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COMPARATIVE LAW FOR WHAT KIND OF DEVELOPMENT?

Giuseppe Bellantuono

SUMMARY: *1. Introduction. 2. Addressing criticisms. 3. Comparing interpretations. 4. Comparing implementation contexts. 5. Comparing evaluation processes. 6. Conclusions.*

1. Introduction

The law and development field has had a troubled relationship with comparative legal studies. More often than not, comparative legal scholars have criticized both the scientific underpinnings and the political strategies that studies on law and development are assumed to endorse. Over the past decades, the crisis of the law and development field and its multiple failures in promoting effective legal reforms have been repeatedly denounced. This debate did not only concern methodological disagreements, but involved broader challenges to the Western concept of development and to the capitalist system it supports. Undeterred by these criticisms, both the international donor community and law and development scholars have kept searching for new and improved approaches to legal reform in developing countries.

The research question addressed in this chapter is whether the eruption on the global scene of the Sustainable Development Goals (SDGs), unanimously adopted by the UN General Assembly in 2015 and heralded as the major driver of development policies in the next decade, should prompt a reassessment of the relationship between law, development and comparative legal studies. On an optimistic tone, the SDGs «may be an important step in the longer-term development of more widely shared norms of sustainability around which states can craft policies, actors can mobilize, and institutional mechanisms can adapt and

support»¹. A more pessimist view is that the SDGs still rely on a concept of development which cannot be decoupled from environmentally unsustainable practices and social injustice². Given that controversies on development are not going to end any time soon, the argument could be made that the SDGs cannot help the community of law and development scholars to coalesce with the community of comparative legal scholars around a shared research agenda.

The view advocated in this chapter is that the limits of the SDGs are the main reason why the legal dimensions of development should be addressed in a comparative perspective. The starting point should not be the search for widespread consensus on concepts of development, but the planetary ecological crisis and the growing global inequalities within and between countries³. The SDGs may or may not contribute to mitigate both problems. Perhaps they will fail to mobilize the financial resources needed to implement them⁴. Still, they include two innovative features which offer the opportunity to move past current disagreements. Firstly, the SDGs propose a universal approach to development,

¹ N. KANIE ET AL., *Introduction: Global Governance Through Goal Setting*, in N. KANIE, F. BIERMANN (eds.), *Governing Through Goals: Sustainable Development Goals as Governance Innovation*, Cambridge, Mass.-London, UK, 2017, p. 23.

² W. SACHS, *The Sustainable Development Goals and Laudato si': Varieties of Post-Development?* 38(12) *Third World Q.* 2573 (2017); S. ADELMAN, *The Sustainable Development Goals, Anthropocentrism and Neoliberalism*, in D. FRENCH, L.J. KOTZÉ (eds.), *Sustainable Development Goals: Law, Theory and Implementation*, Cheltenham, 2018, p. 15.

³ See W. STEFFEN ET AL., *Planetary Boundaries: Guiding Human Development on a Changing Planet*, 347 *Science* Issue 6223, 13 February 2015 (evidence about planetary boundaries being transgressed); F. ALVAREDO ET AL., *World Inequality Report*, 2018 (showing that since 1980 inequality has increased both within countries and at global level). Global inequalities and climate change are linked in multiple ways: see, e.g., the contributions collected in B.M. HUTTER (ed.), *Risk, Resilience, Inequality and Environmental Law*, Cheltenham, 2017.

⁴ The range of estimates is quite large and goes from \$2 to \$7 trillion per year: see references in T. VOITURIEZ ET AL., *Financing the 2030 Agenda for Sustainable Development*, in N. KANIE, F. BIERMANN, *op. cit.*, p. 259; L. GEORGESON, M. MASLIN, *Putting the United Nations Sustainable Development Goals into Practice: A Review of Implementation, Monitoring, and Finance*, 5(1) *Geography and Environment* 1, 15 (2018).

which also applies to developed countries. This means that legal change is being promoted within a common framework across radically different institutional contexts. This new round of legal reforms could provide a natural experiment to test alternative concepts of development and ways to implement them. But a necessary condition is that information about local experiences is collected and analysed with sound comparative methodologies. Secondly, the collective effort to implement the SDGs will make available new communication channels, new monitoring mechanisms and new accountability systems. All of them will prompt research questions about institutional change and inertia, effectiveness of legal reforms, explicit and implicit assumptions embedded into the SDGs implementation machinery. Both law and development scholars and comparative legal scholars should be attracted to such questions.

The view advocated here does not try to bracket the most controversial issues on development. It tries instead to suggest that the most radical criticisms of Westernized concepts of development (and of the rule of law) should be employed to foster the dialogue among legal scholars in the Global South and in the Global North. Amidst the fragmented and heterogeneous approaches to development themes, the aim to be pursued should not be convergence toward common solutions, but stronger awareness of the impact of contextual differences. This aim could be achieved in several different ways. A focus on the SDGs could have the advantage of shifting the debate toward more practical goals. Of course, some scholars will argue that nothing short of the demise of capitalism will help address ecological crises and global inequalities⁵. Though, even these scholars should be willing to acknowledge that a comparative framework could help identify the stated and unstated assumptions behind the measures implementing the SDGs. Without this kind of knowledge, it is hard to see how alternative views of development could be proposed.

⁵ See, e.g., DA. KENNEDY, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy*, Princeton, 2016, p. 15 («People propose institutional reforms ... as if a lever to move the world had been identified, while remaining intensely aware that this is more aspiration than reality»).

In the following sections, I flesh out some proposals for the comparative analysis of the SDGs. Section 2 reviews the criticisms that comparative legal scholars addressed to law and development studies. I argue not only that these criticisms have to be taken seriously, but that they provide the foundations for a broader research agenda on comparative law and development. The next three sections provide examples of research topics related to the implementation of the SDGs. Section 3 focuses on the comparison of interpretive practices for the SDGs. The explicit premise here is that the debate on the meaning of development will not end, so different meanings have to coexist. Identifying interpretive practices is of crucial importance to select the right implementation measures. Section 4 turns to contextual analysis. Here the research problem is to find ways to take into account the lessons of legal pluralism about the complexity of local cultures. The comparative approach should clarify when a specific context could support or hamper the implementation of the SDGs. Section 5 discusses the evaluation problem: how can comparative law help establish which implementation measures are successful? I try to go beyond the stalled debate about the possibility to use comparative law for policy purposes and suggest that the main long-term contribution should be the improvement of learning processes. Section 6 provides a summary of the arguments presented in the chapter.

2. Addressing criticisms

Mathias Siems usefully summarized the four main criticisms levelled against the proponents of law reform projects as the main engine of development⁶. Firstly, cultural or political factors could drive development, thus relegating law reform to a secondary role. Secondly, top-down approaches, often employed in foreign aid programs, disregard local specificities and the role of informal community norms. Thirdly, trying to use Western legal models in developing countries is doomed to failure. Fourthly, development is not fostered by promoting the

⁶ M. SIEMS, *Comparative Law*, 2nd ed., Cambridge, 2018, p. 352-362.

wrong type of reforms, for instance those which only pay attention to the dismantling of barriers to competition and overlook resource preservation and social rights.

It is not surprising that development themes arouse vigorous debates. But something more than scientific disagreements seems to be at stake here. The whole law and development enterprise is accused of being an attempt at exporting American, or more generally Western, models, the ultimate goal being to control the global economy and preserve the status quo. Consider, for example, Jedidiah Kroncke's wide-ranging critique of efforts to export American law during the twentieth century⁷. He argued that the law and development field completely overlooked three of the most important lessons stemming from the comparative law literature. Firstly, attempts at exporting American law were depicted as technical solutions devoid of any political meaning. Secondly, American law was said to be easily transferable to foreign legal systems, no matter how different their institutional, political, economic and cultural features. Thirdly, what was transferred was an idealized package of institutional solutions, a long way off the historical dynamics that shaped American law and completely oblivious to the lively domestic debates that influence the meaning of the institutions whose export was, and is, actively promoted. According to Kroncke, the deep roots of this mistaken approach to law and development can be traced back to the cultural influence of Christian missionaries in the early twentieth century. In a few decades, such influence was converted into a foreign policy which, both before and after the Second World War, saw the export of American law as one of the main ways to ensure the protection of national interests and the containment of Soviet and Chinese expansion. Although Kroncke devotes most of his attention to the relationship between the US and China, he argues that the same approach was used in Latin America, Africa and the Middle East. In all cases, attempts at exporting American law are judged to be a complete failure. Note, however, that Kroncke does not deny the possibility of legal transplants. He argues instead that no persuasive evidence has

⁷ J. KRONCKE, *Law and Development as Anti-Comparative Law*, 45 *Vand. J. Trans. L.* 477 (2012); J. KRONCKE, *The Futility of Law and Development: China and the Dangers of Exporting American Law*, Oxford, 2016.

been provided about the contribution of American law to development in any of the countries in which this strategy has been adopted. The identification of law and development with the export of American law leads Kroncke to conclude that the whole enterprise of promoting legal reforms abroad should be abandoned. He maintains that reviving comparative legal studies in the US is the only way to stop the endless cycle of optimism and delusion which characterized the law and development field in the last decades.

Kroncke is not alone in criticizing the law and development field from the vantage point of comparative law. Ugo Mattei and Laura Nader argued that «Ruling elites in Europe and the USA have imposed and still impose the social costs of their development on weaker people, at home and abroad, and the rule of law effectively and elegantly serves this practice»⁸. If a close association is detected between global inequalities and Western legal models, no common ground can be identified on which to start a discussion about the details of legal reforms. This problem is not confined to the contents of the reforms, but is said to involve the methodology of comparative law. Mattei argued that during the Cold War the whole methodological debate in comparative legal studies suffered from much the same problems that Kroncke had identified in the American approach to international relations⁹. The taxonomy of legal families, the description of the similarities between civil law and common law countries, the elaboration of the concept of a Western Legal Tradition, the almost exclusive focus on private law, as well as the discussion about the comparability of capitalist and communist countries, were deeply influenced by the need to affirm the superiority of Western law. From this point of view, the law and development field did not overlook the lessons of comparative law. The latter partook of the same approach which led to multiple rounds of failures in legal reform efforts.

There are at least three possible reactions to these criticisms. The first one is to locate the contrast in the insiders/outside framework

⁸ U. MATTEI, L. NADER, *Plunder: When the Rule of Law is Illegal*, Malden, Ma., 2008, p. 197.

⁹ U. MATTEI, *The Cold War and Comparative Law: A Reflection on the Politics of Intellectual Discipline*, 65 *Am. J. Comp. L.* 1 (2017).

proposed by David Kennedy. Law and development scholars who work on improving global governance can be perceived as the insiders, while comparative legal scholars are called to play the role of outsiders who contest patterns of domination and denounce inequalities. Each camp employs its own vocabulary and relies on methodologies the other camp finds unacceptable. This framework might describe what has happened in the last few decades, but it does not suggest that the divide between insiders and outsiders will be a stable and permanent one¹⁰. Therefore, a second reaction could be to use comparative law to promote alternative concepts of development.

For a number of reasons, this is no easy task. To begin with, alternative concepts of development should be grounded on the analysis of the causes of the problems to be addressed. So far, criticisms of law and development have only focused on Western exploitation. For example, Mattei and Nader direct attention to one crucial source of world inequalities when they argue that “underdevelopment is a historically produced victimization of weaker and more closed communities and not the disease of lesser people”¹¹. Though, they also suggest that exploitation from Western countries is the only problem to be addressed. If we take a more long-term view of development, this approach looks too monolithic. Factors other than Western domination need to be included in the analysis. For instance, transatlantic slave trade and colonialism did play a crucial role in Africa, but they interacted in complex ways with the history of local institutions. Their effects were not the same everywhere. To explain not only why Africa became poor, but also why it stayed poor, geographical, kinship and religious factors have to be taken into account as well¹².

Secondly, which alternative concepts of development should comparative legal scholars support? It is possible that, by coming into con-

¹⁰ DA. KENNEDY, *op. cit.*, p. 103-107 (on the insiders/outside distinction), 153-159 (boundary work leading to revise acceptable arguments in a specific field). Indeed, this chapter can be understood as an attempt to modify the boundaries between law and development and comparative law.

¹¹ U. MATTEI, L. NADER, *op. cit.*, p. 6.

¹² See M. McMILLAN, *Understanding African Poverty Over the Longue Durée: A Review of Africa's Development in Historical Perspective*, 54(3) *J. Econ. Lit.* 893 (2016).

tact with legal cultures in developing countries, comparative legal scholars are able to identify alternative ways to organize economic and social relationships. Consider, for example, the recognition of the Nature, or Mother Earth, as a legal subject in some Latin American constitutions¹³. An alternative concept of society is visible here. It explicitly embraces the main tenets of indigenous traditions, namely the rejection of the duality between man and the environment, the primacy of inter-generational duties over the right to exploit natural resources, and the ideas of collective responsibility and solidarity. This alternative concept animated the debate on the possibility of an economic model that rejects the capitalism modes of production. More generally, the indigenous view of modernity is contrasted with the Western view and the economic organization it has historically produced. It is argued that contemporary economies should not become more sustainable, but replace the ideas of growth and progress with a perspective that grants priority to the preservation of natural resources.

The comparative legal scholar has a role to play in clarifying the origins of indigenous concepts and their legal implications. There are, however, two risks to be avoided. The first one is the acritical adhesion to alternative concepts of development. If exporting Western concepts to developing countries is plainly wrong, trying to suggest that indigenous concepts could be used to transform capitalism in developed countries does not appear to be supported by any theory of legal change¹⁴. Furthermore, it is widely acknowledged that indigenous concepts are still struggling to transform the economic and institutional frameworks of Latin American countries. Thus, the object of comparison should be

¹³ See, e.g., the discussion in S. LANNI, *Il diritto nell'America Latina*, Napoli, 2017, p. 149ff. (on Nature as a legal subject), p. 157ff. (on indigenous law as the foundation for a new economic order).

¹⁴ For example, F. CAPRA, U. MATTEI, *The Ecology of Law*, Oakland, Ca., 2015, p. 29, 156, 175 argue that a cultural revolution is needed to replace the traditional concept of economic growth with a relational order in which all the living inhabitants share equal access to global commons. To achieve this goal, the best legal practices capable of implementing the values of power diffusion, social justice and ecological sustainability should be identified. The problem with this view is that it might be understood as replacing the universalist bias of Western countries with another universalist bias, this time rooted in alternative concepts of development.

the attempts carried out in both developed and developing countries to remedy the distortions affecting current economic systems. The working hypothesis should be that both the problems to be addressed and the paths to be followed differ to a significant extent.

The second risk to be avoided is the illusion that alternative understandings of modernity can live in separate spheres. The world societies and economies are too intertwined to hold such a belief. This is acknowledged by post-developmental scholars when they suggest that indigenous communities are able to engage selectively with markets and technologies, without however being completely dominated by them¹⁵. But interdependencies among developed and developing countries are also said to be the main factor driving aid policies after the end of the Cold War¹⁶. Therefore, comparative legal scholars cannot limit themselves to contrast alternative concepts of development. They have to explore their multiple interactions both within and outside national contexts.

None of the observations made above is meant to suggest that comparative legal scholars cannot play an advocacy role¹⁷. What they do suggest, however, is that the insiders/outside dichotomy does little to clarify the multiple ways to combine an interest in development themes with a comparative perspective. Besides criticizing the naïve optimism of those who maintain that the rule of law can foster development and advocating alternative concepts of development, comparative legal scholars should also acknowledge their role in fostering a dialogue among legal scholars in the Global North and the Global South. This is, indeed, the third possible reaction to the above mentioned criticisms of

¹⁵ See, e.g., G. ESTEVA, A. ESCOBAR, *Post-Development @ 25: on 'Being Stuck' and Moving Forward, Sideways, Backward and Otherwise*, 38(12) *Third World Q.* 2559 (2017).

¹⁶ See S. BERMEJO, *Targeted Development: Industrialized Country Strategy in a Globalizing World*, Oxford, 2018 (suggesting that rich countries use development policy to protect themselves from the negative spillovers of underdevelopment).

¹⁷ See, e.g., R. SACCO, *Antropologia del diritto*, Bologna, 2007, p. 85-88 for a discussion of the defense of ethno-law in legal pluralism literature; R. PRICE, *The Anthropologist as Expert Witness: A Personal Account*, in J.A.R. NAFZIGER (ed.), *Comparative Law and Anthropology*, Cheltenham, 2017, p. 415 for examples of direct involvement in legal disputes on the rights of local communities.

the law and development field. Kroncke hints at this possibility when he observes that engaging in a dialogue with foreign scholars could help avoid ‘unproductive generalizations’ of one’s own legal system and to better understand common challenges¹⁸. However, he is more interested in reviving US comparative legal studies and does not explain how such a dialogue could be supported. I argue that the dialogue could avoid the faulty import/export framework and shift the debate toward learning processes. More specifically, a two-pronged strategy can be devised: firstly, the criticisms of comparative legal scholars have to be taken seriously; secondly, a common ground to discuss the plurality of development paths shall be identified.

With regard to the first prong, I single out three lessons about what should be absolutely forbidden to law and development scholars:

- 1) You cannot argue that law is just a neutral technology
- 2) You cannot argue that Western law is superior to non-Western law
- 3) You cannot use the export-import metaphor.

I maintain that most, if not all, contemporary law and development scholars would agree with the above mentioned list of «do nots». It could be more difficult for international development organizations to explicitly subscribe to these lessons. But it seems something is starting to change. In its 2017 World Development Report, the World Bank accepts some of the arguments raised by its critics and seems willing to engage in a dialogue which over time could lead to deeper revisions of its aid strategies. Legal pluralism is acknowledged as a real-world feature of both developed and developing countries, not inherently good or bad, and equally capable of generating challenges and opportunities. Criticisms of Doing Business indicators are widely endorsed, thus suggesting the consolidation of strongly different views within the World Bank. Specific attention is devoted to institutions which redistribute resources and rents, as well as more generally to the relationship between growth and inequalities. Finally, the effectiveness of aid programs is openly discussed, its variable impact is acknowledged and

¹⁸ J. KRONCKE, *The Futility*, cit., p. 236.

more efforts to identify interactions between aid and local contexts are recommended¹⁹.

The Report provides a balanced presentation of the evidence supporting the above mentioned arguments. Though, some critical issues shall be highlighted. Firstly, there is no hint that alternative concepts of development can find their way into the World Bank strategies. This could mean that the critical branch of development studies will always reject any invitation to make proposals on how to reform aid strategies. Secondly, the acknowledgement of legal pluralism does not lead to a reflection on the relationship between state and non-state law. The ultimate aim seems to be a behavioural change, to be achieved through the reduction of pluralism. Thirdly, the Report does not emphasize rule of law projects, but relies on economists' understanding of the role that law could play. The drawback is that much of the complexity related to legal change is lost. Fourthly, when positive and negative experiences with development reforms are discussed, no real comparative exercise is undertaken to explain the reasons for success and failure. This may relate to the lack of detailed legal knowledge about those reforms.

Should the list of do nots be longer? For instance, should criticisms of capitalism be embraced? Or should the instrumental use of law for development purposes be rejected? I maintain that these aspects should be part of the research agenda, but in a positive and not in a negative way. It is possible to disagree on these aspects while contributing to a common research agenda. As far as criticisms of capitalism are concerned, it has been proposed to detach the analysis of legal reform from the definition of what counts as social progress in a given country²⁰. The problem with this approach is that any comparative legal analysis has to start with the type of development sought. Omitting this aspect leads to analyses that are too abstract or too dependent on implicit assumptions. Therefore, any comparative analysis has to accept that what needs to be explored are the implications of each concept of develop-

¹⁹ WORLD BANK, *Governance and the Law*, World Development Report, 2017, p. 84, 87f., 119-122, 167ff., 266-273.

²⁰ See Y.-S. LEE, *General Theory of Law and Development*, 50 *Cornell Int. L. J.* 416, 432 (2017).

ment²¹. How this approach could affect the interpretation of SDGs is explained in section 3. With regard to instrumental uses of law, it has been observed that they were directly affected by American approaches borne in the heyday of legal realism, but exported to other institutional contexts they legitimized the authority of the state and reduced the autonomy of the legal sphere from the political sphere²². However, alternative scenarios are possible. Even a strongly instrumental method like law and economics can be used in the United States to restrain state interferences with markets, in Europe to promote regulatory reforms and in developing countries to challenge corruption. It can be added that non-instrumental methods, e.g. those emphasizing distributive justice dimensions, could also negatively affect domestic legal debates in developing countries by delegitimizing formal legal structures²³. It is thus preferable for a comparative analysis to stay open to consider all kinds of instrumental and no-instrumental methods.

Turning now to the search for a common ground, it cannot be denied that legal reforms supporting the achievement of the SDGs could start a new cycle of optimism and delusion. Though, participating to the debate about the SDGs does not mean to accept at face value anything that international organizations and national governments do to implement them, much less to agree on a universal concept of development. If the goal is to foster the dialogue among scholars in the Global South and the Global North, using the SDGs as a starting point has several advantages. The UN 2030 Agenda introduced a wholly new governance machinery, affecting all aspects of development policies. The machinery included new roles for institutions at international, national and sub-national levels, new concepts and new indicators. Therefore, downplaying the novelty of the SDGs risks missing opportunities to inject new ideas in the law and development debate. Moreover, starting with the SDGs might help avoid two problems previously encountered in North-

²¹ See, e.g., A. ZIAI, 'I am not a Post-Developmentalist, but...' *The Influence of Post-Development on Development Studies*, 38(12) *Third World Q.* 2719, 2727f. (2017) (rejection of development as single path).

²² L. PES, *Teorie dello sviluppo giuridico*, Trento, 2012, p. 109.

²³ See J.L. ESQUIROL, *Legal Latin Americanism*, 16 *Yale Human Rights & Dev. L. J.* 145, 161-163 (2013).

South or South-South dialogues. The first problem is the disconnected representations that the international legal literature and the national legal communities make of legal systems in developing countries. This divergence leads to overlooking both the effects of using specific legal methods and how such methods could distort the direction of legal change²⁴. The second problem is that law and development studies supported the use of empirical methods, but did not make any sustained attempt at using comparative methodologies. The lack of interest for a comparative perspective prevented broad processes of horizontal learning across developing countries²⁵.

Both problems could be managed if the comparative approach to the SDGs is understood as an open debate across legal and non-legal disciplines about the desirability of each goal and the ways to achieve them. The purpose of the research endeavour should be to assess the SDGs implementation process and its relationships to the institutional context of each country. Less divergence between international and national legal discourses can be expected because both would use the SDGs as a starting point. Moreover, the universal character of the SDGs should foster interest in identifying similarities and differences in implementation processes.

In the sections that follow, I discuss three areas in which the SDGs could help develop a shared research agenda:

- a) How should the SDGs be interpreted? If they cannot be supposed to have a single meaning, who can decide about the interpretation to be prioritized? At which level (global, national, local) should interpretations be chosen? Whose interests should be taken into account? How should the relationships among SDGs be described and embedded in the chosen interpretation?
- b) How should the SDGs be implemented? If local institutional contexts matter, how can their components be identified?

²⁴ J.L. ESQUIROL, cit., p. 148ff.

²⁵ See D.M. TRUBEK, *Scan Globally, Reinvent Locally: Can We Overcome the Barriers to Using the Horizontal Learning Method in Law and Development?*, 258 *Nagoya J. L. and Politics* 11 (2014) for the observation that the complexity of comparison was one of the barriers to South-South learning, but suggesting that the problem was the lack of empirical skills, not the lack of comparative methodologies.

c) According to which criteria should the achievement of the goals be assessed? Comparative law does not have criteria to propose. But a comparative analysis of evaluation processes could be useful to critically discuss the methodologies, assumptions and concepts which are being used to identify successful and unsuccessful attempts at implementing the SDGs.

These three areas are by no means the only relevant ones. But they are broad enough to start a dialogue among different scholarly points of view. Even though no agreement will ever be reached, what is required from all scholars involved is to make transparent choices on the way to explore the relationship between local contexts and concepts of development. This kind of debate should avoid risks of Westernization to a larger extent than was the case with previous law and development literature.

3. *Comparing interpretations*

The unanimous Resolution of the UN Assembly on the SDGs did not end the development controversy²⁶. It could even make it more polarized. Radical criticisms pinpoint the conventional, Westernized foundations of the SDGs. Economic growth and global trade are not put into question, and the root causes of global inequalities are not addressed. Milder criticisms point out that no consistent definition of sustainable development can be drawn from the SDGs. Scholars with a more supportive stance acknowledge that the implementation of each goal will entail several difficult choices.

These contrasting positions suggest that the SDGs might set in motion a process whose final outcome will not be determined by the agreement reached in 2015. A multiplicity of actors, located at multiple levels, will propose their own interpretation of the SDGs and try to influence other actors. Much the same confrontation was already at work in the consultation and drafting phases. Even though wide-ranging con-

²⁶ UN GENERAL ASSEMBLY *Res. 70/1* (September 25, 2015), *Transforming Our World: the 2030 Agenda for Sustainable Development*.

sultations made room for the voices of a large number of constituencies and for technical expertise outside the UN system, many SDGs did not go much further than vague compromises²⁷. A case in point is the discussion about the rule of law. The most ambitious proposals were to mainstream it in all the SDGs or identify two separate goals, one for peace and security and one for governance and the rule of law. Both proposals failed, in no small part because the universal character of the rule of law and its relationship to economic growth were contested. The final version of SDG 16 only refers to access to justice, with promotion of the rule of law becoming one of targets and linked to indicators that can measure none of the dimensions debated in the last decades²⁸.

While the vagueness of the SDGs may cast doubts on their implementation, I argue instead that it could pave the way for more open-ended interpretative processes. Comparing interpretations should lead to ask questions on the implicit and explicit assumptions about the role of legal reform, the reasons why specific legal tools are chosen, the kind of development to be supported and its impact on different groups. Of course, the development controversy can be expected to map almost perfectly onto the different interpretations. But the value added of the comparative analysis lies in linking critical arguments and proposed interpretations. For example, a specific interpretation of one SDG could be said to reflect an Euro-American bias, or a concept of development which does not foster sustainable practices. In this case, alternative interpretations, and alternative legal interventions, could be proposed. Emphasising the interpretative aspect of the SDGs precludes attempts to shift the debate toward purely technical arguments. Furthermore, it

²⁷ While the Millennium Development Goals (MDGs) emerged out of the confrontation between major donor countries in the OECD Development Assistance Committee and the UN development agenda, broad consultations led by the UN prepared the SDGs. See R. BRENNER, *Global Goal-Setting: How the Current Development Goal Model Undermines International Development Law*, 24(1) *Mich. St. Int. L. Rev.* 145, 154-164 (2015).

²⁸ SDG 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. Target 16.3: Promote the rule of law at the national and international levels and ensure equal access to justice to all. On the negotiation of this goal see N. ARAJÄRVI, *The Rule of Law in the 2030 Agenda*, 10(1) *Hague J. Rule of Law* 187 (2018).

can be suggested that openness to interpretations matching accepted perceptions of identity and common good could be one of the conditions contributing to the effectiveness of the SDGs²⁹.

To be sure, critical development scholars could argue that the SDGs already foreclose some interpretations because of explicit references to economic growth and the benefits from trade. Economist Jeffrey Sachs, advisor to the UN Secretary-General both for the design of the MDGs and of the SDGs, provided the theoretical foundation for the approach that pursues the decoupling of economic growth from its negative environmental impact. Though, Sachs himself acknowledged that no country is on path to sustainable development. Moreover, he included the voluntary reduction of fertility rates among the conditions which would allow such decoupling³⁰. While he meant to provide an optimistic message, omitting any critical analysis of the traditional concept of economic growth does not contribute to its persuasiveness. More generally, the complexity of the implementation process will constrain any attempt to use the broad statements of the SDGs as guidance. It is more likely that the real meaning of the SDGs will emerge from that process. Hence, the main interest of the comparative analysis lies in uncovering its inner dynamics.

The comparative perspective outlined here is only partially overlapping with the approach proposed by international law scholars. The SDGs explicitly adopt concepts and purposes of several legally binding international texts. This means that their interpretation needs to take into account the relationships with those legal instruments. A risk to be avoided is that the SDGs replace binding obligations³¹. It can be expected that the interpretation of each goal will be tested for its compatibility with the existing legal framework and that the SDGs implementation process will be exploited to overcome the weaknesses of binding

²⁹ See, in this vein, O.R. YOUNG, *Conceptualization: Goal Setting as a Strategy for Earth System Governance*, in N. KANIE, F. BIERMANN, *op. cit.*, p. 38f.

³⁰ J.D. SACHS, *The Age of Sustainable Development*, New York, 2015, p. 182, 217.

³¹ See R. BRENNER, *op. cit.*, p. 173-175 (arguing that both the MDGs and the SDGs could create new priorities, take power away from existing legal frameworks, introduce parallel oversight processes and even modify the goals to be pursued).

instruments³². I argue, however, that compatibility with international law should not be the only factor affecting interpretations. A comparative analysis calls for a broader assessment, in which multiple benchmarks should play a role. More specifically, I suggest three possible focal points for such an assessment:

- 1) Comparing the interpreters
- 2) Comparing institutional levels
- 3) Comparing integration concepts.

Each aspect could be used independently as the focus of a comparative inquiry. But all together they should provide a deep understanding of the influence that the SDGs could have on legal reforms. Let us consider each in turn.

Who are the interpreters of the SDGs? Two processes look particularly interesting to understand the selection of meanings: the orchestrating activity of the High-Level Political Forum for Sustainable Development (HLPF) on one hand and the activities required by the Follow-up and Review Process on the other hand.

The HLPF was established in 2012 to replace the unsuccessful Commission on Sustainable Development³³. The latter failed to attract high-level policymakers and was not endowed with adequate monitoring and review powers. The HLPF is not a new institution, but an interstate forum meeting under the auspices of the UN General Assembly (every four years) and of the UN Economic and Social Council (ECOSOC) (every year). Unlike its predecessor, it received a broad mandate to coordinate initiatives within the UN system and to integrate sustainable development at all levels of decision-making. With the ap-

³² See R.E. KIM, *The Nexus between International Law and the Sustainable Development Goals*, 25(1) *Rev. Eur. Comm. & Int. Env. L.* 15, 16f. (2016) (suggesting a two-way relationship between the SDGs and international legal frameworks); R. PAVONI, D. PISELLI, *The Sustainable Development Goals and International Environmental Law: Normative Value and Challenges for Implementation*, 13(26) *Veredas to Direito* 13, 30 (2016) (the SDGs could become a blueprint for the development of international environmental law).

³³ UN GENERAL ASSEMBLY Res. 66/288 (September 11, 2012), *The Future We Want*, par. 84; UN GENERAL ASSEMBLY Res. 67/290 (July 9, 2013), *Format and Organizational Aspects of the High-Level Political Forum on Sustainable Development*.

proval of the SDGs, the HLPF was granted a central role in overseeing a network of follow-up and review processes at global level³⁴.

From the perspective of political science, the HLPF is an orchestrator which tries to influence other intermediaries. The latter should then directly intervene on the final targets. The intermediaries that the HLPF should try to enlist can be UN bodies, regional organizations, networks of stakeholders, and transnational organizations of non-state actors. Targets can be other international organizations, states or non-state actors. Among the orchestration tools that the HLPF could use, ideational support is particularly relevant from the point of view of interpretation techniques. It is suggested that, by providing information and cognitive guidance, the HLPF should be able to help the intermediaries pursue their goals more effectively. One key resource should be the annual global development report. Besides reviewing progress, the report should provide evidence-based analysis about the links between development interventions and outcomes. Moreover, the HLPF could exploit its coordination role to solve inter-institutional disagreements³⁵.

The mismatch between its limited resources and its broad mandate might constrain the degree of coordination that the HLPF will be able to promote. But a more general issue is the weight to be attached to the interpretation of the HLPF. The orchestration approach emphasizes coherence and coordination. From this perspective, the HLPF will be successful to the extent its interpretation of the SDGs becomes widely accepted. Similarly, international law scholars argue that the HLPF should adopt a long-term definition of sustainable development and use it as an overarching principle in the interpretation of the SDGs. Such definition should aim at ensuring that the integrity of the earth's ecosys-

³⁴ UN GENERAL ASSEMBLY Res. 70/1, cit., par. 82-90.

³⁵ K.W. ABBOTT, S. BERNSTEIN, *The High-Level Political Forum on Sustainable Development: Orchestration by Default and Design*, 6(3) *Global Policy* 222 (2015); S. BERNSTEIN, *The United Nations and the Governance of Sustainable Development Goals*, in N. KANIE, F. BIERMANN, *op. cit.*, p. 213. On orchestration more generally see K.W. ABBOTT ET AL. (eds.), *International Organizations as Orchestrators*, Cambridge, 2015.

tem becomes universally accepted and guide the balancing of the needs of future generations against those of the present generation³⁶.

A comparative analysis of interpretations should adopt a different approach. If a meaningful dialogue among competing interpretations of development is to be promoted, the main purpose should not be to find a single interpretation, but to allow a thorough examination of the underlying premises of each proposed interpretation. To put it differently, the HLPF should not strive to gain a monopoly on interpretative activities, but make sure that each constituency contributes its own version of a long-term vision. This perspective is in line with the 2030 Agenda and could avoid the disengagement that led to the failure of previous coordination efforts³⁷.

The Follow-up and Review process, as first delineated in the 2030 Agenda and subsequently specified by the UN Secretary-General, confirms the need to make room for multiple interpretations. The Agenda explicitly acknowledges that primary responsibility for the implementation of the SDGs lies with the UN Member States³⁸. Furthermore, monitoring progress and reporting about it is required at national, regional and international levels. Non-state actors should be involved as well. As far as Member States are concerned, the main reporting tool is the Voluntary National Review (VNR), to be drafted according to Secretary-General guidelines³⁹. While the main purpose of the VNR is to

³⁶ R.E. KIM, *op. cit.*, p. 25; O.R. YOUNG, *Goal Setting in the Anthropocene: The Ultimate Challenge of Planetary Stewardship*, in N. KANIE, F. BIERMANN, *op. cit.*, p. 65-70.

³⁷ See, e.g., the acknowledgement of «different approaches, visions, models and tools available to each country, in accordance with its national circumstances and priorities, to achieve sustainable development» (UN GENERAL ASSEMBLY *Res. 70/1*, *cit.*, par. 59). Also see ABBOTT, BERNSTEIN, *op. cit.*, p. 228 for the observation that previous coordinating bodies failed to adequately represent women, indigenous people, youth and children and farmers, as well as to ensure the true multistakeholder character of most partnerships.

³⁸ UN GENERAL ASSEMBLY *Res. 70/1*, *cit.*, par. 41, 47.

³⁹ See UN GENERAL ASSEMBLY *Res. 70/1*, *cit.*, par. 72-90; REPORT OF THE SECRETARY-GENERAL, *Critical Milestones Towards Coherent, Efficient and Inclusive Follow-up and Review at Global Level*, A/70/684 (15 January 2016); UN GENERAL ASSEMBLY

assess the status of SDGs, the 2030 Agenda also refers to the establishment of national targets which should take into account national circumstances⁴⁰. Although the relationship between the SDGs and the national targets is not clear, it can be argued that the Follow-up and Review process acknowledges the legitimacy of national choices about development pathways. Such choices need to be grounded on coherent interpretations about the possible meanings of the goals and targets⁴¹. Therefore, a comparative analysis of VNRs, as well as of other monitoring documents, should significantly contribute to a diffuse understanding of alternative concepts of development. Fears about conflicting interpretations should be downplayed: if the current state of the debate about development does not allow convergence on widely shared visions of the future, encouraging and supporting the plurality of interpretations seems the most effective way to avoid conflicts, not to foster them.

Much the same observation can be made about a comparative analysis focused on institutional levels. Instead of assuming that the interpretation proposed by a specific level should carry more authority, the focus should be on the type of interpretative process which takes place at each level. The kind of information available and relied on, the degree of participation and actual influence of different stakeholder groups, as well as the relationship between pre-existing (regional, national or local) priorities and new interpretations should be among the factors to be considered for each institutional level. The comparative analysis should not aim at identifying the level best equipped to impose its own interpretation, but at singling out the factors which each level is capable of taking into account. Two risks have to be avoided. The first one is the interpretative dominance of a few well-resourced actors. The second one is the instrumentalization of the SDGs in domestic political battles.

Res. 70/299 (July 29, 2016), Follow-up and Review of the 2030 Agenda for Sustainable Development at the Global Level.

⁴⁰ UN GENERAL ASSEMBLY *Res. 70/1*, cit., par. 55.

⁴¹ See Å. PERSSON ET AL., *Follow-up and Review of the Sustainable Development Goals: Alignment v. Internalization*, 25(1) *Rev. Eur. Comm. & Int. Env. L.* 59 (2016) (observing that transformative action at national level will depend less on alignment with global indicators and more on the selection of nationally specific targets).

Both risks surface in the initiatives of the Global Taskforce of local and regional governments (GTF), a coordination and consultation mechanism which brings together the major national and international networks of local governments. While collecting useful information on subnational activities, the reports of the GTF also convey the impression that only the most important subnational institutions have a strong interest in participating to the implementation of the SDGs. Moreover, this interest has more to do with requests for internal reforms (e.g. fiscal decentralization) than with progress on the SDGs⁴².

Finally, goal integration is going to play a crucial role. The Preamble to the 2030 Agenda refers to the crucial importance of interlinkages and the integrated nature of the SDGs. The three dimensions of economic development, social development and environmental protection are embedded in all targets⁴³. Though, the relationships among the SDGs are extremely complex and lend themselves to different interpretations. In the early years of implementation, the prevalent focus has been on embedding the SDGs into national strategies. One of the consequences has been that each country has chosen to underline specific linkages and ignore other ones⁴⁴. These differences are welcome if they allow to tailor development concepts to local needs. There is, however, the risk that some choices might be dictated by contingent governments' preferences. In some cases, they could even be attempts at dodging more radical transformations. UN bodies are trying to manage this risk by providing assessment toolkits and information about possible ways to integrate the SDGs, as well as about institutional reforms

⁴² See, e.g., GTF, *Towards the Localization of the SDGs*, 2nd Report, 2018.

⁴³ See M. NILSSON ET AL., *Introduction: A Framework for Understanding Sustainable Development Goals Interactions*, in D.J. GRIGGS ET AL. (eds.), *A Guide to SDGs Interactions: From Science to Implementation*, International Council for Science, Paris, 2017, p. 20f.

⁴⁴ See, e.g., COMMITTEE FOR DEVELOPMENT POLICY, *Voluntary National Review Reports – What Do They Report?*, CDP Background Paper No. 46, July 2018, 9 (showing that most VNRs submitted until 2017 avoided discussion of difficult and politically sensitive trade-offs); J. TOSUN, J. LEININGER, *Governing the Interlinkages between the Sustainable Development Goals: Approaches to Attain Policy Integration*, 1(9) *Global Challenges* 1 (2017) (showing significant differences in the way six countries addressed goal integration in their VNRs).

which could support integration⁴⁵. This cognitive support could have the unintended effect of decreasing recourse to alternative integration strategies.

With regard to goal integration, a comparative analysis could play at least three roles. Firstly, it should make sure that old mistakes about exporting Western models do not repeat themselves. Secondly, it should focus on ways to generate new integration options. Thirdly, it should help to openly acknowledge that there is no single answer to integration issues. The latter role appears to be of great relevance. Each methodology will provide a description of interlinkages which does not exactly match other descriptions. Differences may be due to assumptions, available data, scale or focus of the analysis. This means that policy-makers need to be aware of these limitations and justify the use of each methodology when selecting legal interventions⁴⁶. A more general issue is that the positive or negative nature of linkages across the SDGs depends on the institutional framework. Depending on how the latter is structured, synergies or conflicts can arise. For instance, increasing agricultural productivity is required to end hunger (SDG 2), but agricultural expansion could have adverse effects on the environment and health. This negative relationship could be turned into a positive one with adequate rules and enforcement institutions⁴⁷. But the interest of a comparative analysis lies in identifying how to achieve this outcome. So far, most integration strategies pursued in a variety of fields and for projects with a smaller scale than the SDGs have had limited success.

⁴⁵ See, e.g., UNITED NATIONS DEVELOPMENT PROGRAMME, *Rapid Integrated Assessment (RIA) to Facilitate Mainstreaming of SDGs into National and Local Plans*, 2017; UN DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *Working Together: Integration, Institutions, and the Sustainable Development Goals*, World Public Sector Report 2018.

⁴⁶ See, e.g., C. ALLEN ET AL., *Prioritising SDG Targets: Assessing Baselines, Gaps and Interlinkages*, *Sustainability Sc.* advance publication, 2 July 2018 (observing that semi-quantitative analysis can be useful for target prioritisation and building awareness of systemic interactions, less so for detailed policy evaluation).

⁴⁷ See M. NILSSON ET AL., *Mapping Interactions between the Sustainable Development Goals: Lessons Learned and Ways Forward*, *Sustainability Sc.* advance publication, 13 July 2018.

Some causes of these failures have an institutional dimension⁴⁸. Therefore, comparative analyses which engage in a dialogue with non-legal scholars interested in integration strategies could contribute to the debate on the interpretation of SDGs by highlighting the legal dimension of those strategies.

4. Comparing implementation contexts

In one of his books on research methodology, American sociologist Howard Becker tells the story of his working experience in Brazil. He went to Rio in the seventies, during the military dictatorship. He needed a *visto* to work there, and also to leave the country when his stay came to an end. But the *visto* was not forthcoming through official channels, so his Brazilian colleagues decided to use a *despachante*. This is a middleman who knows how to get things done by the local bureaucracy. Indeed, Becker got his *visto* the day of his departure from Brazil. What he discovered from this experience is not only the existence of *despachantes*, but also the Brazilian concept of *jeito*, an «implied social know-how, those little bits of knowledge you had to have to make things come out the way you wanted them to»⁴⁹.

As suggested by Becker, this case does not show some kind of Latin American failing, but belongs to a broader class of situations in which expert knowledge is unevenly distributed or is difficult to access for some class of people. The differences between the Brazilian case and other cases of informal intermediaries in other countries may be used to

⁴⁸ See the review by J.J.L. CANDEL, *Holy Grail or Inflated Expectations? The Success and Failure of Integrated Policy Strategies*, 38(6) *Policy Stud.* 519 (2017).

⁴⁹ H.S. BECKER, *What About Mozart? What About Murder? Reasoning from Cases*, Chicago, 2014, p. 9-11, quote at p. 11. The concept of *jeito* is also discussed in the legal literature: see, e.g., K.S. ROSENN, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and Its Developmental Implications*, 19(3) *Am. J. Comp. L.* (1971); K.S. ROSENN, *O Jeito na Cultura Juridica Brasileira*, Rio de Janeiro, 1998; B. KOZOLCHYK, *Comparative Commercial Contracts*, St. Paul, Minn., 2014, p. 509. Note, however, that this literature can be criticized on the ground that it conveys the misleading impression of dysfunctional legal systems in all Latin American countries: see J.L. ESQUIROL, *op. cit.*, p. 152.

deepen our understanding of the general class of things both cases belong to. From a comparative perspective, the unfamiliar elements of each new case can be used to improve generalizations by identifying new things to add to the grid of variable elements that helps understand any case of that kind⁵⁰.

The approach proposed by Becker includes two aspects which can be useful in the debate on the implementation of the SDGs. Firstly, there is a general recognition that contextual aspects have to be taken into account when designing policies for sustainable development. For example, the «localization» of SDGs is understood to require a focus on sub-national contexts in the achievement of the 2030 agenda⁵¹. Similarly, the «contextualization» of SDGs «involves moving towards a bottom-up approach whereby local stakeholders inform SDG prioritisation and implementation tailored to their needs»⁵². At the same time, we have seen in section 2 that critics of the law and development field have long maintained that contextual differences prevent any attempts at linking legal reforms and development. Conversely, Becker suggests that a contextual approach allows to take into account the largest possible number of differences. Secondly, the example proposed by Becker touches upon the dimension that makes contextual analysis especially difficult to carry out, namely the distinction between formal and informal institutions. The relevance, and sometimes the prevalence, of the informal dimension in economic and social relationships makes it hard to believe that implementation measures exclusively addressed to the official public sector will allow to make progress on the SDGs.

The main underlying tension running throughout the development debate is between assuming that contexts are unsurmountable barriers to reform initiatives and assuming that they can be controlled to achieve the desired ends. These conflicting positions are clearly reflected in the literature on legal pluralism. Some scholars argue that non-state institutions express a specific idea of legality. Development programs should

⁵⁰ H.S. BECKER, *op. cit.*, p. 14, 20.

⁵¹ GTF, *op. cit.*, p. 14.

⁵² F. MACHINGURA, S. NICOLAI, *Contextualising the SDGs to Leave No One Behind in Health: A Case Study from Zimbabwe*, Overseas Development Institute Briefing Note, May 2018, p. 3.

not try to replace it with a unified approach to state legality⁵³. Other scholars display more optimism on the possibility to design institutional hybrids which mediate different types of legal reasoning⁵⁴. In a more long-term perspective, it has been observed that since the early modern period legal pluralism entailed the strategic use of multiple enforcement fora, but there was no stark divide between state and non-state legal processes. The main implication for today's legal reforms is that the latter will produce legal change in developing countries by modifying the permeable boundaries among jurisdictions⁵⁵. Thus, legal pluralism is not going to disappear, should not be perceived as a problem, but does not lend itself to policy prescriptions that can be easily translated into development policies.

Close analogies to these positions can be found in the literature on the informal economy⁵⁶. Not only informality is created, and sometimes supported, by the state. It can also represent an alternative way to structure economic relationships. Large informal sectors are present in countries of the Global North, although they are usually larger in the Global

⁵³ See, e.g., B.Z. TAMANAHA, *The Rule of Law and Legal Pluralism in Development*, in B.Z. TAMANAHA ET AL. (eds.), *Legal Pluralism and Development*, Cambridge, 2012, p. 46 (the bulk of ordinary social intercourse better dealt with through local tribunals); G.R. WOODMAN, *The Development "Problem" of Legal Pluralism*, in B.Z. TAMANAHA ET AL., *op. cit.*, p. 129 (legal pluralism may lead to stop attempts at imposing some principles through development policies); J. FAUNDEZ, *Legal Pluralism and International Development Agencies*, in B.Z. TAMANAHA ET AL., *op. cit.*, p. 177 (attempts by external agents to regulate non-state justice systems may disrupt fragile political equilibria between communities and governments).

⁵⁴ See, e.g., K. JAYASURIYA, *Institutional Hybrids and the Rule of Law as a Regulatory Project*, in B.Z. TAMANAHA ET AL., *op. cit.*, p. 145 (suggesting to use civic and customary legal regimes not as an alternative to state law, but to change the meaning of regulation).

⁵⁵ L. BENTON, *Historical Perspectives on Legal Pluralism*, in B.Z. TAMANAHA ET AL., *op. cit.*, p. 21.

⁵⁶ In what follows I draw on T. GOODFELLOW, *Urban Informality and the State: A Relationship of Perpetual Negotiation*, in J. GRUGEL, D. HAMMETT (eds.), *The Palgrave Handbook of International Development*, Cham, 2016, p. 207; A. POLESE ET AL., *Introduction: Informal Economies as Varieties of Governance*, in ID. (eds.), *The Informal Economy in Global Perspective*, Cham, 2017, p. 1.

South⁵⁷. Moreover, informality can involve both the poor and the rich. The complex interactions between the formal and the informal economy counsel against the adoption of universal solutions. The idea of conferring official status to informal titles or legal positions, until a few years ago widely embraced by donor organizations, is now considered misleading. Formal legal rights might be of little value to the poor if they are too costly to use. Similarly, shifting to official market transactions might devalue previous use rights on the same resources⁵⁸. These observations confirm that informality cannot be simply eradicated, but has to be managed to redress the direst situations of risk and vulnerability. Furthermore, the relationship between the state and the informal economy may be modified by global economic and technological trends that affect the opportunities offered to informal agents. Some of them will innovate and stay in the informal sector, some will move, partially or totally, to the formal economy⁵⁹.

Legal pluralism and informality do not completely overlap, but it is plausible to hypothesize a two-way relationship. On one hand, the availability of non-state institutions increases the probability they are used to support the informal economy. On the other hand, the expansion of the informal economy might foster the creation of new non-state institutions. The implementation of the SDGs cannot ignore these phenomena. But incorporating them in development policies could require several revisions to the current understanding of the SDGs. For instance, the promotion of the rule of law cannot lead to the replacement of non-state legal orders. Its meaning should be assessed in light of evi-

⁵⁷ See L. MEDINA, F. SCHNEIDER, *Shadow Economies Around the World: What Did We Learn Over the Last 20 Years?*, IMF Working Paper 18/17, January 2018, for data on the shadow economy in 153 countries between 1991 and 2015. Regions with the largest average size of the shadow economy (above 36 per cent) are Latin America and Sub-Saharan Africa.

⁵⁸ J.L. ESQUIROL, *Formalizing Property in Latin America*, in M. GRAZIADEI, L. SMITH (eds.), *Comparative Property Law*, Cheltenham, 2017, p. 345-349.

⁵⁹ See B. HARRIS-WHITE, *Rethinking Institutions: Innovation and Institutional Change in India's Informal Economy*, 51(6) *Modern Asian Stud.* 1727 (2017) for a discussion of examples of transformations induced by new communications technologies, new financial markets, long-distance worker mobility and education systems in India, the country with the largest informal economy in absolute terms.

dence about the role played by non-state institutions and their relationship with official ones. As long suggested by legal anthropologists, the distinction between what is legal and what is illegal should not be taken for granted, but identified through a contextual analysis of each case⁶⁰. More generally, legal pluralism and informality should be taken into account in each reform proposal aimed at implementing any SDG. A comparative approach could provide the overarching framework to integrate contributions from the disciplines interested in exploring the porous borders between state and non-state institutions. A few suggestions on how to carry out such comparative inquiry are proposed here.

To begin with, a wide-ranging definition of the implementation context should be adopted. This is because non-state institutions usually rely on deeply held views of morality, often rooted in religious traditions. Therefore, factors affecting how people behave in the informal economy have to be found in this social dimension. The drawback is that knowledge of non-state institutions may be limited or even inaccessible to outsiders⁶¹. This problem may be more or less difficult to overcome with additional investments in field research. But even a limited knowledge is better than filling gaps with universal concepts.

The complexity of the interplay between the formal and informal dimensions could also be mitigated to some extent by the adoption of a diagnostic framework which, along the lines proposed by political scientist Elinor Ostrom and her co-authors, tries to identify the relationships among the main actors involved in a specific field. For example, Ostrom pointed out that development cooperation involves systematic interactions among donors, recipients, implementing organizations (non-governmental organizations or private contractors), interest groups and civil society organizations within donor and recipient countries, targeted beneficiaries. For development projects and programs to have any chance of succeeding, the incentives involved in all these relationships need to be taken into account. Each actor could possess crucial

⁶⁰ L. NADER, *Whose Comparative Law? A Global Perspective*, in J.A.R. NAFZIGER, *op. cit.*, p. 31 («[c]rime is a socio-cultural construct»).

⁶¹ See R. SACCO, *Il diritto muto*, Bologna, 2015, p. 135f., for the remark that non-state legal orders may lack legal terminology, so that attempts at translating their rules may lead to misleading results.

information about the effectiveness of the projects in a specific context. But how this information is shared and used depends on the incentives each actor faces⁶². While no development initiative can rely on perfectly aligned incentives, focusing on the relationships among the actors involved could prove useful to understand the role of non-state institutions in the process of implementing the SDGs. Let us explore this perspective with the example of proposals which try to decrease the costs faced by informal African traders when crossing national borders.

Informal cross-border trade contributes 30-40 per cent of intra-regional trade in Southern and Eastern Africa. Most informal traders are women and youth. Trade goes beyond basic agricultural products and extends to manufactured goods and services. Compared to formal trade, informality proved crucial in resisting food crises and other economic shocks. A multitude of unofficial micro, small and medium-sized enterprises contributes to reducing social exclusion and alleviate poverty. It can be argued that informal cross-border trading helps achieve SDG 1 (end poverty), SDG 2 (end hunger, achieve food security) and SDG Target 8.3 (promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation). Though, this thriving informal sector is also plagued by endemic problems: custom procedures too complex to cope with for partially literate or illiterate traders, border infrastructures which increase insecurity and slow-down procedures, limited access to finance, corruption and harassment at the hands of state authorities, limited business management skills⁶³. Proposals to address these problems invariably go in the direction of increasing formalization, that is to reduce the size of the informal economy⁶⁴. For example, simplified trade regimes have

⁶² E. OSTROM ET AL., *An Institutional Analysis of Development Cooperation*, in S. BARRETT ET AL. (eds.), *Environment and Development Economics*, Oxford, 2014, p. 117.

⁶³ See P. BENTON, C. SOPRANO, *Small-Scale Cross-Border Trade in Africa: Why It Matters and How It Should Be Supported*, ICTSD Bridges Africa, 5 June 2018; L. SOMMER, C. NSHIMBI, *The African Continental Free Trade Area: An Opportunity for Informal Cross-Border Trade*, ICTSD Bridges Africa, 5 June 2018.

⁶⁴ See FAO, CUTS INTERNATIONAL, *Formalization of Informal Trade in Africa*, 2017. The second half of SDG Target 8.3 refers explicitly to encouraging «the formali-

been introduced to reduce the costs of complying with custom procedures and allow some unofficial enterprises to enter the formal trading system. The aim is to increase the competitiveness and the productivity of the informal sector. This approach relies on the idea, widely publicized by the World Bank Doing Business indicators, that what hampers cross-border trade are inefficient customs procedures⁶⁵. It can be argued that this approach risks repeating the mistakes of the past by not considering the wide range of relationships involved in informal trading.

Firstly, activities in the informal economy are heterogeneous. Sometimes they are carried out for survival reasons, sometimes because they allow independence and self-employment, sometimes because they are linked to the formal economy⁶⁶. Therefore, the problems to be addressed, as well as the benefits of informality, can vary a lot across different types of traders. Formalization may be recommended in some cases but not always⁶⁷. Secondly, the formalization approach does not take into account the role that the informal economy plays in supporting the formal economy, for instance through subcontracting. It may well be that national or local authorities do not have any incentives in reducing the size of the informal economy because of presumed or real negative effects on the formal economy. The informal economy could even be said to be «created» by state economic policies which lead to price

zation and growth of micro-, small- and medium-sized enterprises, including through access to financial services».

⁶⁵ For the theoretical underpinnings see S. DJANKOV ET AL., *Trading on Time*, 92(1) *Rev. Econ. Stat.* 166 (2010). The annual Doing Business reports rank countries according to the cost and time involved in export/import procedures.

⁶⁶ See E. ARYEETAY, *The Informal Economy, Economic Growth, and Poverty in Sub-Saharan Africa*, in A. MCKAY, E. THORBECKE (eds.), *Economic Growth and Poverty Reduction in Sub-Saharan Africa*, Oxford, 2015, p. 165f.

⁶⁷ For example, interviews to African female traders signal two reasons why the simplified trade regime is under-used: some goods that are traded cross-border are not included in the regime and the additional costs and time of compliance, however small, make it more difficult to compete with informal traders (UNCTAD, *Borderline: Women in Informal Trade Want to Do Business Legally and Become More Prosperous*, 5 March 2018, available at <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1675>). Other reasons could be present on other borders. It is unlikely that formalization will be able to address all of them.

differentials with neighbouring countries. Thirdly, formalization does not consider the needs of those involved in informal trading, for example women. The flexibility made possible by informality contributes to the economic empowerment of female workers, but formalization could reduce their opportunities. Fourthly, formalization does not reflect African customary perceptions of exchange relationships. Strong communitarian links support the creation of trust and make it possible to ensure that reciprocity is the guiding principle⁶⁸. This communitarian perception is not reflected in the projects on the harmonization of African commercial law promoted by OHADA⁶⁹. If formalization means replacing the trust-supporting relationships with official contract rules, it can be expected that the divide between the informal and formal dimensions will increase.

Instead of suggesting formalization as the only way forward for informal cross-border trade, a comparative analysis grounded on a diagnostic approach could help sort out the impact of different relationships. Here is a non-exhaustive list of possible research foci:

- a) The relationship between informal traders and public authorities. If trading takes place according to stable social relationships, allowing a free space in which they can unfold would explicitly recognize their public value⁷⁰. Such space should be well-defined, both to en-

⁶⁸ Ethnic groups living across national borders increase informal trade and deeper integration of communities (FAO, CUTS INTERNATIONAL, *op. cit.*, p. 12; S. GOLUB, *Informal Cross-Border Trade and Smuggling in Africa*, in O. MORISSEY ET AL. (eds.), *Handbook on Trade and Development*, Cheltenham, 2015, p. 190f.). More generally, on the communitarian view of African contractual relationships see D. BURBIDGE, *Connecting African Jurisprudence to Universal Jurisprudence Through a Shared Understanding of Contract*, in O. ONAZI (ed.), *African Legal Theory and Contemporary Problems: Critical Essays*, Dordrecht, 2014, p. 93; A. HUTCHISON, N. SIBANDA, *A Living Customary Law of Commercial Contracting in South Africa: Some Law-Related Hypotheses*, 33(3) *South African J. Human Rights* 380 (2017).

⁶⁹ See J. BASHI RUDAHINDWA, *OHADA and the Making of Transnational Commercial Law in Africa*, 11(2) *Law and Dev. Rev.* 371 (2018) (OHADA texts inspired to Western models may give rise to local resistance through high levels of informality).

⁷⁰ For a similar proposal of an informal property regime see J.L. ESQUIROL, *Formalizing Property*, *cit.*, p. 348 («an ‘informal’ regime could signal a zone of de facto regulation or differential regulation», leading to a separate low-income housing market). With regard to the management of natural resources, A. TELESETSKY, *Legal Plu-*

sure that it does not strengthen existing power relationships and that it serves the goal of increasing trust in public authorities. The informal trading regime should take into account all the agents which the literature on the informal economy has analysed, namely the traders and their networks, trade and union organizations, cooperatives, intermediaries, and border authorities.

- b) The relationship between donors and recipients. The widely acknowledged low level of aid effectiveness could be improved with supporting measures catering for the needs of specific categories of traders⁷¹. Instead of linking aid to conditions that satisfy the interests, or the institutional views, of the donor, comparative analyses could show which reform paths are feasible and what kind of foreign aid could support them. The New Development Consensus proposed by the European Commission in 2016 goes in this direction when it states that strategic responses grounded in quality analysis of the country context will be developed, that stronger partnerships beyond governments should be forged and that development action must vary according to the capacities and needs of developing countries⁷². However, it is still not clear whether the new EU strategies will leave room for alternative concepts of development. Moreover, previous commitments to work with a wide range of local actors proved challenging to implement⁷³.
- c) The relationship between official law and non-state rules. Informality should not be confused with the lack of organized structures and widely followed social norms. The latter form a non-state legal regime which replaces the state one. In some cases, religious or ethnic

ralism – Linking Law and Culture in Natural Resource Co-management and Environmental Compliance, in J.A.R. NAFZIGER, *op. cit.*, p. 116 suggests that compliance with formal law can be increased by acknowledging the legitimacy of non-state rule-making systems.

⁷¹ On the debate on foreign aid see M.J. TREBILCOCK, M. MOTA PRADO, *Advanced Introduction to Law and Development*, Cheltenham, 2014, p. 202-213.

⁷² EUROPEAN COMMISSION, *Proposal for a New European Consensus on Development: Our World, Our Dignity, Our Future*, COM(2016)740 of 22 November 2016.

⁷³ See AECOM INTERNATIONAL DEVELOPMENT EUROPE, *Effective Development Cooperation: Has the European Union Delivered?*, December 2016, p. 96-99.

ties support informal business networks across continents⁷⁴. Whether these networks foster flexibility and provide an escape route from poverty, or are used to discriminate vulnerable groups, should be assessed through empirical research⁷⁵. When evidence on the positive effects of informality is available, it could be extremely useful to identify the legislative, judicial and administrative channels through which customary trading concepts and norms find recognition in official law.

- d) The relationship between regional and continental-wide agreements and the informal economy. No reference is made to the informal economy in the African Continental Free Trade Area Agreement, signed in March 2018, in the OHADA harmonization texts, or in the founding agreements of the African Regional Economic Communities. The latter put in place several initiatives aimed at reducing the size of the informal economy. This means that they have added another layer of regulation in an already crowded institutional environment⁷⁶. What is missing is a sustained attempt at discussing how official trade-related rules could exploit the networks of social relationships on which the informal economy is built⁷⁷.

All these aspects could be explored with a comparative approach which aims at providing insights on the role of the informal economy, its relationships to the formal economy and the non-state legal regimes underpinning it. Similarities and differences could be assessed across

⁷⁴ See S. GOLUB, *op. cit.*, p. 186f. On the factors affecting the structure of trade networks see also O.J. WALTHER, *Business, Brokers, and Borders: The Structure of West African Trade Networks*, 51(5) *J. Dev. Stud.* 603 (2015).

⁷⁵ On power dynamics in informal cross-border trade see, e.g., V. VAN DEN BOO-GAARD ET AL., *Norms, Networks, Power, and Control: Understanding Informal Payments and Brokerage in Cross-Border Trade in Sierra Leone*, International Centre for Tax and Development, Working Paper 74, February 2018.

⁷⁶ See O.C. RUPPEL, K. RUPPEL-SCHLICHTING, *The Hybridity of Law in Namibia and the Role of Community Law in the Southern African Development Community*, in J.A.R. NAFZIGER, *op. cit.*, p. 85, for a discussion of the interplay between the regional economic communities and customary law.

⁷⁷ See O.J. WALTHER, *op. cit.*, p. 617, for the argument that place-specific development policies could take into account the variety of trade networks and shape the development potential of cross-border trade.

African states, across developing countries in different continents, or across developed and developing countries. The guiding principle for the selection of cases to be compared should not be the identification of supposed best practices, but the search for the factors contributing to context-dependent adaptations of the formal and informal dimensions.

5. Comparing evaluation processes

The crucial role that measurement systems play for the SDGs can hardly be overemphasized. It has been argued that the peculiar form of indirect governance promoted by the SDGs needs to rely on measurability as a substitute for the lack of legally binding force⁷⁸. In 2017, the UN General Assembly endorsed the 230 indicators laid out by the Inter-Agency and Expert Group within the UN Statistical Commission⁷⁹. They will not only provide the main reference point to assess progress on each SDG target, but also significantly affect the selection and design of development programs.

An evaluation process which relies heavily on quantitative indicators is nothing new. It reflects quantification trends that have been taking place at least since the nineteenth century and gained more traction in the second half of the twentieth century. Sociological studies pointed out that indicators of various types served to consolidate the authority of the nation-state. More recently, their widespread adoption in a variety of fields has been prompted by processes of internationalization, technological standardization, and bureaucratic management, as well as by the quantification turn in several scientific disciplines⁸⁰. As far as the

⁷⁸ F. BIERMANN, N. KANIE, *Conclusion: Key Challenges for Global Governance Through Goals*, in ID., *op. cit.*, p. 296.

⁷⁹ UN GENERAL ASSEMBLY Res. 71/313 (July 6, 2017). On the process employed to work out the indicators see UN ECONOMIC AND SOCIAL COUNCIL, *Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators*, Note by the Secretary-General, 15 December 2016.

⁸⁰ See R. DIAZ-BONE, E. DIDIER, *The Sociology of Quantification – Perspectives on an Emerging Field in the Social Sciences*, 41(2) *Historical Social Research* 7 (2016) (on French studies pioneered by the statistician Alain Desrosières); M. LEHTONEN, *Indicators: Tools for Informing, Monitoring or Controlling?*, in A.J. JORDAN, J.R. TURN-

development field is concerned, quantification of macroeconomic data in the fifties started the theoretical reflection on development economics and is likely to have shaped the decision-making processes of the donor community⁸¹. Since then, two parallel phenomena can be observed: on one hand, the production of indicators has steadily increased at international level; on the other hand, their legitimacy and credibility have been widely contested. For instance, the UN were accused of manipulating the MDGs indicators to show that some progress had been made⁸².

What about the quantification of the legal dimensions of the SDGs? In the early twenty-first century, the use of quantitative indicators to measure various aspects of legal phenomena prompted a vigorous debate⁸³. Criticisms have been addressed to the low quality of the information on which legal indicators rely and to the lack of transparency of the decision-making processes in which indicators are used. More radically, indicators have been said to reflect standards and values imposed by the Global North and to ignore the values and preferences of people in developing countries⁸⁴. Criticisms sometimes lead to improvements in the technical quality of indicators, but widely contested indicators

PERRY (eds.), *Tools of Policy Formulation*, Cheltenham, 2015, p. 76 (on subsequent waves of indicators).

⁸¹ D. SPEICH CHASSÉ, *The Roots of the Millennium Development Goals: A Framework for Studying the History of Global Statistics*, 41(2) *Historical Social Research* 218 (2016).

⁸² See J. HICKEL, *The True Extent of Global Poverty and Hunger: Questioning the Good News Narrative of the Millennium Development Goals*, 37(5) *Third World Q.* 749 (2016) (showing that UN reports misrepresented both the extent and the increasing trends of poverty and hunger after the MDGs). Also see A. BROOKS, *The End of Development*, London, 2017, p. 183-201 (showing that, despite the «Africa Rising» narrative of the early twenty-first century, very limited progress towards alleviating poverty has been achieved).

⁸³ See M. SIEMS, *op. cit.*, p. 180ff., for an overview of the literature on methods to collect and ways to use quantitative legal information.

⁸⁴ M. GOODWIN, *The Poverty of Numbers: Reflections on the Legitimacy of Global Development Indicators*, 13(4) *Int. J. L. in Context* 485 (2017); D. RESTREPO AMARILES, *Transnational Legal Indicators: The Missing Link in a New Era of Law and Development*, in P. FORTES ET AL. (eds.), *Law and Policy in Latin America*, London, 2017, p. 95.

show a surprising resistance. Furthermore, there is no sign that their use is going to decrease. One of the reasons is that indicators help the organizations producing or using them to achieve their goals. It has been observed that measurement systems are «conservative, slow-changing aspects of governance». Maintaining a high level of consistency over time is prized higher than taking into account the negative impact of the current mode of development⁸⁵. Another reason is that indicators can represent a useful form of empirical knowledge. None of these reasons can lead to the unconditional acceptance of indicators. The latter select a specific portion of available data and discard all data that cannot be included in the chosen quantitative variables. This means that indicators select the kind of information public and private actors are interested in producing and using⁸⁶.

Where a comparative analysis of evaluation processes might prove useful is in helping identify the assumptions undergirding each measurement system. In the current debate on sustainable development, the accuracy of indicators from the point of view of social sciences methodologies is often the only factor taken into account. Science institutions trying to influence policymakers engage in legitimation strategies which rely on claims of independence, representation of a wide range of scientific, geographic or gender perspectives, or participation from non-academic actors⁸⁷. The problem with these strategies is that they leave no room for additional evaluations to be carried out according to

⁸⁵ L. PINTÉR ET AL., *Measuring Progress in Achieving the Sustainable Development Goals*, in N. KANIE, F. BIERMANN, *op. cit.*, p. 102.

⁸⁶ See, on the two-way relationship between knowledge and power, K.E. DAVIS ET AL., *Introduction: The Local-Global Life of Indicators: Law, Power, and Resistance*, in S.E. MERRY ET AL. (eds.), *The Quiet Power of Indicators: Measuring Governance, Corruption, and the Rule of Law*, Cambridge, 2015, p. 1f. Of course, indicators are also used by grassroots and advocacy groups to challenge dominant institutions and worldviews: see R. ROTTENBURG, S.E. MERRY, *A World of Indicators: the Making of Governmental Knowledge through Quantification*, in R. ROTTENBURG ET AL. (eds.), *The World of Indicators*, Cambridge, 2015, p. 4.

⁸⁷ S. VAN DER HEL, F. BIERMANN, *The Authority of Science in Sustainability Governance: a Structured Comparison of Six Science Institutions Engaged with the Sustainable Development Goals*, 77 *Env. Sc. and Pol'y* 211 (2017).

specific legal standards⁸⁸. It seems preferable to set apart the debate about the authority of scientific results from the use of scientific expertise in the policymaking process. The latter can and should be the object of discussion. The aim should be to foster the debate about the available options, not to close the door to additional contributions and points of view⁸⁹.

Three additional factors suggest that indicators should not be the exclusive measurement system for SDGs. Firstly, it is still unclear whether the financial and organizational resources required by the indicators will be available in all countries by 2030⁹⁰. This means that indicators alone might not provide a reliable description of progress on the SDGs. Secondly, a variety of evaluation processes is now available. In several fields, non-state initiatives arose as a reaction to the perceived lack of independence of centralized measurement systems. Recourse to non-official data sources has also been discussed in the context of SDGs implementation⁹¹. Although not immune from defects, non-state evaluations could provide a critical perspective and alternative views⁹². Thirdly, evaluation processes based on indicators can be oblivious to

⁸⁸ D. NELKEN, *Conclusion: Contesting Global Indicators*, in S.E. MERRY ET AL., *op. cit.*, p. 329 («law gives its blessing to the enterprise of indicators by treating science as more capable of producing knowledge free from challenge than is really possible»).

⁸⁹ H. STRASSHEIM, *Trends Toward Evidence-Based Policy Formulation*, in M. HOWLETT, I. MUKHERJEE (eds.), *Handbook of Policy Formulation*, Cheltenham, 2017, p. 504 (arguing that a public debate is needed on different kinds of expertise).

⁹⁰ See L. GEORGESON, M. MASLIN, *op. cit.*, p. 13 («no country is currently capable of measuring against all indicators, let alone with full disaggregation»). The cost of putting in place statistical systems capable of measuring the SDGs in lower-income countries was estimated to be \$1 billion per year (SUSTAINABLE DEVELOPMENT SOLUTIONS NETWORK, *Data for Development*, April 17, 2015), but in 2015 financial support to developing countries for all areas of statistics only amounted to \$541 million (UN ECONOMIC AND SOCIAL COUNCIL, *Progress Toward the Sustainable Development Goals*, Report of the Secretary-General, E/2018/64, 10 May 2018).

⁹¹ For instance, the Cape Town Global Action Plan for Sustainable Development Data, adopted by the UN Statistical Commission in March 2017, includes among its key actions the development of a mechanism for the use of data from alternative and innovative sources within official statistics.

⁹² J. SCHOENEFELD, A. JORDAN, *Governing Policy Evaluation? Towards a New Typology*, 23(3) *Evaluation* 274 (2017).

the timing of legal change. In organizations like the World Bank, any project which does not produce tangible results in three-five years is unlikely to find support⁹³. Much the same bureaucratic constraint seems to be imposed by the short cycle of progress assessment required by the SDGs indicators. These factors point to the need to devise a comparative approach in which the evaluation processes are analysed and their assumptions on the relationship between law and development unveiled. Such an approach could focus on two phases usually involved in any evaluation which relies on indicators, that is the conceptual definition of the indicator and its production.

When the indicator is conceptualized, the problem to be addressed is defined according to a specific underlying theory and the effects that interventions could produce⁹⁴. In this phase, the main question is which development concepts are assumed as a starting point⁹⁵. A comparative analysis should aim at showing the variety of concepts that could be employed to define the main dimensions of a legal concept. For instance, in 2015 the UN Statistical Commission created the Praia Group on Governance Statistics with the mandate to develop methodologies for governance indicators. When defining the dimensions of governance, the Group is likely to rely on what is already available in official statistics⁹⁶. When measuring the rule of law dimension of governance, the Group will mainly seek statistical sources which provide data on access to justice, constraints on executive power, the independence of the judiciary, policing and trust in the courts. The main shortcoming of

⁹³ C. SAGE, M. WOOLCOCK, *Legal Pluralism and Development Policy*, in B.Z. TAMANAHA ET AL., *op. cit.*, p. 6 (international aid architecture provides limited support for development initiatives whose impact may not be apparent for multiple decades).

⁹⁴ K.E. DAVIS ET AL., *op. cit.*, p. 10-12, 21 («underlying theories affect how decisions are made: indicators that become dominant persuade decision makers to follow their models»).

⁹⁵ M.A. PRADA URIBE, *The Quest for Measuring Development: The Role of the Indicator Bank*, in S.E. MERRY ET AL., *op. cit.*, p. 133 (discussing the genealogy of World Bank indicators and the concepts of development they reflect).

⁹⁶ See, e.g., UN ECONOMIC AND SOCIAL COUNCIL, *Report of the Praia Group on Governance Statistics*, Report of the Secretary-General, E/CN.3/2018/34, 14 December 2017, which refers to S. GONZÁLEZ ET AL., *Governance Statistics in OECD Countries and Beyond*, OECD Statistics Working Papers 2017/03.

this approach is that it does not contribute to critically discuss unstated assumptions behind the most widespread concepts. Where a comparative analysis could make the difference is in suggesting that alternative concepts are available and that a variety of measurement systems could provide a richer understanding of the settings in which the indicators are assumed to operate.

The production phase of indicators is aimed at data collection. This process is not only affected by technical and resource challenges, but also by the need to measure the same thing in very different contexts⁹⁷. When this standardization of data collection goes wrong, the indicators won't have any influence in the target country⁹⁸. Though, standardization might be unavoidable to prevent the adoption of criteria linked to a specific society, or even to promote what is considered the best solution⁹⁹. These conflicting perspectives suggest that contextualizing indicators might be an impossible task. An alternative approach could be to put in place a two-track system in which global and local indicators co-exist. The two sets of indicators would not fully overlap, but it could be possible to ensure some degree of comparability while at the same time avoiding the disconnect from local priorities and values¹⁰⁰.

The two-track approach still relies exclusively on indicators. But a comparative approach could start from a different premise. All evaluation processes are aimed at assessing causal relationships. The latter cannot be observed directly, but have to be reconstructed. The general

⁹⁷ R. ROTTENBURG, S.E. MERRY, *op. cit.*, p. 11 («interpretation underlies all quantification systems»). A related consequence of the dependence of many political and economic choices on the measurement system is that the latter is generally difficult to change without producing multiple cascading effects: see L. PINTÉR ET AL., *op. cit.*, p. 107f.

⁹⁸ See, e.g., M. SERBAN, *Rule of Law Indicators as a Technology of Power in Romania*, in S.E. MERRY ET AL., *op. cit.*, p. 199, for the observation that rule of law indicators imposed by the EU on Romania's accession had a limited influence on the country's institutional context.

⁹⁹ D. NELKEN, *op. cit.*, p. 326f. On indicators as tools which create a universal language to make communication possible see R. ROTTENBURG, S.E. MERRY, *op. cit.*, p. 17f.

¹⁰⁰ On the need for national targets see Å. PERSSON ET AL., *op. cit.*, p. 67f., as well as the discussion in L. PINTÉR ET AL., *op. cit.*, p. 116-119.

question is: why did the intervention that was implemented have the observed impact? It is well known that this question never admits easy answers. This is partly due to the difficulty of disentangling the causal contribution of multiple factors. But above all, evaluation processes are embedded in institutional frameworks which bias their objectivity. While such bias can be somewhat moderated, it can never be completely avoided. Therefore, a comparative analysis could contribute to openly debate the features of different evaluation processes, thus fostering a debate on which reconstruction of causal relationships looks more reliable and on possible revisions. The spirit of this proposal is close to the approach of mixed methods research. The latter tries to integrate quantitative and qualitative data in a research design which overcomes the limits of single method research. In the development field, mixed methods research could provide more accurate evidence about contextual factors which quantitative approaches tend to overlook¹⁰¹. Much the same could be said about comparative legal analysis. Instead of relying on the standard concepts of quantitative studies, each development program aimed at implementing the SDGs could be supported with qualitative information about the legal factors which could influence its effectiveness. This kind of analysis could help identify the root causes of inequality, thus contributing to the social transformation that the SDGs endeavour to promote. To pick up one example among many: several SDGs targets refer to measures aimed at changing global production systems, for instance food production, food commodity markets and food waste (targets 2.4, 2.c and 12.3), diversification, technologic

¹⁰¹ See N.A. JONES ET AL., *How Does Mixed Methods Research Add Value to Our Understanding of Development?*, in S.N. HESSE-BIBER, R.B. JOHNSON (eds.), *The Oxford Handbook of Multimethod and Mixed Methods Research Inquiry*, Oxford, 2015, p. 486, 497 (suggesting that mixed methods research can provide a «more contextualized and in-depth understanding of people’s experiences of poverty, social inclusion, and development – which are hard to capture with more static quantitative instruments alone»). See also J.W. CRESWELL, R.C. SINLEY, *Developing a Culturally-Specific Mixed Methods Approach to Global Research*, 69 *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 87 (2017) for the argument that mixed methods research should be tailored to the methodological orientation, research agenda, values and communication strategies of a specific community. This perspective fits comparative law focus on the culture of legal professionals in each legal system.

upgrading and innovation (target 8.2), financial services (targets 8.10 and 10.5), transport systems (target 11.2), and sustainability practices for transnational corporations (target 12.6). Instead of measuring progress with indicators only, qualitative research could provide case studies which shed light on the links between current legal structures and unsustainable production systems¹⁰². Drawing on this research, new indicators could be designed to assess the impact of reforms aimed at re-shaping the legal structure of current production systems.

Of course, how exactly to design the comparative analysis of evaluation processes and how to connect qualitative information to quantitative indicators will be open to debate and face several organizational and financial constraints¹⁰³. Though, if evaluation processes are the places in which concepts and ideas about causal relationships are moulded, they could be one of the main terrains on which supporters and critics of the law and development field could engage in a constructive debate.

6. Conclusions

The fields of comparative law and law and development are not going to find easy points of contact in the near future. Perhaps the deepest reason for this state of affairs is that each field perceives the other one as pursuing different goals and employing incompatible methodologies. Or perhaps both fields tend to overemphasize the differences when vy-

¹⁰² Evidence of links between the organization of global supply chains and Western models of corporate and contract law is already available: see, e.g., D. DANIELSEN, *Beyond Corporate Governance: Why a New Approach to the Study of Corporate Law is Needed to Address Global Inequality and Economic Development*, in U. MATTEI, J. HASKELL (eds.), *Research Handbook on Political Economy and Law*, Cheltenham, 2015, p. 195; B. LOMFELD, *Sustainable Contracting*, in B. LOMFELD ET AL. (eds.), *Reshaping Markets: Economic Governance, the Global Financial Crisis and Liberal Utopia*, Cambridge, 2016, p. 257.

¹⁰³ How to integrate qualitative research into each stage of evaluation processes is discussed by A.M. ALCÁNTARA, M. WOOLCOCK, *Integrating Qualitative Methods into Investment Climate Impact Evaluations*, World Bank Policy Research Working Paper 7145, December 2014.

ing for research funding or the policymakers' attention. Be that as it may, the uneasiness between the two fields could entail a high cost in terms of delaying a shared understanding of planetary challenges. If the only interaction between the two fields is reciprocal criticism, a lot of room is left to global elites' definition of problems to be addressed¹⁰⁴. This chapter has sought to suggest that a comparative approach could absorb the lessons of the past half-century and promote a research agenda in which the boundaries between the two fields become less relevant than they are today. The SDGs could provide a useful starting point not because of their underlying development model, but because they could set in motion a transformative process whose final outcomes cannot be fully controlled by the UN or the donor community. By analysing the interpretative practices, the implementation practices and the evaluation practices of the SDGs, a comparative approach could show that a multiplicity of development paths is possible.

¹⁰⁴ See DA. KENNEDY, *op. cit.*, p. 92 («today's insiders take as given a world with common problems demanding that they rise to the challenge of global management»).