Chapter 12
The Law of Sustainability

Mauro Bussani

Introduction

Inasmuch as keeping the world sustainable requires continuous commitments and substantial changes in human behavior, law is, and should be, a central concern for any sustainability-oriented initiative. Yet, in spite of the unavoidable centrality of law for any program seriously aiming to reorient and curb human activities, the legal architecture that is currently being built around the concept of sustainability is extremely thin and soft. As it happens with other Western-driven fights against global 'obvious evils' (such as poverty, human rights violations, and war), beneath broad and vague formulas about sustainability deep disagreements lie about what sustainability means, which obligations can be derived from it, who should be bound by these obligations, and for benefit of whom. To be sure, these disagreements account for the absence of clear rules and effective enforcement mechanisms for international sustainability commitments, as well as for the widespread reliance on pseudoquantitative assessments for 'measuring' sustainable behavior. But the point is that institutional and mainstream debates keep tapping into a functionally narrow view of the law that matters, and an even more limited awareness of the legal diversity of the world.

In the pages that follow, section "The Legal Framework on Sustainability" will sketch out the main features of current legal architectures and narrations on sustainability, delving in particular into the quest for development (section "Introduction"), the fight against climate change and efforts to advance corporate social responsibility (section "The Legal Framework on Sustainability"). Section Enforcing Sustainable Obligations from Below" will shed light on the potential opened up by some alternative paths. Section "Quantifying the Law? De-quantifying the SDGs?" will

M. Bussani (✉)
IUSLIT Department, University of Trieste, Trieste, Italy
e-mail: mauro.bussani@units.it

Faculty of Law, University of Macau, S.A.R. of the P. R. of China, Macau, People's Republic of China

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provide some illustrations of how quantitative approaches are deployed in the legal field. Section "The Dark Side of Numbers" will elaborate on the limitations and challenges of commensuration in the social world, while section "What Law?" will explore what quantitative techniques employed in the legal sector often miss. Section "What to Do?" will set up a tentative agenda for the activities of the Trieste Laboratory on Quantitative Sustainability (TLQS) inasmuch as the law is concerned.

The Legal Framework on Sustainability

There is no international treaty imposing legal obligations on state parties as far as sustainability is concerned. The closest document to a treaty is the Rio Declaration on Environment and Development adopted in 1992 by the General Assembly of the United Nations (UN), which however is a mere declaration[1]—in legal terms, it gives voice to an agreement upon standards but is not legally binding. As a consequence, notwithstanding that several international bodies—from the General Assembly itself to the United Nations Environment Programme (UNEP) to the United Nations Development Programme (UNDP)—cooperate and work with states and non-state actors on sustainability-related issues, there is no international agency entrusted with monitoring and enforcement powers.

Lacking an agreement on the creation of stronger legal regimes, contemporary legal debates and practices about sustainability have largely pursued other, less politically sensitive paths. These paths do not try to impose burdens on unwilling state and non-state actors, but rather attempt to engage these actors in quantitative initiatives, requiring them to keep track and monitor the effects of their sustainable-oriented activities. Measuring processes and outcomes have thus become the preferred mode of intervention in the field, insofar as they enable the mediatization of the sustainability discourse through a variety of actors, while leaving the latter substantial freedom as to what to do and how.

The UN Development Goals

The UN General Assembly embraced this approach in its 2001 'Millennium Declaration'[2] and the related 'Millennium Development Goals' indicators (MDGs).[3] The

[1] United Nations General Assembly, Report of the United Nations Conference on Environment and Development, on 12 August 1992, A/CONF.151/26 (Vol. I), at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf.

[2] United Nations General Assembly, United Nations Millennium Declaration, A/RES/55/2, on 18 September 2000, at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/559/51/PDF/N0055951.pdf?OpenElement.

[3] See the website https://mdgs.un.org/unsd/mdg/default.aspx.

same approach has later been confirmed by the Declaration on the '2030 Agenda for Sustainable Development'[4] and the related 'Sustainable Development Goals' indicators (SDGs).[5] The latter contain a few indicators that are clearly centered on legal matters, asking for statistics and data about the percentage of population enjoying this or that right, as well as the rate of progress in the implementation of selected sustainable-oriented rules and institutions.[6] But the legal potential of the SDGs goes, theoretically at least, well beyond the small number of indicators focusing on strictly legal features. In principle, the entire set of the SDGs actually aims to shape practices and promote legal change by inviting international agencies and states to collect data and by exposing states to the pressure of attaining benchmarks and competing with their peers.[7]

All this can be seen as a far-reaching nudging strategy, trying to drive 'sustainable' behaviors by the concerned actors and 'sustainable' decision-making by governments and public authorities.[8] But nudges may only work in legal environments where there are strong gate-keepers and law enforcement agencies suitable to ultimately make right undesirable actions and outcomes.[9] In the sustainability field, this not the case.

Climate and Corporations

The features just highlighted—the lack of hard rules and especially the absence of enforcement mechanisms, which are then filled by the more or less voluntary

[4] United Nations General Assembly, Resolution adopted by the General Assembly on 21 October 2015, A/RES/70/1, at https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

[5] United Nations General Assembly, Resolution adopted by the General Assembly on 6 July 2017, A/RES/71/313, at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/207/63/PDF/N1720763.pdf?OpenElement.

[6] See for instance indicators 1.4.2, 5.1.1, 5.6.2, 5.a.1, 5.a.2, 12.6.1, 12.7.1, 14.6.1, 14.b.1, 14.c.1, 15.6.1, 15.8.1, 16.10.2; see also below, section "Quantifying the Law? De-quantifying the SDGs?".

[7] See Ruth Buchanan, Kimberley Byers, Kristina Mansveld, "What gets measured gets done": exploring the social construction of globalized knowledge for development, in Moshe Hirsch and Andrew Lang (eds.), Research Handbook on the Sociology of International Law, EE, 2018, 101–121; Sharmila Murthy, Translating Legal Norms into Quantitative Indicators: Lessons from the Global Water, Sanitation, and Hygiene Sector, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 385–446 (2018); Sakiko Fukuda-Parr, Alicia Ely Yamin, Joshua Greenstein, The Power of Numbers: A Critical Review of the Millennium Development Goal Targets for Human Development and Human Rights, 15 Journal of Human Development and Capabilities 105–117 (2014); Kerry Rittich, Governing by Measuring, in Hélène Ruiz Fabri, Rudiger Wolfrum, Jana Gogolin (eds.), Selected Proceedings of the European Society of International Law, Hart, 2010, 463–487.

[8] Richard Thaler and Cass Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness, Penguin Books, 2008; Cass Sunstein, Why Nudge?: The Politics of Libertarian Paternalism, Yale University Press, 2014; Cass Sunstein, The Ethics of Influence: Government in the Age of Behavioral Science, CUP, 2016.

[9] See e.g. Robert Lepenies and Magdalena Małecka, Magdalena, The Institutional Consequences of Nudging—Nudges, Politics, and the Law, 6 Review of Philosophy and Psychology 427–437 (2015); Alberto Alemanno and Alessandro Spina, Nudging legally: On the checks and balances of behavioral regulation, 12(2) International Journal of Constitutional Law 429–456 (2014).

imposition of some limited and quantifiable targets and of reporting obligations—are common to many other global initiatives for the 'good' of the planet.

This corresponds, for instance, to the dominant legal approach in the fight against climate change. As is well-known, the Kyoto Protocol to the United Nations Framework Convention on Climate Change of 1997, as amended in 2012, sets forth minimal quantified emission limitation and reduction commitments for states parties.[10] The Paris Agreement and subsequent international compacts require state parties to undertake and communicate to the international community their 'ambitious efforts' for limiting the increase of the global average temperature.[11] None of these texts provides for a mechanism to hold parties to their promises or to sanction their inactivity.[12]

Along similar lines, the instruments addressing the sustainability obligations of multinational companies basically focus on the so-called corporate social responsibility (CSR), to be meant as the voluntary adherence to systems of self- or external assessment of companies' compliance with legal, social and environmental standards.[13] In this regard, suffice it to mention: the Global Reporting Initiative (GRI), a program led by a non-governmental organization that rewards companies which submit reports about their sustainable activities[14]; the United Nations

[10] See Kyoto Protocol to the United Nations Framework Convention on Climate Change, FCCC/CP/1997/L.7/Add.1, of 10 December 1997, at https://unfccc.int/sites/default/files/resource/docs/cop3/l07a01.pdf; Doha Amendment to the Kyoto Protocol, of 8 December 2012, at https://treaties.un.org/doc/Publication/CN/2012/CN.718.2012-Eng.pdf.

[11] Paris Agreement, of 12 December 2015, at https://unfccc.int/sites/default/files/english_paris_agreement.pdf; Conference of the Parties serving as the meeting of the Parties to the Paris Agreement, Glasgow Climate Pact, FCCC/PA/CMA/2021/10/Add.1, of 13 November 2021, https://unfccc.int/sites/default/files/resource/cma2021_10_add1_adv.pdf.

[12] Regional initiatives—such as the ones adopted by the EU, which set up in 2005 the world's first international emissions trading system, and now aims to become climate-neutral by 2050 (see Regulation (EU) 2021/1119 establishing the framework for achieving climate neutrality)—may have an impact on the concerned slice of the planet—and on those willing or forced to follow suit. But before global challenges, they remain size-limited achievements.

[13] Domestic and supranational legislation exist in this respect too, especially in Europe. EU Member States have for instance enacted legislation to comply with the Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (recently amended by the Directive (EU) 2022/2464 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting), according to which largest companies should publish annual reports assessing the adverse impacts of their activities. More recently, the Commission of the European Union has issued a proposal for a CSR directive that would require companies to perform due diligence as to identify, prevent and remedy to adverse human rights and environmental impacts (European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 22 February 2022, COM/2022/71 final, at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071). The Commission also announced a Sustainable Finance Strategy (COM(2021) 390 final) highlighting the need to include a better integration of environmental, social and governance (ESG) risks into the EU legal framework. The local/global mismatch of these initiatives is the same as pointed out in the previous footnote.

[14] See https://www.globalreporting.org.

Global Compact, that similarly relies on companies' declared respect for sustainability principles[15]; the standards developed by the International Organization for Standardisation (ISO), with the aim to certify the quality of companies and cities' environmental management and social responsibility.[16] Again, instruments of this kind do not impose obligations whose lack of performance exposes the obligor to liability; rather, they impose duties to assess, monitor, and document efforts towards sustainability.

These are simple illustrations of the mainstream legal approach to sustainability. They might be seen as the result of a conscious design choices that keep the (r)evolutionary potential of the notion of sustainability under control while promoting it with minimal challenges to the status quo. But they certainly are part and parcel of a more general shift towards the governance of the world through commensuration. It is a process that started five centuries ago[17] and has exponentially grown in the recent decades hand in hand with the ability to reap and treat large amounts of information. It is therefore of the utmost importance to understand the cultural and practical boundaries (and biases) of this pseudoquantitative legal approach to sustainability. We are going to delve into this issue in sections "Quantifying the Law? De-quantifying the SDGs? and The Dark Side of Numbers". Before doing this, however, a possible alternative path, and its limits, are worth highlighting.

Enforcing Sustainable Obligations from Below

Against the framework just sketched, it is no surprise that some of the most effective measures for promoting states' and companies' compliance with declarations, promises and voluntary commitments to sustainability have so far stemmed, rather than from the initiatives just recalled, from private-led actions brought before national courts.

For instance, with the very mediatized Urgenda decision of 2019,[18] the Hoge Raad (the Dutch Supreme Court) held that a Dutch environmental group, Urgenda Foundation, was entitled to sue the Dutch state for the latter's failure to adopt adequate measures to meet the objective of reducing the emission of greenhouse gases originating from Dutch soil, by the end of 2020, of at least 25% compared to 1990. According to the court, by failing to reduce greenhouse gas emissions by at least

[15] See https://www.unglobalcompact.org.

[16] See https://www.iso.org/developing-sustainably.html. For a list of similar initiatives and their effects, see Laura Valle and Maria Chiara Marullo, Contract as an Instrument Achieving Sustainability and Corporate Social Responsibility Goals, 24(1–2) International Community Law Review 100–123 (2022), doi: https://doi.org/10.1163/18719732-12341485.

[17] "[I]t may be recalled that since the sixteenth century the development of capitalism has called for the destruction of differences in laws, standards, currencies, weights and measures, taxes, customs duties at the level of nation state": B.S. Chimni, International Institutions Today: An Imperial Global State in the Making, 15 European Journal of International Law 1, 7 (2004).

[18] Hoge Raad, 20 December 2019, ECLI:NL:HR:2019:2006.

25% by the end of 2020, the Dutch government was acting in contravention of its duty of care under Articles 2 and 8 of the European Convention on Human Rights (ECHR). A similar decision was adopted in 2021 by the Conseil d'État, the French highest administrative court, which, upon request of the mayor of a town in Northern France, ordered the French state to reduce the curve of gas emissions on the French territory as foreseen by several international and national acts by March 2022.[19]

Promoting such actions before national courts requires plaintiffs to invest substantial energy, time and resources in the litigation. Litigating before national courts becomes even more burdensome when the action is led, rather than against states, against foreign companies, since this often requires victims of corporate activities to find an appropriate legal basis for their claims, and to raise adequate funding for their action in order to establish jurisdiction abroad, to engage in transnational evidence-gathering and in battles between scientific experts, and to pay teams of lawyers (and experts) for doing so. Yet, notwithstanding all these limitations, litigation against multinationals for their behavior abroad seems to be mounting.

Pioneers in this regard have been United States courts, which in the past have often used the jurisdictional basis provided by the 1789 Alien Tort Statute (ATS)[20] for hearing claims against foreign companies for illegal activities realized abroad. For instance, It was enough that a federal court accepted jurisdiction to hear the claims brought under US law against Royal Dutch Shell by the relatives of a few Ogoni leaders who had been killed by the Nigerian government, allegedly at the instigation of Royal Dutch Shell, in reprisal for their political opposition to the company's oil exploration activities in their territory,[21] for Royal Dutch Shell to rush to settle the case with the victims (for 15 millions USD, 4,5 millions of which went to a trust to benefit the Ogoni people).[22]

Other Western courts have been willing to step in. In 2017 the Oberlandesgericht Hamm held that, in principle, a Peruvian resident is entitled to sue the German electricity company, RWE AG, and that German law allows him to ask RWE, as the largest CO_2 emitter in Europe, to bear the cost of the protection measures necessary to prevent a melting glacier in the Peruvian Cordillera Blanca to flood his house[23]; it remains to be seen—evidence gathering in the legal proceedings is still ongoing—whether the plaintiff will be able to prove a sufficiently adequate causal link between RWE emissions and the melting of the glacier in Peru.[24] In 2019, the UK Supreme Court ruled that, under English law, a case for redress of environmental harm brought

[19] Conseil d'état, 1st July 2021, n° 427,301, ECLI:FR: CECHR:2021:427, 301.20210701.

[20] 28 U.S.C. § 1350: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

[21] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000).

[22] Seehttps://asil.org/insights/volume/13/issue/14/WiWa-v-shell-155-million-settlement. It has to be noted, however, that recent judicial developments restricting the scope of the ATS (Nestle USA, Inc. v. Doe, 141 S.Ct. 1931 (2021); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013)) have curtailed the ability of American courts to hear claims brought by foreigners against foreign companies.

[23] Oberlandesgericht Hamm, 17 December 2017, I-5 U 15/17.

[24] See https://www.germanwatch.org/en/85108.

by almost 2,000 Zambian villagers against the local mining company and its parent UK-based company Vedanta could be heard by the English courts.[25] Two year later, the same court confirmed its position by holding that it was at least arguable that a London-headquartered parent company of a Nigerian oil company owed under English law a duty of care in negligence to claimants based in Nigeria with respect to the polluting activities of its local subsidiary.[26] In 2020, the Canadian Supreme Court affirmed Canadian jurisdiction to hear the case brought by three Eritrean refugees against a Canadian mining company which allegedly breached customary international law by being complicit with local mining companies in the use of forced labor at the Bisha mine in Eritrea.[27] In 2021, the Hague Court of Appeals, applying Nigerian law, held Royal Dutch Shell liable for several oil spillages produced by its Nigerian subsidiary company that polluted the arable land and water in the Niger delta.[28]

All the above shows that, in the absence of clear international obligations, activists, lawyers and judges can affirm and enforce sustainable obligations upon states and companies under existing national laws. Yet, one should also bear in mind that judicial interventions such as the ones just outlined are always lengthy and costly, have a legal impact geographically limited, and often are able only to provide a limited group of people with some form of compensation after a serious wrongdoing. In other words, they can complement, but they alone cannot sustain, a more general shift to sustainable practices.

Quantifying the Law? De-quantifying the SDGs?

We already underlined that, rather than affirming enforceable obligations and rights, the legal initiatives surveyed in section "The Legal Framework on Sustainability" prefer to rely on reporting duties and on pseudoquantification of processes and performances, as a less contestable (and less effective) way to promote legal change. The problem with this choice, however, is not only its ineffectiveness. As we are about to see, the very project of quantifying the law, and of nudging legal change through quantification, is inherently problematic.

Quantification of social phenomena, and especially quantification aiming at nudging human behavior, is different from measuring marine ecosystems, the environmental footprint of agri-food production, climate change and GHG emissions, demography or epidemiology. Measuring the law and, more generally, relying on quantification to change the law, are no exact science. Most often, this kind of quantitative initiatives cannot even qualify as measurements at all, for the very simple

[25] Vedanta Resources PLC and anor. v Lungowe and others, 10 April 2019, UKSC 20.

[26] Okpabi and others v Royal Dutch Shell and another [2021] UKSC 3.

[27] Nevsun Resources Ltd. v. Araya, 2020 SCC 5.

[28] Hague Court of Appeals, 29 January 2021, ECLI:NL:GHDHA:2021:132.

reason that, "when a measure becomes a target, it ceases to be a good measure".[29] In other words, when we are measuring something that reacts, or is expected to react, to the very act of measurement, we are not measuring anymore; we are rather co-producing (random numbers and real) change. The conclusion is undisputed in a number of disciplines, from anthropology[30] to sociology,[31] from psychology[32] to economics.[33] Actually, it is the very ability of social measurements to inspire change, coupled with the desire to avoid hard choices through soft politics, that explains the emphasis of current legal frameworks on sustainability on reporting and pseudoquantification.[34]

Yet one should additionally consider that, in the domain of social phenomena, there is often little (if any) agreement on what should be measured and how this should be done. The result is that one ends up measuring what can be more easily counted rather than what actually counts, thus leaving scores of important and yet hardly quantifiable or politically unacceptable features out of the spotlight.[35] This is very clearly demonstrated by the few SDGs indicators directly dealing with legal issues. Let us take, for instance, SDGs 1.4, 12.6 and 14.6:

– SDG 1.4 aims to ensure that, by 2030, "all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance". Two indicators measure the attainment of this goal. Indicator 1.4.1, whose custodian is UN-Habitat,[36] asks for the "proportion of population living in households with access to basic services". Indicator 1.4.2, under the supervision of UN-Habitat and the World Bank, requires to monitor the "proportion of total adult population with secure tenure rights to land, with legally

[29] Marilyn Strathern, From Improvement to Enhancement: An Anthropological Comment on the Audit Culture, 19 Cambridge Anthr. 1–21 (1996/7), at 5.

[30] See Strathern, supra fn. 29.

[31] Henry A. Landsberger, Hawthorne Revisited, Cornell U. P., 1958.

[32] Donald T. Campbell, Assessing the Impact of Planned Social Change, The Public Affairs Center, 1976, 49, at https://www.globalhivmeinfo.org/CapacityBuilding/Occasional%20Papers/08%20Assessing%20the%20Impact%20of%20Planned%20Social%20Change.pdf ("The more any quantitative social indicator (or even some qualitative indicator) is used for social decision-making, the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor").

[33] Charles Goodhart, Problems of Monetary Management: The U.K. Experience, in Anthony S. Courakis (ed.), Inflation, Depression, and Economic Policy in the West, Rowman & Littlefield, 1981, 111, 116 ("Any observed statistical regularity will tend to collapse once pressure is placed upon it for control purposes").

[34] Marta Infantino, Numera et impera. Gli indicatori giuridici globali e il diritto comparato, FrancoAngeli, 2019, 72, 89–90, 215–230.

[35] Buchanan, Byers, Mansveld, supra fn. 7, 114–119; Murthy, supra fn. 7, 394, 418–429; Fukuda-Parr, Yamin, Greenstein, supra fn. 7, 106, 112–113; Rittich, supra fn. 7, 466–483.

[36] Every indicator has an agency which acts as a custodian for the data collection process: see https://unstats.un.org/sdgs/dataContacts/.

recognized documentation and who perceive their rights to land as secure, by sex and by type of tenure". What should be noted is, on the one hand, that the breadth of the goal is lost in the formulation of the two technical indicators, whose scope is incomparably narrower than the original goal itself. On the other hand, in spite of their narrow formulation, the legal content of these indicators remains intolerably vague. Suffice it to consider that, in light of the variety of entitlements of people and groups on land in different legal settings, neither the notion of 'secure tenure', nor that of 'rights to land' have a clear or uniform meaning[37];

– SDG 12.6 has more limited ambitions: it hopes to "encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting cycle". Since it is clearly hard to measure 'encouragements', the only indicator for this goal, indicator 12.6.1, measures, under the supervision of the United Nations Environment Programme (UNEP) as custodian agency, the "number of companies publishing sustainability reports". The somewhat paradoxical result of this indicator is that, the higher the number of companies publishing these reports, the more SDG 12.6 will be considered accomplished—no matter what these reports say, and no matter how these actually behave in the real world –. The reason underlying indicator 12.6.1 is simple: it is easier to count the number of companies publishing sustainability reports than investigating about what these companies do. Additionally, the indicator also shows another drawback of relying on commensuration for legal change: commensuration favors gaming strategies of all kinds. In the field of social measurements, for the concerned parties it is often easier to engage in symbolic compliance and window dressing (or to manipulate the data or their treatment) rather than changing actual practices;
– the mismatch between goals and indicators is evident also in the case of the SDG 14.6. SDG 14.6 aims to "prohibit certain forms of fisheries subsidies which contribute to overcapacity and overfishing, eliminate subsidies that contribute to illegal, unreported and unregulated fishing and refrain from introducing new such subsidies, recognizing that appropriate and effective special and differential treatment for developing and least developed countries should be an integral part of the World Trade Organization fisheries subsidies negotiation". Also in this case, only one indicator accounts for attaining such goal. According to indicator 14.6.1, whose custodian agency is the Food and Agriculture Organization (FAO) of the United Nations, the goal is attained whenever there is evidence of "progress by countries in the degree of implementation of international instruments aiming to combat illegal, unreported and unregulated fishing". Leaving aside the ambiguity of the idea of 'progress in the degree of implementation of international instruments on fishing', what should be stressed is that the second fragment of the goal—the one prohibiting the introduction of new subsidies for the benefit of developing and least developed countries—is simply silenced by the indicator.

[37] See e.g. Mauro Bussani, El derecho de Occidente. Geopolítica de las reglas globales, Marcial Pons: Madrid, 2018, 52–53, 229–230, 251–252.

Yet, and again, paradoxically, 'progress in the degree of implementation of international instruments on fishing' would allow countries also to comply with the goal prohibiting new subsidies.

The Dark Side of Numbers

Many illustrations could follow, considering that even SDGs indicators that do not explicitly focus on legal issues, still aim to produce behavioral and legal change. But the examples just mentioned suffice to demonstrate some of the very well-known side-effects of commensuration of social phenomena for policy purposes: the choice of what and how to measure is always, at least partly, discretionary, and more often than not it is determined by political and technical factors that (have little to do with what the measurement is for, and yet) make the measurement easier, cheaper, or more acceptable. By contrast, what is not measured—no matter how important this is—becomes irrelevant, deserving neither efforts nor attention.

This is not all. Even assuming that a complete and comprehensive measurement of what matters could be done, the history of quantification of social phenomena and of nudging through commensuration has repeatedly demonstrated one fact. Gaming strategies aside, the effects of pseudoquantitative governance techniques are often quite different from those expected, in ways that are very hard to predict.[38] It is therefore highly unclear whether measuring efforts, progress and results, multiplying reporting obligations, relying on certificates, labels and self-declarations would actually help reach the desired objective, or would rather nurture uneven and perverse consequences, at least for some of the actors involved.

This is why it is of the utmost importance for the Trieste Laboratory on Quantitative Sustainability to seriously analyze the quantitative dimension of sustainability to understand the legal models that such an approach conveys (are these models respectful of existing diversities, or do they promote as purportedly universal values that are actually Western?), and the legal effects that it triggers, also in order to monitor how appropriate these models and effects are with regard to the original goal.

What Law?

The above tasks should be performed by the TLQS by taking into account another limitation of currently dominant approaches to sustanaibility. The mainstream framework, in fact, is based on and nurtures the impression that the contribution of the legal

[38] E.g.: Sally Engle Merry, The Seductions of Quantification. Measuring Human Rights, Gender Violence, and Sex Trafficking, Chicago U.P., 2016; Kevin E. Davis, Angelina Fisher, Benedict Kingsbury, Sally Engle Merry (eds.), Governance by Indicators. Global Power through Quantification and Rankings, OUP, 2012.

architecture to sustainability is limited to specific fields and areas—such as pollution and environmental impact, human rights compliance, multinational behavior, and democratic processes. This is misleading because the relationship between law and sustainability runs much deeper. As language and culture, the law contributes to determine who we (think we) are, our relationship with fellow humans, other species and the environment, our use of resources, the boundaries of our actions and the horizons of our choices. Law always and everywhere shapes practices and destinies. It is at the level of the law (and its apparatuses) that it is possible to grasp the variety of factors affecting any operational process geared towards sustainability, together with its interrelations with the diversity of cultures and legal traditions (both official and unofficial ones) that inhabit the planet. In this perspective, law provides a magnifying glass for examining issues that, although usually neglected in the public discourse, deeply affect the sustainable and unsustainable way in which we look at the world we live in.

Underlying this view there are two fundamental assumptions that are often sidelined, if not thrown out, in mainstream debates.

First, the law that matters for sustainability goes beyond secure tenure land rights and treaties on illegal fishing, multinational companies' reporting, GHG emissions, and climate change responsibility. The law that matters is also the law that variably determines who can own and use what (entitlements, land, money, energy, status), for what purposes and with what limits; the law that shapes the relationship between people and the natural/supranatural/artificial environment they live in; the law that relentlessly cements and sometimes challenges the power structures at play within human societies.[39]

Second, different societies are ruled by different laws, with their own sources, vocabulary, management and dispute settlement tools. There is no 'ideal' model of sustainability, as there is no 'ideal' model of a just society. More precisely, there is no model of sustainability that can work without maintaining and nourishing a strong relationship of compatibility with the socio-economic, cultural and legal reality on which that model is expected to apply. It is therefore fundamental to keep in mind that the needs to be met and the tools to be used when devising any sustainability rule are factors which vary considerably, depending on the area of the law in question, and on the area of the world one targets. It is important to bear in mind that finance is not welfare, healthcare is not commerce and that what is necessary to make any reform work in the matter of energy or tax law is quite different if one considers the case of, for example, France as compared to Burundi.[40]

[39] H. Patrick Glenn, Legal Traditions of the World: Sustainable Diversity in Law, OUP, 2014, 5th edn.

[40] Mauro Bussani, Geopolitics of Legal Reforms and the Role of Comparative Law, in Mauro Bussani and Lukas Heckendorn Urscheler (eds.), Comparisons in Legal Development. The Impact of Foreign and International Law on National Legal Systems, Schulthess, 2016, 235–248.

What to Do?

On the basis of these assumptions, that are largely neglected by contemporary Western-driven approaches to sustainability in the law, it is therefore crucial to evaluate:

- which rules are the most suitable for encouraging operationally virtuous behavior on the sustainability front, in which areas and for what sectors of human activity (e.g., food, drugs, trade, transportation, tourism, international finance);
- the optimal dimension of the specific rules on energy production/distribution/consumption, in light of their impact on the social fabric and on the supply chains in globalized localities;
- which are the appropriate incentives to drive governments, business and social organizations to comply with the rules aiming to achieve the SDGs;
- the individual and social costs of sustainable rules—who they favor, who penalize, where, in what time range;
- the design of rules of responsibility—effective, not declaimed—for those who favor global warming, or for those who, even at an international level, disregard their promises;
- which is the actual wiggle room to propose rules embedding an 'accountability by design' model, doing away with the legal vagueness of the present situation and setting up legal mechanisms responsive to the different contexts where the rules should apply. Behind and beyond the above one should be aware that the present situation shaped by initiatives such as the SDGs, CSR obligations, and loose commitments to flight climate change nurture the Western rhetoric, blur the agendas and practices of a plurality of actors (from states to NGOs, from multinationals to citizens), and end up by raising an equal amount of expectations and disappointments.