

Concept paper

“REGULATION FOR SUSTAINABILITY”

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The world is currently facing a crisis which, originated in 2007 in the United States as a financial crisis, has rapidly expanded to the international community at large. Far from being purely financial or economic, the current crisis rather is revealing its systemic nature. This view finds a first indirect support in the Brundtland Report that, already in 1987, acknowledged that there were no separate crises but “*interlocking crises*” resulting in a unique crisis.¹ The present-day situation seems to be similar to the one already recognised by the Brundtland Report, with regard to the various criticalities afflicting the international community (social inequalities, conflicts, economic crisis, climate change, energy shortage just to mention a few). In fact, it can be seen as the expression of one deeper and more comprehensive reality: a crisis of the mainstream development model, based on a potentially limitless increase of gross domestic product, driven by progressive deregulation at the expenses of planetary wellbeing.² Anthropogenic activities informed to the mainstream myth of “economic growth”,³ in fact, are seriously impacting on ecosystems, altering their health as well as their capacity of providing ecosystem services that are essential to human life on Planet Earth.

In front of such challenges, the international community, from one side, claims the necessity of a more sustainable development path⁴ while, from the other one, keeps on regulating and acting in an unsustainable way. As different interpretations of the same concept lead to different approaches and actions, the meaning given to the concept of “sustainability” lays at the core of such dichotomous behaviour. The term “sustainability” was coined in 1713 by the engineer von

¹ “*These are not separate crises: an environmental crisis, a development crisis, an energy crisis. They are all one*”, in World Commission on Environment and Development (WCED), *Our Common Future, From One Earth to One World*, Oxford University Press, 1987, section 1.2.

² In this sense see, for instance, Kates et al: “*The world’s present development path is not sustainable*” (R. W. Kates, W. C. Clark, R. Corell, J. M. Hall, C. C. Jaeger, I. Lowe, J. J. Mc Carthy, H. J. Schellnhuber, B. Bolin, N. M. Dickson, S. Faucheux, G. C. Gallopin, A. Grubler, B. Huntley, J. Jäger, N. S. Jodha, R. E. Kasperson, A. Mabogunje, P. Matson, H. Mooney, B. III Moore, T. O’Riordan and U. Svedin, *Sustainability Science*, in *Science*, 2001, vol. 292, No. 5517, pp. 641-642, at p. 641).

³ W. E. Rees defines sustainability through growth as a “*modern myth*”. See W. E. Rees, *Globalization and Sustainability: Conflict or Convergence?*, in *Bulletin of Science, Technology & Society*, 2002, vol. 22, No. 4, pp. 249-268, p. 251.

⁴ See, for instance, the new Sustainable Development Goals, which are due to replace the Millennium Development Goals.

Carlovitz, claiming for the principle not to extract more renewable resources from a stock than the quantity which could be reintegrated through natural production in the same period.⁵ In other words, at the beginning, sustainability was recognised its proper ecological foundation, the biosphere and the ecosystems being the only basis for life on planet Earth. As Bosselmann remarked, *“No economic prosperity without social justice and no social justice without economic prosperity, and both within the limits of ecological sustainability”*.⁶ However, the ecological connotation has been progressively replaced by a lighter environmental characterisation, coupled with economic (and social) dimension up to the point whereby nowadays, in the political agenda, sustainability (usually replaced by a more compromising “sustainable development”) firstly stands for economic sustainability. Thus, sustainability has progressively lost its original ecological connotation in favour of an economic characterisation fitting with the mainstream consumerist development model.

In this context, the role of regulation as an effective means for the promotion of an alternative, truly sustainable, development model deserves a particular attention. Such reasoning is based on two main assumptions, which are incisively conveyed by the wording of two scholars. Firstly, it seems that *“Humans will continue to violate ecological limits and upset fundamental ecological balances until we establish ways of regulation of human conduct that ensure that we comply with the fundamental rules of the Earth community”*.⁷ Secondly, *“Unless law is made sustainable, it protects unsustainable conducts”*.⁸ In such context, a new kind of regulation could play a key role in structuring and enforcing cooperation for a truly sustainable management of natural resources. In this sense, we deem more appropriate to talk in terms of *“regulation for sustainability”*, rather than *“regulation of sustainability”*. Sustainability, in fact, does not need any legal regulation to exist, being regulated by natural laws. On the contrary, it needs regulation to be pursued and attained in human society.

From a methodological perspective, in the process of designing an effective *“regulation for sustainability”*, it has to be taken into consideration that law is deeply modified by the interplay

⁵ U. Grober, *Deep roots. A conceptual history of “sustainable development” (Nachhaltigkeit)*, Discussion paper Best-Nr. P2007-002, Wissenschaftszentrum Berlin für Sozialforschung, 2007, pp. 16 ff.

⁶ K. Bosselmann, *The principle of sustainability. Transforming law and governance*, Ashgate Publishing, 2008, p. 5.

⁷ C. Cullinan, *Wild Law. A manifesto for Earth Justice*, Green Books, (2002) 2011, p. 7.

⁸ S. Westerlund, *Theory for Sustainable Development*, in H. C. Bugge and C. Voigt (eds.), *Sustainable Development in International and National Law*, 2008, pp. 49-66, p. 54.

with ecological problems, which can hardly be encompassed within the traditional legal structures.⁹ Moreover, the coupled socio-ecological systems entail sustainability challenges that go beyond any disciplinary framework, being extremely complex and multifaceted. As remarked by Cullinan, “*there should be a correlation between the regulatory system and what was being regulated*”.¹⁰ Hence, it seems that a deep reform of the traditional sectorial normative approach is needed. In this sense, a transdisciplinary approach based on a holistic vision could represent a proper methodology to analyse, frame and regulate the various issues posed by sustainability and could play a crucial role in addressing the traditional fragmentation of environmental legislative acts, policies and measures.¹¹

From a substantive point of view, first of all regulation *for* sustainability calls for a medium-long term perspective to replace the short-term one, to which many pieces of legislation are informed. Such shift represents a fundamental evolution from the economic timespan to the ecological one.¹² Secondly, it seems reasonable to envision regulation *for* sustainability as the product of a step-by-step process. The challenge is not easy neither little, but retrieving the role of regulation for the promotion of sustainability is worth the effort and it could represent the basis for a “*new contract between science and society*” advocated in the literature as a response to the emergence of unprecedented planetary-scale challenges.¹³

⁹ M. Tallacchini, *Diritto per la natura. Ecologia e filosofia del diritto*, Giappichelli, 1996, p. 169.

¹⁰ C. Cullinan, *Wild Law. A Manifesto for Earth Justice*, cit., pp. 27-28.

¹¹ On transdisciplinarity see T. Jahn, M. Bergmann and F. Keil, *Transdisciplinarity: Between mainstreaming and marginalization*, in *Ecological Economics*, 2012, vol. 79, issue C, pp. 1-10, at p. 1. See also M. A. Max-Neef, *Foundations of transdisciplinarity*, in *Ecological Economics*, 2005, vol. 53, issue 1, pp. 5-16.

¹² On the theme see E. Tiezzi, *Tempi storici, tempi biologici*, Donzelli editore, 2005.

¹³ W. C. Clark, P. J. Crutzen and H. J. Schellnhuber, *Science for Global Sustainability: Toward a New Paradigm*, CID Working Paper No. 120. Cambridge, MA: Science, Environment and Development Group, Center for International Development, Harvard University, 2005, pp. 1-28, at p. 24.