal which is to "provide access to justice for all", with the target being to "ensure access to justice for all" (italics added). Much more care and precision is needed in identifying and articulating targets and their relationships to the goals.

The proposed version of Goal 16 and its related targets are not clear, coherent or comprehensive.

In the face of such division, the position that will be put to the General Assembly this year represents a significant compromise. While OWG delegates were of course striving to strike the right balance between aspirations and what can realistically be accomplished by 2030, the compromise ultimately remains flawed. The rule of law does not have a sufficiently strong presence. It is true that the rule of law still features in the Introduction to the goals and targets as a general and crosscutting guiding principle, sitting alongside other purposes and principles of the UN Charter, such as promotion of peace and security and protection of human rights (para 7). The Introduction also recognizes the importance of the rule of law at national and international levels for sustainable inclusive and equitable development (para 12). The promotion of the Rule of Law is also referred to in the same breath as access to justice in Target 16.3. However, to see it jettisoned from the text of Goal 16 is a great loss.

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<sup>7</sup> European Commission for Democracy Through Law, *Report of the Rule of Law*, Report, April 2011, <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282011%29003rev-e>.

<sup>8</sup> African Union, *Common African Position (CAP) on the Post-2015 Development Agenda*, Report, June 2014, <http://www.nepad.org/sites/default/files/Common%20African%20Position-%20ENG%20final.pdf>.

#### 4. WHAT ARE THE IMPLICATIONS OF THESE DEVELOPMENTS?

The choice of 'access to justice' for Goal 16 is important to the extent that it recognizes one aspect of the rule of law at least. It is broadly acknowledged that the choice of the goals to be included in the Post-2015 development agenda should be a result of State negotiations and collaborative input from civil society organizations and relevant stakeholders. However, the dominance of States and the subordination of civil society was made clear by the Kenyan [Co-Chair who stated in the final OWG meeting](#) that civil society must "respect the sanctity of this room."<sup>9</sup> In the light of this, it is hard to overlook the contrast between the central relevance of the rule of law – in a broader sense than access to justice alone – in the Report of the High-Level Panel of Eminent Experts inspired by the input of multiple stakeholders and the diluted references to this concept in the outcome document of the governmental-led proposal adopted by the OWG.

Goal 16, without doubt, places a foot in the door for at least one aspect of the rule of law. However, it also represents a last moment retreat from a broader commitment that seemed to attract wide consensus among the UN Member States and civil society.

Looking ahead to September 2015 when the UN General Assembly will finalise the post-2015 agenda, what position might the rule of law ultimately occupy?

The rule of law may yet reappear with the force that it seemed to have until June 2014. It is heartening that, even though in a weakened form, the rule of law is still in the document that will be submitted for consideration to the UN General Assembly in September 2014. We also know that when the General Assembly in September 2014 considers the OWG proposal it will have the complete picture of the changes that were made in the different drafts. This is because the General Assembly will be presented with an accompanying report that will include an annex listing the goals that were removed with explanations of why they were removed. This will be important when the General Assembly considers the text of Goal 16. The rule of law may yet emerge as a stand-alone goal, though its proponents will clearly have to overcome great opposition.

At the same time, however, the debates over Goal 16 were so contentious that it cannot be presumed that the rule of law - or even access to justice - will survive to be included in the text of the final agenda. The SDGs as drafted in July are only a 'proposal' to the UN General Assembly. Just as the rule of law may rise again, it could fall further if opposition continues.

As a core and indispensable element of empowerment, stability and development it is vital that the rule of law occupies a firm and clear place in the development agenda for the fifteen years that follow. While it is crucial that it retains – at a minimum – its present profile, it is to be hoped that in the coming year the rule of law will regain the initial traction of previous negotiations and be established as a distinct development goal. Without it, some of the errors and omissions of the Millennium Development Goals will persist, and it will be much more difficult to achieve respect for the human dignity of the poor and marginalised.

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<sup>9</sup> International Institute for Sustainable Development, *Summary of the Thirteenth Session of the UN General Assembly Open Working Group on Sustainable Development Goals*, Report, July 2014, <http://www.iisd.ca/vol32/enb3213e.html>.



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