Love Rönnelid

# What legal research in sustainable development could become

## 1 Introduction: The massive agenda of the latest sustainable development goals

Within a few years, the idea of "sustainable development" has taken root deep in central societal discussions in several parts of the world. At least here in Sweden, you see the term being used by agencies, corporations, NGOs, and for deciding on numerous types of funding. Whatever the effects of this, there is clearly a marked increase in the usage of the concept in multiple spheres of society. The current volume can itself be seen as an example of this. This article aims to contribute to our understanding of what this type of discourse does and how legal scholars might contribute constructively to the sustainable-development project.

The latest international rendition of sustainable development are the 17 goals laid down in the 2030 Agenda for Sustainable Development adopted by the General Assembly of the United Nations (UN).[1] The sustainable development goals (SDGs) encompass almost every imaginable policy area. Several of the goals mirror the thinking in earlier development agendas, in the sense that they concern the economic development of the Global South. For example, goal 1 concerns the eradication of poverty, goal 2 the aim of zero hunger, and goal 8 decent work and economic growth. These are all compatible with a historical development agenda, as originally imagined from the South during the early postcolonial era

[1] "Transforming our world: the 2030 Agenda for Sustainable Development", General Assembly Resolution A/RES/70/1, adopted 21 of October 2015.

after the Second World War.[2] This agenda mainly concerned how the countries subject to North-Atlantic colonialism and imperialism should be able to reassert economic independence and prosperity. It was embodied, on the international level, in projects such as the New International Economic Order.[3] The failure of this attempt was witnessed in particular during the 1980s and 1990s.[4] It largely coincided with the time when the Brundtland Report originally adds the idea of "sustainability" to the development agenda.[5] However, even remaining merely within the explicitly economic parts of the SDGs, the current goals are more ambitious than the old development project. Goal 10 does not only aim to reduce inequality between countries – which has already in practice proven fairly difficult – but also to reduce it within countries. The latter of which has not been very successful, judging from the numbers.[6]

In addition to these already far-reaching economic plans, the agenda proclaims a number of additional goals. The aim is to achieve gender equality (goal 5), make cities and production sustainable (goals 11 and 12), halt biodegradation and biodiversity loss on land (goal 15), and conserve and sustainably use the oceans, seas, and marine resources for sustainable development (goal 14) to name a few. Apart from the circularity (sustainable development is often to be achieved by sustainable action), the already very ambitious economic agenda is through these

[2] For an excellent piece of writing on economic development from a legal point of view, see David Kennedy, "The 'Rule of Law', Political Choices, and Development Common Sense" in David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006). For an important economic perspective, see Gerard M. Meier, *Biography of a Subject – An Evolution of Development Economics* (Oxford University Press 2005).

[3] The standard book from a legal point of view is Mohammed Bedjaoui, "Towards a new international economic order" (Holmes and Meier 1979). For a later reading, see Margot E. Salomon, "From NIEO to Now and the Unfinishable Story of Economic Justice", 62(1) *International & Comparative Law Quarterly* 31 (2013).

[4] For a legal perspective on this, see Tor Krever, "The Legal Turn in Later Development Theory: The Rule of Law and the World Bank's Development Model", 52 *Harvard International Law Journal* 288 (2011).

[5] "Report of the World Commission on Environment and Development: Our Common Future", taken note of in General Assembly Resolution A/42/427, adopted 11 December 1987.

[6] Branco Milanovic, *Global Inequality – A New Approach for the Age of Globalization* (Harvard University Press 2018), in particular pp. 155 *et seq*. While inequality between countries have decreased in the aggregate, the divide between the poorest and the richest countries is increasing. Inequality within countries is on the increase over the board.

goals expanded to include numerous other types of complicated social reorganization. For example, goal number 13 lays down the intention to take urgent action to combat climate change and its impacts. This goal adds significant further complexity to the Agenda 2030. At the time of writing, we are less than 8 years away from the target year. Taken together, the goals constitute a vast policy domain with numerous complicated sub-projects.

What to make of this sort of ambition? Historical evidence suggests decreasing the inequality within and between countries is uncommon and hard won.[7] Getting political backing for policies that constrain companies that cause much of the environmental degradation has been difficult, not to mention the difficulties in curbing global warming. The same goes for gender equality and equalizing access to valuable resources such as those of the sea. The many UN-sponsored "events" and "actions" created to implement the agenda pale in comparison with the ambition of the goals.[8] The UN Progress Report from July 2022 itself indicates that the project is in "grave danger", "along with humanity's very own survival".[9] The gap between the proclamations and the realities appears vast. How can one study a project of this type? What can a researcher in a law school contribute under these circumstances?

In this article I will endeavor to indicate some answers to such questions. Hopefully it might help produce generative analysis or at least create constructive dialogue on these matters. In order to more easily follow the text, it makes sense at this point to give the reader an outline. First, the article will attempt to localize legal scholarship in the policy field of sustainable development. This section attempts to show that all core areas of law can be studied from a sustainable development perspective, not least traditional private law. Second, I draw on previous scholarship that have analyzed SDG discourse as "bullshit" (as understood by Harry Frankfurt) and try to discern such situations from instances where SDG discourse might have real bite. Third, I will show that two core problems in current SDG discussions are (1) its lack of historicity and (2) that it underplays the need for tradeoffs and struggle in order to achieve the

[7] Thomas Piketty, *Capital in the Twenty-First Century* (Harvard University Press 2017).

[8] The typical sort of events arranged under the agenda are "capacity building events" and "stakeholder consultations", see https://sdgs.un.org/events.

[9] The Sustainable Development Goals Report 2022 (United Nations 2022) quoted from https://unstats.un.org/sdgs/report/2022/.

goals. Fourth, the text will outline how legal scholarship might contribute to ameliorating these two shortcomings of the SDG agenda. The article concludes by discussing some final points about legal scholarship aiming to contribute to the SDG project along the suggested lines.

Some of the thinking in this article draws on experiences from teaching sustainable development to doctoral candidates. In this sense, the thoughts in the article both constitute a form of autoethnography and arise out of practical considerations emerging when researchers are grappling with the SDG policy terrain.[10] As more researchers in law schools are incentivized to work with projects on sustainable development, it seems worthwhile to have an idea about what legal research in this field could become. The doctoral-candidate course explores such ideas and the present text constitutes a way of thinking through and hopefully refining insights gained from teaching as well as from collegial discussions.

Finally, a word on critiquing a well-intended – perhaps even emancipatory – language. There can be little doubt that the SDGs are laudable. Very few people would actively be against something like clean seas. In spite of this, this article outlines some of the difficulties with the SDG agenda. I realize that some of the analysis below might therefore be interpreted as a critique of the goals in themselves. It is worth mentioning already at the outset that nothing in the text is intended to be read in this way. Rather, the aim is to evaluate current policy intended to reach the SDGs and the particular role of legal research in this respect. I perform this analysis to allow scrutiny of such policy precisely because the project is praiseworthy. The aim is to encourage research that can render actual achieval of the goals possible, by outlining what policy such a project would actually require. The approach thus implies *taking the goals seriously* in order to incentivize research that might matter for reaching the goals.

[10] In particular, part three of the present text is indebted to Markus Gunneflo whom the course is thought with. Moreover, the text in section three below builds on work presented together with him at the Law & Society Annual Meeting in Lisbon 2022.

## 2 What does law have to do with the SDGs? – the various workings of the law

It is not always obvious to academic lawyers what law could bring to the study of sustainable development. Even more so, people outside academia are at times surprised that a course on sustainable development is given in a law school. Perhaps this has something to do with how legal research is normally carried out in some of the countries where the SDG agenda holds the most political clout. It might also be an effect of that legal scholarship often does little to bridge the current public-private divide in law schools. More on that towards the end of this section. Before we get to those arguments, I would like to present a case for how the SDG project is law, makes use of law, and can be fruitfully analyzed through a legal lens.

Most obvious (and perhaps least important) is the fact that the General Assembly resolution establishing the sustainable-development agenda is a creature of international law. There is an ample literature on the legal and other effects of such resolution, which is of lesser interest in the current context.[11] Suffice to say here that the document in all probability has some guiding power over UN bodies. There are currently several UN bodies working actively with the document. These organizations are also creatures of law, just like many of the domestic institutions dealing with the goals. Such administrative organs at times channel some amount of funds and wield a certain largely symbolic power. Thus, they can be investigated by legal scholars in order to understand their contributions to the SDG project. However, as will be clear at the end of this section, it might not be the most significant areas of law for deciding on questions that will affect the extent to which the sustainable development agenda will come true.

Instead of looking to these areas of law for understanding the potential of the SDG project, it is submitted here that other areas might be more useful candidates for research. In this context, it is worth bringing to mind Janet Koven Levit's words: "International law often makes story-

[11] See, for example, Richard Falk, "On the Quasi-Legislative Competence of the General Assembly", 60(4) *American Journal of International Law* 782 (1966) and many later similar texts.

tellers of onlookers."[12] In the quoted article she surveys how three international legal arrangements almost unheard of in the public international law literature perform decisive functions in the international economy. This, I think, is the sort of mindset legal researchers interested in the conditions for the SDG agenda might want to consider adopting. When looking beyond the most obvious types of public law bodies charged with the agenda, a world of possibilities opens up. Some types of international financial instruments, such as "blue bonds" are explicitly created for purposes of "sustainability".[13] This largely mirrors a previous approach to "development" where the legal conditions for investment flows were deemed a key policy tool.[14] However, all significant forms of private ordering of the economy appear important for the SDG agenda. After all, the agenda imagines a fundamental remaking of the whole economy. Understanding how private law structures can be remodeled to make the green transition possible appear like a central – albeit difficult – task for legal scholars to take on. This type of project would thus differ from what is normally studied in for example "climate change law".[15]

Instead of focusing on the law of the institutions that are explicitly working with the SDG project, I think more is to be gained from surveying the areas of law that are decisive for constructing the economy. Domestic legal orders are the basis on which the international economy is constructed.[16] As much of the SDG project is about changing the economy, law will be decisive for the endeavor. If the SDG agenda does not take hold in economic law, including core areas of private law, it simply will not be successful. After all, the current configuration of the economy is largely enabled through forms of private law. Law does not only attempt to constrain global warming, to take a (perhaps overly) clear example – it

[12] Janet Koven Levit, "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments", 30 *Yale Journal of International Law* 125 (2005), p. 126.

[13] Joywin Mathew and Claire Robertson, "Shades of blue in financing: transforming the ocean economy with blue bonds", 22(3) *Journal of Investment Compliance* 243 (2021).

[14] For an important discussion on this idea, see David Kennedy, "Some Caution about Property Rights as a Recipe for Economic Development", in David Kennedy and Joseph E. Stiglitz (eds.), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Centur*y (Oxford University Press 2013).

[15] Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017).

[16] Katharina Pistor, *The Code of Capital – How the Law Creates Wealth and Inequality* (Princeton University Press 2019).

also enables it. It would seem obvious that a plethora of domestic rules, including those on property and contract, are at the basis of structuring the form of economic organization that currently permits, even generates, the warming. Investigating such rules with a view to understanding how they currently make global warming possible should be central to legal scholarship. This in turn could be the basis for imagining new solutions, if we were to take the SDG agenda seriously. Many areas of law are yet to be reimagined from such a point of view.

An analysis along these lines would probably lead researchers to direct their attention to private, rather than public, forms of law. There is certainly something important that can be gained from such a shift.[17] However, one also should not focus too strictly on the formal characterization of an area of law as public or private. In this respect, it is worth keeping in mind the old legal insight that public ordering (sovereignty) is what enables private ordering (property).[18] Thus, the conditions for the economy will be determined by the *interplay* of these. Moreover, it would be simplistic to imagine that private law is only enabling a phenomenon such as global warming. The private law of a country will both enable and constrain economic activities depending on its exact legal content. Some structures of private law might be more prone to degrade biodiversity than others, depending on factors like which corporate forms are allowed and the conditions for taxation of these. Different types of private law (such as from different jurisdictions) are also likely to have different effects on a phenomenon such as global warming. For example, the space within which private contracting is allowed decisively shapes the ability for private ordering.

To summarize, the SDGs are created through law, make use of law, and will need to reshape numerous central forms of law if the agenda is to be successful. Moreover, as will be shown later in this article, legal scholarship could in some ways help come to terms with two particular shortcomings of SDG discourse. However, before we can analyze the two main shortcomings of the sustainable development project, we need to turn our attention to some of the pertinent and peculiar forms of critique levied at SDG discourse.

[17] For an outstanding analysis leading up to this conclusion, see Martti Koskenniemi, "Empire and International Law: The Real Spanish Contribution", 61 *University of Toronto Law Journal* 1 (2011).

[18] Morris A. Cohen, "Property and Sovereignty", 13(1) *Cornell Law Review* 8 (1927).

# 3 Bullshit or not? An outline for analyzing how and when SDG discourse matters

Conversations about sustainable development often take on a distinct character.[19] It is always clear that everyone is in favor of sustainable development. After all, no one is against the many abstract well-intended goals stated in the UN document that constitutes the current gold standard for the concept. In spite of this consensus about the importance of sustainable development, however, the support for the project is almost invariably invoked in passing and in a fairly muted tone. I have at least not, so far, come across anyone who is genuinely excited about the SDG project. More importantly, the supportive invocations seldom give rise to discussion on *which type* of "sustainable development" is intended or *how* it should be achieved.[20] People often appear to invoke it hoping to make people feel they are a part of something important, in order to tick a box in an administrative procedure, or because they hope the invocation can help access funding.

It is very hard to disagree with the SDG agenda in the abstract. Few people would actively contest that there is a need to combat climate change, achieve gender equality, or even decrease economic inequality.[21] Nevertheless, surprisingly enough, no one appears threatened by the SDG project – in spite of it promising far-reaching rearrangements of rights, resources, and economic value. This could be the effect of an agenda with very limited power. Only in very special situations do SDG invocations promise/threaten to actually achieve the political effects the language implies. In part, the surprising lack of resistance might spring

[19] In analyzing SDG talk, I am drawing loosely on Carol Bacchi's what-is-the-problem-represented-to-be approach". For an excellent breakdown of it, see Carol Bacchi, "Introducing the 'What's the Problem Represented to be?' approach", in Angelique Bletsas and Chris Beasley (eds.), *Engaging with Carol Bacchi – Strategic Interventions and Exchanges* (Cambridge University Press 2016). A more theoretical explanation is given in Carol Bacchi, "Why study problematizations? Making politics visible" 2 *Open journal of political science* 1 (2012).

[20] For an interesting discussion, see Jason Hickel, "The contradiction of the sustainable development goals: Growth versus ecology on a finite planet", 27 *Sustainable Development* 873 (2019).

[21] For that reason, I was first thinking that the SDGs constituted a far-reaching form of "essentially contested concept"; see W. B. Gallie, "Essentially contested concepts", 56 *Proceedings of the Aristotelian society* 167 (1955). However, as the degree of actual *contestation* is so low, another way of analyzing the discourse appeared necessary.

from the fact that the discourse outlines very few targets or costs. This might seem surprising in view of that the project purportedly aims to change almost *everything*. The SDGs create a form of discourse which aims to change the whole global order, from the economic to the social, but in a way where no one feels a need to oppose this purported massive change.

It is hard to resist the feeling that the carelessness of sustainability invocations derive from the fact that commentators believe the agenda might not change much or at least that one cannot easily envision groups that might lose out from it. In this sense, the proclamations in the agenda suffer from similar kinds of problems that some (other) types of rights discourse do.[22] When the goals are not institutionalized in any effective way and there is no duty-bearer, the proclaimed right start to look meaningless.[23] Such talk then becomes a substitute for a right which one cannot actually have access to: You cannot have food, but you can get a *right* to "zero hunger" (as goal number 2 proclaims).

How then to study this type of discourse from an academic point of view? In this context, it appears significant that scholars have argued that SDG discourse constitutes a form of "bullshit", as elaborated in the influential work of Harry Frankfurt.[24] It is striking that so many academics exposed to SDG discourse reach for this particular provocative reference.[25] Professor Frankfurt's analysis concludes that bullshit constitutes a form of talk where the speaker is indifferent to whether what they say is true or not.[26] In that sense, bullshit can be discerned from lying or

[22] For a broad discussion, see Martti Koskenniemi, "The Effects of Rights on Political Culture" in Martti Koskenniemi (ed.), *The Politics of International Law* (Hart Publishing 2011), in particular pp. 136–7 including footnote 10. Interestingly, in line with the argument above, human rights also seem prone to produce "a political culture of bad faith" p. 151 (emphasis removed).

[23] An inspiration for taking this type of analysis further could be Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning", 26(8) *The Yale Law Journal* 710 (1917). For a more accessible rendition of this thinking, see Pierre Schlag, "How to Do Things with Hohfeld" 78 *Law and Contemporary Problems* 185 (2015).

[24] Julian Kirchherr, "Bullshit in the Sustainability and Transitions Literature: a Provocation", Opinion paper, *Circular Economy and Sustainability* (2022). See also Fred Luks, "The Ugly, the Bad, and the Good: Bullshit as Discourse, Accursed Share, and Lubricant", 1 *Journal of Extreme Anthropology* 85 (2017).

[25] Numerous blog posts also invoke this theme in a less scholarly way.

[26] Harry G. Frankfurt, *On Bullshit* (Princeton University Press 2005), p. 61: "The

deception, as these both concern speech acts where the truth is actively circumvented or misconstrued. For this reason, Frankfurt holds bullshit to be a larger threat to the truth than lying.[27] One risk with discourse affected by bullshitting is that it normalizes a culture with limited regard for truthfulness. When scholars argue that SDG discourse constitutes bullshit, they thus argue that those invoking it speak with indifference as to whether their suggestions are likely to lead to the invoked outcome.[28] To my mind, it is clear that this analysis at times applies to SDG talk. "Sustainable development" is often simply invoked, without much regard for what the suggested action will actually lead to.

In spite of this, it is clear that in the complicated policy terrain where SDG language is the most invoked, the language sometimes carries significant political clout. At least in some settings, the SDGs enjoy a political, symbolic, or economic power which seem to affect allocation of resources or decide on questions of real societal ordering when it comes to policy relating to the SDGs. The situations where SDG discourse appear to have such "bite" come in varying types. Three examples come to mind.

First, in some regions or settings, SDG discourse appear to affect significant economic and political allocation. It seems this is particularly pronounced in the UN, in Northern Europe, and perhaps also in some parts of the Anglosphere. In these regions, the project at times appear to hold significant political power. Second, the symbolic value of the SDG language is evident from how governments and corporations lash onto the label as a signaling device. Governments use it to label initiatives and corporations to brand products and services. Much of this branding appears to constitute "sustainability-washing", in the sense that little change is intended or will actually take place. However, the competition to brand oneself as sustainable is such that it also at times appear to give rise to real change. If this analysis holds true, a significant question of SDG research is when the one or the other situation holds true. Moreover, even when constituting sustainability-washing, SDG talk typically has *some* effect – just not the intended one. Third, in some policy areas, the SDG project channels substantial funds, in particular with respect to development

bullshitter ignores these demands altogether. He does not reject the authority of the truth, as the liar does, and oppose himself to it. He pays no attention to it at all."

[27] Frankfurt, *supra*, p. 61.

[28] Some of what is labelled as "greenwashing" appears to have this character. Some greenwashing, however, might rather constitute lying or deception. For further analysis, see Oskar Mossberg in this volume.

aid and public funding in the UN, as well as domestically in some rich countries, mainly in Northern Europe. More so, powerful classification systems create categorizations pertaining to sustainable development that indirectly affect capital allocation in areas such as certain pension schemes, so-called blue bonds, and tax rebates for certain types of energy.[29] These all seem like areas where the sustainability concept has taken on real-world significance. Following this line of thought, SDG researchers might want to focus attention on areas where such systems actually redistribute resources or trigger some change. Or, conversely, there might be instances when it is worthwhile to study which role law might have in rendering the current situation so immune to change.

To conclude, the SDGs have at times given rise to a form of talk with little regard for what such discussions might lead to – but this is not always the case. There are on the one hand clearly instances where the goals carry the sort of do-goody air that makes them easy to invoke, hard to denounce, and often of little practical importance. This is often how "sustainability" (commonly without the original, in part more radical, idea of "development") appears to be loosely invoked in meetings of administrative bodies and in much corporate marketing. In these situations, there is typically a pressure to speak about some form of sustainability without much care for if this will have some actual effects.[30] On the other hand, it is hard to deny that the goals, in certain situations, seem to carry real-world political clout. First, they do channel some funding and significant symbolic capital – in particular in Northern Europe, in development aid, and within the UN system. Second, it is clear that commercial and other actors are making use of the language in ways that need not always come from a genuine commitment, but still at times commit real resources and appear to trigger some change. Thirdly, some types of classification systems appear to make real inroads in the economic

[29] Such as the EU taxonomy. For an overview, see Franziska Schütze, Jan Stede, Marc Blauert, and Katharina Erdmann, "EU taxonomy increasing transparency of sustainable investments", 10(51) *DIW Weekly Report* 485 (2020) from Deutsches Institut für Wirtschaftsforschung.

[30] When such pressure is there, the risks of creating bullshit increases. See, Frankfurt, *supra*, p. 63: "Bullshit is unavoidable whenever circumstances require someone to talk without knowing what he is talking about. Thus the production of bullshit is stimulated whenever a person's obligations or opportunities to speak about some topic are more excessive than his knowledge of the facts that are relevant to that topic."

organization of the global economy in ways that might lead to significant changes for the 17 goals.

What then to make of this mix of meaninglessness and occasional political clout? How to study an agenda that both appears to promise much and do little, but which at least in certain issue areas in some corners of the world holds some symbolic and economic power? How to carry out research in this complicated intellectual and policy terrain? One main difficulty appears to be understanding *when* the SDGs are doing work and *what* work they are doing. Put in other terms, one significant question is to discern the bullshit of SDG discourse from places where it leads to some actual effects for the SDG project.[31]

## 4 On the causes for the current nature of SDG talk – or "if one does not understand the problems, it is hard to solve them"

During the doctoral-candidate course, we have noticed two core problems that appear to contribute both to the "bullshitty" nature of SDG discourse and to the current inability to solve many of the problems on the agenda. First, this seems to spring from the lack of historicity in the sustainable development agenda. This absence appears to contribute to a poor sense of problem analysis and strategic agency in the project. Second, we believe that the SDG agenda heavily underplays that some actors will have to lose something to put the agenda into action. This can be described as a lack of trade-offs, conflict, struggle, or as an inattention to distributive questions. This second absence contributes to the technocratic nature of the SDG project, where the political interests and tensions between groups are underplayed. I will describe these two shortcomings below and will then try to indicate some ways in which they are related towards the end of this section. In the next section, I will discuss which types of legal research that might help to remedy these shortcomings.

Let's first turn our attention to the lack of historicity in SDG discourse. Core historical phenomena, that would seem decisive to understand for coming to terms with the goals, are not mentioned in the Gen-

[31] And, of course, to try to understand what other work ineffective invocations (from the point of view of the SDG project) might nevertheless perform. For example, as a form of justification of a practice or to disguise problematic consequences of it.

eral Assembly resolution, and not normally discussed among SDG practitioners. Strikingly, neither the industrial revolution, nor colonialism are mentioned in the resolution.[32] The document does not discuss any other causes for the origins of the environmental disasters facing humanity, nor the origins of the global economy that constitute the preconditions for inequality in the first place. Neither the long trajectory of thinking about (economic) "development", the historical background to such developmentalism, or the way "sustainability" has come to overtake the discourse is a regular part of the discussion among SDG practitioners. A student approaching the General Assembly resolution without a historical background will not learn about the emergence of the carbon-driven economy or about the economic history of the 19th century, when the great divergence between "developed" and "developing" countries largely emerged.[33] As the discourse does not analyze the causes creating the problems, these in turn become harder to understand. More so, it is hard to grasp that the current use of "sustainability" in the North from a third-world perspective often comes across as an appropriation of a discourse that originally was about rectifying economic injustices with deep historical roots.

The lack of historicity is a problem because if one does not know how these problems emerged, one is limited in one's understanding of how to solve them. As so often, Friedrich Kratochwil has said it the most succinctly:

> "[T]hose who forget their history are not only condemned to repeat their mistakes […]. The problem is even more serious since those who cannot recall the past from the ever-changing problems of the present and connect it meaningfully to a future are impaired in their agency and therefore prone

[32] For a famous argument about the emergence of the carbon-driven economy, see Andreas Malm, *Fossil Capital – The Rise of Steam Power and the Roots of Global Warming* (Verso 2016). An excellent explanation of economic thinking shaping the economies in colonies, see Erik S. Reinert, "Emulation versus Comparative Advantage: Competing and Complementary Principles in the History of Economic Policy", in Mario Cimoli, Giovanni Dosi, and Joseph Stiglitz (eds.), *Industrial Policy for Development: The Political Economy of Capabilities Accumulation* (Oxford University Press, 2009).

[33] The term the great divergence was coined in Kenneth Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Princeton University Press 2001) and has led to a massive literature. For an accessible econometric study, see Paul Bairoch, "International Industrialization Levels from 1750 to 1980" 11 *Journal of European Economic History* 269 (1982), p. 273.

> to misunderstand the issues and choices that have been made. While history cannot be the 'teacher' of all things practical, the critical reflection on our historicity is an indispensable precondition for grasping our predicament as agents."[34]

Exactly this type of predicament appears to plague SDG discourse. Its dearth of historicity becomes particularly problematic when the goals are translated to a practical policy setting. Since those engaging with the goals often work within bureaucracies charged with concrete policy areas, they normally operate with a practical problem-solving mindset.[35] This is likely inevitable in that sort of organization, but this does not mean such a mindset it the only one available. This is not, I believe, a type of thinking where academics should hope to outdo our colleagues working with practical policy.

Luckily, we have other routes to take. Perhaps the sort of analysis performed in the previous section – trying to figure out the character of SDG talk or placing the discourse in a historical context – could support the SDG project by providing explanations for some of the current difficulties for the Agenda. Analysis of how a problem emerged or what the distributive stakes are could also contribute valuable information to policymakers. Even where such distributive analysis would result in criticism of current solutions, it could in the long run help render the project more credible – and potentially effective. In a similar way, historicization could contribute valuable information by shaping our perception of the problem, that might in turn help finding other policy solutions than those currently imagined. An analysis of how a problem emerged, at its best, might help illuminating which policy might actually help solving it. Judging from the Progress Report cited above, critical examination of the current policy solutions seems urgent.

Seen through such a lens, the kind of examination suggested here would not be a small thing. And neither would it be "academic", in the conventional meaning of the word. For example, if one does not understand how the inequality between states has been created, maintained, and sometimes

[34] Friedrich Kratochwil, "History, Action and Identity: Revisiting the 'Second' Great Debate and Assessing its Importance for Social Theory", 12 *European Journal of International Relations* 5 (2006), pp. 20–21.

[35] For the distinction between critical and problem-solving mindsets, see Robert Cox, "Social Forces, States and World Orders: Beyond International Relations Theory", 20(1) *Millennium: Journal of International Studies* 126 (1981), in particular on p. 128 *et seq*.

remedied, one cannot easily see the stakes of a project to overcome it. Such an unimaginative situation risks sustaining an inability to come to terms with several of the goals. Moreover, it is hard to understand the role of "sustainable development" today without connecting it to the long trajectory of previous developmentalism and its particular role as a form of politics in the former colonies to assert economic self-determination.[36] In this respect, as lawyers we might not only want to focus on how law might provide solutions to the SDG problems, but also on how law currently can play a role in creating or sustaining the problems identified by the SDG project. For example, is it not clear that private law in some sense is a driver of global warming and the loss of biodiversity? Is it not probable that the current rules on finance contribute to enabling the widening inequality in most countries around the world?[37] Such questions constitute first-rate legal research questions of significant complexity. Might the SDG Agenda help inspire projects such as these?

The second core problem with SDG discourse (the lack of targets and sense of struggle) appears related to its technocratic character. Most practitioners and many scholars discuss the project as a matter of bureaucratic fine-tuning. The field is normally portrayed as one devoid of struggle and conflict. To the contrary, SDG discourse often emphasize that all the 17 goals are complementary or mutually enforcing. Moreover, the agenda is typically imagined to have few or no losers. When operating with such a world-view, it becomes hard to imagine tradeoffs or conflict. When looking at the breathtaking scope of the goals set forth in the SDG project, it is hard to imagine that no one would try to resist actual attempts to trigger such a transformation. After all, decreasing inequalities either between or within countries have not come without significant struggle in the past. Similarly, reshaping the international economy to stop or revert global warming is highly likely to produce at least some losers.

Seen through this perspective, there is a need to find policy areas where the Agenda has to affect change to take effect. However, the oft-neglected need for struggle can be highlighted by certain forms of legal knowledge.

[36] See for example, Joseph Morgan Hodge, "Writing the History of Development (Part 1: First Wave)", 6(3) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 429 (2015) and "Writing the History of Development (Part 2: Longer, Deeper, Wider)", 7(1) *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 125 (2016).

[37] Pistor, *supra*. See also, David Kennedy, *A World of Struggle – How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

Law can – for a researcher who wants to take the SDG project seriously – be a place of study for outlining how SDG policies might engineer particular forms of resistance. Is it not the case that climate action would have to affect a number of current legal entitlements to property or established through contract in order to take effect?[38] Is not one or another group opponents to some particular legal change? In its practical operation, law is by its nature conflicutal. When you start viewing the SDGs through such a legal lens, merely achieving one of the goals without significant resistance appears utopian. Achieving all of them simultaneously arguably would be harder. However, something in the way SDG participants talk make it seem like achieving a whole set of very complicated goals somehow will be *easier* when they are presented as a package deal.

A concrete example might make it clearer what I mean by such a lack of a conflict dimension. In a very oft-quoted article, a number of influential researchers from a diverse set of disciplines set out to aid the SDG agenda through better "operationalizations".[39] They do so by sorting the 17 goals into 6 focus areas each giving rise to a "transformation".[40] When considering how far-reaching the change imagined by the authors is, it is interesting to see how smoothly they imagine it to take place. When reviewing how the focus areas interact, they consider most the transformations to be "synergistic with no major trade-offs".[41] Sometimes trade-offs are imagined, but then the solution is typically found in administrative change with a distinct technocratic ring. These include "sound accounting frameworks", to "strengthen coordination mechanisms", or in the need for "a comprehensive set of regulatory standards".[42] The only major opponents to the agenda mentioned in the article are poor people in rich countries (the examples being *les gillets jaunes* and equivalent German groups protesting against increased gasoline taxation).[43] To me, it seems at least as likely that effective climate action would engender resist-

[38] Lea Di Salvatore, "Investor–State Disputes in the Fossil Fuel Industry", Report for the International Institute for Sustainable Development, December 2021.

[39] Jeffrey D. Sachs, Guido Schmidt-Traub, Mariana Mazzucato, Dirk Messner, Nebojsa Nakicenovic, and Johan Rockström, "Six Transformations to achieve the Sustainable Development Goals", 2 *Nature Sustainability* 805 (2019).

[40] Sachs et al. *supra*, for example on p. 805.

[41] Sachs et al. *supra*, e.g. on p. 806.

[42] Sachs et al. *supra*. Examples taken from the discussions on transformations number 3, 4 and 6 respectively.

[43] Sachs et al. *supra*, p. 808.

ance from say companies operating in the oil and natural gas sectors.[44] However, conflicts or tradeoffs of this nature are not imagined in the article. Instead, the overarching message is that the SDG are complementary in the sense of supporting each other.

The two problems of ahistoricity and lack of conflict in SDG discussions are intertwined in some fundamental ways. Probably it is only with a fairly ahistorical worldview that all the goals can be imagined as mutually reinforcing. After all, if one knew about the struggles it has taken in the past to for example increase gender equality, it would seem less likely that such an endeavor would be significantly furthered by protecting biodiversity. At least, the link is not clear. Similarly, the need for struggle can be underplayed precisely in a setting where there is little description or explanation of how the problems that the SDGs attempt to tackle came about. If one does not survey what it has taken to fundamentally reorganize economies, achieve economic equality, stop environmental degradation, or undo power disparities among genders in the past, one might downplay the difficulties for achieving such goals currently. This outlook in turn lends credence to a mindset where minor changes are imagined to make the highly ambitious agenda a reality.

At this point, I want to highlight that it appears correct that the different goals all affect each other. It is of course the case that different policy problems interact in numerous complicated ways. The world simply refuses to be neatly ordered into policy areas. This seems necessary to acknowledge in order to effectively push the SDG Agenda. However, this does not mean that the goals work in exclusively (or even mainly) synergistic ways. There is a significant danger in imagining the goals as mutually supporting. There are decisive economic, political, and – not least – legal constraints and tradeoffs that have to be realistically appraised. I believe a mindset where such difficulties are frankly acknowledged would aid in reaching the goals. My intuition is that SDG research that helps outline and explain such constraints and tradeoffs might be particularly timely at the current moment.

[44] International investors in oil and gas are common claimants in investment treaty arbitration also in the current lenient policy climate. For a discussion, see Di Salvatore *supra*.

# 5 How can legal scholarship contribute historicity or a conflict dimension to SDG discourse?

I hope to have made it plausible that the SDG project suffers from a lack of historicity and sense of conflict. In which senses might the academic study of law help remedy the two problems described above? I will try to outline some of the characteristics of legal research that could be emphasized in order to ameliorate the discussed problems.

When it comes to the lack of historicity in SDG discourse, law has the advantage of being naturally historical. After all, it is part and parcel of legal practice to appeal to sources of authority from the past – such as previous documents, practices, and ideas – in order to justify what should happen in the future.[45] In this sense, law is a practice tying the past to the future.[46] This gives lawyers a natural road for surveying the historical construction of important policy areas if there is a will to do so.[47] While the historical aspect might not be emphasized in much legal research, it can always be brought forth. Due to the natural connection to past practices, legal scholars can often fairly easy draw up a narrative about the history of a relevant policy area. This could be applied to areas of law found central to one or another of the goals in the agenda. Relevant questions abound: Which were the arguments in environmental law that created a system of permits that allowed emitters to be shielded from claims once the permit was established?[48] What allowed low-tax and secrecy jurisdictions to emerge during decolonization?[49] What type of law helps sustain

[45] Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021).

[46] Philip Allott, "International Law and the Idea of History", 1 *Journal of the History of International Law* 1 (1999).

[47] Of course, often history is not used with a view to understanding how a problem came about – but rather focused on how to solve a problem within the type of problem formulation that is currently dominant in the legal sub-field. In order to break out of such a mindset, I have found the two texts by Bacchi in footnote 19 helpful.

[48] Agnes Hellner, *Arguments for Access to Justice: Supra-individual Environmental Claims Before Administrative Courts* (Uppsala 2019) diss. However, some of her outstanding work on these questions did not end up in the dissertation and regrettably remains to be published.

[49] Vanessa Ogle, "Archipelago Capitalism: Tax Havens, Offshore Money, and the State, 1950s–1970s", 122(5) *The American Historical Review* 1431 (2017).

economic inequalities?[50] Such research can contribute to bringing out the stakes of the SDGs more clearly and thus increase awareness of the conditions for the SDG project and perhaps even contribute to the imaginative capacity of policy people operating in the domain.

Let us now turn our attention to the lack of conflict in SDG discourse. Here, as well, law can be studied in ways that help overcome this difficulty, as struggle and conflict exist naturally in the law. After all, law is often structured around questions of dispute settlement between defined groups, such as between producers and consumers, employers and employees, or investors and host states. Under such circumstances, one can study how different readings of the law will benefit the one or other group.[51] While always present in the law, this struggle is not always brought forth.[52] Doing so, however, can contribute to a better understanding of how the different goals interact and the SDG Agenda can be better realized.

What is more, law is often a silent repository of power. It is a core way in which political power shrouds itself, becomes naturalized, and perceived as apolitical.[53] Thus, finding ways to highlight the politics of law can aid the SDG project by revealing places where legal change would be needed in order to achieve the goals in the SDG project. Again, let's take the example of action to combat climate crisis. Which changes in property or contract rules might actually lead to decreases in global warming? Is there a way to provide a roadmap for how such changes can be engineered? To which extent will rules on public procurement, state aid, and competition law make it harder to push through effective policy for green transition?[54] In addition, where policy people already appear to be on the right track, numerous distributive questions are of importance for

[50] An interesting attempt at understanding this can be found in Pistor, *supra*.

[51] For some inspirational examples from the law-and-society tradition and American legal realism respectively, see Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", 9 *Law & Society Review* 95 (1974) and Robert L. Hale, "Coercion and Distribution in the Supposedly Non-Coercive State", 38(3) *Political Science Quarterly* 470 (1923).

[52] Rather, in many parts of academia, the opposite might be truer.

[53] A good introduction to analysis of this kind can be found in David Kennedy, *A World of Struggle – How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

[54] In creating these particular examples, I have been loosely inspired by the work of Mariana Mazzucato on technology transformation. See Mariana Mazzucato, *The Entrepreneurial State – Debunking Public vs. Private Myths in Innovation* (Anthem Press 2013).

which of the goals will be better achieved and how the burdens for this societal transition will fall. The costs and benefits of green transition will clearly fall on different groups depending on how it is institutionalized through law.

To sum up, certain types of legal research can contribute to understanding the conditions for the SDG project better. By historicizing and highlighting conflict, the two problems outlined above can be mitigated. Such research can help outline the real stakes at play, help policy-people realize the true conditions for the SDG project, find important but previously hidden areas for policy, and contribute to making hard but necessary choices. In this respect, I have found the work of Karl Polanyi helpful.[55] He surveys how the economy has affected other important societal interests through studying the intersection between public and private power historically. This type of approach would be a helpful point of departure for legal analysis of the SDGs.[56] Moreover, Polanyian analysis aims to show how the (legal) institutionalization of the economy can come in conflict with other societal interests. As so much of the SDG project aims precisely to reshape the economy in order to reach other goals, this makes Polanyian analysis a natural starting point for much research.

## 6 Concluding remarks: Finding law where the action is, historicize and highlighting the stakes

I do hope to have at this point made it plausible that SDG discourse has a problematic lack of historicity and that it underplays the need for distributive analysis for reaching the goals. I also hope to have shown some ways in which legal research might be useful for remedying these difficulties – by revealing the distributive stakes of policy areas and historicizing

[55] Karl Polanyi, *The Great Transformation – The Political and Economic Origins of Our Time* (Beacon Press, 2001 [originally 1944] reissue with new introduction).

[56] My application of these ideas to international economic law can be found in Love Rönnelid, "Regulatory Capabilities of Catch-up Growth: The developmental state, the history of policy space, and today's international economic constitution" in Diego González Cadenas (ed.), *Cambio constitucional y order juridico international* (Tirant lo Blanch 2022).

them. There are numerous ways to carry out this type of research from a legal perspective. This often means studying a policy question over legal categorizations, in particular across the public-private divide.

First, through legal history, academic lawyers might create plausible accounts of how the many policy problems of the SDG agenda emerged. Which law currently enables un-sustainable development? How did that law come about? Which ideas might currently sustain such law? Second, studies of the actual places where law helps decide which group gets what could help revert some of the most problematic harmonious tendencies of SDG discourse which overemphasizes the synergies between the goals. Moreover, a focus on the conflicts almost always present in law can help dispel the depoliticization narrative of mutual gains and the idea that all the goals are necessarily reinforcing each other. In this way, legal research might make a lasting contribution to our common future.

Many indicators for the Agenda-2030 project are currently pointing in the wrong direction. For certain of the policy areas – such as climate action and the loss of biodiversity – irreversible damage is immanent. With respect to other areas, the situation constitutes a protracted continuous crisis, such as with respect to poverty and hunger in the least-developed countries. Whichever the situation, we should try to do our utmost to resist invoking these goals lightly. Instead, meaningful SDG research should help highlighting the deep-seated history of how our current predicament came about. By doing this, SDG research could shift attention towards understanding what it might actually take to undo the current disasters, as well as highlighting the distributive conflict that it might take to actually reach the goals – not just talk about them.