Resilience and Sustainability in Law

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Theoretical and Critical Approaches

By

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TABLE OF CONTENTS

SECTION 1

SUSTAINABILITY AND LAW

1. Introduction

The law in the field of sustainability has recently grown, alongside which open discussions about its qualification and its practical operations have emerged. Therefore, some theoretical approaches to sustainability will be described and critically examined. The functions of the law on the subject of sustainability are particularly important in this framework, as they concern solving potential conflicts among several types of norms. Theories concerning "weak" and "strong" views will be deepened through an analytical examination. The contrast between these ethics helps to shed light on a particular form of justice, which I have defined as "emergency sustainability".

2. Sustainable Development Law

In this section, I am going to describe the evolution of sustainable development law by undertaking an analytical examination of the main international sources.

Apart from the historical definition of sustainable development that is given in the Brundtland Report (1987)[1], the Rio Conference and more precisely Resolution n. 44/228 of December 21st 1989 (paragraph 15d) gave the assignment of promoting progressive development of "environmental international law" (see e.g., Bosselmann, 2020) and to verify the definition of the rights and duties of each State in the environmental field, in virtue of existing international legal measures[2]. The project of a binding code of rights and duties of nations was however put aside during the preparatory sessions and never carried out. It is likely the various countries feared the

[1] Sustainable development is development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.
[2] General Assembly Resolution 44/228, 21 December 1989 (par. 15 d).

binding effects linked to norms concerning sustainable development (Grasso, 2015, 46). The International Court of Justice asserts that the principles of international law, among which is included also the principle of sustainable development, constituting the *ratio of* specific rules which do not satisfy criteria of *usus* and *opinio juris*[3], but rather determine standards of conduct, are intended to guide and homogenise the behaviours of several States.

As far back as 1996, the United Nations Commission on Sustainable Development filed a Report showing a series of principles on the subject of sustainability and underlined the role played by Agenda 21[4] and by the Declaration of Rio[5]. In 2002, the Committee on the juridical aspects of sustainable development, pertaining to the International Law Association, drafted the New Delhi Declaration on Principles of International Law relating to Sustainable Development. This declaration, despite being published as an official document of the United Nations (UN Doc A/57/329), does not have a binding force on the topic of sustainable development. The principles in question, furthermore, had already been declaimed by previous international sources, like the International Conference of Rio (1992) − more precisely the Charter of principles edited on the occasion of the same Conference − and Agenda 21. The principles taken into consideration by the New Delhi Declaration are, in fact, the principle of equity and abolishment of poverty; the principle of rational use and sustainability of natural resources; the principle of common but differentiated responsibilities; the principle of precaution; the principle of participation and of access to information and to justice in environmental matters; the principle of good administration; and the principle of integration. These principles are identified as a group of norms which make up an initial project in the emerging field of law and policies on sustainability (Schrijver, 2005). The Declaration seems to represent the point of arrival for a coherent and systematic elaboration of the principle of sustainable development within the legal sector. The New Delhi principles are influencing the decisions of dispute settlement bodies which have jurisdiction over many subjects[6]. Indeed, courts and tribunals are contributing to the

[3] "*Opinio juris*" concerns the conviction that a norm conforms to the law.

[4] United Nations Conference on Environment & Development, Rio de Janeiro, Brazil, 3 - 14 June 1992, Agenda 21. It is a non-binding action plan of the United Nations relating to sustainable development.

[5] United Nations Commission on Sustainable Development, 1995, Report of Principles of International Law for Sustainable Development, Geneva.

[6] Such as environmental issues, human rights, trade or investment.

world's Sustainable Development Goals[7]. Judges, in many jurisdictions, fight with the status of different environmental values as weighed against energy, economic, health and further national concerns (Gillroy, 2006, 42).

Also in 2002, ahead of the Johannesburg Summit, several judges at an international level adopted a document, "The Johannesburg Principles on the Role of Law and Sustainable Development". This document highlighted the need for assuring that environmental law and law in the field of sustainable development could greatly influence academic *curricula,* legal studies, and formation at all levels, in particular that of judges and other subjects involved in the jurisdictional process. This document showed also that in the framework of environmental law there is an urgent necessity to realise a work programme focalising on education, formation, and diffusion of information. In the same year, many jurists signed the mandate "International Jurists for the Implementation of International Sustainable Development Law", in which the same principles contained in the New Delhi Declaration were replicated[8], while in 2003 the Committee of International Law on Sustainable Development was founded. It is one among the twenty-four committees of the International Law Association, which has the task of studying the legal nature of this principle. Confirming the highly important role covered by the New Delhi Declaration, this Committee focalises its attention on the principle of integration, which seems without doubt to constitute a fundamental corollary of sustainable development. In this context, I want to highlight two reports written by this Committee: the first, in 2004, on the occasion of the Berlin Conference and the second, in 2006, during the Toronto Conference. If the first report praises the New Delhi Declaration, the second, instead, lays the accent on the principle of integration, considered the essential component of the concept of sustainability. Notwithstanding this, the nature of sustainable development does not seem at all clear.

The United Nations Conference on Sustainable Development "Rio + 20" (2012) ended with the adoption of Resolution n. 66/288 in which the

[7] The effectiveness of the Sustainable Development Goals can be discussed at length. In my own opinion, these goals are not always interconnected with each other within a defined conceptual framework.

[8] Namely, the principle of equity and the abolition of poverty; the principle of rational and sustainable use of natural resources; the principle of common but differentiated responsibilities; the precautionary principle; the principle of access to information, public participation, and access to justice in environmental matters; the principle of good administration; and the principle of integration.

conceptual and operative complexity of sustainable development is explained affirming that within this topic there are different approaches, visions, models and tools available to each country, under its national circumstances and priorities.

Under a constitutional profile, there are various Constitutions that take sustainable development into account. I would like to mention for example the Constitutions of Latin America, Africa and Asia, where such development plays an essential role in the State. In the Bolivian Constitution (2009)[9] "integral sustainable development" is mentioned in every part of the Constitution, and not merely in the titles related to habitat, rural development and resources, so much so that a class action against public authorities, individuals and groups who harm public health, the environment and natural patrimony has been configured. Asiatic Constitutions, moreover, evidence the link between sustainability and human right to environment. The Philippine Constitution (1987)[10], in turn, considers among its fundamental principles the duty of the State to safeguard personal rights to a healthy ecologically balanced environment as well as a right to good health. Such a duty is correlated in respect of the harmony of natural rhythms and development. The Constitution of Nepal (2015)[11], furthermore, declares the priority of environmental protection and the prevention of harm to development activities and takes on the commitment of favouring public awareness on environmental issues. The Indian Constitution (2019)[12] shows two basic elements of sustainable development too: the right of development, on the one hand, and on the other hand, the right to a healthy environment. From this point of view, even the Constitution of Kenya (2010)[13] is no less important, inasmuch as dimensions of equity emerge in respect to an equitable distribution of resources.

There is no doubt that environmental law is a fundamental component of sustainable development law. Therefore, before going on to describe

[9] The Constitution of Bolivia came into effect on February 7, 2009.
[10] The Constitution of the Philippines was ratified by a nationwide plebiscite on February 2, 1987.
[11] The Constitution of Nepal 2015 came into effect on September 20, 2015, replacing the Interim Constitution of 2007.
[12] The Constitution of India [as of 1st April, 2019] was brought into effect on 14.01.2019.
[13] The Constitution of Kenya was promulgated on 27 August 2010. The 2010 edition replaced the 1963 Independence Constitution.

some important theoretical aspects of sustainability law, I would like to describe the main characteristics of environmental law.

3. The Ethical Functions of Environmental Law

Before I start to describe the main functions of environmental law, let me start by saying that the environmental component (the relationship between man and the environment) is the best expression of sustainability. This is the reason why environmental law represents perhaps the most important matrix of sustainability ethics.

I will start by saying first of all that environmental law is a written and codified law, which is composed by several statutory rules: "secondary" or *competence* ones (which assign powers), "primary" rules (referring to behaviour), which might be described as "regulative rules", as they regulate behaviour and orient actions, and finally *constitutive* rules, which in a direct way constitute "*de facto status*", producing and realising certain situations or effects (for example let us only think about the environmental impact assessment procedure).

With regard to the distinctive features of environmental law, I would like to mention its *emergency* and *social* characteristics. Regarding the "emergency" aspect, environmental problems have often been faced according to their urgency, that is, after they have already produced catastrophic effects or effects serious enough to require immediate action. You can certainly notice a discrepancy between the political timelines and those characterising the environmental processes, with particular reference to the ones regarding degradation. The time horizon of policymakers, in fact, is unlikely to go beyond the next election date. The environmental legislation fully reflects this characteristic, with the presence of so called "hasty" rules. In addition to this, the unavailability of appropriate information concerning the causal relationship would lead policymakers to take decisions under conditions of high uncertainty, and this may constitute grounds for postponing these decisions.

The social character of this law, however, is outlined by an environmental justice seen as social justice, and recalls the need for a fair treatment for everyone, with the result that no population should bear an unfair portion of exposure to the effects of pollution and other environmental risks. This character, therefore, is inherent to the concept of distributive justice applied to natural resources, but also to the notions of "participation", as governed

by the Aarhus Convention, and of "associations", developed with the contribution of the environmental movements.

The "sustainable soul" of environmental law is identified by its post-modern nature and "two-faced" character. This latter aspect highlights the contradictions inherent in environmental law, given that it, on the one hand, tends to pursue interests through a clear utilitarian connotation and, on the other hand, aims to protect the environment and its intrinsic value. However, these contradictions are not a symptom of the hypocrisy of this law, but rather they represent its effort to protect the natural world by also considering human needs, among which nonetheless some precise economic interests emerge.

Among the functions of this particular law, we recognise firstly a function of impulse for new public policies. The principles of this law are vital: the legislator adopts specific measures of implementation, foreseeing the consequent legislative adjustments. To cite an example: whenever within the European context there is uncertainty on the existence or extent of risk for human health, the principle of precaution allows the European community institutions to set up measures of safeguarding without necessarily having to wait for effectiveness or the seriousness of the risk level to become evident[14]. The principle of integration plays an important role in determining the most appropriate juridical bases for environmental measures. The encroachment of environmental law into the juridical sphere of some rights, for example property rights, can be justified principally by the impulse function in consideration.

The mentioned principles play an essential role even in the construction of the legal system, setting up a valid instrument aimed at a logical systematisation of the norms, and are characterised by values which complete the norms and determine their meaning. Such principles have the merit of identifying guidelines for the legislator, with the aim of qualifying norms within a unitary system and offering measures which are able to solve different cases homogeneously.

The systemic nature related to such principles enables environmental law to value itself critically each time. Nicolas De Sadeleer, instead of discussing "political principles" in regard to this, prefers to speak about "guiding principles", precisely to evidence the function of general orientation. Public authorities need more and more to be orientated and the

[14] Court of Justice of the European Communities, cause: C-157/96, 1998, 2265.

principles of environmental law guarantee such orientation, thus reconciling divergent interests. From this point of view, we can assume that this function of orientation is realised through a mediating activity, as the principles in question tend to balance various conflicting public interests. Whenever a public authority must decide whether to authorise a project which implies considerable impact on a protected natural area, national authorities should balance the imperative motives of relevant public interest, which represent the justification for the project, as well as the duty of avoiding any irreversible harm to biodiversity. When the European Commission is called upon to examine the various derogation requests concerning the legislation on competitiveness, the same Commission cannot derogate activities which would have harmful consequences on the environment. The European Court of Justice has established that under art.174 (2) of the European Treaty, communitarian policies regarding environmental matters must pursue the guarantee of a high level of safeguarding based on the principles of precaution and prevention[15].

The variety of institutional stakeholders operating in the field of environmental protection is without doubt considerable. Public policies on the environment concern the competences of many international, national and local operators. The guiding principles of environmental law are therefore subordinated to the interpretation of the numerous institutions which operate in this field. The nature of international environmental law is indeed particularly problematic, despite the efforts made in 1992 in Rio. It has proceeded in a fragmented way, never being "the product of any comprehensive or systematic scheme of law making, nor has it been based on any clearly defined pre-existing code of principles". European law, meanwhile, is affected by remarkable complexity and legislative articulation (Boyle, 1999).

These principles also have an operational function. The principle of precaution, for instance, through the implementation of measures of a prudential and cautionary nature, influences social actions and individual behaviours. In this regard, let us also remember the existence of the polluter pays principle, the principle of correction at source and the principle of prevention, which all push towards *ad personam* responsibility.

From the principles of environmental law, furthermore, we could extract an educational function, since they correspond to internationally fixed objectives in the field of environmental education. A synthesis of the

[15] Cause C-418/97 e C-419/97, 2000, in CGCE I-4512 (39).

principle evolutionary stages concerning this particular type of education should be drawn now.

During the Conference on the conservation of nature in Bangkok (1965), organised by the International Union for the conservation of nature, environmental education was directed towards the conservation of natural patrimony. In 1970, on the occasion of the conference promoted by the Union itself, environmental education was defined as a process of identification of values and concepts useful to develop the necessary attitudes and techniques for understanding existing interrelations between man, his culture and the biophysical environment surrounding him. During the United Nations Conference in Stockholm on the Environment (1972), the idea of eco-development was introduced. The necessity of regarding environmental problems as an integral part of economic development was underlined during this session. In this framework, environmental education detains the function of developing the link between environment and human activity. The Belgrade Charter (1975), on the other hand, is a predisposed document at inter-governmental level aimed at defining the objectives, principles and methods of environmental education. Later, in 1977, the Conference of Tbilisi organised by UNESCO and UNEP was held, where this education found a new collocation and promotion at regional and national levels in the scholastic curriculum at both preschool and post-university levels.

Successive developments then occurred in the years surrounding the turn of the millennium: during the United Nations Conference in Rio, environmental education was indicated as an essential element for the promotion of sustainable development; at the International Conference of Thessaloniki (1997), the conclusive Declaration on "*Environment and Society: education and awareness for sustainability*" was approved; and the United Nations Decade on education for sustainable development (2005) sought to deal with different environmental, social and economic implications. The aim of this decade is represented by the integration of the principles, values and practices of sustainable development in all aspects of education and learning. Similarly, in UNECE Strategy, aimed at promoting education in favour of sustainable development (Vilnius, 2005), such education is defined as a permanent process which interests the individual throughout their entire life span. It is not limited to formal learning, but is extended also to informal learning. Education is a human right as well as a pre-requisite for good governance, for informed decision-making, and for the promotion of democracy. Even in the international workshop held in Belgrade in 2005, environmental education was qualified as an element

directed towards the construction of a new universal ethics, capable of emphasising individual and social behaviours compatible with the place that humanity occupies in the biosphere and capable of reacting with sensitivity to the complex and ever-changing relationship between nature and humanity. An equally significant role is attributable to the World Conference on Education for Sustainable Development (Bonn, 2009) that incorporates the results gained in the above-mentioned Decade and sets the stage for future strategies to be carried out. In the light of this synthetic chronology related to the principal stages on environmental education, we realise that the fundamental values, which are the basis for this education, correspond fundamentally to the objectives that the principles of environmental law intend to pursue. It is therefore possible to discuss in favour of an educative function of this right, exercised through its principles that, moreover, may be qualified as rules of conduct, since they prescribe the behaviours to be followed.

4. The Nature(s) of Environmental Law

The post-modern nature of environmental law includes a profile that might be described as fragile and complex, functional to the concept of risk and environmental guidelines. We must say that one of the main elements characterising post-modernity is given by the presence of *guiding principles* aimed at balancing different interests. These principles represent in the sector of the constituent law the best example of discipline oriented to goals, which then describes the legal area mainly characterised by post-modern elements[16]. The environmental law principles seem to mark in a particularly clear way the transition from modern law to post-modern law, marked by the pragmatic nature of rules. They are required by specific legislation and are therefore likely to be applied directly by the public authorities, although often the more political nature is more emphasised than the strictly legal one (Grasso, 2015).

There is no doubt, in any case, that the principles in question carry out different functions, for both social and legal significance. The scientific literature on environmental law principles is certainly considerable. Both European studies and those outside of Europe, in fact, have examined them in detail and individually studied them in-depth under a legal and political profile. Only at European level according to Art. 174 of the Treaty, the Community policy on the environment is based on the precautionary

[16] The contemporary law is in effect a law structured for targets.

principles and preventive action, on the principle of priority correction at the source of the environmental damage and on the 'polluter pays' principle. Keep in mind that the principles of environmental law can be considered true conceptual corollaries of the "sustainable norm" and therefore of sustainable law. The principles of prevention, integration and precaution, for example, can build bridges between regulatory areas that have little interest or conflict between them. Consequently, these principles can become new interpretive tools to resolve disputes arising in different areas of international law (such as the conflict between multilateral environmental Agreements and WTO obligations). We must, however, point out that such principles can eliminate the points of conflict, but not necessarily solve them in a definitive manner; therefore, the importance of greater integration of environmental interests within commercial legal systems (such as those of the WTO and of the EC internal market) is really opportune.

In the post-modern perspective, environmental law will no doubt be recognised thanks to a certain *fragility*. This right, in fact, by its very nature is often in conflict with the interests and rights coming from the economic and commercial sphere. The right on economic issues certainly represents the strongest right, the one that embodies the interests and demands for which, often, strong powers are indeed hidden, while the environmental law defending the environment in the strict sense or a human's needs through the environment, is in a distinct disadvantage.

To resolve the conflictual relationship between environmental law and economic law, the representatives of the European Community and the Member States adopted in Marrakesh (1994) a direct decision to coordinate trade and environmental policies within the limits of the competence of the multilateral trading system[17]. The Decision requires the establishment of a committee that can propose changes to this system, in order to improve the interaction between trade and environment and to avoid protectionist trade measures, thereby ensuring the pursuit of the environmental aims of Agenda 21 and of the Declaration of Rio. It also ensures the monitoring of trade measures with environmental purposes, as well as environmental measures identified by commercial profiles, thereby allowing the implementation of the multilateral disciplines that govern such measures.

[17] Communication of the Committee of the GATT trade negotiations, *Decision on Trade and Environment*, GATT Doc. MTN.TNC/W/141, 29 March 1994.

Despite some decisions of this Organization, such as *Gasoline*[18] *and Shrimp/Turtle* (2002)[19], we have recognised that even in the case of multilateral trade measures, the WTO system is not a regime tightly closed so as to refuse to consider principles of environmental law; from the global point of view, the environmental measures related to trade are often in conflict with the WTO agreement. Similarly, at the European level, the use by Member States of trade restrictions for environmental purposes would be in contrast with the principle of free movement of goods.

The aforementioned fragility is also apparent given that the examined law, more than any other, is often confronted with the "risk" variable. Most of the provisions on the environment, in fact, consider the risk within their structure. In other words, we could easily recognise the risk of a peculiar trait of environmental law, so that it can be identified as a "friend-enemy" of the same law. If friendship was justified by the strong link between the two variables, the enmity instead would be explained by the fact that the risk is often configured as an obstacle to the same environmental guidelines, sometimes constituting the grounds for the postponement of political and administrative decisions. The precautionary principle, for example, considers the fundamental concept of risk. Some political decisions result in significant effects on the environment, not all predictable, that could represent a harm to the society in general or specific persons in particular; therefore, the menace of the environment can be represented as the result of decisions and is interpreted according to the risk category.

Within the post-modern nature of environmental law, we also find its character represented by *complexity*, mainly caused by the continuing and growing need for legislative intervention, as well as the difficulty of equitably balancing the different interdisciplinary skills. This law, in fact, is characterised by the theoretical difficulty of ensuring unity in legislation affecting contexts and purposes inconsistent with each other. This difficulty can in large part be explained with the traditional separation between legal science and the natural sciences. The practical nature of the law indeed led jurists to dissociate the different constituent elements of ecosystems and to

[18] In this case, the WTO Appellate Body stated that "customary rules of interpretation" would include art. 31 of the Vienna Convention of 1996, which "has attained the status of a rule of customary or general International law" (Gasoline: 17).

[19] According to the WTO Appellate Body, the concept of "natural exhaustible resources" must be interpreted "in the light of contemporary concerns of the community of nations about the protection and conservation of the environment" (Appellate Body, Shrimp, par. 129).

acquire them in accordance with their immediate economic value. Environmental law is an interdisciplinary science that incorporates knowledge from the different nature of the law and has a strong technical matrix. It is not always the legislator who decides the sense of the norm, but rather those who impose parameters and limits and who would have the ambition to dictate the rules of conduct governing the different cases.

From another viewpoint, the nature of environmental law on the one hand corresponds to a view of environmental protection, instrumental to the satisfaction of human needs, which sees the human being as the direct recipient of environmental law; on the other hand, instead, the nature of this law is represented by the protection of the environment as it is. That is to say, as an entity with its own value and capable of being the direct beneficiary of the laws.

If the first aspect of its nature has led towards the recognition of rights that relate to the environmental sphere and interprets the damage to the environment through anthropocentric parameters, such as the financial loss suffered as a result of damage, the second aspect of its nature has opened the way to the "rights of nature" and assesses environmental damage through forms of *restitutio in integrum,* aimed at returning the value to the damaged environment.

The "two-faced" character of environmental law highlights its inherent contradictions, summarised in the conflict between utilitarian interests and interests aimed at the intrinsic good of the environment itself. The conflictual link between the extrinsic value and the intrinsic value of natural goods translates within the sphere of law in the link – not always consistent – between the rights of nature and human, social, and economic rights.

Similarly, the connection between a "weak approach" to sustainability and a utilitarian side of environmental law, as well as the connection between the "strong approach" to sustainability and the ecological side of this law, is particularly evident within this framework. In effect, the two-faced nature of environmental law finds a perfect and logical correspondence in the existing bipartition in the field of sustainability: "strong" and "weak" approaches. In other words, the utilitarian side of environmental law corresponds to a weak approach applied to environmental sustainability. Conversely, the side linked to the rights of nature is connected instead to a strong approach to this sustainability.

Even qualifying the right to the environment as the "right to human life" or "right to a healthy environment" would clearly fall into the conceptual sphere of a weak vision (utilitarian), because the protection of environment would be instrumental compared to human life and human health. A similar consideration could be made if we decided to protect the environment only in view of our existence and future generations, that is, in accordance with an instrumental key.

Nevertheless, I think that we cannot speak of anthropocentrism or utilitarianism, or even more of a weak approach, to the extent that we want to guarantee a healthy living environment for us and for the generations to come or if we want to qualify the environmental right as a right to life. Our natural environment in fact is our "common home". Therefore, I will be describing these two particular meanings of environmental law in the next two sections, taking this premise into account.

4.1. Environmental Law as Right to Human Life

The Aarhus Convention on the access to information, the public participation in decision-making, and the access to justice in environmental matters (1998) recognises that an adequate protection of the environment is essential to human well-being, given that every human has the right to live in an environment capable of ensuring the protection of their health and well-being as well as the individual and the collective duty to protect and enhance the environment in the interest of present and future generations.

In this regard, in the lawsuit Joseph D. Kessy *vs*. the City Council of Dar es Salaam[20] (1998) the residents of Tabata, a suburb of Dar es Salaam, Tanzania, made an application to the Supreme Court to obtain an injunction to ensure that the City Council desisted from continuing to dump garbage in that area. This Council, on the contrary, asked to be allowed to continue their activities. The Court, denying the Council this request, believed that activity would endanger the health and lives of the appellant, thus violating the constitutional right to life[21].

[20] Supreme Court of Tanzania, civil case 29/1998.

[21] In other words the judge Lugakingira wrote: "I have never heard it anywhere before for a public authority, or even an individual to go to court and confidently seek for permission to pollute the environment and endanger people's lives, regardless of their number. Such wonders appear to be peculiarly Tanzanian, but I regret to say that it is not given to any court to grant such a prayer. Article 14 of our

The lawsuit submitted to the Supreme Court of Sri Lanka, *Deshan Harinda (a minor) et al. vs. Ceylon Electricity Board et al.* (also known as the case "Kotte Kids", 1998)[22] is also significant, where a group of children promoted a legal proceeding in which they stated that the noise from a power plant exceeded the allowable noise level, causing – amongst other things – hearing loss. Although the Constitution of Sri Lanka did not expressly impose the right to life, it was argued that all other constitutionally enshrined rights necessarily presupposed the existence of this right.

In the lawsuit *Subash Kumar vs. State of Bihar*[23] (1991), the applicants complained about the violation of the right to life, compromised because of the pollution of the River Bokaro, caused by the wastewaters from the Tata Iron Steel Company. The Court recognised that this right includes the right to the enjoyment of unpolluted water and air, setting that in face of any risk relating to the quality of life, any concerned person can assert action aiming to claim the fundamental rights of the community or of a group which is not able to assert their rights for failure, poverty or ignorance of the law.

Even in the lawsuit of the Pakistani *Shehla Zia and Others vs. WAPDA* (1994)[24], a case concerning electromagnetic pollution matters, the right to life is qualified as environmental law and as healthy environment law in particular. The judge in this case clearly expressed that life cannot be limited to mere existence, understood as a time lag between conception and death.

Furthermore, we quote herewith the lawsuit *Lalanath de Silva vs. The Minister of Forestry and Environment*[25] (1998), where the applicants complained that the Ministry of Environment had predisposed air quality standards, which were clearly contrary to the right to life. Therefore, the Supreme Court ordered the enactment of regulations aimed to control the air pollution caused by vehicle emissions in the city of Colombo.

The human right to the environment is a precondition for defining further rights. Under the comparative profile, it is worth recalling some

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constitution provides that every person has a right to live and to protection of his life by the society. It is therefore, a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or, what is eminently monstrous, to enlist the assistance of the court in this infringement."

[22] Kotte Kids case (1998).

[23] Subhash Kumar *vs*. Bihar et al., A.I.R. 1991 S.C. 420 (1991) (India).

[24] Ms. Shehla Zia et al. *vs*. WAPDA, P.L.D. 1994 S.C. 693.

[25] Supreme Court of Sri Lanka, Lalanath de Silva *vs*. Minister of Forestry & Env. (The Air Pollution Case), 1998.

constitutional provisions that create a secure anthropocentric view of environmental law. Article 45 of the Spanish Constitution (October 31, 1978), for example, establishes the right of everyone to an adequate environment. Article 66 of the Portuguese Constitution (dated April 2, 1976) mentions the right to a humane, healthy and ecologically balanced environment. Article 101 of the National Environmental Policy of the United States Act (1969) also recognises the right to a healthy environment. Other Constitutions consider the right to a balanced environment too (Peru and Thailand) whereas others, instead, prefer to argue about the value of the environment through the protection of natural resources (for example, the constitutions of Canada and China). The right to the environment as the right to human life is clearly present in the Constitution of Ecuador (2009), which sees Mother Earth (*Pachamama*) as a subject of law. In fact, the intention of creating a "new form of citizen coexistence in harmony with nature" has been declared in order to pursue the "*buen vivir*", the "*sumak kawsay*". The Ecuadorian Constitution enshrines the rights of this "*vivir*", pertaining to a healthy environment, health, water, food, housing, culture, information, communication, education, science and business. The "*buen vivir*" includes both rules relating to inclusion/social equality and rules relating to biodiversity and more generally to natural resources. In the Bolivian Constitution, however, good living is a concept of a collective and communitarian matrix that manages to complete individual interest.

4.2. Environmental Law as Right to a Healthy Environment

The right to human life finds its best form of expression in the "right to a healthy environment". In this regard, the General Assembly of the United Nations confirmed the existence of a right to the environment in its 1990 Resolution. It welcomed the decision of the Commission on Human Rights and of the Sub-Commission on Minorities to study the relationship between human rights and the environment, observing that all individuals are entitled to live in an environment which is adequate for their health and their well-being[26]. Although that resolution confirmed the relationship between environmental degradation and human rights, this was still far away from the recognition of the right to a healthy environment. Articles on human rights and the environment adopted by the Sub-Commission on Minorities, in fact, had no resonance. The "Experts' Sustainable Development Report" also noted that the right to a healthy environment constituted an instrument

[26] United Nations General Assembly Resolution 45/94, UN GAOR, 45° session, UN Doc. A/RES/45/94 (1991).

to integrate the environmental sphere with that of development. In this sense, the sustainability of development would seem subjected to the condition that the right to a healthy environment is realised. The Stockholm Declaration (1972) already affirmed the human right to a healthy and dignified life. In Art. 1 of the Rio de Janeiro Declaration, we can also read that human beings are entitled to a healthy and productive life in harmony with nature. Principle 14 of the same Declaration also recalled the importance of monitoring any activity or substance that is considered harmful to human health.

The European Court of Human Rights in Strasbourg, however, drew up a precise notion of the right to the environment by relating it to the protection of the right to health. The lawsuits *López-Ostra vs. Spain* (1994)[27] and *Guerra vs. Italy* (1998) are examples of this: in the case law of this Court, in fact, the effort to grant a more extensive protection to the environmental dimension of human health emerged. Even Judge Weeramantry, of the International Court of Justice, in his dissenting opinion expressed on September 25, 1997 in connection with the lawsuit *Gabčíkovo vs. Nagymaros*[28] stated that environmental protection is a vital part of the theory of human rights, necessarily integrated with the right to health and more generally with the right to life.

Even the World Health Organization (WHO) has stated on numerous occasions that the right to health is related to environmental injuries. In 1976 the Executive Body of the WHO recommended that the World Health Assembly adopt a resolution directed to governments in order to make environmental health programmes an integral part of national health policy and development strategies[29]. The resolution adopted by this Assembly on January 27, 1976 considered that the improvement of environmental conditions should be seen as part of the efforts to promote development and health protection. In 1989, the Executive Body of the WHO reported that the environmental degradation caused by the indiscriminate use of technology constitutes a threat to human health; hence, a new World Health Assembly resolution directed to the Member States to evaluate policies and strategies aimed at preventing the adverse effects of development on the environment and on human health. The international community is

[27] European Court of Human Rights, López-Ostra *vs*. Spain, Series A, No. 303 C, 1994; European Court of Human Rights, Guerra et al. *vs*. Italia, Case 14967/89, 1998.
[28] International Court of Justice, Gabčíkovo *vs*. Nagymaros, 1997.
[29] WHO EB57.R28 Resolution, Geneva, 1976.

frequently called upon to strengthen its support for activities that promote a healthy environment and to monitor the adverse effects of development on the environment and human health[30]. The Stockholm Convention on Persistent Organic Pollutants, for example, aims to protect human health and the environment. Similarly, the Protocol on Water and Health (London, 1999), borne out of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992), is aimed to promote the protection of human health and welfare at all levels in accordance with both an individual and a collective point of view. The UN Committee on Economic and Social Rights, moreover, believed that the right to the highest viable level of physical and mental health, contained in Article. 12.1 of the Covenant on Economic, Social and Cultural Rights, was not to be limited to the right to health in the strict sense: the right to health, in fact, carries over into other rights, like the right to potable water and the right to a healthy environment. Even the American Declaration of the Rights and Duties of Man (1948) establishes that every man has the right to preserve his health through sanitary and social measures related to food, clothing, housing and medical care. This guarantee is interpreted in the Protocol at the American Convention on Human Rights in the area of economic, social and cultural rights (art. 10 of the San Salvador Protocol) as a chance to ensure the enjoyment of the highest possible standard of physical, mental and social welfare. The right to health protection, as mentioned in the American Declaration, necessarily includes a prohibition of environmental degradation because otherwise health would be damaged.

The right to a healthy environment is well established as part of the rights of indigenous people. The Inter-American Court for Human Rights, in relation to the *Awas Tingni* case (2001), considered that the lack of prevention of environmental damage on indigenous lands brought prejudices to the same indigenous people since the possibility of maintaining a social unit depends on its collective and communitarian existence as well as on the maintenance of the land. Similarly, in the decision of the *Belize Maya* case (2004), the Inter-American Commission on Human Rights claimed that the rights violation of the Mayan people had been exacerbated by the environmental damage done to their lands. Previously, in its Report on the situation of human rights in Ecuador on April 24, 1997, the Commission had already reported that “Indigenous peoples maintain special ties with their traditional lands, and a close

[30] WHO EB83.R15 Resolution, Geneva, 1989.

dependence upon the natural resources provided therein – respect for which is essential to their physical and cultural survival".

In the case concerning the Yanomami Indians, on March 5, 1985, the Inter-American Commission on Human Rights again recalled that the damage to people resulting from environmental degradation violates the right to health in Art. XI of the American Declaration.

The need to protect the quality of the environment (and thus the guarantee of a healthy environment) is globally recognised as an essential component of indigenous culture, from the Brundtland Report of 1987 and principle 22 of the Declaration on Environment and Development of 1992, to the Convention on Biological Diversity of 1992 and the Declaration on the Establishment of the Arctic Council. When the conditions that sustain the traditional culture of indigenous peoples are missing, the settlement of the inhabitants in other areas will inevitably lead to the elimination of the culture of these peoples and thus to the loss of their identity[31].

[31] In the *Saramaka People vs. Suriname* case (2007), for instance, the serious environmental degradation resulting from the abuse of the Saramaka, a population descending from the Maroons (slaves of African origin), was seriously lamented. The Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council *vs*. Kenya case (2010) concerns the forced relocation of Endorois communities from their ancestral lands and their denial of access to the same lands and to its traditional resources, because of a mining concession.
The heavy exploitation of indigenous lands is also well exemplified in the experience of the ethnic groups of the Maasai and Ogiek in Kenya. The Mau Forest is located on the western side of the high plain of the Rift Valley and is the largest complex system of forests and waterways in Kenya. Before the British colonisation, which took place in the early 1900s, groups of the Maasai and the Ogiek lived in the areas nearby. The British, after colonising these territories, began to build a railway network, forcefully deforesting the area, in order to recover spaces and use wood as fuel. In addition to the deforestation, the expulsion of ethnic inhabitants and the destruction of different native species and natural ecosystems occurred. The traditional knowledge of these ethnic groups was supplanted by industrial activities linked to deforestation by settlers, who took possession of the forest and the management of its resources. Later, the British government established a new system aimed at the cultivation of deforested areas for the three years following deforestation, and from the fourth year the portions of cultivated land would have been affected by the operations of reforestation. This system was named the *Shamba System*. The reforestation and the cultivation, however, did not take account either of the native species or traditional knowledge of the Maasai and Ogiek. Indeed,

Let us remember that the Supreme Court of Nepal in the lawsuit *Suray Prasad Sharma Dhungel vs. Godavari Marble Industries et al.* (1995)[32] deemed that a healthy environment was part of the constitutional right to life. Similarly, the Supreme Court of Kenya in the lawsuit *Waweru vs. Republic* (2006)[33] deemed that the constitutional right to life, as established in Section 71 of the Constitution of Kenya, had to grant the right to a clean and healthy environment. More precisely, the Court stated that all people "are entitled to the right to life – In our view the right to life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment".

In the lawsuit *Sharma et al. vs*. *Nepal Drinking Water Corporation et al*. (2001), the Supreme Court noted the exclusive role of drinking water compared to public health, stating that its decision could be a valid example of responsibility for a welfare state[34].

Parallel to the right to a healthy environment law, we have the right that arises in connection with disturbances and environmental interferences that the common law legal system defines as *environmental nuisances*.

5. Qualifications of the Concept of "Sustainable Development Law"

Legal-political theories on sustainability are affected by the theoretical bipartition between "weak" and "strong" approaches. The former see

European crops considered most profitable for the timber market were planted. The change of species also brought about a change in power and the traditional culture of the local people. Only in the sixties did Kenya gain independence from the United Kingdom. Nevertheless, only the richest and the most influential of the population were able to achieve benefits from independence. The new Vice President of Kenya, in fact, abolished the *Shamba System*, implementing a new management system of the forest that originally provided for the restoration and redistribution of areas of lands to indigenous communities. Subsequently, on the contrary, due to high levels of corruption, the forest was divided and assigned to the new President and to the most influential people of the Molo district: only 10% of the territory was attributed to the Ogiek. The privatisation of forests led to the signing of short-term contracts relating to the granting of forest portions. Deforestation in these areas has already had harmful effects, causing ecological disasters of large dimensions that in the near future may even cause global catastrophes.

[32] Supreme Court of Nepal, Dhungel *vs*. Godavari Marble Indus., No. 35, 1995.

[33] Waweru *vs.* Republic, 1 K.L.R. 677-700 (H.C.K), Kenya, 2006.

[34] Supreme Court of Nepal, Sharma *vs*. Nepal Drinking Water Corp., No. 2237, 2001.

sustainability as an interaction between different spheres (including the ecological sphere) and are distinguished by a non-ecocentric integrative nature. The latter instead are characterised by a clearly ecocentric matrix. Therefore, even the opinions of sustainability law scholars have divided substantially between those who highlight the integrative dimension and those who highlight the pre-eminent ecological role.

There is no single definition attributable to sustainable development law. Rather, different theoretical qualifications can be attributed to this particular law. In general terms, law experts were mostly worried about interpreting the concept of sustainable development[35] through the identification of a group of legal principles, which would be able to solve the conflict between rules related to economic law, law concerning social development, and also to environmental law. In this way, sustainable development could even be considered a meta-principle of procedural character inclined to influence the decisions of international courts.

The nature of the principle of sustainable development does not seem at all peaceful. Its condition is strictly correlated to its definition. Vaughn Lowe, in these terms, has observed that the vagueness of the concept is incompatible with it having a "norm-creating character" (Lowe, 1999). Sustainable development would indeed be an "umbrella term", that is an inclusive concept, capable of holding within itself different shades of meaning, including both substantial and procedural components. According to Lowe's theory, it is a "meta-principle" capable of exercising an "interstitial normativity", compared to further legal norms, whenever the latter conflict with each other or overlap[36]. Lowe adopts the notion of "modifying norms", that is norms that have the function of modifying the efficiency of primary norms and which do not depend on their own juridical condition, but which can be applied directly by Courts. In this sense, sustainable development is therefore a "modifying norm" which reconciles development with protection of the environment. If Lowe considers that the vagueness of the concept lies mainly in the way of pursuing the juridical condition, Hunter *et alias*, instead, argue that the very same concept has been accepted by different States in virtue of its ambiguity (Hunter, Salzman

[35] In the history of the concept of sustainable development, two schools of thought have been identified. They refer to the 'weak' and 'strong' interpretations of this concept.

[36] The different dimensions of sustainability help to identify the concept of sustainable development as a "variegated" concept, not tethered to one conceptual mooring.

and Zaelke, 2007). If, on the one hand, such peculiar development is more than just a simple concept, as the States invoke it relatively to their own development activities, on the other hand, it seems to be lacking in any certain and substantial normative quality. Ellis and Wood also speak about a meta-principle of environmental law (Ellis and Wood 2006) and Wilkinson describes it as a meta-principle in reference to which the other principles, which develop its content, are identified (Wilkinson, 2002).

As noted by Cordonier Segger and Khalfan, sustainable development is a norm detaining the function of balancing conflicting juridical norms, concerning precisely socioeconomic development and the safeguarding of the environment (Cordonier Segger and Khalfan, 2004).

For Birnie and Boyle, some doubts exist about the nature of the development that I am discussing. They wonder whether it should be considered a form of domestic policy, which influences decisional processes at national level, or rather a principle that tries to influence the behaviour of States on an international level (Birnie and Boyle, 1994). The answer lies in the observation that sustainable development is characterised by both natures as it is an international principle, which attempts to impact decisional processes at a national level.

The prominent academic John Dernbach believes that the effective meaning of the concept under discussion must be sought above all in Agenda 21, in the Declaration of Rio, and in other national political documents, and that such a concept should furnish a range of useful instruments to strengthen governance. Dernbach also identifies unsolved issues within the area of sustainability, such as the responsibility of developed countries and developing countries and the role of international commerce (Dernbach, 2002). Sands, for his part, claims that "there can be little doubt that the concept of sustainable development has entered the corpus of International customary law, requiring different streams of international law to be treated in an integrated manner" (Sands, 2003, 208). The condition of such development can be seen in the juridical dimension, which refers to processes, principles and objectives, as well as a large corpus of international agreements connected with the environment on economic, civil and political rights (Sands, 1994): its legal status thus seems to be approximately between a norm and a concept. It requires the application of the existing principles, norms and institutional apparatus in an integrated style. Segger, on the contrary, evincing doubts on the legal nature of the concept, maintains that it is not indisputable to consider that this form of

development represents a principle of customary law of the environment (Cordonier Segger and Weeramantry, 2005).

According to Bosselmann, who promotes a strong vision by "ecological law", sustainability instead should be seen as a recognised legal principle, which could be applied to the entire legal system, rather than just environmental law, regardless of its international or domestic levels (Bosselmann, 2008).

In my opinion, sustainability law is based on a meta-legal, holistic and moral nature, and it is recognisable as a customary norm with a strictly interdisciplinary character. Sustainable responsibility, then, consists of several elements and is mainly embodied in value-based, common, equitable and intergenerational responsibilities, where ample space is given to virtues and integrity (moral and ecological). It goes beyond a merely 'weak' approach, so too a 'strong' one of sustainable development, and is placed within a "balanced sustainability", which lies between an ecocentric (not extremist) vision and one of "responsible anthropocentrism" (Grasso, 2015). My vision of sustainability is confronted with environmental and health emergencies: it is mainly linked to catastrophic emergencies, such as those connected to extreme events, so much so that I recently theorised a new branch of sustainability: "Emergency Sustainability" (Grasso 2019).

6. Some Theoretical Issues about the "Open" Dimensions of Sustainability Law

Sustainable development presupposes that infinite economic growth on the planet is impossible (Georgescu-Roegen 1986). "Sustainable law" or law on the subject of sustainability should necessarily be read with a "global"[37] key (Kelsen, 1967), or at least should be as open as possible, so as to include several interactions among various knowledge systems. In 1997 Günther Teubner was speaking of a "Global Bukowina" (a phrase first used by Ehrlich, 1936)[38]. According to Teubner, in fact, global law can only be explained by a theory of legal pluralism turning from the law of colonial

[37] In this sense, for example, a "global law" could be justified through the legal philosophical Kelsenian theories of purity and normative unity of law, which seem to link several governance reasons within a greater system of law.
[38] Eugen Ehrlich (1936) spoke first regarding a "Global Bukowina". According to him, it is civil society that will globalise its legal orders.

societies to the laws of several ethnic, religious and cultural communities in modern States (Teubner, 1997).

The intersections of legal systems of different natures were theorised by André-Jean Arnaud (Arnaud, 1981). The inter-legality − or rather the simultaneous insertion of every single subject or group of subjects within a series of distinct normative systems in virtue of the nature of single acts or single expectations − was emphasised by Boaventura de Sousa Santos in his *Toward a New Common Sense* (De Sousa Santos, 1995). Last but not least, the essay by François Ost and Michel Van De Kerchove on the passage from the "pyramid" to a "network" is worthy of mention (Ost and Van De Kerchove, 2002).

Most environmental problems are not contained within State boundaries, but affect the biosphere and are therefore inherently global concerns (Gillroy, 2006). According to Twining, furthermore, a healthy cosmopolitan discipline of law should encompass all levels of social relations (Twining, 2009). He explores the implications of adopting a global, or rather, a "general" perspective for a number of particular topics, such as diffusion of law[39] and the relationship between law and development. The concept of "general jurisprudence" should be interpreted broadly to include any general enquiries about law that go beyond legal cultures (Twining, 2009). In this sense, law can be viewed as a "heritage", an "ideology", or even the activity of "theorising". It is precisely in this last sense that this work sees the role and function of "law in action"[40] on sustainable development, namely as a possibility of theorisation. In the following section, I will outline the theories on the functions of law in order to discuss in particular the ethical functions of sustainability law, which relate mainly to the reduction of complexity and to the solution of potential conflicts between conflicting norms.

7. The Functions of Law: Theoretical Aspects

In order to describe the functions of sustainability law, a short theoretical analysis concerning the general branch of the functions of law should be

[39] Chapter 9 considers critically some assumptions about the literature on "reception" and "transplantation" of law and offers a new framework for the study of diffusion.
[40] "Law in action" is a legal theory examining the role of law as a tool connected to society. The first reference may have been a 1910 paper by Roscoe Pound, that was a forerunner to the legal realism movement.

considered. Therefore, a few considerations about the philosophical-juridical theory on this topic will be dealt with.

The position of Niklas Luhmann seems crucial at this juncture, among the different critical reconstructions. In his opinion, law has the function of reducing complexity and stabilising contingency, making a choice among possible incompatible expectations, on the basis of normative reference points, thereby bringing about a decrease in the degree of incertitude which is in principle characterising human action. According to the German scholar, the human environment has in fact moved by a multitude of subjective expectations, which are much greater than the possibility to satisfy them, and is marked by great incertitude and a high degree of contingency of actions and events (Luhmann, 1981); that is, a world where actions and events are theoretically possible and equally probable. The game of subjective expectations is represented by Luhmann as a game of reflexive mirrors, where a subject acts not only in relation to the expectations of another, but rather in relation to the expectations that another nurtures towards him and so on to infinity. Therefore, this over-complex environment needs to be simplified. Hence, human action is organised through social systems that Luhmann considers to be self-constituted communicative structures, gifted with sense, possessing the aim of reducing complexity and allowing choice within incompatible alternatives.

Under a theoretical profile, social complexity, interpreted as a surplus of theoretical possibilities of action compared to actual experimental ones, can be reduced by selecting some possibilities among the eligible ones. It is here that power reveals itself, just like a reductive instrument, by definition, as it consists in the possibility of selecting by its own decision an alternative for others and in reducing social complexity. Social systems, characterised by communicative actions, play the role of attributing a shared social sense towards actions and offer useful criteria for choosing among the numerous possible alternatives of action put forward by the environment, which is extremely complex and contingent. Therefore, social action coincides with communication through socially shared sense schemes. Moreover, the systems of social communication do not live apart from others but rather together with interaction systems, which involve individuals and interact through structural couplings, namely "*strukturelle kopplung*", allowing them to transfer meaning to each other (Luhmann, 1984). Describing these couplings, Luhmann indicates a method of reconciliation of intra-systemic self-referentiality and inter-systemic exchanges, two concepts in apparent contradiction. He defines the structural couplings as forms of simultaneous relationships, strategic co-ordinations. In other words, the theory of autopoietic