



# Gaining a Foot in the Door: Giving Access to Justice with SDG 16.3?

Winfried **Huck**, Jennifer **Maaß**



*C-EENRG Working Papers, 2021-5*

July 2021

Please cite this paper as:

W. Huck, J. Maaß, 2021, 'Gaining a Foot in the Door: Giving Access to Justice with SDG 16.3?'. C-EENRG Working Papers, 2021-5. pp.1-34. Cambridge Centre for Environment, Energy and Natural Resource Governance, University of Cambridge.

**The Cambridge Centre for Environment, Energy and Natural Resource Governance (C-EENRG)** was established in 2014 within the Department of Land Economy in order to conduct integrative research on the governance of environmental transitions, such as the climate-driven transition from a carbon-intensive inefficient energy matrix to a decarbonised and efficient one, or the water/population-driven transformation of food production systems. The role of law and governance in such transitions is of particular importance. C-EENRG approaches law as a technology to bring, guide and/or manage environment-driven societal transformations. Whereas other research groups within the University of Cambridge cover questions relating to the environment, energy and natural resources from a natural science, engineering, conservation and policy perspective, until 2014 there was no centre concentrating on the law and governance aspects of environmental transitions. C-EENRG was established to fill this gap in the policy research cycle, in line with University's strategic research initiatives on energy, conservation, global food security and public policy.

The **C-EENRG Working Papers** provide a platform to convey research aiming to support the effective governance of such environmental transitions. The series hosts research across disciplines, including law, economics, policy, and modelling, and welcomes research on a wide range of environmental topics across the food-energy-water-land nexus.

## SCIENTIFIC COMMITTEE

Professor Laura <b>Diaz Anadon</b>	<i>Climate policy, economics and transitions</i>
Professor Andreas <b>Kontoleon</b>	<i>Economics and biodiversity</i>
Dr Shaun <b>Larcom</b>	<i>Economics and biodiversity</i>
Dr Emma <b>Lees</b>	<i>Law and governance</i>
Dr Jean-François <b>Mercuré</b>	<i>Modelling and transitions</i>
Dr Pablo <b>Salas</b>	<i>Modelling and transitions</i>
Professor Jorge E. <b>Viñuales</b>	<i>Law, governance and transitions</i>

Send your enquiries regarding the C-EENRG Working Papers to the editorial team: **Paul Lohmann** [pml44@cam.ac.uk](mailto:pml44@cam.ac.uk) and **Dr Tong Xu** [tx224@cam.ac.uk](mailto:tx224@cam.ac.uk)

## GUIDELINES FOR AUTHORS

Submit your manuscript in \*.odt, \*.doc, \*.docx, or \*.rtf format, together with a \*.pdf version. It should contain title, abstract, keywords, and contact details for the lead author. Email your file to the editor. The manuscript will be processed and sent to two reviewers. The editor will process the reviewers' feedback and request the scientific committee to adopt a final decision about the publication of the manuscript

## DISCLAIMER

The opinions expressed in this working paper do not necessarily reflect the position of C-EENRG, the Department of Land Economy, or the University of Cambridge as a whole.

C-EENRG, 2021, <http://www.ceenrg.landecon.cam.ac.uk/>

**Winfried Huck**

Brunswick European Law School (BELS), Institute for European and International Economic Law (EIW) Ostfalia University of Applied Sciences, GER

Fellow, Cambridge Centre for Environment, Energy and Natural Resource Governance (C-EENRG) University of Cambridge, UK

Professor at the Chinese German College for Postgraduate Studies (CDHK), Tongji University, CN

Miembro corresponsal de la Sociedad Cubana de Derecho Constitucional y Administrativo de la Unión Nacional de Juristas de Cuba, CUB

**Jennifer Maaß, LL.M.**

Brunswick European Law School (BELS), Institute for European and International Economic Law (EIW) Ostfalia University of Applied Sciences, GER

SWPS University of Social Sciences and Humanities, Faculty of Law, Warsaw, POL

Contact:

**Winfried Huck**

Institute for European and International Economic Law (EIW)

Ostfalia University of Applied Sciences

Braunschweig/Wolfenbuettel, GER

w.huck@ostfalia.de

# Gaining a Foot in the Door: Giving Access to Justice with SDG 16.3?

Winfried Huck, Jennifer Maaß

## ABSTRACT

Access to Justice is seen for good reasons as a building block in the *rule of law* concept of the SDGs. Yet, to date, it is not certain what access to justice even means in light of the Global Agenda 2030 and the SDGs. Do the rights of individuals and groups have a chance of being realised against the background of the growing number of Free Trade Agreements with Trade and Sustainable Development Chapters? Who takes care? Moreover, what chance does “Mother Earth” have in court? Even if law creates its own restrictive rules on access to justice in some regard, could the SDGs help to facilitate access? Could arguments be extracted from the SDGs that justify and even expand access to court? This study discusses the understanding of the concept of access to justice as enshrined in SDG 16.3 and attempts to identify and extract its legally resilient meaning. Based on this understanding, the difficulties in life’s realities and the most yawning gaps are revealed and juxtaposed with ways to overcome them and concludes with further ensuing research questions.

**Keywords:** Access to Justice, Rule of Law, Sustainable Development Goals, SDG 16, Equal Rights, Concept of Justice, Environmental Justice, Social Justice

## A. Introduction

What if a mother could nurture her children with safe, potable water all over the world? What if people were let enjoying and living on the lands they lived on since hundreds of years before? What if land, seas, oceans or forests would be equipped with rights so that they might grow and flourish in legal peace? What if, as a result of this play of thoughts, each one might be safe and provided with all that is needed for a decent life and thus, justice could prevail?

In exploring the Global Agenda 2030 and the Sustainable Development Goals (SDGs),<sup>1</sup> the attempt to strive for a just and stable world soon becomes apparent. With SDG 16.3, the SDGs include the objective of safeguarding the *rule of law* and specifically anchors “ensuring access to justice equally for all”. In contrast to their predecessors, the SDGs were explicitly negotiated to comprise some form of justice.<sup>2</sup> Ready and meaningful access to justice, which provides access to judicial and administrative proceedings in public (including constitutional law), civil and criminal law<sup>3</sup> including redress and remedy, was considered an “essential enabler for inclusive, sustainable development”<sup>4</sup>, involving public participation and access to information as integral components. In being protective and reinforcing, access to justice is thus to be assumed one central axis of the *rule of law* concept, no matter how differently it may be understood in the various legal families.

In attempting to interpret the concept of access to justice in the light of the SDGs and the Global Agenda 2030, at least five things quickly become apparent: (1) Formally considered, the UNGA resolution, despite having been unanimously adopted by all UN Member States, constitutes a (legally) non-binding resolution. In clearer words, the initial instrument remains to be the expression of a diplomatically-worded, political agenda. (2) The structure of the SDGs<sup>5</sup> and their embedding in the Global Agenda 2030 demonstrate the inadequacy of their autonomous interpretation. Rather, one must consider even more instruments of the global community to grasp the abundant context to unravel their meaning. Instruments as mentioned in the Global Agenda 2030 such as the Addis Ababa Action Agenda (AAAA), the UN Charter, the Universal Declaration of Human Rights

---

<sup>1</sup> See for systemic consideration of the Global Agenda 2030: W. Huck, ‘The EU and the Global Agenda 2030: Reflection, Strategy and legal implementation’ (2020), C-EENRG Working Papers, 2020-1, 7.

<sup>2</sup> Forms of justice were also intended to enrich earlier multilateral agreements, such as the Atlantic Charter. However, this Charter did not come into effect as binding instrument, and for a variety of reasons, the idea of justice was not embraced in subsequent instruments; A. Buchanan and D. Golove, ‘Philosophy of International Law’, in: J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (2002), 897.

<sup>3</sup> A/RES/67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, para. 12.

<sup>4</sup> UNGA, OWG on Sustainable Development Goals, *Compendium of TST Issues Briefs, A compendium of issues briefs prepared by the United Nations inter-agency technical support team for the United Nations General Assembly Open Working Group on Sustainable Development Goals* (2014), 140.

<sup>5</sup> W. Huck, 2020, ‘The EU and the Global Agenda 2030: Reflection, Strategy and legal implementation’, C-EENRG Working Papers, 2020-1, 7.

(UDHR) and further international human rights treaties, the outcomes of all major UN conferences or, more generally the principles of international law form an entangled and legally complicated basis to observe normative outcome which, moreover, are to be considered differently.<sup>6</sup> (3) Additionally, the rise of Free Trade Agreements (FTA) since the 1990s has led to increasing implementation of social and environmental rights, health and safety regulations for affected workers, and sustainability requirements to some extent. This is true for the US and the EU, for example, but however, do not reveal the extent to which these rights apply. Do third parties or certain groups receive their own substantive rights directly based on the FTA?<sup>7</sup>

If so, are they recognised in an FTA and do they entitle them to special judicial or arbitrational access, thereby opening legal recourse in the sense of the SDGs? This concern inevitably leads to the question of (4) how access to justice is to be understood against the background of the Global Agenda 2030 and the inherent SDGs. This question seems rather unspectacular, but it certainly is not since the answer to it forms a basis for categorising the area under investigation. Finally, (5) a conceptual aspect in the basic understanding of sustainable development, vividly debated and acknowledged by the UN, raises the question of whether nature has its own right of action to secure planetary boundaries (Earth Jurisprudence), given that access to justice is derived from human rights.<sup>8</sup>

These main questions lead to a diverse, (almost) intricate framing of legal areas under the guise of sustainable development, which must be considered when access to justice is given substantive meaning. The resulting landscape also shapes access to justice as an approach and makes it adaptable and applicable to any form of life reality addressed by the SDGs. This fundamental connectedness of the most diverse fields of law has been raised, for example, with the Stockholm Declaration in the form of access to ecological

---

<sup>6</sup> A/RES70/1, paras. 10-13: The instruments and frameworks mentioned guide, ground, inform or in their outcomes are directly included in the Global Agenda 2030 or, even more, form the foundation of sustainable development and are thus to be considered in the integrated solution finding the “new approach” calls for.

<sup>7</sup> See J. Harrison, M. Barbu, L. Campling, B. Richardson, and A. Smith, ‘Governing labour standards through free trade agreements: limits of the European Union’s trade and sustainable development chapters’ (2019) 57(2) *Journal of Common Market Studies*, 260-277; B. Melo Araujo, ‘Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric And Reality’ (2018) 67(1) *International and Comparative Law Quarterly*, 233-253; A. Marx, F. Ebert and N. Hachez, ‘Dispute settlement for labour provisions in EU Free Trade Agreements: Rethinking current approaches’ (2017) 5(4) *Politics and Governance*, 49-59; M.-C. Cordonier-Segger, Negotiating Sustainable Development in the Free Trade Area of the Americas, in Sustainable Development in World Trade Law, M. W. Gehring, M.-C. Cordonier Segger (eds), Kluwer Law International, 2005, 461-494; S. L. Baier and J. H. Bergstrand, ‘Do free trade agreements actually increase members’ international trade?’ (2007) 71(1) *Journal of International Economics*, 72-95.

<sup>8</sup> <http://www.harmonywithnatureun.org/> indicates 888 records (last visited: 30.11.2020); A/75/266, Harmony with Nature, Supplement to SG Report on Harmony with Nature, 28.07.2020; Harmony with nature refers to Principle 1 of the Rio Declaration on Environment and Development A/CONF.151/26 (Vol. I) 12.08.1992: “Principle 1 Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in *harmony with nature*”; J. E. Koons, ‘What Is Earth Jurisprudence?: Key Principles to Transform Law for the Health of the Planet’ (2009)18 *Penn State Environmental Law Review*, Available at SSRN: <https://ssrn.com/abstract=2505556>.

justice<sup>9</sup> and manifested again in the Rio Declaration twenty years later in an environmental law sense.<sup>10</sup> With both, the separation of the legal fields in the judicial evaluation of facts was marked inefficient since this led to distortions in the application of law.<sup>11</sup> Although, as we will see, the fundament of SDG 16.3 which advocates the *rule of law* seems quite poor, the Global Agenda 2030 enshrines the business sector and the widespread standards of the Guiding Principles on Business and Human Rights.<sup>12</sup>

One can hardly ignore that the core issues of origins in the development of environmental law determine the public debate on sustainable development, where they are historically and philosophically rooted. Social and economic dimensions are usually driven by the preponderance of environmental law, although the SDGs are inextricably linked and must lead to an overall balance without the primacy of environmental law. Many discussions neglect the economic and even more the social dimension since questions of energy production and its effects on the environment have traditionally been the basic pattern for environmental movements and legal foundations.<sup>13</sup> Unfortunately, the enormous damage caused by organised crime is not registered and made a public issue with the same intensity and dedication.

Having access to justice is a basic prerequisite for the judicial review of disputed facts in any of such levels. But how does one apply a political declaration of intent, which in *Stiglitz's* sense can at best be classified as “global norms”?<sup>14</sup> Which effects result from the fact that they have already been integrated in many different policies and standards worldwide<sup>15</sup> to enable access to justice?

---

<sup>9</sup> Stockholm Declaration (1972), Principle 22: “States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”

<sup>10</sup> Rio Declaration (1992), Principle 10:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

<sup>11</sup> J. Ebbesson and P. Okowa (eds), *Environmental Law and Justice in Context* (CUP 2009), 17; Agenda 21, Chapter 8, paras. 8.2 f., 39.2.

<sup>12</sup> A/RES/70/1, para. 17; J. Bonnitche and R. McCorquodale, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights’ (2017) 28(3) *European Journal of International Law*, 899–919.

<sup>13</sup> E. Nordtveit, ‘International energy law in perspective – The relationship between national and international energy law’ in T. Hunter et al. (eds), *The Routledge Handbook of Energy Law* (2020), 42 (43); A. Halff, B. K. Sovacool, and J. Rozhon (eds), *Energy poverty: global challenges and local solutions* (2014).

<sup>14</sup> R. Kanbur, E. Patel and J. Stiglitz, Sustainable Development Goals and Measurement of Economic and Social Progress, Paper prepared for forthcoming report of the OECD High Level Expert Group on the Measurement of Economic and Social Progress, drawing on the proceedings of a conference on the Measurement of Wellbeing and Development in Africa, organized by the Government of South Africa, Columbia University and Cornell University, and held in Durban, November 12-14, 2015.

<sup>15</sup> See W. Huck and C. Kurkin, ‘The UN Sustainable Development Goals (SDGs) in the Transnational Multilevel System’ (2018) 2/2018 *Heidelberg Journal of International Law (HJIL)*, 375, Available at SSRN: <https://ssrn.com/abstract=3273899>; Standards and Actors e.g.:

This paper, as an extract from a larger study, aims to illustrate the practical applicability of the concept of access to justice under the guise of the SDGs. For this purpose, the normative elements of the concept, as accepted valid by the authors, are first briefly discussed with an emphasis on formal and functional characteristics of access to justice. In the subsequent analysis, the opportunities for gaining access to justice are confronted with the life realities addressed by the SDGs and the most yawning gaps are revealed. To the extent possible, these are countered by currents that indicate an effective or rising access to justice. This allows to clarify which areas of the concept lack resilience and how gaps could be bridged. From the resulting continuum, possible resolving strategies and additional future research questions are derived.

## B. Fundamentals of the Concept of Justice

A lack of access to justice triggers different effects within societies. Understanding these will allow to reveal opportunities for building bridges to sustainable development. Therefore, it is first necessary to define how the concept of justice is to be understood in the light of the Global Agenda 2030 and the SDGs. To grasp its meaning, the foundation and scope of the access to justice continuum is analysed against the concept of justice as exhibited I. in the SDGs' targets; II. in the vision of SDG 16; and III. in its associated indicators.

### I. What Justice and giving Access to it mean in the Context of the SDGs

The term justice occupies a place in human history that is as old as human history itself. In different times and different societies, it has recurrently been and still continues to be analysed. In law, too, it has been attached to ideas and concepts, values and systematic approaches in many different ways.<sup>16</sup> Similarly, the framework provided by the Global Agenda 2030 and the SDGs incorporates analytical factors borne of many (legal and philosophical) ideas and thus shapes an understanding of justice in its own unique and particular way. As such, the Global Agenda 2030 describes an aspirational state seeking an inner balance on at least three levels of attainment – social, economic and ecological.

---

<https://sustainabledevelopment.un.org/memberstates>; Small Island Developing States Partnership Framework (SIDS); The Executive Committee on Economic and Social Affairs (ECESA) Plus Members; The Extractive Industries Transparency Initiative (EITI).

<sup>16</sup> Cicero, *De Officiis*; Aristotle, *Nicomachean Ethics*; R. von Jhering, *Spirit of Roman Law at the Different Stages of Its Development*, Second Part. First Dept., (1854) § 29, 91; I. Kant, *The Metaphysics of Morals*; J. Rawls, *Justice as Fairness*; A. Sen, *The idea of justice* (2009); M. Nussbaum, *The Capability Approach* (2011); A. Kaufmann, *Rechtsphilosophie* (1997); C.-E. Mecke and W. Huck, 'Billigkeit im Recht oder Billigkeit versus Recht? Eine Analyse höchstrichterlicher Rechtsprechung' (2020), *AcP* 220, 861–892; C.-E. Mecke, 'Der Grundsatz der Verhältnismäßigkeit im Zivilrecht unter besonderer Berücksichtigung des deutschen und des polnischen Rechts', in: P. Szymaniec (ed), *The principle of proportionality and the protection of the fundamental rights in the European States* (2015), 351–376.



Additionally, the 5 Principles (5 P's)<sup>17</sup> shape the immanent concept of justice for the purposes of the SDGs. Without going into detail, it appears evident that the term “planet” creates a link to respecting planetary boundaries,<sup>18</sup> the contents of which are assigned to the category of Earth Jurisprudence.<sup>19</sup> This balancing function can best be linked to an idea of proportionality, an overall equilibrium which on the one hand enables people to develop and on the other hand provides them with responsibilities that go beyond their own sphere and which need to have effect utterly detached from a temporal and personal context.<sup>20</sup> It is noticeable that this condition is to be achieved in different ways for different stakeholders, as some of the SDGs themselves target specific groups.<sup>21</sup> Although this should not be understood as excluding other groups, this sets different *modi operandi* in the SDGs' implementation and lead to different outcomes over time. Furthermore, the diverse contexts of the generations now living, with their different needs, form divergent starting points that influence and trigger different modes of implementation.<sup>22</sup> But what does it then mean to give all people access to justice?

The Global Agenda 2030 and its associated instruments do not bear a clear definition of access to justice.<sup>23</sup> The same applies when examining human rights.<sup>24</sup> Although their basic function as a justice-securing “institutional embodiment” arises from a core set<sup>25</sup> of human rights<sup>26</sup> with their respective references and characteristics,<sup>27</sup> it is the concrete relations to human beings in the various societies and the design of the

<sup>17</sup> The 5 Principles are as follows: People, Planet, Prosperity, Peace, Partnership, A/RES/70/1, preamble.

<sup>18</sup> <https://www.stockholmresilience.org/research/planetary-boundaries.html>.

<sup>19</sup> <http://www.harmonywithnatureun.org/ejInputs/>; further reading: N. Rühs and A. Jones, ‘The Implementation of Earth Jurisprudence through Substantive Constitutional Rights of Nature’ 8 *Sustainability* 2016, 174–193.

<sup>20</sup> This general approach shows a clear similarity to, for example, the concepts of: Martha Nussbaum, *Creating Capabilities, The Human Development Approach* (2011), 17–46; Amartya Sen, ‘Human Rights and Capabilities’ (2005) 6(2) *Journal of Human Development*, 151–66; Amartya Sen, ‘Capabilities, Lists and Public Reasons: Continuing the Conversation’ (2004) 10(3) *Feminist Economics*, 77–80.

<sup>21</sup> See, amongst others, e.g. SDG 1.5, SDG 1.a, SDG 1.b, SDG 10.6, SDG 10.7, SDG 10.a., SDG 10.b, SDG 10.c.

<sup>22</sup> This is recognised, amongst others, in the 5<sup>th</sup> principle of the preamble of A/RES/70/1: “focused in particular on the needs of the poorest and most vulnerable and with the participation of all countries, all stakeholders and all people”

<sup>23</sup> S. Fukuda-Parr, ‘Sustainable Development Goals’, in: Weiss and Daws, *The Oxford Handbook on the United Nations* (2019), 771.

<sup>24</sup> J. E. Viñuales, *The Rio Declaration on Environment and Development (Preliminary Study on Principle 10)*, 33.

<sup>25</sup> Which at least means the right to life, to liberty, to freedom of conscience, and to subsistence; see A. Buchanan and D. Golove, ‘Philosophy of International Law’, in: J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (2002), 889.

<sup>26</sup> And access to justice may itself be seen as “the most basic “human right”—of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all”, B. G. Garth and M. Cappelletti, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978), 27 *Buffalo Law Review*, 181 (185).

<sup>27</sup> To be understood as non-derivative “basic rights” or as derivative human rights, to which expression is given by the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), see resp. preambles; see M. Scheinin, ‘Core Rights and Obligations’ in D. Shelton, *The Oxford Handbook of International Human Rights Law* (2013), 527-540.

respective legal systems that determine what access to justice means in concrete terms.<sup>28</sup> Assuming that justice in a human rights context refers to the equality of people and should help to achieve this equality, people must have access to institutions that enable them to realise their human rights.<sup>29</sup> Yet by comparing several acknowledged international standards such as Art. 8, 10 of the UDHR or Arts. 12(2), 40(2) (iii) of the Convention on the Rights of the Child,<sup>30</sup> it solidifies that a condition or the ability of people to defend and exercise their rights is required to implement consistent access to justice. This necessarily includes enabling the acquisition of legal and judicial outcomes (including redress and remedy) through the means of “impartial formal or informal institutions of justice and with appropriate legal support.”

More precisely, under international and regional human rights law, the concept of access to justice obliges states to guarantee every individual the right to go to court<sup>31</sup> – or even to provide and accept alternative dispute resolution bodies (based on fair principles)<sup>32</sup> – to obtain a remedy when an individual’s rights have been violated.<sup>33</sup> However, some of the justice systems fail to give women an adequate access to justice. *Chopra* and *Isser* illustrate difficult situations, when they exemplify that “[i]n Somalia, [...] local norms prohibit a woman from [...] accessing courts, requiring that she be represented by her husband or a male family member, who may have interests at odds with hers. In Afghanistan, women and girls who act against the wishes of their families often face threats and intimidation. In addition, in Aceh, local leaders actively discourage women from turning to the formal system, as it may upset the community order.”<sup>34</sup> Thus,

<sup>28</sup> A. Buchannan and D. Golove, ‘Philosophy of International Law’, in: J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (2002), 890 f.

<sup>29</sup> Following the thoughts of fundamental classifications of justice: A. Buchannan and D. Golove, ‘Philosophy of International Law’, in: J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (2002), 904; and on the notion of basic justice and its implementation: M. Nussbaum, *Creating Capabilities, The Human Development Approach* (2011), 62–68, 120–122.

<sup>30</sup> And all the more: United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Arts. 27, 40; Convention on the Rights of Persons with Disabilities (CRPD), Art. 13; European Convention on Human Rights (ECHR), Arts. 6, 13, 35, 46; EU Charter of Fundamental Rights, Art. 47.

<sup>31</sup> See amongst many: Universal Declaration of Human Rights (UDHR), Arts. 8, 10; United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Arts. 27, 40; Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49 (UNCRC), Arts. 12(2), 40(2) (iii); Convention on the Rights of Persons with Disabilities (CRPD), Art. 13; European Convention on Human Rights (ECHR), Arts. 6, 13, 35, 46; EU Charter of Fundamental Rights, Art. 47 and Art. 19 IV GG (German Basic Law).

<sup>32</sup> Which is also affirmed by judicial decisions, see e.g.: ECtHR (in applying the *Vilho Eskelinen* test), *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, paras. 88–91, Non-judicial bodies are courts if they fulfil judicial functions and offer procedural guarantees required by Article 6 of the ECHR, such as impartiality and independence; ECtHR, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II.

<sup>33</sup> UNDP, Access to justice, Practice note (2004; World Justice Project, Access to Civil Justice Indicator Proposal for SDG Target 16.3.3 (2019); Governance Statistics Praia City Group, Handbook on Governance Statistics (2020), para. 199; see also: A/RES/67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 30 November 2012, para. 18.

<sup>34</sup> See Chopra and Isser, ‘Access to Justice and Legal Pluralism in Fragile States: The Case of Women’s Rights’ (2012) 4(2) *Hague Journal on the Rule of Law*, 337 (344); Yet these kinds of difficulties exist - to a

social pressure as a “*normative power of the factual*”<sup>35</sup> shows the interconnectedness between cultural behaviour that often supersedes the impact of legalistic (western) systems of positive normativity.<sup>36</sup> This kind of injustice, as one of the most grievous violations of the Agenda’s idea of justice, stifles the flourishing of just societies already in its seeds and makes it hardly possible to connect further target measures of the SDGs such as on gender equality (SDG 5), no poverty (SDG 1) or zero hunger (SDG 2).

Access to justice in the light of the Global Agenda 2030 also presupposes a court system which follows democratic principles,<sup>37</sup> is financed and maintained by the state<sup>38</sup> and protects the principle of impartiality.<sup>39</sup> Beyond that, the court system shall be sufficiently protected in its structure and functioning against corruption and other undue influence,<sup>40</sup> and be based on freely acting, well-trained and staffed judiciary<sup>41</sup> on the basis of a *rule of law* concept.<sup>42</sup>

### 1. *Shedding some Light to the Background*

Several national, international and regional human rights norms stipulate access to and the quality of justice. For example, the UDHR and the International Covenant on Civil and Political Rights (ICCPR) – two cornerstones of international human rights norms – refer directly to access to justice by articulating procedural due process safeguards<sup>43</sup> that are necessary for people involved with the legal system.<sup>44</sup> Despite their embeddedness in numerous human rights treaties, reality often proves to be different. It must therefore be derived, that justice and a fair judicial system operating on the *rule of law* may not be brought to everybody within legal structures. Arguably, one of the most prominent tasks to be accomplished is to create effective access to fair and adequate justice for all in order

---

greater or lesser extent - in even more parts of the world, with women, as a multiply disadvantaged group, often being the most affected.

<sup>35</sup> See Anter (ed), *Die normative Kraft des Faktischen: das Staatsverständnis Georg Jellineks*, (2004).

<sup>36</sup> Anter (ed), *Die normative Kraft des Faktischen: das Staatsverständnis Georg Jellineks*, (2004), 344.

<sup>37</sup> A/RES/70/1, para. 9; A/RES/67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, para. 5.

<sup>38</sup> A/RES/70/1, paras. 27, 41.

<sup>39</sup> A/RES/67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, para. 13.

<sup>40</sup> A/RES/70/1, para. 35, SDG 16.5; A/RES/67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, para. 25.

<sup>41</sup> See United Nations General Assembly, Open Working Group on Sustainable Development Goals, *Compendium of TST Issues Briefs, A compendium of issues briefs prepared by the United Nations inter-agency technical support team for the United Nations General Assembly Open Working Group on Sustainable Development Goals* (2014), 231, 238.

<sup>42</sup> A/RES/70/1, paras. 8 f., 35, SDG 16.3.

<sup>43</sup> E.g.: UDHR, Art. 8: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”; International Covenant on Civil and Political Rights (ICCPR) Art. 2(3): “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy [...]”.

<sup>44</sup> Governance Statistics Praia City Group, *Handbook on Governance Statistics* (2020), para.198.

to ensure that human life and assets can be protected and unfair practices and discrimination can be halted. This would allow for opportunities that are more significant for individuals and communities.<sup>45</sup>

The notion “access to justice” only occurs once in the text of the Global Agenda 2030 and is then made dependent on preconditions<sup>46</sup> when it is stated: “The new Agenda recognises the need to build peaceful, just and inclusive societies that provide equal access to justice”.<sup>47</sup> Thus, the text suggests a two-step approach with a nexus. First, peaceful, just and inclusive societies must be created. If these, as a precondition, are in place, then they are enabled to provide “equal access to justice”.

The question remains as to whether societies which consider themselves to be peaceful, just and inclusive grant access to justice. Presumably, most of them will. But what about the opposite and a modification of it? It seems possible that societies which are not fully peaceful<sup>48</sup> and inclusive, create an increasing need for access to justice and in particular, unstable and unjust societies demonstrate an over-proportional demand for obtaining access to justice. In a narrow scope of meaning, this would exclude precisely those who are most likely to rely on solid structures of a justice system. This inherent gap must be reinterpreted in a teleological sense that does not disqualify societies or parts of it from the *rule of law*-related aspect of access to justice. Thus, the aspect of the role of peace seems to be fundamental.

## 2. *The Role of Peace in gaining Justice*

The Global Agenda 2030 stipulates peace as a *conditio sine qua non* for paving the way for sustainable development in stating that

[s]ustainable development cannot be realized without peace and security; and peace and security will be at risk without sustainable development.<sup>49</sup>

It is understood that only a persistently peaceful society is in a position to act truly sustainably. Besides respecting human rights, an “effective rule of law and good governance at all levels [that rely] on transparent, effective and accountable institutions” are an indispensable precondition.<sup>50</sup> Different SDGs support this pillar of endeavour<sup>51</sup> to

<sup>45</sup> T. Gurd, ‘Justice: What We Need in a Post-2015 World’ (2012) XLIX(4) *UN Chronicle*.

<sup>46</sup> A/RES/70/1, para. 35 and in SDG 16.3

<sup>47</sup> A/RES/70/1, para. 35.

<sup>48</sup> The question about how a peaceful society might be defined is in itself highly complex and contextually coined. For the purpose of this contribution the state of peace shall be understood as a stable condition of a state that enables its population to live within reliable, fair and equitable legal situations which protects the virtue of dignity and self-determination.

<sup>49</sup> A/RES/70/1, preamble and para. 35.

<sup>50</sup> A/RES/70/1, para. 35.

<sup>51</sup> A/RES/70/1, SDG 4.7 “promotion of a culture of peace and non-violence”, SDG 16 “Promote peaceful and inclusive societies for sustainable development [...]”.

foster “dialogue and international cooperation”<sup>52</sup> in so that the societal transformation can be realised.

In fact, fragile and conflict-affected areas and societies are less likely to trust state systems, and the absence of reliable and (equitable) state systems<sup>53</sup> is a major obstacle to the formation of justice.<sup>54</sup> Even after overcoming conflicts, a higher inhibition threshold can be found, which (initially) impedes the sustainable acting of societies and in particular their access to justice.<sup>55</sup> The often convoluted reasons,<sup>56</sup> mainly point to “frayed social cohesion” as the main detrimental influencing factor. A glance at the political and social history of former colonial territories illustrates that in many cases intra-state conflicts are still ongoing, to which political and social uncertainties and instabilities have been compounded after independence.<sup>57</sup> These forms of post-conflict subversion hardly allow for a free, self-determined development, neither for the state nor for the societies located there.<sup>58</sup> The interconnectedness of peace, security and a sustainable development can be read in many historic contexts. It is all the more evident that the Global Agenda 2030 and the SDGs, as an agenda for development, seek to establish a lasting state of peace. Therefore, it has been placed in the preamble and vision as an indispensable component of a sustainable global community<sup>59</sup> to acknowledge the significance, although the quest for peace never gained acceptance in the negotiations on the Global Agenda

---

<sup>52</sup> A/RES/70/1, para. 49.

<sup>53</sup> Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies”, 23 August 2004, S/2004/616, para. 2; World Bank Group, Understanding Access To Justice And Conflict Resolution at the local level in the Central African Republic (CAR) (2012), Social Cohesion and Violence Prevention Team, Social Development Department, 10.

<sup>54</sup> In continuing the thoughts of Sir Terence Etherton, ‘The Universality Of The Rule Of Law As An International Standard, Lionel Cohen Lecture 2018, Jerusalem, 9 April 2018’, 51(3) *Israel Law Review*, pp 469 (482); further indication on this point: A/RES/70/1, paras. 42, 64.

<sup>55</sup> UN, Sixth Committee Speakers Highlight How Corruption, Illicit Financial Flows, Decolonization Issues Undermine Trust of Rule of Law, as Debate Concludes, GA/L/3622, 22 October 2020; see also: Open Working Group on Sustainable Development Goals, *Compendium of TST Issues Briefs Issues Brief 29* (2014), 226; Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies”, 23 August 2004, S/2004/616, para. 3 f., 27 f.

<sup>56</sup> See e.g. H. J. Sharkey, African colonial states. In J. Parker & R. Reid (eds.), *The Oxford handbook of modern African history* (2013), 165 f.

<sup>57</sup> The debate on the controversial nature of the independence of former colonial states ought to be omitted at this point, however, an overview of causes of conflict and hindrances on self-assertion in the post-colonial existence of states, e.g. for the African Continent can be found here: A. Nhema and P. Tiyambe Zeleza (eds), *The Causes & Costs of War in Africa, From Liberation Struggles to the ‘War on Terror’* (2008); A. Bujra, ‘African Conflicts: Their Causes and their Political and Social Environment’ (2002) 4 *Development Policy Management Forum*; for a global perspective: T. Piketty, *Capital and Ideology* (2019).

<sup>58</sup> See e.g. D. North, *Institutions, Institutional Change, and Economic Performance* (1990), 54, where he claims that the absence of a low-cost means of enforcing contracts is “the most important source of both historical stagnation and contemporary underdevelopment in the Third World”; Rick Messick, “Judicial Reform and Economic Development: A Survey of the Issues” (1999) 14(1) *The World Bank Research Observer*, 124–26, which concludes that, although the specifics of causality are unclear, “history and comparative analysis support the view that a better judicial system fosters economic growth”; found in: V. Maru, ‘Access to Justice and Legal Empowerment: A Review of World Bank Practice’ (2009) 9/2009 *justice & development working paper series*, 1.

<sup>59</sup> A/RES/70/1, preamble and para. 35.

2030.<sup>60</sup> Finding peace is the basic condition needed to implement self-determined sustainable development.

## II. The Promise of SDG 16 – What does “Justice for all” mean?

The vision and content of SDG 16 gives a broader indication of what “justice for all” means. Two aspects in particular stand out: the intention to integrate a *rule of law*<sup>61</sup> with the purpose of connecting to and supporting all other SDGs, gives it a considerable and far-reaching function within the agenda, akin to an inner axis.<sup>62</sup> Apart from that, it is recognisable that multiple conflicting positions during the negotiations led to an ambiguous and, not sufficiently strongly formulated<sup>63</sup> SDG 16 which only connects a limited number of legal areas.

SDG 16.3 demand two interrelated aspects. States should “[p]romote the rule of law at the national and international levels and ensure equal access to justice for all.” Promote and ensure access to justice requires any government to do something, which on the basis of their specific constitution means a certain positive action including a promotion and a pledge. But to which extent? Should that mean a small, medium or a big emphasis that produces legally binding outcomes or does it merely serve as a recommendation?

Following the human rights context of the Global Agenda 2030, states have a duty to “respect, protect and fulfil” human rights. This duty prohibits harmful state interference and explicitly requires positive state action to protect the respective rights

---

<sup>60</sup> It is also for this reason that the wording of SDG 16 is deviating significantly from the regular terminology used in human rights law, S. Fukuda-Parr, ‘Sustainable Development Goals’, in: T. Weiss and S. Daws, *The Oxford Handbook on the United Nations*, 771; F. Dodds, D. Donoghue and J. Leiva Roesch, *Negotiating the Sustainable Development Goals, A transformational agenda for an insecure world* (2017), 35, 40; U. Werther-Pietsch, ‘The Impact of SDGs on International Law – A Nucleus of a Right to Peace?’ (2018) 47(1) *OZP – Austrian Journal of Political Science*, 23.

<sup>61</sup> A/RES/67/1, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, para. 7; A/RES/67/187, *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*; F. Dodds, D. Donoghue and J. Leiva Roesch, *Negotiating the Sustainable Development Goals, A transformational agenda for an insecure world* (2017), 50–61; H. Gramckow and N. Menzies, ‘Justice Proposed for Sustainable Development Goal, Governance for Development’, Blog, 9.2.2015, found in: I. Keilitz, ‘The Trouble with Justice in the United Nations Sustainable Development Goals 2016 – 2030’ (2016) in 7(2) *William & Mary Policy Review*, 9.

<sup>62</sup> In following the thoughts of its genesis that “[t]hese elements address often underlying vulnerabilities and risk factors that contribute to under-development”, United Nations General Assembly/Open Working Group on Sustainable Development Goals, *Compendium of TST Issues Briefs* (2014), 236.

<sup>63</sup> See S. Fukuda-Parr, ‘Sustainable Development Goals’, in: T. Weiss and S. Daws, *The Oxford Handbook on the United Nations*, 771; C. L. McDermott et al., ‘SDG 16: Peace, Justice and Strong Institutions – A Political Ecology Perspective’, in P. Katila et al. (eds), *Sustainable Development Goals: Their Impacts on Forests and People* (2019); F. Dodds and D. Donoghue and J. Leiva Roesch, *Negotiating the Sustainable Development Goals, A transformational agenda for an insecure world* (2017), 80; see also: I. Khan, ‘How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?’ (2018), 13(2) *MJSDL*, 211 (212).

or facilitate the enjoyment of human rights.<sup>64</sup> These obligations vary in intensity depending on the human right being pursued but cannot originally be derived from the Global Agenda 2030 or SDG 16. The targets of SDG 16 offer essential concepts on how societies should deploy a stable institutional framework for citizens and companies. However, while the main features of SDG 16 point at peace, the *rule of law*, access to justice and good governance, they lack a globally and translatable definition comprising a core content for each target accompanied by a guide on interpretation. Rather, its features seem to offer a solution in many cases, where a solution is not perceivable in practice, because e.g. women and other vulnerable groups are not equipped with equal rights, or the interpretation of access to justice include informal settings hardly recognisable in a Eurocentric perspective or even do not offer specific legal tools at all.

It must be concluded that SDG 16 means a fundamental agreement that at least allows to stimulate an adaptable structure of processes. This will be implemented in particular by (international and domestic) institutions and not only by governments. As uncertain as its substantial content and its application may be in detail, the procedural approach and accompaniment of all SDGs appear to be manifested with this axis.

### III. The surprising Suppression of Access to Justice through Indicators

#### 1. *The crucial Need for Indicators*

The SDGs as the centrepiece of the Global Agenda 2030 are subject of a follow-up and review process by national governments. The processes are voluntary and country-led.<sup>65</sup> To measure progress and assist the SDGs,<sup>66</sup> national, regional and global SDG indicators<sup>67</sup> are being developed.<sup>68</sup> In particular, reliable disaggregated data which should differ between income, sex, age, race, ethnicity, migratory status, disability and geographic location, or other characteristics<sup>69</sup> is needed to conduct the process of measurement.<sup>70</sup> If indicators are used inconsistently, or the creators and users are biased, the results

---

<sup>64</sup> W. Kälin and J. Künzli, *The Law of International Human Rights Protection* (2nd Ed, 2019), 90 – 108; see also M. Scheinin, ‘Core Rights and Obligations’ in D. Shelton, *The Oxford Handbook of International Human Rights Law* (2013), 527-540.

<sup>65</sup> A/RES/70/1, para. 74.

<sup>66</sup> UN Economic and Social Council, E/2018/64, *Progress towards the Sustainable Development Goals, Report of the Secretary-General*, 10 May 2018.

<sup>67</sup> UN Global SDG Database, <https://unstats.un.org/sdgs/indicators/database/>.

<sup>68</sup> Good overview provides the E-Handbook on Sustainable Development Goals Indicators, <https://unstats.un.org/wiki/display/SDGeHandbook>.

<sup>69</sup> A/RES/67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, para. 3; A/RES/71/313 Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development; A/RES/68/261 Fundamental Principles of Official Statistics

<sup>70</sup> A/RES 70/1, para. 48.

probably be inconsistent, incomprehensible, or even dubious.<sup>71</sup> Thus, measuring success or failure will only allow for holistic action when the available data and applied indicators are reliable and sufficient.<sup>72</sup> Both therefore play a key role and form another *conditio sine qua non* for political outcome-based decision-making.<sup>73</sup>

The complete process of collecting data, the creation and application of indicators and the specific outcome of measurement can be recognised as a prerequisite to conclude whether and what decisions should be taken by government or parliament.<sup>74</sup> If false indicators are selected, or correct indicators are insufficiently weighted, or indicators are defined that are inappropriate for the respective goal, it quickly becomes apparent that the application and examination of the indicators can hardly lead to suitable results in practice. In this way, policy-makers receive an inadequate factual basis, so that the evidence-based approach to policy-making is flawed, which subsequently provokes deficient decisions and insufficient actions.<sup>75</sup>

Yet, the greatest fallacy is to assume that not receiving any result from measurement would equate with an overall achievement of the respective target. In plain language, this requires that in order to create indicators, the needs in the relevant contexts must be known and, moreover, the bodies addressed must be able to understand them.

Since policy decisions can be made by positive action or by (legally relevant) omission at every vertical and horizontal level of the state, each country's decision-making process is more or less informal or, by being embedded in the *rule of law* political environment and decision-making processes,<sup>76</sup> based on formal instruments in the respective area of constitutional and administrative principles. As long as the indicators serve as the main measurement tool complementary to the SDGs, they need to be as clear and sound as possible.

---

<sup>71</sup> S. Janoušková, T. Hák and B. Moldan, 'Global SDGs Assessments: Helping or Confusing Indicators?' (2018) 10(5) *Sustainability*, 1–14.

<sup>72</sup> A/RES/70/1, para. 48.

<sup>73</sup> A/RES/70/1, para. 48; see for more detailed consideration: W. Huck, 'The UN Sustainable Development Goals and the Governance of Global Public Goods: The Quest of Legitimacy (2019)' in M. Iovane, F. Palombino, D. Amoroso, G. Zarra, *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry*, 347.

<sup>74</sup> W. Huck, 'The UN Sustainable Development Goals and the Governance of Global Public Goods: The Quest of Legitimacy' (2019) in M. Iovane, F. Palombino, D. Amoroso, G. Zarra, *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry*, 347.

<sup>75</sup> W. Huck, 'The EU and the Global Agenda 2030: Reflection, Strategy and legal implementation' (2020), 2020-1 *C-EENRG Working Papers*, 10 f.

<sup>76</sup> To the two features of global and the national rule of law, see M. Macchia, 'The rule of law and transparency in the global space', in: S. Cassese (ed), *Research Handbook on Global Administrative Law* (2016), 262 et seqq.; and to the questions related how to measure the rule of law see M. Macchia, 273 et seqq.



## 2. *The Indicators of SDG 16.3 – How is Access to Justice measured?*

As part of the SDG Global Indicator Framework (GIF), three global indicators<sup>77</sup> were adopted for target 16.3 by the UN General Assembly in 2020. These focus **exclusively on criminal justice**, completely omitting other levels of justice, such as civil justice needs in contractual relationships of businesses to one another (B2B) or from businesses to customers (B2C) as well as administrative and constitutional justice in many fields.

Some explanation for this may be derived from the original intent of SDG 16, as recognisable from the negotiation processes,<sup>78</sup> which had been to create the peaceful coexistence of societies to be realised by a state in ensuring “freedom from violence” and good governance. During the negotiations on SDG 16, reference was made, amongst others, to the Millennium Declaration where Member States expressed the determination to establish “a just and lasting peace” and acknowledged the right for men and women to live free “from fear of violence, oppression and injustice” or to the declaration adopted at the High-level Meeting on the Rule of Law in September 2012. Peacebuilding, violence prevention, the *rule of law*, equality and social cohesion were acknowledged to be elements that “address often underlying vulnerabilities and risk factors that contribute to under-development [which constitute] a matter of protecting people’s rights and protecting development investments through early prevention and mitigation.”<sup>79</sup>

However, since the indivisible (new) approach<sup>80</sup> of the Global Agenda 2030 demands for holistic interpretation and solution-finding, such a narrow understanding of justice and the *rule of law* would neglect many areas of justice and thus undermine the very purposes of the Global Agenda 2030. Access to administrative and even to constitutional justice plays a vital role in litigation in the sector of public law, in particular of environmental law and beyond in many daily life experiences. Criminal justice undeniably is a crucial sector for the impact of the *rule of law* concept and access to justice, but overlooks the oceanic size of questions coming up from civil and public law, thus, depriving people, communities and organizations from remedying their legal issues properly.<sup>81</sup> Access to civil justice is necessary for people to redress their grievances, access their civil rights and entitlements, and for the realization of the broader

---

<sup>77</sup> E/CN.3/2020/2, The indicators for SDG 16.3 are as follows:

16.3.1 Proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms

16.3.2 Unsentenced detainees as a proportion of overall prison population

16.3.3 Proportion of the population who have experienced a dispute in the past two years and who accessed a formal or informal dispute resolution mechanism, by type of mechanism.

<sup>78</sup> F. Dodds, D. Donoghue and J. Leiva Roesch, *Negotiating the Sustainable Development Goals, A transformational agenda for an insecure world* (2017), 40.

<sup>79</sup> UNGA, OWG on Sustainable Development Goals, *Compendium of TST Issues Briefs, A compendium of issues briefs prepared by the United Nations inter-agency technical support team for the United Nations General Assembly Open Working Group on Sustainable Development Goals* (2014), 239.

<sup>80</sup> A/RES/70/1, para. 13.

<sup>81</sup> OECD and Open Society Justice Initiative, 2019;

[http://ine.cv/praiagroup/handbook/handbook\\_governance\\_statistics.pdf](http://ine.cv/praiagroup/handbook/handbook_governance_statistics.pdf).

sustainable development agenda. Without the inclusion of measuring access to civil justice, an important gap in the GIF remains for the implementation of the SDGs.<sup>82</sup>

This omission has already been recognised and solutions drafted. For example, the proposal from the Organisation for Economic Co-operation and Development (OECD) and the World Justice Project (WJP) provides for building indicators to access to civil justice from **legal needs surveys**, which can increase the visibility of civil justice barriers and highlight the experiences of particular populations. A global legal needs-based indicator focused on access to civil justice could also complement work towards other SDGs by enabling policy makers to better identify how justice systems interact with other developmental priorities.<sup>83</sup> Moreover, the design of indicators and data aggregation on regional and national levels are crucial for a more differentiated measurement which would balance the inadequacy or irrelevance<sup>84</sup> of the GIF for subsequent levels and could also feed global measurement processes. So far, however, data gathering is usually not coordinated (in between countries) or are measured consistently and/or regularly.<sup>85</sup> The greater results are deviating, the less useful the results found are as a basis for any political decision. The level of commitment and accountability appears to be significantly higher<sup>86</sup> if data aggregation is more adequate and could even open up the limited meaning generated by the GIF. This could be an efficient way earnest enough to overcome contentious aspects in practice and heal the frequent deviation of facts and inaccurate measurements.

This would also comply with the demanded prospective and rationale assessment of the context of the SDGs which does not allow for such a limitation. It is not the indicators – which only measure what can be measured (or was diplomatically agreed upon) – that frame the content, but rather the appropriateness of the contextual design under the guise of the sustainability concept from which the fundamental idea of justice as a proportional approach also is nurtured.

## C. The Impacts of lacking Access to Justice

The functional meaning and gravity of access to justice in the SDG agenda has been outlined as fundamental in the previous chapter. But what does the absence of access to

<sup>82</sup> World Justice Project, Access to Civil Justice Indicator Proposal for SDG Target 16.3.3 (2019).

<sup>83</sup> OECD/Open Society Foundations, *Legal Needs Surveys and Access to Justice* (OECD Publishing, Paris 2019).

<sup>84</sup> See e.g. EUROSTAT, EU SDG Indicator set 2020, Result of the review in preparation of the 2020 edition of the EU SDG monitoring report, Final version of 16/01/2020, Revised after implementation of the EU SDG Indicator set 2020 on 22 June 2020, 5.

<sup>85</sup> See e.g. EUROSTAT, EU SDG Indicator set 2020, Result of the review in preparation of the 2020 edition of the EU SDG monitoring report, Final version of 16/01/2020, Revised after implementation of the EU SDG Indicator set 2020 on 22 June 2020.

<sup>86</sup> M. Laberge and N. Touhiri, 'Can SDG 16 Data Drive National Accountability? A Cautiously Optimistic View' (2019) 10(Suppl. 1) *Global Policy* (2019), 153 (154).

justice mean in practice? Firstly, it means that a legal system suffers from gaps and, consequently, norms and standards contained in it are not existent or (adequately) applied. As a result, this system does not comply with the “efficiency rule” of law at least in the areas covered by the gaps. If one recalls the function of law as an instrument for securing a stable, pacified condition, this in turn means a direct erosion of self-determination for the state, since it gives away parts of its regulatory freedom with every gap. Aware of this significance, this section will highlight the most pervasive lacunae and their impact on social structures within a state and, to the extent possible, on the international community.

Gaps appear in various forms and can relate to visible parts of a legal system, e.g. directly affecting courts, prosecutors, police, or other authorities. They may also affect the deeper, invisible parts of the system when inequalities are structurally embedded and thus lead to an imbalance of fairness, equity, equality and social justice within a system,<sup>87</sup> i.e. when laws and institutions that should protect against discrimination and abuse of authority<sup>88</sup> are absent or not effective. Accordingly, gaps of both a legal and non-legal nature can occur. Legal gaps mean that areas are either not regulated or not regulated sufficiently whereas non-legal gaps can exist culturally, or *de facto* when rights are established but the rights holders are not aware of them or are unable to assert them (e.g. because courts and legal aid are unreachable). All discernible gaps share the characteristic that, “when left unaddressed, the horizontal inequalities that some groups in society tend to face on a daily basis can transform into collective grievances and frustrations, sometimes with far-reaching consequences.”<sup>89</sup> The following section illustrates a brief insight of the immense impact on life realities.

### 1. Access to Criminal Justice

An effective access to criminal justice providing an effective remedy to the victims of criminal acts, as well as protecting and enabling proper defence of the rights of those suspected, accused or convicted of crime.<sup>90</sup> Globally, nearly one third of the world’s total prisoners are held without trial.<sup>91</sup> Since countless people are arrested and tens of millions are prosecuted each year,<sup>92</sup> this means more than three million people are being held in pretrial detention<sup>93</sup> where they suffer from “excessive periods, [...] ill-treatment, coerced

---

<sup>87</sup> M. Manuel and C. Manuel, ‘Achieving equal access to justice for all by 2030, lessons from global funds’ (2018) *Working Paper 537 EU Agenda*, 8.

<sup>88</sup> UNDP, P. Keuleers, *Access to justice for all, An enabler of the 2030 Agenda and essential for Leaving No One Behind* (2018), <https://www.undp.org/content/undp/en/home/blog/2018/access-to-justice-for-all.html>.

<sup>89</sup> <https://www.undp.org/content/undp/en/home/blog/2018/access-to-justice-for-all.html>.

<sup>90</sup> UNODC, 2013.

<sup>91</sup> UN Statistical Division, 2017.

<sup>92</sup> UN Statistical Division, 2017.

<sup>93</sup> Praia City Group, *Handbook on Governance Statistics*, 101, Available at: [http://ine.cv/praiagroup/handbook/handbook\\_governance\\_statistics.pdf](http://ine.cv/praiagroup/handbook/handbook_governance_statistics.pdf).

confessions and wrongful convictions.”<sup>94</sup> The social, financial and health consequences of pretrial detention can be severe and disproportionately impact those already disadvantaged (e.g. those who can least afford bail), reinforcing disadvantage and compounding the underlying causes of crime and poverty within and across generations.<sup>95</sup> Consequences extend beyond detainees, to “their families, communities, and even States”.<sup>96</sup>

## 2. *Effective Access to Civil Justice and Administrative Justice.*

Any legal system upholding the *rule of law* must provide access to civil justice and administrative justice. As well as giving meaning to the possession of rights,<sup>97</sup> civil justice promotes general well-being, government accountability and inclusive and sustainable development.<sup>98</sup> Like any other area of law, these areas should be designed in a largely barrier-free way which means that they are understandable and simple in so that people and communities are enabled to understand, use and shape the law and thus can fully participate (legal empowerment).<sup>99</sup> Although not always needed, legal assistance and legal aid can be essential, particularly for vulnerable groups.<sup>100</sup>

### a. Access to Justice for Women and other Vulnerable Groups

As mentioned before, justice as a concept includes both formal judicial mechanisms and informal dispute resolution mechanisms. However, the unequal treatment that minorities, displaced people and migrants face hinders their participation in formal justice systems.<sup>101</sup> Women, as they can be found in each of these groups, tend to be the most severely threatened parts of societies and as a result, lacking voice and agency. “Some legal systems furthermore place women under the constant authority of a man through a guardianship system which passes on from one male relative to another throughout their life cycle (e.g. fathers, sons uncles, husbands, fathers in laws and male successors) which is frequently compounded by women being denied financial support, e.g. “in fault-based

<sup>94</sup> Praia City Group, Handbook on Governance Statistics, 101, Available at: [http://ine.cv/praiagroup/handbook/handbook\\_governance\\_statistics.pdf](http://ine.cv/praiagroup/handbook/handbook_governance_statistics.pdf).

<sup>95</sup> O. de Schutter, Tackling extreme poverty in times of crisis: Key challenges facing the fight against poverty and thematic priorities for the Special Rapporteur on extreme poverty and human rights, 1.5.2020.

<sup>96</sup> Open Society Justice Initiative and UNDP, 2011.

<sup>97</sup> B. G. Garth and M. Cappelletti, ‘Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective’ (1978), 27 *Buffalo Law Review*, 181 (185).

<sup>98</sup> [http://ine.cv/praiagroup/handbook/handbook\\_governance\\_statistics.pdf](http://ine.cv/praiagroup/handbook/handbook_governance_statistics.pdf).

<sup>99</sup> Praia City Group, Handbook on Governance Statistics, 101; V. Maru, ‘Access to Justice and Legal Empowerment: A Review of World Bank Practice’ (2009) 9/2009 *justice & development working paper series*, 1.; S. Golub and K. McQuay, ‘Legal empowerment: Advancing good governance and poverty reduction’ (2001), Law and Policy Reform at the Asian Development Bank ; A/64/133, Legal Empowerment of the poor and eradication of poverty, Report of the Secretary-General, July 2009, paras. 3–5.

<sup>100</sup> Praia City Group, Handbook on Governance Statistics .

<sup>101</sup> UNDDR, Global Assessment Report for Disaster Risk Reduction (2019), 149.

divorce proceedings when the legal notion of fault is stricter for wives than husbands”<sup>102</sup> or in so that the woman does not disturb the public order at all denying them from obtaining legal assistance and legal aid.<sup>103</sup> Moreover, gender stereotypes are frequently occurring in the justice systems itself, reflecting societal values and biases alike. Considering that women form the largest proportion of the population affected by poverty, this indicates the additional obstacle of not having the means to obtain legal aid or seek redress.<sup>104</sup> Thus, “cost, distance and stigma” prevent women from seeking legal institutions. This serious gap specifically evolves in family law investments<sup>105</sup> but also in other areas of law abetting a hostile and development-negating environment for women.<sup>106</sup> Access to justice thus also determines the degree of self-determination a woman is able to exercise. Beyond, gender-neutral laws and regulations are one of the obstacles that create “pervasive inequality and discrimination”<sup>107</sup> and thus a “system of domination of men over women”.<sup>108</sup>

#### b. Access to Court Systems

Among the most detrimental influences that reduce access to judicial mechanisms is any form of corruption, be it economic or political in origin. The exact meaning of corruption differs worldwide due to different social perceptions.<sup>109</sup> The UNDP’s understanding very broadly encompasses any “misuse of entrusted power for private gain”.<sup>110</sup> More precisely, this can include any abuse of power as it relates to the non-delivery of basic services, including physical abuse and sexual exploitation.<sup>111</sup> Although SDG 16.5 distinguishes corruption from the other components of this definition, SDG 16 mirrors this content entirely and even reinforces this assumption when SDG 16.6 calls for effectiveness, accountability and transparency at all levels. Where these levels are not fulfilled, a failure of governance must be assumed which mainly infringes multiple deprived groups such as

---

<sup>102</sup> UN Women, Fact Sheet on the importance of women’s access to justice and family law, <https://www.unssc.org/sites/unssc.org/files/UNWomenFactSheet.pdf>.

<sup>103</sup> S. Maranlou (ed), *Access to Justice in Iran: Women, Perceptions, and Reality* (2014), 123; Praia City Group, Handbook on Governance Statistics ; United Nations General Assembly/Open Working Group on Sustainable Development Goals, *Compendium of TST Issues Briefs* (2014), 236.

<sup>104</sup> See UN Women, *Progress of the World’s Women 2019-2020, Families In A Changing World* (2019), 80, 97; UN Women, Fact Sheet on the importance of women’s access to justice and family law, <https://www.unssc.org/sites/unssc.org/files/UNWomenFactSheet.pdf>.

<sup>105</sup> UN Women, Fact Sheet on the importance of women’s access to justice and family law, <https://www.unssc.org/sites/unssc.org/files/UNWomenFactSheet.pdf>.

<sup>106</sup> UN Women, Fact Sheet on the importance of women’s access to justice and family law, <https://www.unssc.org/sites/unssc.org/files/UNWomenFactSheet.pdf>.

<sup>107</sup> UN Women, *Progress of the World’s Women 2019-2020, Families In A Changing World* (2019), 190.

<sup>108</sup> UN Women, *Progress of the World’s Women 2019-2020, Families In A Changing World* (2019), 80.

<sup>109</sup> See UNDP, *Seeing Beyond the State: Grassroots Women’s Perspectives on Corruption and Anti-Corruption* (2012), 5.

<sup>110</sup> UNDP, Primer on Corruption and Development, Corruption and Development, Anti-Corruption Interventions for Poverty Reduction, Realization of the MDGs and promoting Sustainable Development, 7.

<sup>111</sup> See UNDP, *Seeing Beyond the State: Grassroots Women’s Perspectives on Corruption and Anti-Corruption* (2012), 5.

children, women and indigenous peoples.<sup>112</sup> Corruption exists in developed and developing countries alike, but it affects the latter to a greater extent and generally exacerbates poverty and declines economic growth. It hinders law enforcement (effectiveness of law), shares a nexus with organised crime and fosters an anti-democratic environment.

Other factors diminishing access to court systems include high costs for legal proceedings and legal advice.<sup>113</sup> But also the lack of legal identity, which especially girls and women suffer from due to the lack of entitlement to a birth certificate in certain regions and countries, impedes access to justice. This, as a downward cycle, distracts them e.g. from access to schooling which in turn leads to an unawareness of their rights but all the more declines their legal standing and thus hinders them to appear before a court at all. This may not be an issue everywhere,<sup>114</sup> but all too often occurs, thereby exacerbating social inequality and creating almost irrevocable classes within societies. This is compounded by a lack of capacity in terms of qualified personnel, equipment, and other resources needed for a functioning justice system.<sup>115</sup>

### 3. Access to Environmental Justice

Reasoning access to justice in environmental matters with the SDGs raises particular difficulties when adhering to the wording of SDG 16.3 or its human rights background alone. However, the contextual consideration of interconnections within the Global Agenda 2030 and the underlying concept of sustainable development, which is both historic root and parental thought of the present SDGs. Numerous legal connections provide meaningful context and contribute to give in to broader, also environmentally just interpretation including among others the principles of international law, such as the precautionary principle or intergenerational equity, as well as the provision of “effective access to judicial and administrative proceedings, including redress and remedy”.<sup>116</sup> Accordingly, effective administrative justice in environmental matters forms part of the implementation of full access to justice. The extent to which this is integrated into the SDGs is far too vague, even in the relevant SDGs of the environmental level, namely SDG 13, SDG 14, SDG 15 and SDG 6, for the justification of binding justice to be read out of them.<sup>117</sup> Although these SDGs may substantially be useful as a basis for

<sup>112</sup> UNDP, Primer on Corruption and Development, Corruption and Development, Anti-Corruption Interventions for Poverty Reduction, Realization of the MDGs and promoting Sustainable Development, 10 f.

<sup>113</sup> Supreme Court of UK, Trinity Term [2017] UKSC 51, On appeal from: [2015] EWCA Civ 935, *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)*, Judgement of 26.07.2017, paras. 29, 64-71, 86-89, further reading: <https://ukhumanrightsblog.com/2017/07/27/the-price-of-justice/#more-35764>.

<sup>114</sup> *Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, IACtHR (ser. C) No. 130, ¶ 85(a)(1) (Sept. 8, 2005), 25, para. 115.

<sup>115</sup> World Bank Group, Understanding Access To Justice And Conflict Resolution At The Local Level In The Central African Republic (CAR) (2012), Social Cohesion and Violence Prevention Team, Social Development Department, 8 f.

<sup>116</sup> A/RES70/1, paras. 10-12.

<sup>117</sup> L. M. Collins, ‘Sustainable Development Goals and human rights: challenges and opportunities’, in: Duncan French and Louis J. Kotzé, *Sustainable Development Goals, Law Theory and Implementation* (2017), 80 f.

legal reasoning,<sup>118</sup> they do not create *per se* a formal access to justice. As a means of implementation for other SDGs, including those mentioned above,<sup>119</sup> SDG 16 needs to be understood in a broad and adaptable manner to fulfil its basic function.

The environmental law cases as well as the increasingly frequent climate change litigation stand alongside cases of so-called “Earth Jurisprudence”, which, by invoking the “Harmony with Nature” approach, attempt to endow “Mother Nature”<sup>120</sup> herself with rights. Each of these areas of law face different substantive and formal obstacles, with only a few exceptions of high-profile public interest cases to date.<sup>121</sup> Frequently, *locus standi* is lacking e.g. in the absence of individual concern, or the *actio popularis*, i.e. the action to protect or enforce rights to which the public is entitled (public interest litigation, PIL) is excluded, which makes it impossible for individuals or organisations to bring a claim<sup>122</sup> even if an impairment of existing rights is proven.<sup>123</sup> Lengthy and complex procedures cause high costs.<sup>124</sup> Moreover, despite strong environmental acquis in force, a rapidly deteriorating state of the environment can be observed, e.g. in the EU, where strong legal and policy frameworks are not properly implemented or enforced, leading to environmental and socio-economic problems. In the EU alone, the estimated cost of poor implementation of EU environmental law is around €50 billion per year, undermining the rule of law and public trust in the EU and its member states.<sup>125</sup>

## D. Currents of giving Access to Justice for Sustainable Development

The above brief overview of the most yawning gaps of access to justice reveals these remain even in (democratic) states that are officially considered pacified. This gives a strong indication that creating transparency, accountability and providing people with

---

<sup>118</sup> L. M. Collins, ‘Sustainable Development Goals and human rights: challenges and opportunities’, in: D.

French and L. J. Kotzé, *Sustainable Development Goals, Law Theory and Implementation* (2017), 79-83.

<sup>119</sup> Niko Soininen, ‘Torn by (un)certainity – can there be peace between the rule of law and other Sustainable Development Goals?’, in: D. French and L. J. Kotzé, *Sustainable Development Goals, Law Theory and Implementation* (2017), 251.

<sup>120</sup> <http://www.harmonywithnatureun.org/>.

<sup>121</sup> See for a global overview: UN Environment, *The Status Of Climate Change Litigation, A Global Review* (UNEP 2017).

<sup>122</sup> K. Bouwer, *The Unsexy Future of Climate Change Litigation* (2018) 30 *Journal of Environmental Law*, 483–506; A. Oexle and T. Lammers, *Klimapolitik vor den Verwaltungsgerichten – Herausforderungen der „climate change litigation“*, *NVwZ* 2020, 1723-1727.

<sup>123</sup> ECtHR, *Tătar v. România*, No. 67021/01, 27 January 2009, paras. 93, 101, 113–116 and 118.

<sup>124</sup> K. Bouwer, *The Unsexy Future of Climate Change Litigation* (2018) 30 *Journal of Environmental Law*, 483–506; A. Oexle and T. Lammers, ‘Klimapolitik vor den Verwaltungsgerichten – Herausforderungen der „climate change litigation“’, *NVwZ* 2020, 1723-1727.

<sup>125</sup> ClientEarth, Communications, *The General Court of the EU rejects the people climate case as inadmissible*, 3 June 2019.

legal identities are merely the foundations of building structures for enabling societies based on the *rule of law*. A protection of the court system (and further institutions) against corruption and further undue influence requires the security of impartiality, integrity and free and non-discriminating acting on the basis of a *rule of law* concept,<sup>126</sup> ideally follow democratic principles and are financed and maintained by the state. It is striking that life's realities often prove otherwise, and official (and democratic) mechanisms cannot be generated easily.

These all the more underlines that there is a crucial need for indicators that precisely and comparably prove whether states comply with the *rule of law* concept. Despite the review of the Global Indicator Framework (GIF) with which SDG 16.3 recently has been extended to include a further indicator (16.3.3), the lack of (sufficient, reliable and comparable) data makes it hardly possible to receive meaningful results.<sup>127</sup> With the SDGs and the GIF in its current form, the duty content and the duty addressee are mostly unclear, if legally no or only limited inclusion takes place. Once again, the bottleneck of the SDGs becomes apparent: How can they become utilisable on their own?

Most importantly, limited access to legal recourse is more than a significant barrier to participation in justice. In this context, existing systems will hardly be reorganised in their entirety since necessary changes appear too extensive and complex. And yet, various currents that allow for narrowing down the gaps in access to justice can be identified and even point to possible solutions in some areas:

- a) Creation of a new review mechanism by acknowledgment of the global community, which opens up legal recourse to any party, if necessary with the provision of experts (agents) or advocates-general, so that no party suffers a significant disadvantage.

However, the difficulty of establishing a new (globally acknowledged) jurisdiction can already be read from investment law, where the establishment of a multilateral investment court has been discussed for years or were not successful at all.<sup>128</sup> Due to multi-layered criticism and the exorbitant realisation period, further elaborating this possibility is refrained from in this contribution although the discussion about such a possibility still seems to be ongoing.<sup>129</sup>

<sup>126</sup> A/RES/67/1, *Declaration of the High-Level Meeting of the General Assembly on Rule of Law at the National and International Levels*, para.13.

<sup>127</sup> W. Huck, 'The UN Sustainable Development Goals and the Governance of Global Public Goods: The Quest of Legitimacy' (2021) in M. Iovane, F. Palombino, D. Amoroso, G. Zarra, *The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry*.

<sup>128</sup> P. Sands, *International Environmental Litigation and Its Future* (2019) 32 *U. Rich. L. Rev.*, 1619 (1637 f.), Available at: <http://scholarship.richmond.edu/lawreview/vol32/iss5/7>; J. E. Viñuales, *The Rio Declaration on Environment and Development, A Commentary* (2015), 614; see also P. H. Sand, UNCED and the Development of International Environmental Law (1992) 8 *J Nat Resources & Envtl L*, 209 (217 f.).

<sup>129</sup> International Bar Association (IBA), A. McMillan, *Time for an International Court for the Environment*, 11 December 2019, Available at: <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=71b817c7-8026-48de-8744-50d227954e04>; see also: <http://www.icecoalition.org/>.



- b) Designing new types of court and other public procedures by digitalising them<sup>130</sup> or by creating further individual legal remedies or instruments such as tutelas or as part of PIL. An ongoing discussion about new forms of legal empowerment especially touch upon technology-enabled strategies.<sup>131</sup> At this point, the use of PIL in particular appears to be promising and will be considered as a supportive and broadly applicable instrument in the subsequent section, which as an element external to the sustainable legal system to be developed affects it and coerces it into further improvement.
- c) Identifying the basic difficulties and the basic thrust of the various jurisdictions and applying and invoking them in a strategic development of legal knowledge through case law as means for the determination of legal rules. Since the evaluation of the legal findings of courts is an indispensable source for measuring the functionality of legal systems and crucial for instruments such as PIL, this possibility as an analysis of the application is explored in the following section.
- d) Recognition of informal dispute resolution mechanisms to promote access to justice or to enable it in the first place by linking formal and informal procedures could enhance justice as a whole.<sup>132</sup> Since informal institution-setting is applied in many contexts globally and even is recognised judicially,<sup>133</sup> this possibility will be explored in the section D. II.
- e) The incorporation of the SDGs into instruments of positive law, thus opening up and manifesting justice in further legal channels. In particular, the inclusion in trade and investment agreements could offer opportunities for expanding participation in justice mechanisms. These opportunities of Trade and Sustainable Development chapters in the EU's trade agreements will be explored in more detail in section D. III.

## I. Creating access to justice by using Courts for Sustainability Law-Making?

The concept of sustainability and thus the rationale of the SDGs are reflected in the jurisprudence of various courts, and on different levels of justice with varying degrees of intensity. In addition to different interpretations, the decisions made or the agreements on the termination of proceedings show different impacts, e.g. on national law and its further development. It is particularly noticeable that even judgements with high-profile

<sup>130</sup> Sir Terence Etherton, 'The Universality of the Rule of Law as an International Standard, Lionel Cohen Lecture 2018' (2018), 51(3) *Israel Law Review*, 469 (474).

<sup>131</sup> K. Bergtora Sandvik, The SDGs, access to civil justice, and legal technology (2020) 3 *DevPolicyBlog*, Published on May 18, <https://www.hiil.org/what-we-do/the-justice-accelerator/>; <https://www.hiil.org/projects/>.

<sup>132</sup> S/2004/616, Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004, para. 30.

<sup>133</sup> See e.g.: ECtHR (in applying the *Vilho Eskelinen* test), *Oleksandr Volkov v. Ukraine*, no. 21722/11, 9 January 2013, paras. 88–91, Non judicial bodies are courts if they fulfil judicial functions and offer procedural guarantees required by Article 6 of the ECHR, such as impartiality and independence; ECtHR, *Vilho Eskelinen and Others v. Finland* [GC], no. 63235/00, § 62, ECHR 2007-II.

character show a rather fragile effectiveness as well as different short-term and long-term impacts.

SDGs, which are given a greater positive legal acquis, also seem to have a greater basis for argumentation in court. This is the case, for example, with SDGs 6, 13, 14 and 15, which affect various areas of international environmental law. The judicial interpretations of various global courts can be observed, which is largely independent of the area of law under consideration. For example, the level of social justice is taken into account recurringly and progressively in Latin American jurisprudence and especially in the Inter-American Court of Human Rights (IACtHR),<sup>134</sup> whereas in various domestic courts of the EU,<sup>135</sup> or before the Court of Justice of the European Union (ECJ),<sup>136</sup> it is rather the ecological level of justice that gives seemingly substantial impetus.<sup>137</sup> However, formal procedural requirements frequently lead to a dismissal of the complaint<sup>138</sup> and thus possibly prevent more ground-breaking decisions yet. A further current can be inferred from Indian jurisprudence which clearly and progressively fuels both the social and environmental levels of justice.<sup>139</sup>

These and further currents of judicial processing of the SDGs' contents,<sup>140</sup> the instruments associated with them, and the concept of sustainability are to be welcomed, but raise various questions of how judgments are to be translated into actual measures and secure long-term effects. As one obstacle, the transfer from international into national jurisdictions frequently do not amount to fulfilment or only after heavy constraints and after significant time lapses.<sup>141</sup> Furthermore, contentious proceedings continue to be initiated in many similar cases with following similar decisions. This

<sup>134</sup> See e.g. D. Iglesias Márquez, B. Felipe Pérez and L. Martínez Hernández, *Rethinking Sustainable Development in Terms of Justice: Issues of Theory, Law and Governance* (2019).

<sup>135</sup> See e.g. Dutch Supreme Court, *Urgenda Foundation vs. Netherlands*, ECLI:NL:HR:2019:2007; Tribunal of First Instance, Petition, *VZW Klimaatzaak v Kingdom of Belgium*, Brussels, filed 4 December 2014.

<sup>136</sup> See e.g. ECJ, Case C-164/15, 20.12.2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkschauptmannschaft Gmünd*, ECLI:EU:C:2017:987, paras. 34 f., 90 f.;

<sup>137</sup> See for a broad overview of relevant cases in the area of climate litigation:  
<http://climatecasechart.com/non-us-climate-change-litigation/?cn-reloaded=1>.

<sup>138</sup> See e.g. EuG (General Court of the EU), *Carvalho vs. Parliament and Council*, T-330/18, decision of 8.5.2019, fn. 53.

<sup>139</sup> See as proxy for many more: Supreme Court of India, *Association For Protection Of Democratic Rights & Anr. v. The State Of West Bengal & Ors.*, Special Leave Petition (Civil) No. 25047 of 2018, Order of 25 March 2021; National Green Tribunal, *Court on its own Motion sv State of Himachal Pradesh & Ors. And Abhimanyu Rathor vs. State of H.P. & Ors.*, Judgment of 9 May 2016; see also: Task Force on Justice, *Justice for All – Final Report* (2019), 97.

<sup>140</sup> For deeper insights on these currents see: W. Huck, *The Sustainable Development Goals, An Article-by-Article Commentary* (forthcoming, 2021).

<sup>141</sup> See as an illustration of the lengthiness of the processes and (merely partial) implementation of decisions among countless others: *Case of Kaweri Coffee Plantation Ltd. in Mubende/Uganda* (Civil Suit No. 179 of 2002) at Nakawa High Court (Kampala); Civil Appeal No. 144 of 2013 arising out of H.C. Civil Suit No. 179/2002; Civil Suit No. 2563/2016), after more than 17 years since conviction the case is now pending in mediation; see also: *Pakootas v. Teck Cominco Metals, Ltd. (Pakoota litigation)*, No. 16-35742 (9th Cir. 2018); *Aguas del Tunari v Bolivia* (Water Wars/Cochabamba), ICSID Case No ARB/02/3 and related thereto *Urbaser S.A. and Corsorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26 (8 December 2016).

recurrence is at least thought-provoking: even if judicially pronounced law does have legal effect and thus a steering effect, why then do many such cases continue to be found? Perhaps this may point to an unsustainably designed or malfunctioning legal system.

Another issue deals with the different levels of justice addressed by the SDGs. It is striking, that “economic justice” is not emphasised to any particular extent but is actually and effectively protected by various principles of international and national law. A regular starting level alike, economic justice seems to be involved without having to be raised separately. What does this mean for the other levels of justice? It can be assumed that for those areas in which social justice builds on a human right but is not explicitly anchored in other positive law, might it then have a lesser judicial effect in the cases in question than, for example, contractual law? The same is perceptible in the area of environmental justice.<sup>142</sup>

Knowing about the fundamental positioning of the courts already forms an expression of strategic litigation, e.g. in the choice of court. By using this knowledge, “islands of secure legal governance” could systematically be created and thus condense the legal assessment with each case and contribute to further legal development. Such a trend can already be observed e.g. in environmental law, recognised as judicialization and viewed quite critically due to its fragmenting effect.<sup>143</sup> However, due to procedural requirements this could at best be realised at national levels or if obvious connecting factors allow for a “utilisation” of the respective court.

## II. Implementing Justice through informal Dispute Resolution?

As illustrated before, effective access to independent (impartial) dispute resolution mechanisms is not possible or only to a limited extent in many areas. Even with state mechanisms in place, they may be inaccessible due to their poor design or harmful influences within the state, e.g. corruption, turmoil and other conflicts, and cultural or societal practices. Two factors in particular have a limiting effect on recourse:

1. Absence of (sufficient) financial resources, e.g. to cover court costs, the appointment of legal counsel or training of judicial staff.
2. Restriction of access for natural persons and / or international organisations as representatives of natural persons before international and regional courts, e.g. the ICJ or ECJ.

The inequality of different parties before courts thus remains one of the greatest challenges to effectively implement justice. With SDG 10 and SDG 16.3, a reduction of inequality is addressed but again the indicators are limiting meaning and readiness when

---

<sup>142</sup> This phenomenon can be read e.g. from the well-known *Gabčíkovo-Nagymaros* case where the International Court of Justice (ICJ) gave greater weight to the principle of *pacta sunt servanda* than to environmental protection and emphasised that no deviation from the principles of international law may be made for the purpose of environmental protection, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, 25 September 1997, paras. 140–142).

<sup>143</sup> J. E. Viñuales, *The Rio Declaration on Environment and Development, A Commentary* (2015), 612-614.

it is merely the amount of people having “experienced a dispute in the past two years and who accessed a formal or informal dispute resolution mechanism” is measured which does not indicate the extent to which judgments could be realised.

A strengthening of formal mechanisms in many places is not sufficient to ensure participation for all.<sup>144</sup> Adding informal mechanisms creates another level of access to justice. Informal (institutional and procedural) settings can range from the establishment of national human rights commissions<sup>145</sup> with a quasi-judicial character to an individual arbitrator of disputes, for example in the form of a local village elder who decides on a dispute of villagers. The adequate linkage of both systems with each other is indispensable<sup>146</sup> in order to ensure true legal empowerment and achieve the broad approach needed to move forward in implementing SDG 16.<sup>147</sup>

Informal justice mechanisms release and extend existing legal systems, which then can be developed or adapted by the time it needs to grow sustainably. The creation of centralised judicial institutions and functions, and also their legitimacy and recognition in localised conditions could thus be supported. Initial positive approaches have been noted<sup>148</sup> but providing access to justice in some places, e.g. in the Central African region, particularly outside the larger cities, remains fraught with considerable uncertainties, and also affects women to a higher degree.<sup>149</sup> Social preconceptions, biases and gender stereotypes continue to exist and coin the informal settlement of disputes. In many places, these discriminating beliefs are then quasi-legitimised when linked to formal legal systems. As a two-bladed sword, it needs the recognition of the underlying values of the SDGs, and the precise design of the interlinkage of formal and informal justice systems

---

<sup>144</sup> United Nations. The rule of law and transitional justice in conflict and post conflict societies, UN Security Council, S/2004/616 (2004), para. 7; See also, Human Rights Committee, *General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties, and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (General Assembly resolution 60/147 of 16 December 2005, annex)] and A/HRC/17/30, *Report of the Special Rapporteur on the independence of judges and lawyers* (2011).

<sup>145</sup> Successful human rights mechanisms have already been implemented in Afghanistan, Rwanda, Colombia, Indonesia, Nepal, Sri Lanka and Uganda, and with regard to war crimes in the form of ad hoc tribunals in former Yugoslavia, Rwanda, Burundi and Timor-Leste; UN, *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004, S/2004/616, para. 30.

<sup>146</sup> A/RES/67/1, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, 30 November 2012, para. 15; see also UN, *Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004, S/2004/616, para. 35 f.

<sup>147</sup> UN WOMEN, Fact Sheet on the importance of women’s access to justice and family law, 2, <https://www.unssc.org/sites/unssc.org/files/UNWomenFactSheet.pdf>.

<sup>148</sup> UNDP/UN Women/UNFPA/ESCWA, *Gender Justice & Equality before the law, Analysis of Progress and Challenges in the Arab States Region* (2019), 17 ff.; Task Force on Justice, *Justice for All – Final Report*. (New York: Center on International Cooperation, 2019), 97-99, available at <https://www.justice.sdg16.plus/>; broad country-specific overview: WJP-A2J-2019.pdf; [worldjusticeproject.org](http://worldjusticeproject.org).

<sup>149</sup> World Bank Group, *Understanding Access To Justice And Conflict Resolution at the local level in the Local Level In The Central African Republic (CAR)* (2012), Social Cohesion and Violence Prevention Team, Social Development Department, 10.

to allow for a supportive instrument for legal empowerment for all<sup>150</sup> and not merely being an erosion of reliable legal systems.

For granting open public justice, significant analytical work has been done by the OECD and the World Justice Project which as a proxy for many other efforts, point to a distinct indication: the opening up of justice systems should be understood as an enrichment rather than a blurring.<sup>151</sup> Programmes that raise awareness and increase legal knowledge, as well as special training on gender or minority issues for the judiciary and law enforcement officers, guidelines or protocols, e.g. for responding to violence against women are indispensable.<sup>152</sup> More precise indicators that reflect the legal needs of a society not just in a criminal context, as well as monitoring already help realise these efforts. However, it is hardly understandable why the proposed indicator for the civil justice sector was not adopted in the last amendment of the GIF. If one considers the costs of not maintaining access to justice<sup>153</sup> in the broad sense though being demanded by the SDGs, the difficulty of data collection seems much worth it.

### III. Implementing Justice through Trade and Sustainable Development Chapters in EU Trade Agreements

Since 2009, the inclusion of so-called Trade and Sustainable Development Chapters (TSD) in European trade agreements has been influencing the sustainable development of the European Union (EU) and its international partners. The EU therefore has started to commence with the reconciling of two historically separated paths (international law and human rights law) towards a more balanced international trade.<sup>154</sup> The TSDs, which clearly refer to the SDGs since their existence,<sup>155</sup> aim at building bridges to all stakeholders of the SDGs and establishing stable and secure (economic) relations that mirror EU values and thus the principle of sustainability. By including social and environmental standards trade and investment shall be directed to contribute to sustainable development.<sup>156</sup>

The TSDs embrace manifold references to principles of international law such as the principle of precaution and non-discrimination and moreover, make reference to international or multilateral agreed instruments such as UN Convention on the Law of the Seas (UNCLOS), UN Framework Convention on Climate Change (UNFCCC), the ILO Conventions, the Convention on Biological Diversity (CBD), Convention on International Trade in Endangered Species (CITES) and the different connected, partly

---

<sup>150</sup> S. Maranlou (ed), *Access to Justice in Iran: Women, Perceptions, and Reality* (2014), 123–154.

<sup>151</sup> A2J-RT-Session-notes-May-2017.pdf (oecd.org).

<sup>152</sup> UN Women, *Progress of the World's Women 2019-2020, Families In A Changing World* (2019), 197.

<sup>153</sup> Task Force on Justice, *Justice for All – Final Report*. (New York: Center on International Cooperation, 2019), available at <https://www.justice.sdg16.plus/>, 44.

<sup>154</sup> W. Huck, *The Sustainable Development Goals, An Article-by-Article Commentary* (forthcoming, 2021).

<sup>155</sup> The EU has recognised the Global Agenda 2030 and the SDGs as its political guideline for all its policies. The principle of sustainable development thereby is anchored in Art. 3(3) sent. 2, Art. 3(5) sent. 2 Treaty on European Union (TEU) and in Art. 11 Treaty on the functioning of the European Union (TFEU) for the cross-sectional subject of environmental protection.

<sup>156</sup> See e.g. EU-Vietnam Free Trade Agreement, Art. 13.1.1.

voluntary instruments. However, the language used in the TSDs<sup>157</sup> suggests a shared orientation and commitment to a long-lasting relationship rather than an actual legal submission of the parties under the specific agreement. It is all the more remarkable that these chapters create different approaches to access to justice themselves. With the means of joint capacity building, the contracting parties are required to establish a review mechanism as well as institutions that are conducive to the implementation of the TSD contents. Moreover, a (newly) created conflict resolution mechanism provides access to justice in the sense that the demanded TSD standards are opened up to review, notably in an original source of international law. Though the substantive sphere of trade is explicitly excluded from these TSD and only opened to the contracting parties (states),<sup>158</sup> and even in more recent EU FTAs only “trade-related aspects of sustainable development” are to be addressed with this mechanism, it nevertheless indicates a clear orientation towards an adjustment of EU trade partnerships, particularly in view of the size and regional scope of some of the agreements. International trade and services thus could grow in a sense of human and global value-oriented business rather than to reach the shimmery and opaque horizon of mere prosperity (for all?).<sup>159</sup>

The quite controversially discussed<sup>160</sup> cooperative approach relies on dialogue and governmental consultations and, if the disagreement cannot be solved, the establishment of a Panel of Experts. The reports and recommendations of these panels can be drafted with direct reference to other internationally recognised human and environmental rights instruments, such as the ILO Labour Standards or relevant multilateral environmental agreements. However, without joint recognition and implementation of the solutions found, these are not enforceable *per se*. Moreover, other stimulating influences such as pressure built up by the participatory public, will presumably be absent since information on conflicts and decisions needs not to be made publicly accessible if the parties concerned agree so.<sup>161</sup> This exposes at least three issues: Trade concerns are not covered by the conflict resolution mechanism at all. Yet, it seems questionable how a regulation could look like that deals with the sustainability of a trade agreement, but not with the core of the agreement itself, i.e. trade. In addition, since it is mostly companies and organisations that engage in trade under the guise of the agreement and not governments, it seems doubtful if this instrument will be applied. Whether governments will complicate and increase the costs of contractual obligations of their economic drivers in favour of sustainable values is not clear by now but may depend on the state of prosperity within a state. Moreover, it follows from the wording of the TSDs, that non-compliance does not jeopardise the validity of the contract itself which means the principle *pacta sunt*

---

<sup>157</sup> TSD Chapters use terms such as “make continued and sustained efforts”, “consider the ratification of other conventions”, “encourage”, “promote”, “enhance”.

<sup>158</sup> The areas of the agreements outside the TSD include a regular dispute settlement mechanism, to which, however, disputes about the contents of the TSD are not amenable.

<sup>159</sup> W. Huck, *The Sustainable Development Goals, An Article-by-Article Commentary* (forthcoming, 2021).

<sup>160</sup> L. van den Putte and S. Velluti, ‘The promotion of social trade by the European Union in its external trade relations’ in S. and M. García Korana, *Handbook on the EU and International Trade* (2018), 233 f.

<sup>161</sup> See e.g. EU-Vietnam Free Trade Agreement, Art. 13.16.6 and Art. 13.17.8.

*servanda* is not affected by an infringement of the TSD.<sup>162</sup> Moreover, there is a risk that this mechanism, which has so far not been used in a way ascertainable to the public, would only be used behind closed doors, thus opening the floodgates to lack of transparency.

It results that a quasi-judicial mechanism has been created which, although enhancing especially social and environmental justice, presumably means at best a minor change of a subordinate role.<sup>163</sup> A (traceable) application of this mechanism will show whether meaningful and ready access to justice has been created. Although such an interlocking with legal structures is to be welcomed, this appears to be a concept that is not burgeoning enough. An alignment of the EU TSD with, for example, US agreements, which do not separate the substantive matter and in which such standards are seen as inherent to trade, seems more expedient at the moment.<sup>164</sup>

#### IV. Giving Justice to Mother Nature

The provision of rights that do not directly relate to human beings, but rather endow nature itself with rights, or at least accept them as true and grant it legal standing,<sup>165</sup> is not a new phenomenon.<sup>166</sup> What is significant, however, is the rapid increase in the frequency with which these possibilities are being exercised, both through an adaptation of legislative outcomes and through increased consideration within jurisprudence.<sup>167</sup> Not least, their strategic analysis and adapted use of strategic public interest litigations (PIL) has led to significant impetus, especially in climate change litigation.

At the same time, it remains difficult in many cases, especially in the area of procedural and administrative access, to place claims at all or to achieve the desired success.<sup>168</sup> Nevertheless, changes can be observed worldwide<sup>169</sup> that continue to trigger the common thrust on environmental justice. The SDGs and their rationale provide a sound basis for legal reasoning and are increasingly finding their way into policies,

---

<sup>162</sup> See e.g. EU-Vietnam Free Trade Agreement, Art. 13.16.4 and 13.17.9.

<sup>163</sup> R. Nash, 'Financing Access to Justice: Innovating Possibilities to Promote Access for All' (2013), 5 *Hague Journal on the Rule of Law*, 96 (106):

<sup>164</sup> See L. van den Putte and S. Velluti, „The promotion of social trade by the European Union in its external trade relations“ in S. Korana, María García, *Handbook on the EU and International Trade* (2018), 225 f.; <https://crsreports.congress.gov/product/pdf/IF/IF10046>; Sam Lowe, The EU should reconsider its approach to trade and sustainable development, Centre for European Reform, Insight, 31 October 2019; <https://crsreports.congress.gov/product/pdf/IF/IF10972>.

<sup>165</sup> E.g. Supreme Court Of The United States, *Sierra Club v. Morton*, Sec. Int. No. 70-34, 405 U.S. 727, Argued 17 November 1971, Decided 19 April 1972, Dissenting Opinion of Judge William O. Douglas.

<sup>166</sup> See as a very well-known illustration: ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Vice-President Christopher Gregory Weeramantry to the Judgment of 25 September 1997.

<sup>167</sup> See for a recent overview: UN, Harmony with Nature, Rights of Nature Law, Policy and Education, <http://www.harmonywithnatureun.org/rightsOfNature/>.

<sup>168</sup> See UN Environment, The Status Of Climate Change Litigation, A Global Review (UNEP 2017).

<sup>169</sup> See e.g. El País, El municipio de Los Alcázares aprueba una iniciativa legislativa para dar derechos propios al Mar Menor, 23 July 2020, Available at: <https://elpais.com/sociedad/2020-07-23/el-municipio-de-los-alczares-aprueba-una-iniciativa-legislativa-para-dar-derechos-propios-al-mar-menor.html>.

legislative action plans<sup>170</sup> and international agreements. As a result, national legislation is being adapted and review mechanisms are being implemented,<sup>171</sup> and thus expand access to justice.

More recently, another instrument could soon amplify access to environmental. The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) was concluded on 4 March 2018 and should build a new regional consensus with direct reference to the SDGs. Despite being of legally non-binding nature, the Escazú Agreement grants various procedural rights, such as broad active legal standing in defence of the environment (in accordance with domestic legislation); the possibility of ordering precautionary and interim measures, inter alia, to prevent, halt, mitigate or rehabilitate damage to the environment; and the reversal of the burden of proof and the dynamic burden of proof, Art. 8 (3) (b)-(e) and allows any other form of decision-making besides the ICJ, Art. 8. Moreover, competent state entities with access to expertise in environmental matters should be established to publicize means to the right of access to justice and the procedures to ensure its effectiveness, Art. 8 (4). The Escazú Agreement has entered into force on 22 April 2021, thus becoming a unique instrument granting access to justice for the purpose of “the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development” in addition to international and regional protection instruments.<sup>172</sup>

Increasingly, the substantial linkage between environmental matters and human rights is also being reflected in jurisprudence and provides an outlook on future findings in jurisprudence and the further development of law.<sup>173</sup> At the same time, tendencies to reduce procedural obstacles can be observed, e.g. by extending legal standing for individuals and organisations<sup>174</sup> or, in the case of regional entities, by the mandatory establishment of review mechanisms, even if these are not provided for in national law itself.<sup>175</sup>

These tendencies cannot, however, hide the fact that access to justice in environmental matters often remains tough and often fruitless. Larger studies show very

<sup>170</sup> Examples include the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention); EU New Green Deal; EU New Industrial Strategy.

<sup>171</sup> E.g. Aarhus Convention Compliance Committee (ACCC); Indian Environmental Court, further reading: G. Nain Gill, ‘Mapping the Power Struggles of the National Green Tribunal of India: The Rise and Fall?’ (2020) 7 *Asian Journal of Law and Society*, 85–126.

<sup>172</sup> M. C. Cordonier Segger and A. Harrington, ‘Environment and Sustainable Development’ in S. Chesterman and D. Malone and S. Villalpando, *The Oxford Handbook of United Nations Treaties* (2019), 204-216, 223.

<sup>173</sup> For deeper insights see: W. Huck, *The Sustainable Development Goals, An Article-by-Article Commentary* (forthcoming, 2021).

<sup>174</sup> ECJ, Case C-164/15, 20.12.2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:987, paras. 34 f., 90 f.

<sup>175</sup> ECJ, Joined Cases, C-128/09 to C-131/09, C-134/09 and C-135/09, ECLI:EU:C:2011:667, *Antoine Boxus, Willy Roua, Guido Durlet and Others, Paul Fastrez, Henriette Fastrez, Philippe Daras, Association des rive-rains et habitants des communes proches de l’aéroport BSCA (Brussels South Charleroi Airport) (ARACH), Bernard Page, Léon L’Hoir, Nadine Dartois v. Région wallonne (Boxus v. Région wallonne)*, Judgement, 18.10.2011, paras. 49–57.



clearly that too often, either legal standing is not given or the legal quality of “Mother Nature” is still not considered sufficient to endow her with independent, resilient rights.<sup>176</sup> SDG 16 and its reference to access to justice for all cannot be deemed capable of generating independent access to justice, even when drawing on all other relevant SDGs and the associated instruments. The (no longer too distant) view into the future will hopefully teach us better.

## E. Overcoming Deviations?

According to the analysis so far, access to justice in the light of the SDGs presents itself as a fragmentary concept that can hardly be assigned a universal basic structure. For this concept to have effectiveness, it is firstly necessary to discuss and clarify SDG 16 from a legal perspective. The uncovering of a normative core could then create a basic consensus. This clarification is essential to establish review mechanisms that can withstand (political, legal and cultural) regional and national conditions. Transparent monitoring and tight linkage to reliable indicators is demanded by the Global Agenda 2030 as key for decision-making<sup>177</sup> and needs to be refined and should also be coordinated with the review processes of other multilateral agreements that touch on the SDGs’ contents. The (legal) meaning of SDG visions, targets and their specific indicators need to be aligned with globally effective, legitimate indicators, in turn supported by regional and national indicators. Insofar results of measurement suggest that sub-targets are not achieved,<sup>178</sup> this must be understood as an indication of non-compliance with resilient standards and consequently must allow for the opening of (judicial) remedies. Thus, the processing of the review results eventually leads to a genuine linking of (legally relevant) contents of the SDGs and legal systems as such. The SDGs would thus directly support the respective legal systems in their functional review.

This approach might be accommodated by locating a (judicial) review at e.g. ECOSOC<sup>179</sup> as a main body of the UN, since they already promote the infrastructure for creating and advocating for global solutions in many of the cross-cutting issues the concept of access to justice is struggling about. Recent discussions on the establishment

---

<sup>176</sup> See e.g. S. Biggs, T. B. K. Goldtooth and O. Orielle Lake, *Rights of Nature & Mother Earth: Rights-based law for Systemic Change* (2017); P. Sólón, ‘The Rights Of Mother Earth’ in V. Satgar, *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives* (2018), 107-130; European Parliament, Study requested by the JURI committee, J. Darpö, *Can Nature Get it Right?, A Study on Rights of Nature in the European Context* (2021)

<sup>177</sup> A/RES/70/1, paras. 48, 72.

<sup>178</sup> See for countries’ reports on SDG achievement: <https://dashboards.sdindex.org/rankings>.

<sup>179</sup> Joint work with, among others, the HLPF as (subordinate) body in the global review processes is manifested in detail in the Global Agenda. Data, figures and processes are established and could provide tangible support. Further support in national coordination could be called upon on the basis of the United Nations Convention against Corruption, see A/RES/70/1, paras. 82-90; A/RES/58/4, Art. 5(3), (4) and Art. 6.

of international organisations or sub-organisations point to possible solutions to build the mandate needed.<sup>180</sup>

Another imaginable solution could be to include a representative for sustainable development in the respective (already existing) judicial procedures, in so that similar to a lay judge, the representative would be given weight in reaching a decision. Judicial outcomes would thus be formulated mandatorily under consideration of the SDG's targets or at least of its rationale. However, the extent to which jurisdictions and dispute settlement bodies<sup>181</sup> will open up to such an approach is beset with clear doubts and also fails to solve the fundamental dilemma of lacking judicial review mechanisms in many situations. Besides, a complementary input at a softer level is needed as well. Awareness of the most yawning gaps needs to be raised and to be transparently communicated concerning the extent to which they hinder access to justice, the areas they touch and the challenges they may be subject to.

With the means of education and financing the gaping holes of access to justice can be narrowed down. Legal aid programmes as “a vital means”<sup>182</sup> provide teaching not only for police, but to lawyers, prosecutors, judges and prison officers as well<sup>183</sup> and could be a first step to achieve attention to this uneven field. In breaking down the complex and for many people overwhelming legal systems and formal processes, legal aid helps “to understand and exercise [peoples] rights and can help to address the root causes of exclusion and systemic biases”.<sup>184</sup>

Additionally, legal needs surveys offer a broadly applicable extension of the measurement tools used so far. They give further information on which areas of a legal system are in most urgent need of revision and thus be used as a governance tool for steering the emergence of law. Nevertheless, their collection and evaluation is associated with considerable effort and cannot be used universally without further ado which is not in line with the still insufficient capacities in many places for providing legal aid and other recognised good practices.<sup>185</sup> The UN supports the design,<sup>186</sup> implementation and

---

<sup>180</sup> G. Droesse, *Membership in International Organizations, Paradigms of Membership Structures, Legal Implications of Membership and the Concept of International Organization* (2020).

<sup>181</sup> This refers to those dispute resolution mechanisms that are not established under EU FTA for the purpose of realising SD.

<sup>182</sup> UNODC, UNDP, *Global Study on Legal Aid, Global Report* (2016), 8.

<sup>183</sup> [https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice\\_PN\\_En.pdf](https://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf).

<sup>184</sup> UNDP, P. Keuleers, *Access to justice for all, An enabler of the 2030 Agenda and essential for Leaving No One Behind* (2018), Available at: <https://www.undp.org/content/undp/en/home/blog/2018/access-to-justice-for-all.html>.

<sup>185</sup> A/RES/67/187, *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, Annex, para. 5.

<sup>186</sup> UNODC, *Model Law On Legal Aid In Criminal Justice Systems With Commentaries*; UNODC, *Handbook on Ensuring Quality of Legal Aid Services in Criminal Justice Processes: Practical Guidance and Promising Practices*; UNODC, UNDP, *Handbook on Early access to legal aid in criminal justice processes*; UNICEF, UNDP, UNODC, *Child Friendly Legal Aid in Africa*; UNODC, *Handbook on Access to Legal Aid in Africa*.

measurement<sup>187</sup> of legal aid programmes,<sup>188</sup> but without direct alignment with the purposes of the SDGs.<sup>189</sup> Efforts to enhance legal aid exist but are not directly attributable to SDG funding,<sup>190</sup> which excludes in particular the poorest countries and with it “the poor, the marginalized, and the disadvantaged”<sup>191</sup> people from this development process. All the more, against the backdrop of the current global health crisis, financial resources seem to be needed elsewhere. But here, too, the inherent connection between security, peace and health plays a decisive role.<sup>192</sup>

## F. Conclusion

The purpose of this paper has been to illustrate in which areas and to what extent access to justice is available, what obstacles exist to its implementation and how the Global Agenda 2030 and the SDGs provide further impetus for participation.

In accordance with the very nature of law, it is the different contexts of life’s realities that determine the success or failure when applying the concept of access to justice. Only when law and regulation become *de facto* applicable, they unfold their genuine protective effect. Affirming that, the analysis of the substantive meaning of SDG 16 showed that a fixed, universally valid definition of justice is not feasible due to its contextual implementation. Rather, the inner function of SDG 16 to provide access to justice thus forms a *conditio sine qua non* for the realisation of sustainable development and thus enables all other SDGs. In contrast, the structure and indicators of SDG 16 showed a restrictive framing, merely concentrating on criminal justice. Access to justice in this narrow meaning lacks effectiveness, cannot withstand the markedly broader, at least adaptable interpretation of its legal meaning which is demanded from the Global Agenda 2030 and the instruments and principles associated with it. The comparison of SDG 16 contents’ then revealed formal and substantive gaps.

The restriction of targets to criminal law with the simultaneous omission of civil and public law marginalizes numerous important areas of law and thus also omits those of the Global Agenda 2030. How is empowerment for women and girls supposed to work if there is no remedy in the workplace through independent civil courts? How can we fight for biodiversity, against hunger and for clean drinking water, if not before independent and competent courts, which are responsible for public law? In addition, there are indicators that only to a small extent correspond to the targets of the goals, as in the case of SDG 16. After all, the task of the indicators is precisely to make a

---

<sup>187</sup> UNODC, UNDP, Global Study on Legal Aid, Global Report (2016).

<sup>188</sup> UNODC, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013).

<sup>189</sup> See e.g.: <https://sustainabledevelopment.un.org/partnership/?p=35414>.

<sup>190</sup> See e.g.: <https://sustainabledevelopment.un.org/partnership/?p=35414>.

<sup>191</sup> <https://www.unodc.org/unodc/en/justice-and-prison-reform/legal-aid.html>.

<sup>192</sup> UNODC, Guidance Note, Ensuring Access to Justice in the Context of COVID-19, 6 f., 34, 38.

measurement, the result of which can be the basis for an adjustment of a policy that integrates the SDGs in a country better than before. If, however, there is no agreement or only a limited one, as is the case with SDG 16 (only criminal law), then the results of a measurement do not provide a suitable basis for political decisions, but rather contribute to decisions either not being made or being steered in the wrong direction. It is precisely this (too) narrow framing of criminal justice and its indicators in the substantive scope of SDG 16.3 that does not stand up to the actual meaning of justice and fair access to justice. The instruments and principles associated with the Global Agenda 2030 also call for a legal interpretation of access to justice.

All gaps pointed to two aspects in particular that fundamentally prevent successful access to justice: First, lacking knowledge about existing rights and how to enforce them, or the insufficient awareness often prevailing within the justice systems occurs in many parts of the world. Most often this disproportionately affects children and women. Second, the financial realisation of access to justice still lacks capacity. Legal aid, counselling or litigation assistance are not sufficiently available due to insufficient (state) capacities or irrevocably manifested poverty excluding whole segments of a population, without being averted by social safety nets. Informal justice systems could help overcome many of the issues identified and provide special assistance. Thus, especially neglected groups would be supported in gaining access to justice. However, it remains essential that these informal systems enable fair access to justice and must not encourage the denial of legal protection, especially to women and girls. These systems must not entrench the separation of access before the courts. Otherwise, the acknowledgment and linking of these with formal legal systems could bear the risk of creating parallel justice the externality costs of which cannot even be estimated today. It needs comprehensive knowledge about the downfalls and challenges, possibly supported by legal aid programmes, to indeed enhance an effective access to justice for all. And yet it is still not clear what works the best in already weak pluralistic legal systems. Driven by the idea of creating peaceful societies and leaving no one behind, informal justice mechanisms are an indispensable part of providing access to justice when they meet the requirements of fairness, competence and independence and that the validity of decisions remains subject to judicial review in certain cases.

Further research remains in particular in the area of procedural design: How could an effective nexus of formal and informal justice mechanisms genuinely work? How should the link to normative review processes be designed? Which legal consequences are connected with the empowerment to take legal action? Who should be entitled to do so and before which forum? And who then is the duty addressee? Ultimately, we are still left with the major question of how to overcome the alternation of a social and environmental access to justice and how to reconcile them. The SDGs in any case demand an integrative approach. The distinct regional differences in emphasis must be reconciled at least in a common basic understanding.

What remains is the understanding that SDG 16 has been recognised as a *conditio sine qua non* for all emanations of sustainable development, which cannot be achieved at a national, interregional, transnational or international level without complying with the *rule of law*. The Global Agenda 2030 and the SDGs are the starting point for the

necessary links to implement access to justice. As yet, not every mother can invoke the safety of drinking water in court. Also displaced persons and even less “Mother Earth” have so far had sufficient chances to assert “their” rights. The potential of SDG 16, certainly, has begun to become discernible, almost tangible. The near future will open up further ways of accessing areas of law in the light of the SDGs and create true foundations for a broader legal connection. The first foot is in the door, allowing a glimpse of further ridges.