EUROPEAN UNIVERSITY INSTITUTE

Department of Law

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From Economic to Sustainable Development
Enlarging the Concept of Law

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Supervisor:
Prof. Pierre-Marie Dupuy

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Acknowledgments

It has become fashionable to declare the source of your obsessions. Joining the trend but avoiding beginning with the traumas of infancy, I can say that the desire to complete this thesis originated with my professional life outside academia. I have had the good fortune to work with people from all over the world – spanning from the American ivory towers to the steppes of Mongolia and from buzzing Asia to the red soil of Africa - and always and everywhere to talk about law and how it can assist or impede us in shaping conditions for better lives. Accordingly, my first debt is to all those with whom I have worked who have willingly and eagerly engaged in debate that has now enabled me to articulate what I hope could become a starting point from where the talk about law in a global age can begin.

I also owe a debt to several people who have helped me to get through the research process itself, especially Robert Beckman of the National University of Singapore and James V. Feinerman of Georgetown University Law Center, who from the beginning trusted my project and recommended my application to the EUI.

Most importantly, throughout the last five years, my supervisor, Pierre-Marie Dupuy, helped guide and shape the thread of my argument from its unformed origins to the completed thesis. In addition to bringing a wealth of knowledge and experience from the international law field, he continually encouraged - if not pushed - me to develop and express my own arguments and thus saved me from submerging into an eternal study of the philosophical questions of our time.

The EUI and a semester at the Institute for Legal Studies of the University of Wisconsin have been enriching and enjoyable environments for learning and debate. At the EUI, in particular, the seminars organized by Christian Joerges in co-operation with political science and history helped me think out the implications of ideas as sweepingly interdisciplinary as a paradigm shift. Also, the student environment itself, including the enthusiastic and active environmental law working group driven by Patricia Quillacq and Elisa Morgera, has provided inspiration and support. And, finally, I must mention my trusted co-researcher, Tommi Ralli, who has willingly, if not always silently, suffered the endless debates needed to test the ideas I have tried to express in this work.

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Introduction

"Before action comes perception"[1]

Chapter 1 Overview

The title "From Economic to Sustainable Development: Enlarging the Concept of Law" signals a meta-theoretical approach. However, this thesis is also firmly centred in practice by questioning if, and in what form, law has a role to play in implementation of sustainable development, apart from being a tool for shaping concrete legal mechanisms, such as international conventions and national laws and regulation. Thus, at its core, the research is focused on the role of law in a process of political and socio-economic change and on the relationship of theory and practice.

The policy of sustainable development, which is based on the recognition of global interdependence and on an awareness of the earth as a unified sphere of life, requires co-operation and governance beyond the market and international law, which are too limited in scope to capture the complexity of the global reality. However, a foundation - i.e., a commonality or shared point of departure - for such co-operation has not been articulated, because there is dissonance between the *de facto* situation and the available theoretical/normative narratives. The *de facto* situation is characterized by the emergence of a global polity and a policy paradigm of sustainable development, while the theoretical narratives are based on a neo-liberal economic growth paradigm that was institutionalised at a global level with the Bretton

[1] This observation is attributed to Aristotle and used within the environmental sector to argue for awareness raising and data collection. See for instance the *Information Strategy* [Doc. EEA/025/96 - document on file with author] of the European Environment Agency (http://www.eea.eu.int/. The EEA is the agency responsible for data collection, information and communication about the environment in the European Union.

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Woods Agreements in the middle of the last century and implemented by a system of nation states linked by international law.

Before searching for a shared point of departure, it is necessary to acknowledge that the theoretical narratives and the institutions to which they are linked are all constructs that can be radically changed when they no longer serve their intended purpose. Therefore, to begin, I ask the reader to disengage from conventional categories and from current but historically determined concrete instances of institutions and concepts of democracy and legal systems, and to look beyond them to the phenomena as they are at a higher level of abstraction, such as law as an instance of normativity and jurisprudence as a framework that relates law to society. When "playing the role of the definer and setting the rules of the game" - i.e., performing an archetypal function of the discipline - law enables people to revisit their categories, to reconstitute themselves, co-operate and co-ordinate in new ways. This aspect of the discipline is greatly under-theorized, because the overall focus is on explaining existing positive law and legal systems.

The wide-ranging scope of the research has implications for methodology. To cope with the magnitude of relevant material, I have adopted the maxim that the discussion is complete not when there is no more to add but when no more can be subtracted. Hence, although in the course of my research, I perused a broad field of literature, the thesis includes only what I consider necessary and sufficient to support the analysis and the credibility of my claims.

Thus, with this thesis I hope to demonstrate the plausibility of the claim that the policy of sustainable development represents a wider epistemic shift, and, moreover, that it has generated something bigger than itself by providing the theoretical resources necessary to articulate a new paradigm of knowledge, which will, in turn, both enable and require us to re-describe the concept of law.

My analysis attempts to show that an important insight arising from sustainable development is that practitioners behind the policy testify to academia that the philosophy and theory of change underlying the existing economic development paradigm, within which we understand and legitimise our international institutions, no

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longer fully corresponds to our collective knowledge. Nor does the theory of change fully correspond to the state of the world, where there is an emergent insistence on the need to articulate a normative perspective for an evolving global polity. This comes as no surprise to academia, which has been vigorously involved in critique and search for new perspectives within the last twenty to thirty years. However, no unifying alternative has yet emerged from academic quarters.

Now practice points to the central challenge - the paradigm of knowledge has changed. No matter how we might conceptualise and construe the implications of this realization, we know that we are conditioned on global interdependence and that we are distinct but not isolated from the rest of the biosphere. Furthermore, we know that our fundamental understanding of the nature of the world and how we can know about it underlies societal communication and action. The nature of this emerging paradigm of knowledge is not one of separation, observation and measurement but one of interaction and accountability. Therefore, I suggest that the legal discipline, which enables establishment of the rules of the game, has the conceptual resources to translate an understanding of interdependence of our physical reality - capturing a notion of both the observed and the observer - into the social field. More precisely, I suggest that the theoretical insight arising from the sustainable development policy enables us to propose a conceptualisation of a third-order epistemological framework for connecting self and the world, i.e., connecting mind and matter through a rule-based theory of cognition encompassing what I in a legal context have termed tertiary rules - as an extension of Hart's primary and secondary rules.

A new perspective, or, more succinctly, paradigm, in turn requires and enables our existing concepts, such as that of law, to take on new form. Accordingly, my analysis suggests that law in its jurisprudential sense can be understood and re-described as a process of building relationships between the I and the world, and a union of primary, secondary and tertiary rules. I propose that this concept captures within its scope both formal legal systems and an underlying informal normativity transmitted through legal cultures. Furthermore, I suggest that elaborating on the idea of a global legal culture based on a set of tertiary rules representing the relationship between self and the world, thus integrating informal normativity into a coherent concept of law, may allow us to act socially and politically from a grander perspective than that of the

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nation state or the individual, and, moreover, allow for integration of greater diversity in a common framework, as is required for sustainable development in a global age.

Although my research represents but a broad brushed sketch of a concept of law based on an epistemology of sustainable development, my aim is to demonstrate that addressing the questions raised is a worthwhile and necessary enterprise.

Section 1 The Principal Arguments

1.1 Subject and Scope

My thesis is an exploration of the relationship between law and the policy of sustainable development within the context of the challenges of globalisation. It asks if and how law and jurisprudence might play a role in facilitating implementation of the policy of sustainable development beyond that of a tool for shaping concrete mechanisms, such as international conventions and national laws. This question is embedded in the wider context of material, technological, and socio-political change, commonly termed globalisation, which challenges law and political theory in fundamental ways and which, on a philosophical plane, has been articulated as a crisis of truth.[2] The policy of sustainable development is itself an integral part of the globalisation phenomenon, since it is the first comprehensive policy, incorporating economic, social and environmental considerations, to be developed not only by the community of nation states but by a global community, including civil society and the private sector.

Although the geographical scope is global and the questions are universal, the empirical basis of the analysis is limited in scope. The material for identifying the meaning of sustainable development will predominantly consist of relevant global documents concerning international environmental law and law for sustainable development, which have developed rapidly since the nineteen eighties.

1.2 Background and Purpose

In tandem with accelerating globalisation and an institutional expansion from government to governance, the sustainable development policy has been progressing

[2] See Chapter 5.

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since the late nineteen eighties. The idea of applying the concept of sustainable development -characterized as a "…. development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[3] - to global policies was first launched in 1987. The policy process grew out of concern for the wide reaching impact of pollution and environmental degradation occurring in one locality surfacing also in many other parts of the world. As will be shown in this thesis, the process has been hugely successful in ascertaining the need for global dialogue and change, culminating in 2002 with the first World Summit on Sustainable Development (WSSD)[4] in Johannesburg, South Africa. The first meetings in the process - the United Nations Conference on the Human Environment (UNCHE)[5] held in Stockholm, Sweden in 1972 and the Conference on Environment and Development (UNCED)[6] held in Rio de Janeiro, Brazil in 1992 - stressed the environmental focus of the global dialogue. From the beginning of the process law has played a constructive role as a tool for developing innovative international and national instruments for control and protection of the environment. However, notwithstanding its public relations successes, there is considerable debate about the meaning of the concept of sustainable development and an acknowledged gap between its rhetoric and implementation of the policy. These points are addressed in the following Part I.

I now argue that exploring the relationship between the knowledge underlying the policy of sustainable development and the existing conceptions of law can contribute to new ways of thinking about the role of law in a global age. The crucial and productive tension arises from the dominant conceptions of law, which are bound to national legal systems connected by international law. These conceptions are based on an assumption of national borders that conflicts with the idea of interdependence and with the concrete problems of shared resources, and with pollution and

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[3] *Our Common Future* - The report of the World Commission on Environment and Development (WCED). Oxford: Oxford University Press, 1987, p. 43. The report is commonly referred to as the Brundtland report named after the Chairperson of the Commission: Gro Harlem Brundtland.

[4] *Report of the World Summit on Sustainable Development*, Johannesburg, 26 August - 4 September 2002, UN Doc. A/CONF.199/20 (2002). The report includes the *Johannesburg Declaration* and the *Plan of Implementation* (POI)

[5] *Report of the United Nations Conference on the Human Environment*, Stockholm, 5-16 June 1972, UN Doc. A/CONF.48/14/Rev. 1 (1973). The report includes the *Stockholm Declaration*

[6] *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26/Rev.1 Vol. I-II. (1993). The report includes *The Rio Declaration on Environment and Development* and *Agenda 21* - a programme of action to implement sustainable development.

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environmental degradation, which do not respect political boundaries. These aspects will be addressed in Part II, in which Chapter 7 provides a synthesis of the analyses expressed as a re-describing of the concept of law in the perspective of sustainable development.

My intentions in undertaking the research are, first, to contribute to the debate concerning the relationship of law to the institutional and theoretical challenges of globalisation and, second, to develop perspectives that might lead to a more effective policy implementation. Although sidestepping the debate on the relative influences of human nature and institutions in shaping behaviour, I wish to draw attention to the fact that flawed assumptions underlying the conceptual machinery with which we construe and develop institutions do seem to have real repercussions. In discussing the recently broken WorldCom scandal, Alan Greenspan succinctly conceded this point on CNN in the summer of 2002. Looking somewhat perplexed, he said, "we wanted to create avenues of prosperity and instead we created avenues of greed." This was later repeated in his testimony to the Banking Committee:

> An infectious greed seemed to grip much of our business community . . . It is not that humans have become any more greedy than in generations past. It is that the avenues to express greed have grown so enormously. [7]

1.3 Outcome

I propose that the theoretical insight arising from the sustainable development policy represents a paradigm shift in our knowledge, which can be expressed as a thesis about a third order epistemological framework for connecting self and the world through a rule based theory of cognition. This thesis is not built on any particular theories but is informed by both Western and Asian philosophical and theoretical traditions.

A new paradigm based on knowledge of interdependence as a given of the human condition implies a conceptualisation of the world as a singular entity that is more than the aggregate of the particulars and both requires and enables our existing concept of law to take on a new form. Moreover, developing an idea of a global legal

[7] Alan Greenspan, testimony before the Senate Banking Committee, July 16, 2002. See http://www.federalreserve.gov/boarddocs/hh/2002/july/testimony.htm. Accessed on 19 June 2004.

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culture, including a set of tertiary rules and a measure of legitimate human conduct that integrates the cultural aspects coherently into a concept of law, might provide a platform of shared knowledge about our shared *conditio humana* from which communication and action can start in a global age.

In the process of developing these arguments, the thesis touches upon a number of philosophical debates that are important in their own right. These debates include:

- The dynamic ontology - the many-valued concept of reality, and the related questions of logic and language.
- The unity of knowledge or meta-science.
- The relationship between cognition and values in social and political institutions.
- The relationship between theory and practice.
- The conception of self and community in a global age.
- The relative importance of human nature (and knowledge about human nature) and institutional incentives in shaping behaviour.

I have not touched on other important debates that might be considered necessary for a discussion of a political philosophy of sustainable development, such as the meaning of "needs", because I have only included what is necessary to demonstrate the plausibility of my principal claim that sustainable development enables and requires a re-description of the concept of law. Thus my emphasis is on the technical methodological aspects of conceptualising the implications of sustainable development more than on its substantive aspects.

To develop my thesis beyond the arguments provided in the present document will require both a technical as well as an innovative approach involving law and a number of other disciplines. The work can, therefore, not be done by a single individual, but requires an institutional anchoring.

1.4 Approach

I have added an explorative/synthetic element to the empirical analysis. This approach is motivated by twenty years of work outside academia during which I have experienced an increasing need in the world of practice for a theoretically coherent framework that links the ideas of sustainable development to law and legitimacy of conduct beyond the nation state and beyond particularistic ethics. The problem is universal and cannot be captured and addressed from any particular perspective, and,

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therefore, not by practice itself, which is limited by its concrete form. My experience together with a sense of the fundamentally emancipatory nature of law has structured my approach to envisioning a plausible way of connecting law and legal theory with the present global realities and the explicit aspirations articulated in the policy of sustainable development.

1.5 Structure

The thesis consists of an "Introduction" and two major sections entitled "The Meaning of Sustainable Development" and "Sustainable Development and the Concept of Law in a Global Age" followed by a "Conclusion", which suggests a way forward by identifying issues that could be addressed to further test the utility of linking the concept of law with the theoretical insights arising from the policy of sustainable development as here suggested.

The present Introduction provides an overview of the thesis and a section on approach and methodology. Part I, Chapters 2-4, addresses the meaning of sustainable development. Chapter 2 presents a brief chronicle of the development of the policy and an account and analysis of the related conceptual debate and how it has played out within economics, political science and law. Based on this material, the chapter lays out a core meaning characterizing sustainable development as a development process of a different nature including economic as well as social and environmental factors, and encompassing recognition of interdependence, the requirement for participation and satisfaction of needs, and maintenance of the biosphere as defining elements. Chapter 3 concerns implementation approaches within the legal field and shows how law is a tool for policy implementation, and that policy simultaneously reciprocates by providing the resources for development of innovative methods and new fields of law.

Chapter 4 theorizes the meaning of the policy based on the examined empirical material. Since its inception, the concept of sustainable development has been perceived as vague, ambiguous and inherently conflicting. However, born of conflicting forces - i.e., protection of the environment and economic growth - its ambiguity has reflected political and conceptual realities. From the outset, the policy prescribed "integration" as the main strategy for implementation, because it was

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acknowledged that, although international institutions reflect a functional specialisation, interdependence (particularly among our material base, the environment and human conduct) is a universal condition for the development process that must be reflected in the basis for decision-making and action. Otherwise we might perish in our attempt to create avenues to prosperity.

Next, to develop an understanding of the theoretical implications of the policy, I propose that it is crucial to apply the integration strategy not only to concrete programmes and institutional development but also to the core meaning of the concept of sustainable development. To date, this aspect has not been addressed. The conceptual integration exercise demonstrates that at the theoretical level integrating the rationality of the sustainable development policy into our conceptual machinery both preconditions and enables a new model, i.e., a theory of knowledge based on a dynamic ontology. This insight is what I consider the true theoretical significance of the policy. It has been difficult to make the steps of the present analysis fully distinct, because we are faced with a concrete instance of a new perspective that enables the development of a theory without which we cannot describe the concrete instance accurately. The approach applied in this chapter builds mainly on guidance and methods explained in work of Giovanni Sartori, James N. Rosenau and Henry Teune.

Chapters 5 and 6 of Part II address law and jurisprudence in a global age. As demonstrated in the previous chapters, policy-makers have articulated the idea of sustainable development as reflecting priorities beyond narrow economic development. In parallel, practice has accepted "governance" as a catch-all term to communicate an institutional development beyond government and the private/public divide, and with "global governance" bridging the national/international divide. In Chapter 5, I argue that globalisation is a systemic challenge for law since, in principle, it disregards the foundation on which the system of international law rests. Therefore, the need for rethinking law and democracy in a global context is rarely disputed, only the possibility and nature of a "cure" is debatable. The chapter addresses, for example, the questions of unity or fragmentation of international law and issues related to global "democracy" and justice.

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Chapter 6 addresses the relationship between the individual and community. It identifies the importance of acknowledging the multiple dimensions of legitimacy, while respecting the need for coherently linking the macro socio-political level with the micro philosophical/psychological level of explanation (stating explicitly the necessary assumptions concerning human behaviour). The question of the relative importance of the macro level (institutions) and micro level **(**individuals) in decision-making and governance systems and change is debatable, and, to a large degree, the answer depends on the area of study and on the chosen theoretical framework. However, I argue that, theoretically, the individual is a fundamental unit of a governance system or practice, since macro structures and processes are by their very nature results of actions of numerous individuals. I therefore propose that, from the perspective of governance, it appears to be logically necessary, although not sufficient, to anchor any debate about social change at the level of the individual. Conceptions of mutual vulnerability and respect for agency are introduced as helpful to the theoretical debate about legitimate conduct in a post-national world. In conclusion, the analysis conceptualises the individual as both author and addressee of law as a basis for thinking of a global society as a fundamental layer of governance in a global age.

Chapter 7 answers a call for articulation of an explicit normative perspective on the global reality by developing a re-description of the concept of law linked to the individual and based on sustainable development. The core element of this normative dimension is presented as "a constitution of the mind." I suggest a re-description of the concept of law according to which law constitutes a process of building relationship between the I and the world and consisting of a union of primary, secondary and tertiary rules. I view the empirically supported demonstration of a systemic relationship between policy, law and knowledge, which establishes an interface between individual cognition and the institutional system, as a theoretical and philosophical contribution that is distinct from the policy itself.

In the Conclusion I outline proposals for a future research agenda for what I have termed a global legal culture. The term legal culture signals that the idea of individuals as authors of the law as a basis for co-operative decision-making - mutually assigning authority while respecting our shared vulnerability and the power

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of individual agency - does not imply any coercive powers beyond non-co-operation. Instead, it can be understood as a horizontal layer larger than, but integral to, the authority of the existing vertical, formal, and geographically and functionally specialised legal systems.

Section 2 Methodological Considerations

2.1 Approach and Reflections on Methods

The approach to this research is based on the belief that there is a real world in which things happen and that theory is made through reflecting on what has happened, on discourse, and on action. However, although theory follows reality, it also precedes and shapes it by articulating the general lessons of the particular practice. Thus, this thesis should be seen as articulating a theoretical insight arising from what has happened in practice since the emergence of the sustainable development policy in the nineteen eighties.

The open ended character of my original research question "From economic to sustainable development - the changing role of law" reflects that the issues to be addressed are not limited to an inquiry of a very specific, concrete legal problem, but are directed at also identifying the jurisprudential implications and the potential for meta level changes in the world and in our perception of it.

The nature of the research has a bearing on the methods applied. Initially, I intended to organize the research and presentation from a comparative perspective of law and economics, and in this way develop the thesis by contrasting the relationship between law and the emerging paradigm of sustainability with the existent and well-established paradigm of law and economics, which is an explicit example of law incorporating the rationality of the policy it is to implement. However, very early in the process it became clear that this method would not capture the universal and dynamic dimension of the research question - i.e., how law relates to policy and a changing world - because the inquiry would be limited by the structure of the framework embedded in the conceptual machinery of law and economics. This would, *de facto*, have set a standard to which the sustainable development paradigm

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would be compared and, thus, would not have enabled insights beyond an analysis determining convergence or divergence.

In developing the present approach, I have been guided by writings on concept analysis, theorizing, and explorative research methods[8] that emphasize that positivism, by taking the state of the social whole as given, allows for detailed empirical investigation of discrete problems by focusing on those particular variables that frame the specific and limited object of inquiry. Research focusing on systemic change, on the other hand, needs to develop a different and more intuitive questioning to disclose the dialectical relationship between the concrete instances and the general and the abstract. Thus, the analysis of the theoretical aspects of the thesis is also informed by general systems analysis, while for the analysis of the relationship between law and policy, I draw mostly on Jürgen Habermas, and, for the more synthetic aspects of the legal analysis, I draw on H.L.A. Hart and L.M. Friedman.

However, to identify the fundamental rationality and the potential implications for law, which are contained in the sustainable development policy and in the changing socio-economic reality, it is necessary to address the broader framework and not only focus on the legal material developed in relation to the policy. I therefore see my research as falling partly within what has been termed "global polity research".[9]

2.2 The Emerging Framework for Global Polity Research

Although the idea of a "world polity theory" has existed for some time, global polity research is not a distinct school of research in political science and law.[10] The term itself is contested, because, according to its definition, a polity is a "system of creating value through the collective conferral of authority" and there is no comprehensive conferral of authority at a global level. However, I argue that it is possible to speak about *de facto* but fragmented authority.

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[8] Rosenau, James, and Mary Durfee. *Thinking Theory Thoroughly*. Boulder, Colorado: Westview Press, 2000. Stebbins, Robert A. *Exploratory research in the social sciences*. London, UK: Sage Publications, 2001.

[9] Ougaard, Morten, and Richard Higgot, editors. *Towards a Global Polity*. London, UK: Routledge, 2002.

[10] See, e.g., http://www.sociology.emory.edu/globalization/index.html, which provides an overview of relevant theories and a glossary of terms from which the above definition is taken. Accessed 9 September 2003.

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There is also a change in the perception of the idea of a global polity from seeing it as a layer in the existing system of nation states and international co-operation to a perception of a global polity as a *sui generis polity*, enabling and requiring new methods of research. According to Ougaard, a growing volume of scholarly work[11] views global politics and practice as a much more interconnected and institutionalised whole than is recognized by the more traditional state-centred perspectives of international law, regime theory and
international relations. This view does not necessarily imply any claims as to the emergence or desirability of a world government or a global state. It simply recognizes that increasingly decisions are made and policies implemented through international and transnational structures and processes that have consequences for all or many countries and, consequently, for individuals.

From the perspective of the policy of sustainable development, I agree with Ougaard's argument that the "global polity research" label can be helpful in distinguishing research that directs attention towards developing new perspectives, concepts and theories that transcend the traditional distinction between domestic and international politics and law and away from more traditional approaches that stay within the terminology of the existing formal organization of the world in sovereign states and a public/private divide.

The characteristics of the global polity that bear on the methodological framework are identified as including:

- First, the global polity is a singular phenomenon. This provides the precondition for a conception of a relationship between the whole and its parts.

[11] See supra n. 9, pp. 23-39. A number of examples is listed, including e.g.:
Theory of a global state (Shaw 2000)
Global business regulation (Braitwaite and Drahos 2000)
Global policy analysis (Soroos 1991)
Global public policies (Reinicke 1998)
Global public goods (Kaul et al. 1999)
Global social policy (Deacon et al. 1997)

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- Second, although recognized as a recent phenomenon, it can be shown that the roots are old. There is, however, much evidence to support that it was not until the1970s that a movement towards much denser political integration at the global level accelerated as technological preconditions developed.
- Third, the polity is emerging in the sense that the transformative trends with which it is associated are likely to continue in the future and therefore present an urgent research challenge to identify new institutional forms, new political practices and new modes of interaction between the well-known types of institutions and actors.

I hope the present thesis can be helpful in further developing methods for global polity research[12] by proposing an epistemology of sustainable development that conceptualises a relationship between the individual and a global polity through an enlarged concept of law.

[12] For a different approach to the methodological complexities involved in developing a horizontal synthesis for a legal topic see Hoffmann, Florian, H. *Are Human Rights Transplantable? - Reflections on a pragmatic theory of human rights under conditions of globalisation*. Florence, Italy: European University Institute, Thesis, 2003: pp 1-88. In Hoffmann's own words [preface] the main current of his thesis consists of

> The attempt to systematically bring together various strands of thought on human rights and other relevant concepts, which, it is argued, are frequently either conflated or treated in complete separation. Most of the insights won through this partly synoptic and partly synthetic reading stem from this horizontal combination of material, rather than from a vertically constructed argument following one disciplinary logic.

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Part I The Meaning of Sustainable Development (SD)

> The notion of sustainability has in recent years achieved a popularity approaching that of 'democracy'. Just as every country and ideology after World War II wished to profile itself as 'democratic' we find the same trend today with respect to sustainability, and it could easily be argued that we now need an effort for the conceptual clarification of 'sustainable development,' which corresponds with the UNESCO project on 'democracy' from the 1950's.[13]

Sustainable development was launched as a global policy concept in the 1987 Brundtland Report. In hindsight, the Report has succeeded in establishing sustainable development as a "must" policy concept on a par with democracy and economic development. Although it is difficult to convey the magnitude of the impact, the discourse and actions emanating from Stockholm, Rio, and Johannesburg epitomize the change of orientation that has occurred in the global policy debate, which has progressed from a focus in 1972 on integrating environmental considerations with the economic development process to the 2002 idea of sustainable development as recognizing the interdependence of social, economic and environmental aspects. Today the terms sustainability and sustainable development are widely used and given multiple meanings. This has prompted the concern that the concept of sustainable development has lost meaning through overuse.[14] However, I suggest that the wide and varied use is evidence of the fundamental importance of the concept as a framework or a term to express recognition of the changing global realities and our growing understanding of the inherent implications of these changes.

Concepts cannot be defined in the abstract because there is no terminal context of inquiry.[15] However, in what follows, I identify a core meaning of the policy concept of sustainable development [Chapter 2]. Further, I point to the fact that the composite nature of the core meaning and its inherent requirement of interdisciplinarity create dissonance for the various disciplines involved in transporting the policy into the

[13] Lafferty, William M. *The Implementation of Sustainable Development in The European Union*. Working paper - University of Oslo & Project for an Alternative Future, 1995, p.1.
[14] Pallemaerts, Marc. "International Environmental Law from Stockholm to Rio: Back to the Future?" in Sands, Philippe (editor). *Greening International Law.* London: Earthscan, 1993. p. 11.
See also Lafferty and Langhelle, editors. *Towards Sustainable Development – On the Goals of Development and the Conditions of Sustainability.* London: Macmillan Press Ltd, 1999.
[15] In discussing sustainable development it might be helpful to recap Abraham Kaplan's *The Conduct of Inquiry.* San Francisco: Chandler, 1964, according to which concepts regardless of how specifically they are defined, make usage uncertain. Kaplan refers to the problem as the "openness of meaning".

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concrete development process, because the disciplines are limited by their specific epistemologies. At the same time, the implementation challenge - i.e., the demand for integration of new factors in governance, programmes and policies - spurs fertile development within the various disciplines as demonstrated by the account of developments within law [Chapter 3]. On the background of an acknowledged gap in reaching the goals of sustainability, I suggest that perhaps the approach to implementation, which is focused on "action and results", cannot capture the complexity involved in changing from economic to sustainable development; and that, therefore, international politics are increasingly treating any instance of activity as an anomaly requiring detailed regulation. Hence, I propose in Chapter 4, that theorizing the insight from the policy can provide us with the resources needed to explain that sustainable development represents a wider and emergent epistemic shift - i.e., that the policy both enables and requires a shift from a mechanical to a dynamic concept of knowledge - which, in turn, can serve as the starting point for expanding the theoretical basis of the institutional framework to capture the *de facto* complexities of the global situation [Part II].

Chapter 2 Development of the Policy

This chapter provides a brief chronicle of the evolution of the sustainable development policy, explains the principal threads of the conceptual debate, and identifies the core defining components of the policy concept.

Since its inception, the policy concept has been perceived as vague, ambiguous and inherently conflicting. For analytic purposes, the debates concerning the meaning of the term can be seen as revolving around three general themes:

- The scope and component question: Is sustainable development about integrating environmental considerations into the economic development process or is it about a development process of a different quality?
- The professional question: Is sustainable development fundamentally a political, legal, economic or environmental/ecological concept? (To a certain degree, this question is also inherent in the first and the third theme.)

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- The theoretical question: Is the concept inherently conflicting and what is the nature of the contradiction?

In this chapter, I discuss the gradual development and the evolving confluence of the economic, social and environmental components of the policy, and conclude that the meaning relating to the boundaries[16] of the policy concept - whether it is about environment and development or more comprehensive in scope - is now settled, primarily because the discourse, process and content of the 2002 Johannesburg Summit contributed greatly to clarification of these aspects. From the perspective of the later policy development process, I conclude that the original characterization of sustainable development as "a development that meets the needs of the present generations without compromising the ability of future generations to meet their own needs" [17] has evolved over time and taken on a core meaning that encompasses:

- Recognition of interdependence: the reason for the strategy of integration and institutional change.
- Maintenance of the biosphere: necessary for long-term survival of the species.
- Satisfaction of needs: necessary for social justice and the health of the biosphere.
- The process of participation: reflecting the reality of the agency and the rights of individuals.

Sustainable development is a whole, and the various factors can be disaggregated and addressed separately only for analytical purposes. This creates problems for the policy implementation process where there is a perceived conflict among the various factors, for example, between satisfaction of needs, perceived as economic development, and maintenance of the biosphere, perceived as protection of the environment. I show that this conflict has thus far been addressed by subordinating the idea of sustainable development to the conceptual machinery of particular disciplines, for example, economics.

[16] Regarding concept analysis and reconstruction see Sartori, Giovanni. "Guidelines for Concept Analysis", in Sartori, editor. *Social Science Concepts. A Systematic Analysis.* London: Sage, 1984, where the terms "bounded", "vague" and "ambiguous" are addressed.
[17] See supra n. 3, *Our Common Future.*

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Section 1 A Brief Chronicle of the Evolution of the Policy

1.1 The Emergence of the Environmental Factor

The background for the evolution of the sustainable development policy was a growing awareness of the environmental deterioration caused by the economic development process as it was preached and practised after the Second World War,[18] combined with the political tensions created by the growing disparity between North and South[19].

Until the nineteen sixties[20], there was no significant visible evidence that pollution and exhaustion of resources were creating major problems on a global scale. Even the scientists seemed to believe for a long time that "the solution to pollution is dilution". However, in 1969, an international legal non-governmental organization prepared a draft convention to prohibit pollution.[21] Although that particular document did not go beyond the drafting stage, it may have influenced the thinking behind the subsequent policy initiatives addressing the growing concern for the global environment. And its very existence testifies to the dawning recognition in the 1960s of the environmental externalities of economic development, i.e., pollution and exhaustion of renewable and non-renewable resources. This culminated in 1972 with the "Report of the Club of Rome"[22], which made a clear statement concerning the escalation of global environmental problems and the potential resulting conflicts.

1.2 From Stockholm to Johannesburg

The title "From Stockholm to Johannesburg" signifies the framework within which the political negotiations addressing the emerging challenges and conflicts relating to the environment have evolved. However, in substantive terms, the account concerns a process of change from understanding the challenge as one of reconciling

[18] It can be argued that the philosophy of the neo-liberal growth model was institutionalised internationally with the Bretton Woods Agreements in 1944-45 and the subsequent establishment of the specialized agencies such as the IMF and the World Bank.
[19] See, for instance, Calvocoressi,. *World Politics since 1945*. London: Longman Group, 1993, sixth edition.
[20] Carson, Rachel. *Silent Spring*. Houghton Miffling, 1962 and 1987. This was the first book to point to the global risk or threats related to local pollution by demonstrating the poisoning of the earth with chemicals. See also http://www.rachelcarson.org/
[21] "Draft Convention on Environment Cooperation among Nations" prepared by Carl A. Fleischer and J. W Samuels based on a recommendation from Conference on World Peace through Law in Bangkok, 1969. The organization: World Peace through Law - established in 1963 - changed name to the World Jurist Association in 1991.
[22] Meadows, D. H. *The Limits to Growth*. New York*:* New York University Press, 1972.

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environment and economic development to one of implementing a policy of sustainable development, as exemplified in the titles of the three major international meetings discussed below.

The United Nations Conference on the Human Environment (UNCHE) in 1972 marked the beginning of international co-operation within the field of the environment.[23] The theme of the conference was "Only One Earth" referring to a growing change in perception, which was brought about in part by the photographs of the earth taken from the first orbiting satellites. There was considerable tension between North and South during the conference. The North wanted primarily to agree on policies and standards to protect the environment, while the South wanted economic development, and also advocated for economic compensation as a prerequisite for preserving natural resources for the global common good. Over the years this tension has continued to influence the dialogue culminating in the focus on poverty alleviation and changing patterns of consumption during the World Summit in Johannesburg (2002) as described below.

The parties to the 1972 Conference agreed on a set of principles, "The Stockholm Declaration",[24] which has been seen as marking the emergence of international environmental law as a separate branch of international law.[25] Further, as an extension of the Conference, the UN established a headquarters for environment in Nairobi,[26] which also became a focal point for development of international environmental law.[27] In 1982, there was a follow up Conference in Nairobi, where the delegates agreed to establish the World Commission on Environment and Development - i.e., the "Brundtland Commission" - with a mandate to formulate a "global agenda for change". After extensive consultations, the World Commission on Environment and Development (WCED) published its report *Our Common Future* in 1987.[28] The theme of the report was "From one Earth to one World" and the term

[23] See supra n. 5, Stockholm.
[24] See supra n. 5, Stockholm, at 3.
[25] Sohn, Louis B. "The Stockholm Declaration on the Human Environment" 14 Harv. Int'l L. J. (1973) 423-515.
[26] United Nations Environment Programme: http://www.unep.org .
[27] i.e., Division of Policy Development and Law, Division of Environmental Conventions, Division of Environmental Policy Implementation. See also Chapter 3.
[28] See supra n. 3, *Our Common Future.*

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"sustainable development" was systematically applied in an attempt to reconcile environment and development, the two themes that had for a long time been in an antagonistic relationship in the development process and, since the Stockholm Conference, in global political negotiations as well.

The term sustainable development was for the first time used consistently in international policy documents during the Earth Summit held in Rio de Janeiro in 1992.[29] The Summit was unprecedented for a UN conference, in terms of both its size and the scope of its concerns.

> Twenty years after the first global environment conference, the UN sought to promote rethinking economic development and find ways to halt the destruction of irreplaceable natural resources and pollution of the planet.[30]

The Conference experienced difficult negotiations, with developing countries demanding priority for poverty reduction. However, an agreement was reached on Agenda 21 - an agenda for action and for implementation of sustainable development - and on 27 Principles on Environment and Development.[31] The Conference further launched the UN Framework Convention on Climate Change[32] and the Convention on Biological Diversity. [33] Discussion of an *Earth Charter* was also on the agenda, but no agreement was reached. This idea is today institutionalised and still evolving within a non-governmental framework.[34] As a follow up to the Conference in Rio, the United Nations established the Commission on Sustainable Development (CDS) with a mandate, among others, to monitor progress in implementation of Agenda 21. The Commission was given a secretariat at the headquarters[35] in New York. The mandate of the Commission was expanded after the Johannesburg Summit to include comprehensive monitoring and reporting on progress in executing the Plan of Implementation mentioned below.

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[29] See supra n. 6, Rio.
[30] See *UN Briefing Papers on The World Conferences: Developing Priorities for the 21st Century* available at http://www.un.org/geninfo/bp/enviro.html. Accessed June 2005.
[31] See supra n. 6, *The Rio Declaration on Environment and Development*, 1992.
[32] United Nations Framework Convention on Climate Change: http://unfccc.int
[33] The Convention on Biological Diversity: http://www.biodiv.org
[34] The Earth Charter Initiative: http://www.earthcharter.org. See also http://iucn.org/ - for the IUCN Covenant on Environment and Development
[35] UN Department of Economic and Social Affairs, Division for Sustainable Development http://www.un.org/esa/sustdev/

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From 26 August to 4 September 2002, the World Summit on Sustainable Development (WSSD) was held in Johannesburg, South Africa.[36] According to United Nations General Assembly (UNGA) Resolution 55/199[37], the objective of the meeting was to conduct a ten-year review of the Conference in Rio and to reinvigorate global commitment to sustainable development. Participation and interest in the Summit was high, with 104 Heads of State and Governments participating together with more than 21,000 people including delegates, NGOs, and representatives from business and the press.

At the formal level, the delegates negotiated and adopted the Johannesburg Declaration on Sustainable Development and an eleven-chapter Plan of Implementation[38] detailing actions needed to fight poverty, to address unsustainable patterns of consumption and production, to conserve natural resources, to improve health, to guide globalisation and to promote governance for sustainable development. At the operational level, the meeting identified resources and established partnerships necessary to implement specific programs.

The Summit focused on the financial aspects of sustainable development.[39] Law as an implementation tool was relatively less important. However, the Rio Principles 7 and 15[40], concerning common but differentiated responsibilities (CBDR) and the precautionary approach, respectively, played a role in the negotiation of several agenda items. For instance the conference accepted that CBDR would serve as the normative framework for allocation of resources to sustainable development programs.

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[36] The Earth Negotiations Bulletin (ENB) Vol.22 No 51 (6 September 2002) published by the International Institute for Sustainable Development (IISD) contains a brief history of the WSSD, reporting on major agenda items and a brief and preliminary analysis of the event. http://www.iisd.ca/2002/wssd/. Last accessed May 2005.

[37] *Official Records of the UN General Assembly, Fifty-fifth Session*, UN Doc. A/RES/55/199, 5 February 2000.

[38] See supra n. 4, Johannesburg, *Resolution 1 and 2 respectively*.

[39] Commitments were made such as e.g., to halve the proportion of people without access to sanitation by 2015 together with the Millennium Declaration Goal to halve the proportion of people without access to safe drinking water by 2015 (the US announced US$ 970 in investments to reach this goal). Or the commitments on energy access, which are accompanied by financial commitments from the EU (US$ 700 million) the US (US$43) and 32 separate partnerships worth another 26 million US$.

[40] See supra n. 6, *The Rio Declaration on Environment and Development*, 1992.

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In addition, an official Treaty Event was organized resulting in 83 treaty actions relating to sustainable development.[41] The Summit also had a number of so-called side events featuring, which included, among other topics, international law for sustainable development.[42] In short, although law was not directly addressed, the discipline nevertheless played an important and visible role during the conference and also in the follow up process, where, for example, a number of registered partnerships have been categorized as partnerships for sustainable development law, and in 2004 the CSD hosted an experts panel session to seek advice on the structure of a new textbook on "sustainable development law."[43]

In conclusion, the process, content and discourse of the Summit contributed to the continuing discussion of what constitutes sustainable development and, as argued in more detail in the following, thus offers an opportunity for strengthening sustainable development as a concept containing a distinct rationality, thereby acquiring a theoretical and normative implication of its own.

Section 2 The Problem of Meaning and the Conceptual Debate

2.1 The Focus of the Debate

The Brundtland Report contains the authoritative characterization of the concept: "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[44] However, according to Wikipedia,[45] more than 140 definitions of sustainable development have been catalogued.

The word "sustainable" comes from the Latin sustenere, which means, "to uphold". Its origin in modern times is widely ascribed to the German forestry sector, which in the eighteenth and early nineteenth centuries, after a long period of plundering the

[41] United Nations Treaty Collection. http://untreaty.un.org/English/treaty.asp Accessed on 6 December 2002.
[42] The ENB - on the side Vol.10, Issue #5 (31 August 2002) contains reference to a number of relevant websites for law and sustainable development. Online at http://www.iisd.ca/2002/wssd/enbots/. Accessed on 6 September 2002.
[43] According to http://www.cisdl.org (accessed on 21 April 2004) the title of the meeting was "Sustainable Development Law: Issues, Intersections and Instruments."
[44] See supra n. 3, *Our Common Future*.
[45] http://en.wikipedia.org/wiki/Sustainable_development

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Central European forest resources, created a new system of forest management, which was called "nachhaltige Nutzung" (sustainable use) or "Nachhaltigkeit" (sustainability). "Sustainable development" seems to have first appeared as a concept for global development in 1980 in the World Conservation Strategy.[46] There has been, however, a gradual development in both the usage and the meaning of the term. Three distinct types of usage have be identified that reflect this development:[47]

- Sustainability is used as a purely physical concept for a single resource.
- Sustainability is used as a physical concept for a group of resources or an ecosystem. The idea is the same, but it is immediately more problematic to determine the effects of the exploitation due to the complexity and the interaction between the different parts of the ecosystem.
- In the final type of usage, the concept encompasses a broader social context. Sustainability is used in this instance as a social-physical-economic concept related to the level of social and individual welfare that is to be maintained and developed.

In this thesis, I claim, however, a further development of the word. Specifically, I argue in Chapter 4 that the theoretical insight arising from the policy demonstrates that the meaning of the concept can be explained as a representation of a wider epistemic shift.

2.2 The Problems of Ambiguity and Inherent Conflict

The policy concept of sustainable development, born in 1972 out of conflicting forces - protection of the environment and economic growth - reflects political and conceptual realities. However, it is generally understood that the inherent conflict has contributed to a disappointing implementation process[48] and to leaving the policy vulnerable to capture by special interest groups.

Rooted in the scientifically based reality of ecological interdependence and the recognition of its global implications, the sustainable development policy expressed in

[46] See also Brown, Lester. *Building a Sustainable Society* (1981); the World Charter for Nature (1982) and Mayer, Norman. *Gaia: An Atlas of Planet Management* (1984).
[47] See supra n. 13, Lafferty.
[48] See supra n. 14, Pallemaerts.

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Our Common Future prescribed integration[49] as the strategy for reconciliation of the perceived dichotomies between environmental protection and economic development. The ensuing national and international implementation processes and related organizational changes epitomize the shift in orientation towards integration of environmental consideration into all sectors of the development process and the related policy discourse.

The problems related to the fundamental vagueness and ambiguity are seen to revolve around the question of whether sustainable development is about protection of the (global) environment or about a different quality of the broader development process. The conflicting nature of the concept relates to the fact that the policy does not provide any guidance as how to reconcile the divergent concerns of the various sectors involved.

2.3 A Core Meaning

Although from today's perspective it appears difficult to define sustainable development as being simply about integrating environmental protection into the existing economic development process, history shows that this particular challenge, which is still at the core of the policy today,[50] was the origin of the concept when it was launched in 1987. However, based on this presentation of the evolving nature of the concept, I argue that the debate concerning vagueness and ambiguity, for example uncertainty as to what components are included in the policy concept, was settled by the Johannesburg Summit in 2002, which clarified the question authoritatively, if only indirectly, by pulling economic, social and environmental issues together in a participatory process under the heading of the "World Summit on Sustainable Development."

To begin, the Summit clarified a common misunderstanding. Because sustainable development emerged from the environment and development discourse, in certain quarters there has been a tendency to view sustainable development as relevant mainly for developing countries. As epitomized by the Johannesburg Declaration,

[49] See supra n. 3, *Our Common Future*, Part III: Common Endeavours.
[50] See, e.g., Presentation of the *Millennium Assessment Report* by Walter Reid - Wednesday, May 18, 2005 United Nations, New York. Available at http://millenniumassessment.org/en/index.aspx

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however, the Summit accepted without reservation that sustainable development is a policy of relevance for global governance.[51]

Second, since 1972 at Stockholm, the discourse has moved from reconciling environment and economic growth to a focus on environment and development in 1992 at Rio, to the priority of poverty alleviation in 2002 at Johannesburg. The current understanding leaves no doubt that satisfying the needs of this and future generations is as integral to sustainable development as the protection of the natural resources and the environment.
The Plan of Implementation from Johannesburg reflects the new developments. There is a shift in focus from environment to the social and developmental agenda, and to acknowledging globalisation as a crucial factor for policy development. The introduction to the Plan also stresses that the integration strategy is based on knowledge about the interdependent nature of the various elements of the policy and, therefore, efforts outlined in the Plan will promote the integration of the three components of sustainable development - economic development, social development, and environmental protection - as interdependent and mutually reinforcing pillars.

Further, the idea of inclusiveness and participation permeated the Summit, which was characterized by very broad participation and representation of major groups in the discourse and in the formulation of the outcome.[52] This approach emphasized that sustainable development is bound to ideas of participation and co-operation between public and private sectors such as business, civil society, and religious institutions, and between north and south and rich and poor. Such a co-operative and participatory approach can be taken in each phase from policy development to implementation and evaluation. In summary, sustainable development requires co-operation between all

[51] See supra n. 4, *The Johannesburg Declaration* in its entirety.
[52] See supra n. 4, the *Plan of Implementation* in general and in particular for instance para.*150 and para.3:*"implementation should involve all relevant actors through partnerships, especially between Governments of the North and South, on the one hand, and between Governments and major groups, on the other, to achieve the widely shared goals of sustainable development ... such partnerships are key to pursuing sustainable development in a globalising world."

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major groups and institutions, and includes a micro foundation through explicit inclusion of the individual actor.[53]

Thus, as I interpret it, the Summit firmly expressed a core content of the policy and provided the basis for articulating the boundaries of a policy embodying a whole - a global development process with identifiable features and a rationality of its own - distinct from the aggregate of the individual components of social, economic and environmental factors.

In summary, the rationality - i.e., the theory of change underlying the sustainable development process - is knowledge of interdependence of the three policy fields and of the various actors and the recognition of the need for integrating this awareness into decision-making and action for development. Further, if we are to survive and prosper as a whole, we must integrate a focus on upholding of the biosphere and satisfying basic needs into decision-making and conduct; and, procedurally, we must recognize that a sustainable development process requires broad based participation.

I will return to the importance of awareness of interdependence as an argument for change in the following chapters. Yet, I want to underline that interdependence in the Brundtland report was first and foremost about the realization of the science-based fact that as pollution and exhaustion of natural resources resulting from both human conduct and natural phenomena do not respect institutional and political borders, therefore, the strategy of integration was devised. Interdependence is now understood within the sustainable development debate as a characteristic of a variety of concrete phenomena within the global development process, most notably in relation to the development of the idea of the "three pillars of economic, environmental, and social development". However, I extend my interpretation of the meaning of interdependence beyond the idea reflected in the Brundtland Commission report to

[53] In "Making it Happen" the Chairman of the Summit addressed the Roundtables as follows: "The very nature of sustainable development is such that each and every segment of society should be allowed to participate in every day decision-making that has direct impact on their lives. Similarly, they have to be part of the implementation endeavours. Much more need to be done to promote democratisation of decision-making and broad-based participation in implementation". *UN doc. A/Conf.199/L.5, 30 August 2002,* at 3.

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encompass an awareness of pervasive interdependence as a fundamental human condition.

In Chapter 3, I offer examples of how the legal discipline has responded to the emergence of the sustainable development policy. However, the question of the internal conflict of the concept - i.e., the lack of a coherent vision or any hierarchy of the principal elements of the concept - is still a challenge for the sustainable development process, including for academia and the concrete world of action alike. Accordingly, this question will be addressed in Chapter 4. First, however, I illustrate how the conceptual debate is reflected in academic disciplines.

2.4 Problems of Conceptual Integration and Interdisciplinarity

The acknowledgement of interdependence and the integration strategy[54] implies that sustainable development from the outset has been seen as being an interdisciplinary concept. The interdisciplinary nature of the policy concept creates professional difficulties because there is no articulation of a meta-concept of knowledge organizing or explaining the roles of the various disciplines. Thus, it is difficult for any single discipline to develop a comprehensive theoretical framework, because, invariably, the organizing logic of a discipline subsumes new ideas within its existing conceptual machinery. In particular, economic analysis of sustainable development reveals the fundamental problem of the subordination of the concept to a particular theoretical field of study.[55]

In what follows, I exemplify the nature of the problem with reference to political science and economics. I have included the section to illustrate that the problems of the conflicting elements of the composite concept of sustainable development can seemingly be solved as long as one stays within one sector or discipline.[56] At the same

[54] See e.g., Dovers, Stephen. "Clarifying the Imperative of Integration Research for Sustainable Environmental Management". *Journal of Research Practice* Vol. 1, Issue 2 (2005). The article lists 6 different integration dimensions.

[55] See, e.g., Pearce, David and Edward Barbier. *Blueprint for a Sustainable Economy*. London: Earthscan, 2000. p.26, where the notion of "needs" is translated into preferences and "participation" into consumer sovereignty with no further explanation.

[56] Attempts at developing more interdisciplinary approaches are shown in Chapter 4, but See, e.g., Gunaratne, Shelton A. "Public Diplomacy, Global Communication and World Order: An Analysis Based on Theory of Living Systems" *Current Sociology*, September 2005, Vol. 53 (5): 749-772 SAGE Publications (London, Thousand Oaks, CA and New Delhi). Gunaratne says in the introduction: "Capra

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time, the texts adequately summarize important substantive issues including the relationship of sustainable development to the wider political field, i.e., whether the policy has a sufficiently substantive and unitary core to bring together not just a "discourse coalition" but "a political one as well."[57]

2.4.1 Political Science Conceptions.

In *Sustainable development: Assumptions, Contradictions, Progress,*[58] Michael Jacobs notes that "a discourse coalition has been created" since sustainable development and sustainability are now the common currency of almost all players in the field of environmental politics and policy. Jacobs construes sustainability as containing five substantive core ideas, namely: integration of environment and economy, futurity, environmental protection/limits, equity, quality of life, and the procedural, albeit emerging substantive, requirement for participation. He claims that a number of assumptions underpinning the concept are creating contradictions and may cause increasing difficulties for the implementation of a politics of sustainable development in the future. By contradiction he means a conflict or a tension generated from within the model or by a clash of the model with the world it purports to describe, a world that tends to undermine it. The analysis includes assumptions relating to: scientism (the idea that science can calculate the answers), modernist managerialism (humankind can "manage" the environment), environmental economic optimism (governments can control national and international economies), institutional trust, and legitimacy. He considers all of these more hope than reality.

With regard to institutions, Jacobs argues that the fate of the sustainable development policy will depend on wider change, and that an ideological shift away from neo-liberalism is likely to be important. In this way the sustainable development worldview may find itself attached to the wider project of democratic renewal. However, he considers it a moot point whether a type of "constitutional reform" will be sufficient to open up the scientism and managerialism of government institutions.

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provides the justification for conflating the three discipline bound models of autopoiesis (from biology), cognition (from cognitive science) and dissipative structures (from thermodynamics) - into a dynamic meta theory."

[57] See infra on the following page.

[58] Jacobs, Michael "Justice and Sustainability - Sustainable Development: Assumptions, Contradictions, Progress" in *Contemporary Political Studies, Proceedings of the 1995 Conference of the Political Studies Associations in UK* pp. 1470-84.

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Further, the author suggests that it is essential to understand sustainable development not just as a set of values but as a program of economic restructuring (ecological restructuring), which, by analogy to the emergence of "social democracy" based integration of social issues into the economic structure, might be called "environmental democracy."

Jacobs concludes by pointing out that in such a strategy lies the crucial role for the concept of sustainable development

> …because a political alliance stretching from transnational corporation to radical environmentalist requires a common language through which to express its common interest and goals, not least because these will seem (and will be) in so many other ways to be divergent. This is precisely what the concept of sustainable development provides: a set of ideas which can be interpreted differently by different interests with different value-sets (and ultimately objectives), but which has a sufficiently substantive and unitary core to bring together not just a "discourse coalition" but "a political one as well."

In *Sustainability as a Normative Concept* [59], Tim Hayward attempts to clarify certain disputes between those conceptions that aim primarily at sustaining human welfare through economic growth and efficiency and those that aim at preserving ecosystems' integrity. He suggests that, while competing conceptions of sustainability can be defined substantively, these are all versions of one concept that is to be defined normatively as the objective of balancing competing conceptions of the good.

Hayward claims that it is important to note the contrast between the economic and the ecological approaches to sustainable development, since theories of sustainability that have reasonable prospects of becoming “operationalisable” are developed based on these two disciplines. According to Hayward, the principal issue between economic and ecological approaches is whether the well being of humans or ecosystems should be the ultimate objective. There is, then, a clash of fundamental values, with different views as to "what" should be sustained being grounded in different normative conceptions of the good.

[59] Hayward, Tim. "Justice and Sustainability - Sustainability as a Normative Concept". *Contemporary Political Studies, Proceedings of the 1995 Conference of the Political Studies Associations in UK*. pp. 1457-68.

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The implication to be drawn from these two arguments is that sustainability cannot be uniquely defined even through a combination of the two approaches. Rather it has to be defined more generally as the aim of reconciling in practice two different and irreducible conceptions of the good. The underlying reason is that neither of the disciplines of ecology or economy command concepts and methods adequate to comprehend and, therefore, to provide guidance on achieving the ends at which sustainability theorists aim.

The main argument of Hayward's analysis is, however, that a full account of sustainability must also make reference to a theory of justice, which he defines as a focus on meeting basic needs. His approach to a theory of justice is consistent with what, in the wake of the Johannesburg Summit, we understand as the social component. In particular, Hayward's arguments support the "changing consumptions pattern" element of the Johannesburg *Plan of Implementation*. According to Hayward's analysis, this requirement for a theory of justice arises for ecological as well as for economic conceptions of sustainability. Hayward further debates a "social scientific" approach[60] to sustainability and proposes recasting Brundtland's definition of sustainability as:

- Basic goods are to be distributed equally in the present.
- Consumption of non-basic goods is unjust if it compromises future generations' ability to enjoy basic goods.

In his conclusion, he emphasizes that even though it is important to recast the definition, it is not perfect and needs further elaboration. And likewise, that even though full ecological sustainability may not be attainable in the foreseeable future, something better than economic sustainability is possible and necessary.

In summary, Jacobs understands sustainable development as a component of environmental policy, although he recognizes the policy as a factor influencing, and being influenced by, wider social change. Hayward recognizes a concrete normative message of the policy: development should be based on decision-making that balances the requirements of economic development and environmental protection, and, in the process, secures environmental/economic justice. None of these two

[60] Based on Norton, B.G. "Intergenerational Equity and Environmental Decisions: a model using Rawls' veil of ignorance." in *Ecological Economics*, 1, 1989, pp.146-8.

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articles elaborates on how such a balancing can be effectuated apart from concrete action, because, as mentioned by Hayward, the conceptions of sustainability are under-theorized and existing theories are biased and cannot accurately explain cross-sectoral policy goals.

2.4.2 Economic Conceptions

The response of economics to the emergence of the sustainable development policy continues to be very impressive in terms of the development of new tools and methodologies.[61] The following discussion is based principally on the book *Blueprint for a Sustainable Economy,* [62] which aims at demonstrating how standard economic tools and methods can be applied in solving environmental problems, as well as to make development more sustainable. It also includes a review of the contribution of the "ecological economics" school to the economics of sustainable development.

As their point of departure, the authors, Pearce and Barbier, state that, all the theoretical and methodological issues addressed in the book aside, economics is concerned with the expansion of economic wealth and that the discipline begins with the notion that economic value arises from meeting the preferences of individuals. Thus, the economic value of a commodity A is greater than that of commodity B if A is preferred to B. Elevating human preference to this high status is captured in the notion of consumer sovereignty, i.e., that what people want matters. [63]

The authors submit that, since the importance of the environment for sustained economic development was poorly understood before the seventies, and since the environment has not been protected by property rights, there have been no incentives for consumers to take the environment into account in deciding on preferences. This phenomenon is defined as a classic market failure.[64] The strategy for correcting it is to develop tools to capture effects on the environment in the operation of the

[61] It has, however also been argued that sustainable development from an economic analysis point of view cannot be achieved because the relevant time horizon is unknown and because the political-institutional possibilities for long term planning and management is very poor. See Meldal "Bæredygtige udviklinger?" (Sustainable developments?) in *Samfundsøkonomen* nr. 4. Jurist- og Økonomforbundet, 1999.
[62] See supra n. 55, Pearce and Barbier.
[63] Id. at 7, where there is an elaboration of what preferences means.
[64] Id. at 238.

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economic system through a reinterpretation of environment in economic terms. This would entail developing tools to "value", to "measure" and to "commodify" the environment. One of the tools to measure environmental assets in monetary terms has been the construction of a revised GNP reflecting the role of natural resources as a capital asset on par with man-made and human capital. Wealth is growing if a country's stock of capital assets is rising (per. capita) over time.

Most economic interpretations of sustainability take as their starting point the definition adopted by the Brundtland Commission: "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". Consequently the economics of sustainable development is concerned with "what are the various economic policies and instruments available for ensuring that the economy is able to meet the needs of the present generation without compromising the ability of the economic system, including its environmental base, to meet the needs of future generations".

Chapter 2 of *Blueprint* "The Meaning of Sustainable Development" contains a discussion of several theoretical issues related to the economics of sustainable development. For example, there is a review of the endogenous growth theory, the idea of an environmental Kuznets curve, ecological economics, and the concept of distinguishing between "weak" and "strong" sustainability. According to the weak sustainability view, there is no inherent difference between natural and other forms of capital and hence the same optimal depletion rules ought to apply to both. As long as the natural capital that is being depleted is replaced with even more valuable physical and human capital, then the value of the aggregate stock, comprising human, physical and the remaining natural capital, increases over time. Maintaining and enhancing the total capital stock alone is sufficient to attain sustainable development.

In contrast, the strong sustainability view, which is based on insights of the ecological economics school, questions the idea that natural capital and physical and human capital comprise a single homogeneous asset. Therefore, the strong sustainability school suggests that environmental resources and ecological resources that are essential for human welfare and that cannot be easily substituted by human and

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physical capital should be protected and not depleted. The authors of *Blueprint* commit themselves to the strong sustainability school.

Their book contains a detailed account of the various tools at hand, but it also identifies causes of environmental degradation and available policy instruments for solving the resulting problems. In this connection, there is a discussion of command and control approaches versus economic approaches to regulation, including the allocation of property rights and the creation of marketable permits. With an emphasis on economic tools, the authors make no reference to the role of law, although both approaches would require comprehensive regulation.

Finally, the authors introduce and discuss ecological economics. The theoretical basis for this school has a longer tradition but was brought into the sustainability discourse with the establishment of the International Society for Ecological Economics (ISEE) in the late 1980s. The most significant thrust of ecological economics is that there is no possibility for substitution between natural resources and other capital stock. Instead, as the two have a complementary relationship, natural resources must be protected. Whereas classical economists in the strong sustainability school tend to focus only on those ecological resources and services provided by ecosystems that appear to contribute directly to current and future welfare, ecologists point out that such natural capital is an integral part of a much broader array of life support functions that characterize ecosystems. Therefore, maintenance of some degree of ecological functioning and resilience appears to be necessary for generating certain biological resources (such as trees, fish, wildlife and crops) and ecological services (such as watershed protection, climate stabilization and erosion control) on which economic activity and human welfare depend.[65]

The potential welfare implications of the enormous uncertainty surrounding ecological disruptions may be substantial. Further, it is possible that innovations

[65] This is naturally an overly simplified representation of the school of thought. For a more detailed explanation of the theory, see, for instance, Georgescu-Roegen, *The Entropy Law and the Economic Process,* Harvard University Press, 1971, where the scientific paradigm of ecological economics is explained authoritatively. The American Nobel Prize winner Robert Solow has also contributed to the discussion in *The Economics of Resources or the Resources of Economics* (1974). For an overview of the historic development of the school, see, Martinez-Alier, *Ecological Economics. Energy, Environment and Society.* Basil Blackwell, 1990.

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fostered by the economic process might lead in the long run to the substitution of human and physical capital. Such innovations, however, will not, or are less likely to, lead to substitution for the more unique and possibly essential range of ecological resources and services of concern to ecology and ecological economics, including the general life-support functioning and resilience of ecosystems. Of course, how essential these ecological resources and services are to current and future human welfare, and how costly it might be for society to maintain and protect them, remain important issues that still need to be addressed. The precautionary principle and/or safe minimum standards are advanced as threshold instruments to protect these more diffuse values. However, the authors question the political feasibility because it does not seem to them, writing in 2000, that the world is prepared to countenance such a change in ethics.

The difference in the scientific paradigm - economics as a closed mechanistic system (neo-classical school) or economics as an open system addressing the relation between economic systems and ecosystems - is the basis for the view that ecological economics is a new paradigm for scientific approaches to environment and sustainable development.[66]

[66] See, for instance, Constanza et al. "What is ecological economics?" *Ecological Economics*, 1991, vol.1 pp 1-7:

> Ecological economics is a new transdisciplinary field of study that addresses the relationship between ecosystems and economic systems in the broadest sense. These relationships are central to many of humanity's current problems and to building a sustainable future but are not well covered by any existing scientific discipline. By transdisciplinary we mean that ecological economics goes beyond our normal conceptions of scientific disciplines and tries to integrate and synthesize many different disciplinary perspectives. One way of doing this is by focusing more directly on the problems, how to identify them, what is happening rather than on the particular intellectual tools and models used to solve them, and by ignoring arbitrary intellectual turf boundaries. No discipline has intellectual precedence in an endeavor as important as achieving sustainability. While the intellectual tools we use in this quest are important, they are secondary to the goal of solving the critical problems of managing our use of the planet. We must transcend the focus on tools and techniques so that we avoid being 'a person with a hammer to whom everything looks like a nail'. Rather we should consider the task to evaluate existing tools' abilities to handle the job and to design new ones if the existing tools are ineffective. Ecological economics will use the tools of conventional economics and ecology as appropriate. The need for new intellectual tools and models may emerge where the coupling of economics and ecology is not possible with existing tools.

I have included this otherwise somewhat long citation because I consider the points raised relevant to the overall issue of the professional disciplines being part of the solution or part of the problem, when it comes to understanding and implementing sustainable development.

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Published before *Blueprint*, Daly's *Steady-State Economics*[67] is another important book concerning economic interpretation of sustainable development. Daly commits to "the thermodynamic school" according to which there are three policy issues in sustainable development, namely: allocation, distribution and scale. The core of Daly's thesis is that scale must be agreed before one can determine distribution and allocation. At the same time, scale can only be fixed or agreed through social choice that must reflect ecological limits. These types of choice must be based on estimates of carrying capacity and safe minimum standards that determine the limits to the global scope of pollution. Once this is accomplished, it should be possible to provide for distribution according to criteria for social equity. Only after having made social decisions regarding the optimal scale and an ethically just distribution, "are we in a position to allow reallocation among individuals through markets in the interest of efficiency."[68]

In conclusion, the emergence of the concept of sustainable development has had profound impact on economics. The economic approach to implementation reflects the basic divide between sustainability as a development process of a different nature or as a challenge of integrating environmental considerations into economics. As demonstrated by *Blueprint,* the dominant response thus far is firmly based on the latter.

2.4.3 Introduction to the Legal Field

While economics is an important tool for developing systems and incentives for people to behave in certain ways, to be put into practice, all economic methods require implementing regulation. Law, however, is integral to policy because it provides the machinery for transferring policy from discourse to action. The response of the legal discipline to the policy of sustainable development is, consequently, dealt with in more detail in Chapter 3, where I illustrate how the legal discipline has facilitated integration of environment and sustainable development considerations into the global development process and how this challenge is, in turn, influencing the general field of international law.

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[67] Daly, Herman. *Steady-state Economics* London: Island Press, 1991. See also http://www.steadystate.org/
[68] Id. at 188.

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Chapter 3 Facilitating Implementation of the Policy

> National and international law has traditionally lagged behind events. Today, legal regimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development. Human laws must be reformulated to keep human activities in harmony with the unchanging and universal laws of nature.[69]

Law has been important to the implementation of the sustainable development policy from the outset of the debate, as illustrated by the quote from the Brundtland Report. There are many ways to "cut the cake" when examining the legal/institutional aspects of facilitating implementation. First, there are traditional public international law aspects.[70] Second, there is an emerging field of study concerning how the regulation of the environment has driven the development of innovative regulatory mechanisms, including a range of monetary instruments from taxes to subsidies; laws and regulations, including planning requirements and process-oriented controls; and, more recently, mechanisms of self-regulation, such as reliance on voluntary compliance and control, based on social and market mechanisms rather than through any central enforcement policy. This development is seen as changing the role of law from a focus on an adversarial model to a more co-operative model.[71]

In 1972, elements of what today is termed environmental law were mainly regulated within sectors such as industry, health, agriculture, forestry and wildlife. Today, environmental law is a recognized field of specialization,[72] while a branch called sustainable development law (ISDL) is emerging at the international level. The

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[69] See supra n. 3 p. 330, *Our Common Future*.

[70] Boyle, Alan, and David Freestone. *International Law and Sustainable Development.* Oxford: Oxford University Press, 1999. The book contains a comprehensive list of relevant cases and regulatory documents.

[71] See e.g., Section 2 of this Chapter.

[72] Sands, Philippe. *Principles of International Environmental Law.* 2nd ed. Cambridge: Cambridge University Press, 2003. p 25.

> Modern international environmental law (IEL) can be traced directly to international legal developments, which took place in the second half of the nineteenth century. Thus although the current form and structure of the subject has become recognizable only since the mid-1980s, a proper understanding of modern principles and rules requires a historic sense of earlier scientific, political and legal developments. IEL has evolved over at least four distinct periods, reflecting development in scientific knowledge, the application of new technologies and an understanding of their impacts, changes in political consciousness and the changing structure of the international legal order and institutions.

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account following in Section 1 illustrates this development and how implementation of the policy is thus facilitated through development and integration of new fields of law and regulatory paradigms within the legal/institutional area.

As background to the development within the legal field, it should be understood that globally the sheer magnitude and pervasiveness of the response to the policy during the last ten to fifteen years is stunning, perhaps hitting the high water mark in 2003 with the proposal to establish a Nobel Prize in sustainable development.[73] In general, the sphere of influence of the policy concept ranges from the establishment of a Dow Jones Sustainability Index[74] to the faith communities of the world meeting under the aegis of the World Bank to formulate strategies for sustainable development[75], but in fact the policy is all encompassing and includes, among others, research and development for new sources of energy[76], practical experiments in alternative life styles[77], the call for a new humanity[78], and suggestions for expanding the disclosure requirements of the US Securities and Exchange Commission.[79]

However, it is necessary to caution that response to a policy does not necessarily result in planned outcomes and even less so in desired impact. Aware of this risk,

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[73] See http://www.sustainable-prize.net/. Accessed on 6 December 2004.
[74] Dow Jones Sustainability indexes: http://www.sustainability-indexes.com/ Accessed on June 2005.
[75] Marshall, Katherine. *Faith and Development: Rethinking Development Debates*. Washington. D.C.: The World Bank, June 2005.
[76] See e.g., the Wuppertal Institute for Climate, Environment and Energy - http://www.wupperinst.org
[77] See e.g., the Global Eco village Network: http://gen.ecovillage.org/
[78] See Deepek Chopra speaking to 400 World Bank staff as part of the Sustainable Development Lecture Series (March 13, 2002). Chopra said:

> Sustainable development cannot be achieved by a mechanical adjustment of the social, environmental and economic equations. Sustainability is directly connected to individual and social behaviour.

[79] Romano, Patricia. "Sustainable Development: A Strategy That Reflects the Effects of Globalisation on the International Power Structure." *Houston Journal of International Law* 23 (2000): pp. 91-121. A proposal concerning the role of law in implementation of a public policy of sustainable development under the existing governance paradigm. The paper provides a seemingly well-documented account of the huge environmental, socio-economic and health related problems caused by the US/Mexico trade agreements. However, the main idea of the article advances that the implementation of sustainable development is not only needed, it is essential to the long-term viability of society and since multinational corporations (MNCs) have emerged as the dominant global power, they should therefore have both the means and the influence to take the concept from a "lofty platitude to meaningful implementation". By meeting harmonized development standards MNCs can make sustainable development an integral part of the international community. The MNCs can be motivated to co-operate by expanding the disclosure requirements of the US Securities and Exchange Commission. The regulation should be supported by public education initiatives. The article further submits that adopting what is seen as a global strategy in its implications such a regulatory initiative would enable the United States to reassume its role of world leadership and by seizing this defining moment US can bring the hope of a sustainable future to the world.

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Agenda 21 was conceived as a programme of action to achieve sustainable development in the 21st century. That the results are perceived as disappointing, however, is underlined by the objective of the *World Summit* in Johannesburg, which was to reinvigorate the global commitment to sustainable development and focus on "actions and results".

Although, as mentioned in Chapter 2, criticized for failing to achieve progress,[80] there were new and important commitments made at the Summit, such as setting up the partnership facility, the EU promoted 10-year program on sustainable consumption and production, and the setting of targets relating to sanitation and chemicals. The Commission on Sustainable Development (CDS) has developed an elaborate system for monitoring progress. According to the Report of the Secretary General to the Twelfth Session of the Commission on the progress towards realizing the commitments agreed to in *Agenda 21* and subsequent meetings related to sustainable development, such as those contained in the Johannesburg *Plan of Implementation,*

> ..progress has been especially slow in the international economic arena, as evidenced by the stalling of the Doha Round of trade negotiations, while social and economic progress in general have yielded very mixed outcomes. Within the environmental areas, progress has been mostly in terms of process, including capacity building for developing countries (e.g., with respect to the Clean Development Mechanism of the Kyoto Protocol, sustainable forest management, chemicals classification and labeling, the Basel Convention and trade promotion), development of action plans and refinement of the framework for global environmental governance. Key conventions like those on Prior Informed Consent (PIC) for trade in certain hazardous chemicals and pesticides and on persistent organic pollutants (POP) are close to entry into force. On the other hand, only halting progress has been made at the international level towards addressing challenges such as that of climate change, though regional, national and local initiatives are numerous. [81]

While monitoring implementation of agreed commitments is a first step in assessing progress along a path of sustainable development, there are difficulties in capturing the pervasive complexity[82] of the issues at hand. The challenges are related to the

[80] See in general Bigg, T. "The World Summit on Sustainable Development: An assessment."
[81] E/CN.17/2004/2, 24 February 2004.
[82] According to e.g., Eckley, Noelle. *Designing effective assessments: The role of participation, science and governance, and focus*. - Environmental issue report, No 26. European Environment Agency. Luxembourg: Office for Official Publications of the European Communities, 2001 we are faced with "exponentially increasing levels of complexity"

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need for moving from documentation of project and program outputs, such as the development of international conventions for the protection of the environment and other regulation, to assessment[83] of the overall impact of the activities.

Section 1 The Legal/Institutional Implementation Field

1.1 Principles of International Law for Sustainable Development

The title of Annex 1 of the Brundtland Report, "Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Expert Group on Environmental Law", demonstrates that the "law and sustainable development field" has always been closely linked to environmental law, which was already a distinct field of law when the report was published in 1987. At its Second Session in 1994,[84] the CSD requested further study of the concept, requirements, and implications of sustainable development and international law in combination with the concern of *Agenda 21*(Para 39.5) with the "feasibility of elaborating general rights and obligations of States, as appropriate, in the field of sustainable development". In response, a group of experts (hereafter referred to as the Expert Group) prepared a report[85] within the framework established by the *Rio*

There is an increasing perception that assessments to date in certain areas have been too simple, excluding relevant causal chains to the detriment of good environmental analysis and subsequent decision-making. An example of this is in the chemicals area. Most risk assessments of chemical substances are conducted for only one substance, while people and ecosystems are exposed to mixtures of several different chemicals. Recent research has suggested that the effects caused by a large number of chemicals that are interacting may be quite different from the sum of the individual effects of the constituent substances. However, assessments looking at these interactions must deal with exponentially increasing levels of complexity.

[83]The problem of measurement of progress was referred to in Chapter 40.4 of *Agenda 21*, which called for the development of new ways to measure and assess progress toward sustainable development. In response, significant efforts to develop new tools and to assess performance have been made by corporations, NGOs, academics, communities, national governments and international organizations. Now the field of measurement and assessment has expanded to the degree that the International Institute for Sustainable Development has published a global directory to indicators initiatives. For information on "Compendium: A global directory to indicator initiatives" issued in 2004, see http://www.iisd.org/measure/compendium/

[84] *Report of the Commission on Sustainable Development on its Second Session*. New York 16-27 May, 1994. Official Records E/1994/33

[85] *Principles of International Law for Sustainable Development*, Report of the Expert Group Meeting, Geneva, Switzerland, 26-28 September1995 submitted to the Fourth Session of the CSD, New York, 18 April -3 May 1996.

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Declaration on Environment and Development and *Agenda 21*, as well as the legal instruments that had been negotiated or entered into force since 1992.[86]

The Expert Group did not consider the term sustainable development a legally binding concept that could be used as a standard by an international court. This is confirmed by Boyle and Freestone[87] who state that normative uncertainty, coupled with the absence of justiciable standards for review, strongly suggest that there is as yet no international legal obligation that development must be sustainable, but international law does seem to require development decisions to be the outcome of a process that promotes sustainable development. Therefore, discussions about the legal implications of sustainable development have to focus on the components of sustainable development rather than on the concept itself. The concept might have impact above and beyond being legally enforceable simply by setting a new standard of legal reasoning for deciding on an interpretation of specific rules, regulations and agreements, and thus it may lead to significant changes and development in the existing law.

I quote the classification of all the principles of the *Rio Declaration*, which are included in the Expert Report as follows:

> *1. Principle of interrelationship and integration* forms the backbone of sustainable development. Integration is the underlying theme of the Rio Declaration and Agenda 21. Principles 3 and 4 of the Rio Declaration integrate not only the concepts of environment and development, but also the needs of generations, both present and future. Principle 25 states that peace; development and environmental protection are interdependent and indivisible. The principle of interrelationship and integration is addressed explicitly in chapter 8 of Agenda 21. Interrelationship and integration reflect the interdependence of social, economic, environmental and human rights aspects of life that define sustainable development and could lead to the development of general rules of international law in which these separate fields retain their distinct characters but are subject to an interconnected approach. However, it is

[86] The Expert Group also based its deliberations on a number of other studies and documents prepared in the period after UNCED including the report of a Consultation on Sustainable development: the Challenge to International Law, convened by the Foundation for International Environmental Law and Development (FIELD); the report of the Austrian Government's Symposium on Sustainable Development and International Law; the report of the Committee on Legal Aspects of Sustainable development of the International Law Association; The draft International Covenant on Environment and Development prepared by the Commission on Environmental Law of the World Conservation Union (IUCN) in cooperation with the International Council of Environmental Law; and the Earth Charter Initiative.

[87] See supra n. 70, at 16-19.

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understood that this approach does not subsume the distinct fields of international law into international law for sustainable development.
Further the Expert Group agreed that the rules of international law governing the interpretation of treaties and other sources of international obligations, provided in Articles 31-33 of the Vienna Convention on the Law of Treaties, pointed a way towards facilitating an integrated approach to sustainable development.

2. Principles and concepts relating to environment and development including right to development, right to a healthy environment, eradication of poverty, equity, sovereignty over natural resources and responsibility not to cause damage to the environment of other States or to areas beyond national jurisdiction, sustainable use of natural resources, prevention of environmental harm, precautionary principle.

3. Principles and concepts of international cooperation including duty to cooperate in the spirit of global partnership (a: common concern of mankind; b: common but differentiated responsibilities; c: special treatment of developing countries, small island developing States and countries with economies in transition), common heritage of mankind, cooperation in a transboundary context (a: equitable and reasonable use of transboundary natural resources; b: notification to and consultations with neighbouring and potentially affected States; c: environmental impact assessment in a transboundary context, d: prior informed consent; e: cooperation to discourage or prevent the relocation and transfer of activities and substances that cause severe environmental degradation or are harmful to human health).

4. Principles and concepts of participation, decision-making and transparency including public participation, access to information, environmental impact assessment and informed decision-making.

5. Principles and concepts of dispute avoidance and resolution procedures, monitoring and compliance including peaceful settlement of disputes in the field of environment and sustainable development, equal, expanded and effective access to judicial and administrative proceedings, national implementation of international commitments, monitoring of compliance with international commitments.

The Expert Group acknowledged that the legal status of each of the principles varies considerably with some principles appearing in global or regional international legal instruments, while others can only be identified in soft law instruments. Further, in the absence of judicial authority and with conflicting interpretations under State practice, it is frequently difficult to establish the parameters and the precise legal status of each principle. Therefore, the inclusion of the principles in the Report does not prejudice

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the question of whether these are part of customary international law. The Group also noted that the principles may perform a variety of functions in international political/legal processes, such as assisting in development of new legal instruments and norms and in interpretation and application of treaty and other obligations, and the Group welcomed the fact that various fora, including judicial, relied upon the principles to support substantive legal arguments. Finally, the Expert Group understood that each principle or concept should be interpreted in the light of other relevant principles.

1.2 A Link to National Law

The success or failure of international and global policy and law is intrinsically bound to action at the national level. I shall refer in some detail to a paper from 1997[88] that makes the point explicit and provides an outline of how to evaluate the ways in which legal systems address sustainable development. Nicholas Robinson argues that environmental law can be understood as a continuum of legal relations, stretching from the village through the state to the international. The multilateral environmental agreements, adopted since 1972, have begun to establish norms by which national obligations can be pursued in a coordinated way to maintain the environment of the commons and shared natural systems, such as the oceans, stratospheric ozone and migratory species. As these agreements are dependent on the effectiveness of each State's system of municipal environmental law, comparative environmental law, which is the theme of the article, is of growing importance. Robinson states "there is, of course, no 'field' of law yet denoted as 'Sustainable Development Law', although commentators have been re-examining existing fields of law endeavouring to reconfigure them into themes that resonate with the sustainable development debates."[89] The most insightful commentators are those who address the question of how the law can further the objectives of sustainable development.[90] According to Robinson in 1997, the field of law that is most central to these themes is environmental law. Environmental law seeks to maintain the quality of life in the biosphere, so that the socio-economic systems that depend on stable natural resources

[88]Robinson, Nicholas, A. "Comparative Environmental Law: Evaluating How Legal Systems Address Sustainable Development." *Environmental Policy and Law* 27/4 (1997).
[89] C. Campbell-Mohn, B. Breen, J.W. Futrell, J.M. McElfish, Jr., and P. Grant, *Sustainable Development Law.* West Publishing Co., 1993.
[90] J. Owen Saunders, editor. *The Legal Challenge of Sustainable Development* Calgary: Canadian Institute for Resources Law, 1990;

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can attain an equitable distribution of social well-being. The various elements of environmental law are directed at critical fields of social concern, such as conservation, depletion of resources, sustainable yield, the health of natural systems, public health, and restoring and maintaining liveable cities, which includes maximizing energy efficiency and minimizing waste to secure a robust economy.

Robinson emphasizes that although environmental law is premised on and shaped by the culture in which it functions, it is still defined by a common body of subjects and norms, decisively influencing the effectiveness of regulation. He points to the fact that environmental law tends to contain the same sort of substance and procedures across legal traditions, because the field is influenced by four phenomena that are common to all jurisdictions in the biosphere: 1) science as a shared, common body of knowledge; 2) identical technological systems; 3) national public environmental administrations have more in common than do national public administrations generally; and 4) globalisation and the complexity of the issues at hand, such as rapid transmission of news and communication in general, rapid travel between continents, and expanding trade between nations and regions.

In Robinson's view the "greening of law" based on the integration principle is a necessary ambition. Indeed, because of the transboundary nature of environmental issues, harmonization of laws is an active concern of a number of international entities. Robinson mentions a study[91] on the relationship of environmental law and international trade that stressed that, while reasonable uniform environmental standards are important to establish a level playing field for commercial competition, nonetheless each jurisdiction should be free to establish more advanced and refined standards as necessary to meet local conditions and values. What is needed is a floor, not a rush to the bottom. In conclusion, Robinson states that:

> Environmental Law evaluated across nations through the techniques of Comparative Law, is at once a foundation for sustainable development in terms of *Agenda 21* and serves as an indicator of the success or failure of a nation's measure to attain or maintain sustainable development. However, the systematic analysis of environmental law in this way is still in its

[91] "Harmonizing and Coordinating the Economic Law of Nations: A Comparative Study" by the Committee on the United States in a Global Economy, 49 The Record of the Association of the Bar of the City of New York 800 (1994)

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infancy, while much more attention has so far been devoted to international environmental law.

In what follows, I show that the trend of emphasizing the international aspects is also noticeable within the development of sustainable development law.

1.3 International Sustainable Development Law (ISDL)

In April 2002 the International Law Association (ILA) issued a *Declaration of Principles of International Law Relating to Sustainable Development* together with a summary of the work of the ILA Committee on Legal Aspects of Sustainable Development.[92] The Report provides an overview of how the phrase "sustainable development" has found recognition in international legal instruments, and concludes that sustainable development has now become an established objective of the international community and a concept with some degree of normative status in international law. The Report notes that sustainable development also features in a number of international judicial decisions[93] and in a number of pronouncements by the World Trade Organization (WTO) Appellate Body.[94]

However, the Report stresses that this is not to say that the contents of the concept are clear, and further it refers to a statement that sustainable development "is rooted in theoretical obscurity and confusion, and it suffers from the same reluctance to test theoretical principles for their practical utility that impedes the development of many

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[92] See http://www.ila-hq.org. *Fifth and Final Report. Searching for the Contours of International Law in the Field of Sustainable Development.* (The ILA report).
A new Committee on International Law on Sustainable Development was formed May 2003. The objective of the Committee is to study the legal status and legal implementation of sustainable development. For this purpose the Committee's mandate includes:
- assessment of the legal status of principles and rules of international law in the field of sustainable development, with particular reference to the ILA New Delhi Principles (now also published as UN Doc. A/57/329), as well as assessment of the practice of States and international organizations in this field;
- the study of developing States in a changing global order, particularly the impact of globalisation on the sustainable development opportunities of developing countries;
- in the light of the principle of integration and interrelationship, a re-examination of certain topics of the international law of development, including analysis of (i) the position of the least developed countries in international law, (ii) the right to development and (iii) the obligation to co-operate on matters of social, economic and environmental concern.

[93] See in particular Sands, Philippe. "International Courts and the Application of the Concept of Sustainable Development" in *3 Max Planck UNYB* (1999), pp. 389-403.

[94] See supra n.92, the ILA report at 5.

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other areas of international law"[95]. And in the same vein, the Report quotes I. Browlie, who in 1998 wrote: "For the present, the concept remains problematic and nebulous, appearing more as a statement of the issues than a resolution of the basic problems."[96] The ILA concludes that:

> Building on the description of 'development' in the UN Declaration on the Right to Development (1986), on the Universal Declaration of Human Rights (1948) and on the Stockholm and Rio Declarations 1972 and 1992, we may well arrive at describing sustainable development as a comprehensive economic, social and political process, which aims at the sustainable use of the natural resources of our planet and the protection of the environment on which nature and human life as well as social and economic development depend and which seeks to realize the right of all human beings to an adequate living standard on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from, with due regard to the needs and interests of future generations.[97]

With this background, the Association agreed on the following specific principles of international law in the field of sustainable development:

1. The duty of States to ensure sustainable use of natural resources
2. The principle of equity and eradication of poverty
3. The principle of common but differentiated responsibilities
4. The principle of the precautionary approach to human health, natural resources and ecosystems
5. The principle of public participation and access to information and justice
6. The principle of good governance
7. The principle of integration and interrelationship in particular in relation to human rights and social, economic and environmental objectives.

According to the concluding observations of the ILA report, the 1992 Rio Conference has received an impressive follow-up, especially in international environmental law. However, it notes that developmental concerns have been given relatively less weight in politics and international law:

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[95] Lowe, V., "Sustainable development and unsustainable arguments" in Boyle and Freestone (eds.), *International Law and Sustainable Development*, 1999, pp 30-31.

> …sustainable development is clearly entitled to a place in the Pantheon of concepts that are not to be questioned in polite company, along with democracy, human rights and the sovereign equality of states.

[96] Browlie, I. *Principles of Public International Law*. Oxford, Oxford University Press, 5th ed., 1998, p.287.

[97] See supra n. 92, the ILA report, at 6.

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> It would be no exaggeration to say that there has been a neglect of development in the evolution of international law in the field of sustainable development. However, the Committee also observes that the international law of development is not a moribund relic of the past, but is still alive, albeit subject to considerable challenges.

Between 2002 and today, several books have been published and a peer reviewed law journal launched on the topic of international sustainable development law (ISDL).[98] In the following, I introduce ISDL based on *Weaving the Rules for Our Common Future Law*.[99] The 2002 document consists of five parts. Part I provides the introduction. Part II surveys the origins of the concept of sustainable development, identifies its legal aspects, and provides for the formation of a body of international law related to sustainable development. Part III examines the principles of international law related to sustainable development and suggests that legal instruments in this field can be analyzed according to a typology of degrees of integration between international, social, economic and environmental law as follows:

> We believe that a conceptual "continuum' can be designed, based on the degree to which international regimes integrate economic, social and environmental law. Four degrees of integration must be identified. These range from regimes that envisage international economic, social and environmental law as separate, independent fields to regimes that fully integrate these areas of law and form the corpus of international sustainable development law. The degree of integration along this continuum can be described as follows: a) Separate

[98] Segger, Marie-Claire Cordonier and Ashfaq Khalfan, editors. Sustainable Development Law: Principles, Practices and Prospects. Oxford/New York: Oxford University Press, 2004. - Segger, Marie-Claire Cordonier and Weeramantry C.G., editors. *Sustainable Justice: Reconciling Economic, Social and Environmental Law*. Leiden/Boston: Martinus Nijhoff, 2005.The McGill International Journal of Sustainable Development Law and Policy was launched in 2005. http://www.law.mcgill.ca/jsdlp/

[99] Downloaded from www.cisdl.org. Accessed April 2003. "Weaving the Rules for Our Common Future: Principles, Practices and Prospects for International Sustainable Development Law." The text of the publication was first released for consultation, in draft form, at a meeting on Sustainable Justice 2002: Implementing International Sustainable Development Law, Montreal, Canada, June 13-15 2002, organized in partnership with the United Nations Environment Programme and the World Bank Legal Vice-Presidency. Published in 2004.
CISDL www.cisdl.org: The Centre for International Sustainable Development Law (CISDL) has been established to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

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spheres; b) Parallel yet interdependent; c) Regimes in the process of integration, and d) Highly integrated new regimes.

Part IV provides practical case studies of legal instruments at these various degrees of integration. Part V establishes a research agenda in six areas at the intersection of international social, economic and environmental law, and identifies several themes which cross-cut these substantive agendas. This final section also examines prospects for a new approach to international sustainable development governance in the context of *Agenda 21* and the outcomes of the WSSD.

According to Case Study II concerning compliance-building in ISDL, integration of the economic, social and environmental objectives is evident not only in rules and principles of ISDL regimes, but also in their implementation, monitoring and enforcement. This integrated approach to compliance is considered a distinctive feature of ISDL, and a key to its effectiveness. The Case Study tracks the genesis, operation, and distinctive features of the ISDL approach to compliance through analysis of several highly integrated treaty-based regimes, namely:

- *The Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa*
- *The Cartagena Protocol on Biosafety to the Convention on Biological Diversity*
- *The Montreal Protocol, including the non-compliance procedures and the provisions governing the multilateral fund*

The Study emphasizes two creative tensions. The first is between national sovereignty and the protection of the common interest. According to the Study, an ISDL approach would attempt to resolve this tension by suggesting that States should fully and freely delegate national sovereignty to international, independent, expert institutions, where necessary, to advance the protection of common interest. The second tension, dispersal versus centralization of compliance-coordination, is a manifestation of the first and apparent in the ISDL approach to compliance in particular**.** Specifically, the Study concludes that ISDL should address this tension through a prescription for governance at the most appropriate level. The Case Study concludes by stating that the creative force of the fundamental tensions that animate ISDL is demonstrated by the four key trends in ISDL approaches to compliance, namely:

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- from "balanced governance" to self-governance;
- from treaty-monitoring bodies to compliance-coordinating bodies;
- from individualized relief to systematic relief; and
- from reaction to pro-action: shifting the paradigm from correction of action to prevention of harm.

Concerning the theoretical basis of highly integrated ISDL regimes, the Case Study refers to the orientation of the interactional theory of international law as holding great promise for ongoing ISDL research in the field of compliance. Moreover, the philosophical framework promoted by CISDL for developing the ISDL is seemingly based on the traditional values of liberty, equality and solidarity.[100] Hence, the development of ISDL has not yet resulted in articulation of specific theoretical implications.

Section 2 Evolving Paradigms in International Law for Sustainable Development

2.1 From Substantive to Procedural Norms

Peter Sand places WSSD in the context of 30 years of incremental environmental law-making and he offers his perspective on how international law has developed in the time between the Stockholm Conference and the Johannesburg Summit through a focus on a triple "paradigm shift - and power shift - which has shaped an expansion towards: (i) global pluralism; (ii) multilateral accountability, and (iii) informational regulation".[101]

For an historical perspective on the development of paradigms within environmental law and sustainable development, it is interesting to compare Peter Sand's assessment

[100] "Developing the Underlying Values for a Sustainable Globalisation - Liberty, Equality and Fraternity Revisited" Academic Workshop, Oxford University. Hon. Charles Gonthier, former Judge of the Supreme Court of Canada and Wainwright Senior Research Fellow of the McGill University Faculty of Law, gathers international relations and law scholars to consider the values to provide foundations for a more sustainable globalisation. Participants will discuss recent developments at the intersection of international economic, environmental and human rights law. Debate will focus on one of the most potent and under-explored values of western political and legal philosophy: fraternity, the underlying sense of solidarity or membership that makes up a society, and its implications for international law and policy in a changing world. With discussants Richard Tarasofsky, Royal Institute of International Affairs (London), Bradnee Chambers, United Nations University (Tokyo), and Duncan French, International Law Association Committee on International Law on Sustainable Development, the academic dialogue seeks to develop a deeper understanding of the character and meaning of these values in a rapidly increasingly interdependent global society. http://www.cisdl.org accessed September 2005.

[101] Sand, Peter. "Environmental Summitry and International Law". Yearbook of International Environmental Law 13. Oxford: Oxford University Press, 2003.

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with a study from 1989 "Paradigms in Environmental Management" [102] (see chart in Appendix) according to which:

> The methodologies of environmental management in development are in a period of rapid change, because the dichotomy between environment and development has begun to break down and we are beginning to have serious discussions about sustainable development.

Colby, the author of the article, says that the conceptions of what is economically and technologically practical, ecologically necessary and politically feasible are changing rapidly; and with this backdrop, the paper identifies five analytically distinct, but, in practice, overlapping and evolving broad paradigms of environmental management that reflect the conflict between economic growth and protection of the environment. These are 1) frontier economics; 2) environmental protection; 3) resources management; 4) eco-development, and 5) Deep Ecology. Each of the paradigms involves different imperatives and problems and prescribes different solutions/strategies, technologies, and roles for the private and the governmental sectors. Resolving the cultural, economic and even ethical issues requires different systems of incentives and regulation.

Between 1989 and 2003, apparently, there has been a move from understanding the approach to the environment/development interface as a shift in focus from substantive norms, such as choice between frontier economics and deep ecology (Colby), to one that generates change in norms of competences and procedures (Sand) as shown in more detail in the following, where I expand on the three paradigms identified by Sand.

2.2 Global Pluralism and a Principle of Participation

Regarding "global pluralism" Sand explains how the pattern of international law-making at the 1972 Stockholm Conference was a classic diplomatic circuit of government representatives negotiating government sponsored text, while Stockholm at the same time saw the beginnings of broader public participation. An "Environment Forum" was held in parallel with the intergovernmental sessions as a platform for interaction with and among participants from a broad range of social groups that did not meet the 1968 UN/ECOSOC accreditation criteria. Perhaps, more

[102] Colby, Michael E. *Ecological Economics*, 1991, vol. 3, issue 3, pp 193-213.

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importantly, Sand says, the conventions resulting from the Stockholm process confirmed the legal status of non-state actors in future treaty implementation.[103] The 1992 Rio Conference built on the lessons from Stockholm by organizing a parallel "Global Forum" of unprecedented scale with more than 8000 NGOs participating. By way of ad-hoc rules, the Conference also succeeded in bypassing the UN accreditation rules for more than 1400 NGOs registered as observers. These rules opened the doors more widely for access to the intergovernmental negotiation process and served as a model for the subsequent revision of the UN's own rules in 1996.[104] According to Sand, although the Rio Conference served as a powerful reminder of the legitimate claim of civil society to participate in environmental policy-making, it was the Johannesburg Summit that may have given non-state actors a decisive entry into international law-making by applying the "partnerships" approach:

> The novelty of the partnership concept is its structural design as a public-private global network. Sharing of implementation functions among governmental and non-governmental stakeholders will undoubtly lead to further decentralization and "complexification" of global governance. By the same token, such a deal inevitable confers on non-state actors not only duties of implementation, but also novel rights of participation. The "structural pluralism" so introduced is bound to change the patterns of international law making, and hence the structure of international environmental law.

Today "participation" is at the centre of the wider debate about governance and law in a global age. A principle of participation is inherently related to democracy, legitimacy, transparency and accountability, and it is a role of law[105] to facilitate the

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[103] The Paris World Heritage Convention thus designated several non-governmental institutions as advisers to the World Heritage Committee; and CITES introduced a pioneering formula for admitting observers from "technically qualified non-governmental bodies, which was to become the template for similar provisions in at least twelve subsequent environmental treaties.

[104] Already the Charter of United Nations Article 71 provided for consultations with NGO's concerned with the matters relating to ECOSOC's area of competence. Following the adoption of the UN Charter, ECOSOC established procedures for such consultations, and those procedures have been modified most recently in 1996, when ECOSOC adopted 'Arrangement for Consultations with Non-Governmental Organizations'. The 1992 Rio Conference inspired the revision of the regulation. The Consultative Arrangements form the main legal basis for NGO involvement with ECOSOC. They are also significant, because they provide the model for participation of NGO in all areas of the work of the UN. Although the Consultative Arrangements are the main procedures for NGO participation in the UN other Un bodies conferences and conventions are free to adopt their own rules. This is demonstrated by the practice of the CSD.

[105] For example, methodologies of regulation are presently - at an international level and in random sectors - being expanded from a focus on command and control to focus on regulation, which emphasizes procedures and processes necessary to facilitate an enabling environment for the market and for the stakeholders to find their own 'partnership' solutions. These approaches include for instance tradable permits, negotiated rulemaking, voluntary agreements and formalized ADR (alternative dispute resolution) in enforcement actions.

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processes of participation in decision-making and governance. [106] Participation in international law and policy is linked to notions of 1) non-state-actors, 2) NGOs, and 3) civil society organisations, (CSOs). The Centre for Civil Society at the London School of Economics has come up with a chart[107] suggesting who should be considered in and who should be considered out. The chart excludes for-profit organizations, while Alkoby[108], whose 2003 article includes a comprehensive discussion of the definition issue in his article, argues that the notion of a "non-state actor" should include for-profit organizations. Today participation is an issue in all the major institutions of the global governance structure such as the United Nations, the World Trade Organization (WTO)[109] and of the multilateral financing institutions.[110] While there is an ongoing and perhaps increasingly contentious debate as to "the who, what, when, why and how of participation", NGOs and CSOs have become a significant force both in promoting action and in blocking international agreements.[111] Although for a variety of different reasons and purposes, the principle of participation in decision-making is widely if not universally accepted. In implementation, however, tensions emanating from underlying different rationalities can surface, tensions over, for example, the role of popular participation in decision-making versus the reliance on science and expert bodies;[112] tensions

[106] As such the concept is also linked to corruption, to the ideas about abuse of public office or mandate in general for purely personal gain, which can easily be related to the depletion or degradation of resources, and to combat corruption is it necessary to establish measures to ensure that public and private actors conduct business in a transparent and accountable manner.
[107] *Civil Society: What it is and how to measure it.* Briefing note, LSE, Centre for Civil Society, London, 2002. p. 7.
[108] Alkoby, Asher. "Non-State Actors and the legitimacy of international environmental law." *Non-State Actors and International Law* **3:** 23-98, 2003, p. 30.
[109] Shaffer, Gregory. "The World Trade Organization under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters" *Harvard Environmental Law Review* Vol. 25: 1-93, 2001.
[110] Saladin, Claudia and Brennan Van Dyke, Brennan *Implementing the Principles of the Public Participation Convention in International Organizations*. Washington, D.C.: Center for International Environmental Law, 1998. The document covers, UN, ECOSOC, EU, WTO, EBRD cum WB and compares the organizations in relation to access to information, justice and participation in decision-making.
[111] "The most celebrated blockage, of course, was of the Multilateral Agreement on Investment, which would have been the high water mark of the neo-liberal quest in the 1990s. And the most dramatic case of promoting a new agreement - even participating fully in negotiating it - is the land mines ban, which was begun, literally, by two people with a fax machine, and ended up prevailing over the opposition of the most powerful bureaucracy in the world's most powerful state: the US Pentagon" John Ruggie "Taking Embedded Liberalism Global: The Corporate Connection"- The Miliband Lecture on Global Economic Governance, London School of Economics, June 6, 2002.
[112] See e.g., supra n. 82, Eckley For information on research projects addressing the relationship between participation and science see also http://www.nationalacademies.org

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between government, industry and people over access to particular information;[113] and, tensions in balancing access to information and the legitimate task of national governments to guarantee peace and security[114].

As I illustrate in the following, the emergence of the environment as a sector during the 1970s has been an engine for development of the institutional machinery and methods to facilitate participation at large. Although in 1972 the process sparked participatory developments, the Stockholm Declaration does not include the principle of participation. However, Principle 1 of the Declaration links environmental matters to human rights and is often referred to as implicitly requiring "participation" in the environmental area, as is GA resolution 37/7 of 28 October 1982 on the World Charter for Nature, and resolution 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well being of individuals. The idea of a right to participate emerged in the Rio process (UNCED) based on an initiative by some European countries to elaborate principles setting forth the rights and obligations of individuals regarding the environment, including a right of access to environmental information. The countries had prepared a draft "Charter of Environmental Rights and Obligations" which was, however, never officially transmitted to, or included in, the work of UNCED Preparatory Committee. Nevertheless, the outcome of the debate in Rio was Principle 10:

> Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

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[113] See infra n. 123, Sand at.*6*:

> "It is only now, after court-enforced electronic access to those corporate files, that a research team from the University of California was able to document the multinationals' well-planned and highly successful sabotage of the EU tobacco advertising legislation (Bitton et al. 2002: Neuman et al. 2002) culminating in the annulment of a 1998 Council Directive (EU 1998) by the European Court of Justice in October 2000 (ECJ 2000). What the documentation shows, in gruesome detail and transparency, is how top politicians and governments (with Germany playing the lead part) were used and - to put it bluntly - corrupted in a game that will have massive and measurable negative effects on environmental health for years to come."

[114] See, e.g. *National Security and Open Government: Striking the Right Balance.* Available at http://www.justiceinitiative.org

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Principle 10 is limited in scope to the national level and it has been criticized for being formulated in "manifest non-juridical language", and for carefully avoiding the use of the word "right" thereby making it clear that the purpose was not to extend any direct rights to individuals in the international legal system as is the case with human rights.

The 1995 Report on Identification of Principles of International Law for Sustainable Development mentioned in Section 1.1, however, includes Principle 10 and elaborates on its meaning and on its application in soft law as well as in legally binding instruments covering public participation in decision-making, access to information, environmental impact assessment, and informed decision-making.

In Johannesburg in 2002, a range of NGOs and some European countries attempted to build on Principle 10 and the Aarhus Convention of 1998, which will be mentioned in more detail below, and to agree on a stronger framework for procedural and substantive environmental rights. These proposals were resisted by a number of governments that wanted to avoid its implications for domestic policy.[115] The Johannesburg Declaration, however, reiterates that "sustainable development requires a long term perspective and broad-based participation in policy formulation, decision-making and implementation at all levels." (At para 26.)

Principle 10 has been built into several multilateral environmental agreements (MEAs). For instance, the Framework Convention on Climate Change stipulates the obligation of the Parties to promote access to information on climate change and its effects, and to promote public participation in developing adequate responses (art. 6(a) (ii) and (iii)). The Convention on Biological Diversity also stipulates that the Parties devise appropriate procedures for environmental impact assessment of proposed projects and to ensure participation of major groups and general transparency of decision-making (art. 14, para.1 (a)). The work to solidify a more general right to participation as a constituent principle of environment and sustainable development has continued within the UN after Rio. The United Nations Economic Commission for Europe (UN/ECE) prepared the *Convention on access to information,*

[115] See supra n. 80, Bigg,

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public participation in decision-making and access to justice in environmental matters (Aarhus Convention)[116], which was signed and adopted at the Fourth Ministerial Conference "Environment for Europe" in Aarhus, Denmark on 25 June 1998 and entered into force in 2003. The Convention is an elaboration of Principle 10 of the Rio Declaration and it puts participation in the context of democracy and accountability, transparency and responsiveness. Although the Convention is regional in scope, it is expected to be promoted globally and the implementation guide situates the Convention within the context of other international legal documents relevant to a principle of participation.[117]

The Aarhus Convention affirms in its preamble the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development. Most importantly, the Convention links environmental protection to human rights norms and signals that environmental rights are on par with other human rights by recognizing that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations. This link is significant because it facilitates that violation of the provisions of the Convention can be brought under the jurisdiction of the European Court of Human Rights.[118] The compliance system of the Convention (Article 15) also allows for an element of public participation and is non-confrontational and consultative in nature.[119]

2.3 The Right to Know - Informational Regulation

The right to environmental information, the first pillar of the Aarhus Convention, is a part of the wider concern of a very active transnational movement for access to

[116] All information pertaining to the Convention is available at http://www.unece.org/env/
[117] "The Aarhuus Convention – An Implementation Guide" -UN/ECE, 2000. Foreword by Kofi A. Annan, Secretary-general of the United Nations.
[118] In April 2003 resolution 71/2003 on "Human rights and the environment as part of sustainable development" (http://www.unhchr.ch) was adopted by the Commission on Human Rights. It requested the Secretary-General to submit to the Commission at its sixtieth session in spring 2004 a report "on the consideration being given to the possible relationship between the environment and human rights", taking into account the contributions that concerned international organizations and bodies have made.
[119] See http://www.unece.org/env/oo/compliance.htm

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government-held information[120] (and information of public interest held by private bodies). In a recent book on Freedom of Information (FOI) regimes, Toby Mendel[121] singles out the environment and human rights as important areas of FOI and provides an overview of international standards and trends. In addition, he outlines nine principles of what he considers an adequate FOI regime: 1) maximum disclosure, 2) obligation to publish, 3) promotion of open government, 4) limited scope of exceptions, 5) processes to facilitate access, 6) cost should not be a deterrent, 7) open meetings, 8) disclosure takes precedence, and 9) protection for whistleblowers.

Peter Sand provides in a brief, but comprehensive note[122], an overview of disclosure regulation in Europe and the USA. He shows how, in the face of growing public concern over environmental risks, the dogma of administrative secrecy for government-held information, which had governed administrative law in most countries except the United States and Scandinavia, began to crumble in 1970s, just as preparations for the Stockholm Conference were getting underway, and how by 1992 the concern had shifted to the disclosure of privately held risk-related information; and further how by 2002 the right of information, including environmental risk information, had acquired constitutional status in certain jurisdictions, such as, for example, South Africa. Addressing the critical importance of the disclosure of privately[123] held information, Sand relates the success story of the US Toxics Release

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[120] Evidenced of this can be found by visiting the websites of for instance the National Security Archive, http://www.gwu.edu/~nsarchiv Statewatch http://www.statewatch.org/news and http://freedominfo.org and the Justice Initiative of the Open Society http://www.justiceinitiative.org which all offer support for institutionalising freedom of information regimes including legal advice and monitoring. The organizations provide a wealth of relevant information and links to other organizations operating in the field such as the Online Network of Information Advocates.

[121] See Mendel, Toby. *Freedom of Information: A Comparative Legal Survey* New Delhi: UNESCO, 2003. The book provides an overview of international standards and trends in freedom of information as a precondition for democracy and broad participation in social life. The author elaborates on the human rights regime and states that Article 19 of the Universal Declaration of Human Rights (UDHR) adopted by the UN General Assembly in 1948 and guaranteeing the right to freedom of expression and information is binding on all states as a matter of customary international law. The book includes international jurisprudence reaffirming the right, constitutional guarantees and key developments at the national level.

[122] Sand, Peter H. "The Right to Know: Environmental Information Disclosure by Governments and Industry." Available at http://www.inece.org/forumspublicaccess_sand.pdf
A note based on paper presented to the 2nd Transatlantic Dialogue on " The Reality of Precaution: Comparing Approaches to Risk and Regulation", Airlie House, Warrenton/VA, 13-15 June 2002.

[123] See also Bann, A.J. "Development of an International right-to-know: Towards Public Disclosure of Multi-national Corporations' Environmental Practices through Legal Transparency Measures" *Law, Social Justice & Global Development Journal (LGD)* Vol.1 (2002): pp. 1-24

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Inventory (TRI).[124] The most recent data available, the 10-year period from 1988 to 1997, show that air emissions of some 260 known carcinogens and reproductive toxins from TRI-reporting facilities have been reduced by approximately 85% in the State of California and by some 42% in the rest of the country. Various attempts at explaining the impact of this regulation mention a number of factors including: 1) enforcement by citizen suits; 2) reversal of the burden of proof for exemptions; 3) electronic communication via the Internet; 4) standardized data, facilitating comparison and "performance benchmarking" and 5) "reputation" effects of such competitive ranking on a firm's behaviour.

Regulating information[125] about pollution has proven to be an efficient approach to compliance and enforcement and such registers are, therefore, now widely promoted.[126] Also the UN/ECE has launched a new legally binding instrument[127] requiring companies to report to the public on their polluting emissions. The success of this "informational regulation" has even given rise to a debate about a new "third wave"[128] in pollution control following after the traditional legal remedies (emission standards, command and control regulation) and market based approaches (emission charges, tradable permits).

However, the successful legal mechanisms established to enable better environmental protection and participation in governance can pose a risk. Sand concludes by juxtaposing the story of the public's "right to know" and the "scary zombie" of the government's "duty to hide" resurrected in the wake of September 11, 2001. One

[124] Established in 1986 (after the Bhopal (India) accident in December 1984 involving a local affiliate of a US chemical company and killing more than 2,400 people) by the federal Emergency Planning and Community Right-to-know Act (In California the 1986 Californian State Act on Safe Drinking Water and Toxic Enforcement Act).
[125] OECD Environment Directorate (ed): *Proceedings of the OECD International Conference on Pollutant Release and Transfer Registers. National and global responsibility.* Tokyo, 1998. Paris: OECD Environmental Health and Safety Series on PRTRs No. 1.
[126] See e.g., http://www.oecd.org/ehs/ehsmono/#PRTRS\, http://www.chem.unep.ch/prtr, and NGO initiatives such as the *International Right to Know Campaign,* http://www.earthrights.org/irtk/index.shtml
[127] Adopted and ratified in the legal context of the convention, public access to emission data will, therefore, become an actionable right hence potentially subject to supranational judicial review by the European Court of Human Rights.
[128] Karkkainen, B.C. "Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?" *Georgetown Law Journal* 89, pp. 257-370.

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example of this resurgence is the U.S. Government's classification of a large portion of industrial risk information as sensitive military security data.[129]

2.4 Multilateral Accountability - and the Case of the World Bank

According to Sand a shift to multilateral accountability[130] begins with Principle 21 of the Stockholm Declaration:

> In terms of environmental law, the most-quoted outcome of the 1972 Stockholm Conference probably was Principle 21 of the Declaration on the Human Environment, which affirmed the responsibility of states for transboundary harm. Even though its starting point was the traditional system of state responsibility - on subsequent codifications of which it had a lasting impact, - it already went deliberately beyond the cliché of reciprocal rights (beyond contract) and obligations between individual nation-states, by also imposing a responsibility for harm to the global commons outside national jurisdiction, as a new "multilateral" duty owned to the international community rather than to any particular state.

Principle 2 of the *Rio Declaration* further develops the concept, and Article 6 of the *Johannesburg Declaration* takes the concept of collective responsibility an additional step by defining it as "our responsibility to one another, to the greater community of life and to our children." Sand explains how this understanding of responsibility is related to the discussion of accountability in global governance[131] and to a number of proposals to make use of the public trust doctrine[132] in an international environmental context. He then provides an overview of various forms of "trusteeship", "guardianship", "custodianship" and "stewardship" suggested within a wide range of environmental areas. Quoting Judge Weeramantry of the International Court of Justice in the 1997 Danube Dam case, where in a separate opinion he refers to a "principle of trusteeship for earth resources", Sand explains that the concept of public trusteeship underlies the collective accountability of states acting though intergovernmental organizations. In 1997 the Secretary-General Kofi Annan proposed that the UN Trusteeship Council should:

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[129] U.S. Homeland Security Act of 2002. Available at http://www.dhs.gov/interweb/assetlibrary/hr_5005_enr.pdf

[130] See also Dupuy, Pierre-Marie. "A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility." EJIL (2002). Vol. 13 No. 5, 1053-1081

[131] See Chapter 6.

[132] The origins of the Public Trust Doctrine were the declaration of the Justinian Institute that there are three things common to all mankind: air, running water, and the sea (including the shores of the sea). Title to these essential resources or the common are held by the State, as sovereign, in trust for the people. The purpose of the trust is to preserve resources in a manner that makes them available to the public for certain public uses.

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> be reconstituted as the forum through which Member States exercise their collective trusteeship for the integrity of the global environment and common areas such as the oceans, atmosphere and outer space. At the same time, it should serve to link the United Nations and civil society in addressing these areas of global concern, which require the active contribution of public, private and voluntary sectors.

However, this proposal "never made it to Johannesburg."

Sand describes the World Bank's Inspection Panel as an innovative trust-like model of collective accountability and in what follows I will discuss the panel in more detail. As the Bretton Woods inspired institutions are very much a part of the de facto global governance structure, the debate concerning the accountability and transparency of multilateral development banks has intensified in parallel with the growing demand for public participation.[133] Since the 1980s, the World Bank[134] has been concerned with developing operational policies and systems for public participation and environmental management[135] to enhance project effectiveness[136] and efficiency and also to comply with the human rights regimes[137] and emerging international norms within the environment, such as the requirement for environmental impact assessment (EIA). In general a requirement for EIA was included first in the *Rio Declaration*,[138] and subsequently it has developed into a specific set of multilateral agreements.[139] Although first generation national EIA regulations were fundamentally procedural, in later generation EIA, the objective of the regulation is often explicitly stated as contributing to or facilitating sustainable development and requiring application of the

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[133] Hunter, David and NathalieBernasconi-Osterwalder. *Democratizing Multilateral Development Banks.* Washington, DC: Center for International Environmental Law, 2002.
[134] Shihata, F. I. *The World Bank in a Changing World*. Dordrecht: Martinus Nijhoff, 1991.
[135] For up-to-date information on operational directives, see http://world.bank.org
[136] Social development theories, have for decades promoted that participation by beneficiaries is essential to the success of development projects, both because it facilitates the necessary sense of 'ownership' and because it makes the project management, if not the financing agency, accountable to the clients.
[137] The World Bank and the Promotion of Human Rights. A paper presented by the World Bank at the World Human Rights Conference, Vienna, Austria, June 14-25, 1993.

> While the World Bank is prohibited from interfering in the political affairs of its members, it nonetheless assists in the promotion and protection of economic and social human rights through its economic work. The Bank's operational aim to turn economic and social ideals proclaimed in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights into exercisable rights.

[138] See supra n. 5, Rio, i.e., Principle 17 of the Declaration.
[139] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) Protocol on Strategic Environmental Assessment (SEA) (Kiev, 2003). - A SEA is undertaken much earlier in the decision-making process than EIA, and it is therefore seen as a key tool for sustainable development.

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precautionary principle.[140] In general EIA legislation does not provide a private right of action for violations of its provisions; a plaintiff would have to demonstrate standing under administrative law.[141] However some jurisdictions now include a right of action for specific public interest groups.

In law, the policies and operational procedures concerning EIA in the World Bank are only internal quality control rules. However, with the establishment of the "Independent Inspection Panel" in 1993, the status of the rules was dramatically changed. Now individuals affected could hold the Bank responsible for Bank financed projects. Shihata[142] provides an extensive overview of this institutional novelty[143] in his 1994 book, and today the web site of the panel makes all relevant information, including summary of cases, easily available to the public.

The first case heard by the Panel was one concerning Arun Dam (hydroelectric project) in Nepal. Among others, the complainant argued that the Bank was in violation of the rules concerning participation as required by the Bank's Environmental Impact Assessment operational procedures. The complainant argued that the whole population of Nepal would be affected by the proposed loan, because the repayment of loan and interest would be a burden on the general population and not only on the consumers of dam generated electricity. Thus the argument was related to both participation and distribution. Although the Panel did not find grounds for serious criticism, the President of the Bank decided not to approve of the loan and

[140] Some of the main principles of the Canadian Environmental Assessment Act (http://www.ceaa.gc.ca) are that sustainable development is established as a fundamental objective of the act, and in administering the act federal authorities are obligated to exercise their powers in a manner that protect the environment and human health and applies the precautionary principle.
[141] In general access to the courts is depending on being able to demonstrate: 1) injury in fact; 2) causal connection between injury and conduct complained of, and 3) the likelihood of the injury being redressable by a favourable decision.
[142] Shihata, F.I. *The World Bank Inspection Panel.* Oxford: Oxford University Press, 1994.
[143] According to the http://www.ciel.org/Publications/citizenguide.PDF accessed on 12 Feb. 2004 "the World Bank Inspection Panel is a quasi-independent mechanism that was created under pressure from non-governmental organizations and donor governments concerned about the Bank's history of policy violations. The Panel provides a forum for locally-affected people to request an investigation into the Bank's role in projects, and the extent to which the Bank has complied with its social and environmental policies."

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instead assisted Nepal in devising and implementing an alternative strategy for meeting its needs for electric power. [144]

The case has been hailed as a victory for the citizens of the Arun River Valley. Understandably, it has been argued that the Panel, which accords groups of individuals a right to request an investigation, constitutes an internationalisation of domestic disputes, and, furthermore, that it infringes on states' exclusive jurisdiction to adjudicate international claims. The Bank's interpretation of the legal implications of the issues raised is clear. Loans and conditionalities might limit the policy choices available to the borrowing country, but if this happens, it is based on the consent expressed in the loan agreement (which has the status of an bilateral treaty) and, therefore, it cannot be characterized as the bank unduly infringing the rights and prerogatives of the State. The argument is the same concerning the Panel and possible internationalization of domestic disputes:

> …. It will be the result of the international obligation of the country under the agreement with the Bank. Neither the complaint, nor the Panel's findings, creates new obligations for the borrowing country. They merely alert the Bank to the borrower's obligation under its loan agreement and to the Bank's corresponding duty to see to it that these obligations are being carried out. [145]

Although the Bank's argument cannot be criticized from a strictly de jure point of view, the existence of the Panel will limit the discretionary powers of the borrowing government. Arguably, the impact of requiring accountability to the affected public and according the individual procedural capacity enhances the status of the individual in international governance and law, regardless of the narrow scope and mandate of the Panel.

However, for the World Bank Group the normative aspirations seem to be less painful for operations than for internal administration. The organisation for Access to

[144] In a later case [Qinghai] - concerning poverty alleviation and dam construction the government of China went along with an investment in dam construction for large scale electricity generation although the Bank declined to provide a loan based on the findings of the Inspection Panel.
[145] See supra n. 142, Shihata at 105.

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Information in International Financial and Trade Institutions[146] reported in February 2004 that:

> The World Bank's Executive Board will again review its disclosure policy at a meeting scheduled for March 2004. The Board has spent six months reviewing potential problems stemming from the release of draft documents and Board minutes, which has long been the subject of internal disagreement at the Bank. The World Bank is also considering making a small step toward disclosing more information about its "country performance ratings" for the 81 poorest borrowing countries, but a minority of executive directors appears to have successfully resisted full disclosure, according to another article posted today. In other developments, the International Finance Corporation, the private sector lending wing of the World Bank, said in mid-January that it would accept public comments on its current disclosure policy until March 12. In a separate report, it was revealed that the IFC recently rejected a request by an Indian group to translate an environmental report about a hydropower project into the local language, Hindi.

Section 3 Changing governance structures

3.1 Background

The sustainable development policy as formulated by WCED emphasized that pollution and resource degradation affect the environment far beyond its source and that it does not respect political, administrative and other socially constructed borders. The report of the Commission prescribed integration as a strategy for aligning the material conditions with the institutional structures. Taking action on the strategy and developing the necessary skills and the organizational structures has required significant resources both nationally and internationally and, in general, the integration exercise is a major achievement of the global community, which is not necessarily appreciated when assessed in relation to its impact on change towards sustainable development. However, the exercise should not be underestimated, since moving from mere conceptualisation to being a *de facto* integral part of the mandate of world governments and businesses in less than 30 years is impressive.

The environment surfaced as a topic of concern in the early 1970s and was subsequently institutionalised as a sector in its own right later in the decade and in the

[146] Available at http://freedominfo.org/ifti.htm. Accessed on 11 Feb. 2004.

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1980s. In the 1980s and 1990s environment became linked to sustainable development. Finally, in 2002 the WSSD authoritatively distinguished the environment as only one element of the composite policy vision of sustainable development encompassing the three pillars of environment, economy and social factors. Although the integration of the environmental sector and of the policy of sustainable development have by now permeated international law and institutional infrastructures at a global scale, in what follows I describe the development within the UN in order to show how sustainable development still is predominantly thought of as linked to the environment, [147] and how the institutional response to the composite policy concept is still in the making. This problem with integration into the governance structures of the mandate and the responsibility for sustainable development can at the national level be illustrated with the names and mandates of various ministries. There is not a ministry of sustainable development and finance, for instance, but there are ministries of sustainable development and all kinds of environmental factors.[148] The Swedish Ministry of Sustainable Development[149] established in 2005 is the first that does not have a reference to the environment in its name, even if the new ministry subsumes the former Ministry of the Environment.

3.2 The United Nations and International Environmental Governance (IEG)

The UN's Environment Programme (UNEP) [150] was created as a result of the Stockholm Conference in 1972. Thus, from the start, the UN system has been a catalyst to international co-operation on environment and sustainable development. However, the field was not reflected in the UN mandate agreed to in 1945, because environment was not a concern at the founding of the organization. Consequently, it

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[147] Also in the Millennium Development Goals sustainable development is integral to the environment sector as it evidence with goal 7:Ensure environmental sustainability

> Integrate the principles of sustainable development into country policies and programmes; reverse loss of environmental resources. Reduce by half the proportion of people without sustainable access to safe drinking water. Achieve significant improvement in lives of at least 100 million slum dwellers, by 2020.
>
> GA Resolution A/Res/55/2 of 18 September 2000 - http://www.un.org/millenniumgoals/

[148] *Bolivia*: Ministry of Sustainable Development and Environmental Protection;
In *Quebec* the Ministry of Environment and Wildlife turned into the Ministry of the Environment and then into the Ministry of Sustainable Development, Environment and Parks;
British Columbia: Ministry of Sustainable Resource Management,
France: Ministère de l'Ecologie et du Développement Durable (Ministry of Ecology and Sustainable Development) 2002.

[149] See http://www.sweden.gov.se/sb/d/2066

[150] For more information on the mandate, organizational set-up and activities of the Programme visit: http://www.unep.org/

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was necessary to integrate environmental considerations into the decision-making process of already existing UN agencies. Today this is accomplished by, for example, affording UNEP a seat on various coordinating bodies,[151] notably on the Chief Executive Board (CEB)[152] for Coordination, which was established in 1997 as a part of a reform of the UN administration.[153]

The Global Environment Facility (GEF)[154] was established in 1991 to integrate a growing need to finance the implementation of the international cooperation to protect the global environment. This issue emerged after the initial focus on assistance to development of policy and law in the 1970-80s. The GEF Trust Fund was created by a World Bank Resolution on March 14, 1991, while the Facility was formally established in October 1991 as a joint program between UNEP, UNDP and the World Bank.

In parallel with efforts to strengthen inter-agency coordination and inject the environmental dimension into all policy level discussions, a debate concerning the need for a more coherent and effective international environmental governance (IEG) regime emerged in the mid 1990s. The international efforts since 1972 to develop institutional responses to environmental threats, which were evidenced by the growing body of scientific data on the seriousness of environmental degradation, lead to a proliferation in legal and institutional arrangements for international cooperation to address particular environmental problems. As a result, the international community became increasingly concerned not only with establishing a coherent framework for coordinated international action, but also with ensuring that the limited resources were deployed efficiently and effectively.[155]

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[151] A system of interagency coordination was formerly organized within the framework of the Administrative Committee on Coordination.
[152] See http://ceb.unsystem.org/
[153] See http://www.un.org/reform/ - An official reform program was initiated by Kofi Annan shortly after starting his first term in 1997. On March 21, 2005 Annan presented the latest major report on UN reform, *In Larger Freedom.* Within this perspective it is important to bear in mind that the environment cum sustainable development questions are part of a number of different wider debates depending on the particular context in which it appears; e.g., internally within the UN the environment is part of a broader debate concerning effective use of resources, while externally in international co-operation the environment is, e.g., part of the wider debate about the relationship between economic governance and environmental governance.
[154] For more information on work and organization set-up of the Facility visit: http://www.gefweb.org
[155] See e.g., Report on Workshop on Synergies and Cooperation with other Conventions p. 5, ENB Vol.12 No. 220, July 7, 2003, available on http://www.iisd.ca/linkages/climate/cespo

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By resolution 53/242 of 28 July 1999, the GA adopted the Secretary General's recommendation to establish a Task Force on Environment and Human Settlements. The resolution addressed both the issue of coordination (the internal aspects) as well as IEG's concerns (the external aspects). A number of institutional measures were taken as follow-up to resolution 53/242, including creation of the Environmental Management Group (EMG) and creation of the Global Ministerial Environment Forum (GMEF). The IEG initiative of the UNEP GC/GMEF was adopted in 2002 by decision GCSS VII/1 on international environmental governance. The decision was based on the Report of the Open-ended Intergovernmental Group of Ministers. It included a review of the requirements for a strengthened institutional structure for international environmental governance based on an assessment of future needs and options for an institutional architecture that has the capacity to address wide ranging environmental threats in a globalizing world. IEG was on the agenda in Johannesburg, and improving governance for the environment is now a continuing task within the UN framework. The latest developments are reflected in the proposal for establishing a UN specialized Environment Organization.[156]

3.3 Integration of Economic and Environmental Governance

In parallel with the establishment of the UN in 1945, institutions concerned with economic governance were created. These included the International Monetary Fund (IMF) (financial aspects), the World Bank Group (socio-economic development aspects) and the GATT (commercial aspects), transformed into the World Trade Organization (WTO)[157] by the Uruguay Protocol of the General Agreement on Tariffs and Trade (GATT) in 1994.[158] The WTO is the principal political and legal institution governing global trade. It provides a forum for negotiations on trade liberalization and for adjudicating trade disputes within the three areas of goods, services and intellectual property. The economy and the environment are inherently related, and, therefore, MEAs (multilateral environmental agreements) and the WTO necessarily overlap and address some of the same issues, parties, and products. However, given

[156] See e.g., Lenzerini, Federico. "The Reform of Environmental Governance in the United Nations: the French Proposal" European Working Paper - Law (Forthcoming 2006).

[157] See http://www.wto.org/

[158] See http://www.jus.uio.no/lm/wta.1994/toc.html

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the potentially damaging effect of trade regulation on the environment and development, the WTO's mandate is closely linked to issues of sustainable development. This is reflected in the WTO's preamble, which refers to "the objective of sustainable development". Further the Appellate Body (AB) of the WTO has explicitly stated that specific provisions have to be read in the light of both the preamble of the WTO Agreement and especially in the light of the commitment to sustainable development as an objective of the multilateral trading system. Accordingly, we should interpret the WTO's mandate in light of the evolving norms and rules of general international law.[159]

The WTO has established a Committee on Trade and Environment, but the IEG regime, which is more fragmented, does not have a single forum for debating the effect of trade on its core concerns.

In discussing trade and environment, there is a tendency to focus on potential conflicts,[160] because environmental considerations could be used to ban the import of products in conflict with WTO regulation, and also because the WTO has an effective dispute settlement system which is not accountable beyond the trade regime. The WTO dispute settlement system has competence to take decisions with wide ranging impact for the environment and for social development, and in this way the WTO regime can impinge on legitimate interests of people and national governments to retain full regulatory authority to protect health, safety and the environment. However, a WWF-CIEL Discussion Paper[161] advances a range of possibilities for a more mutually supportive relationship, including the adoption of an interpretation of WTO rules stating that MEAs and the WTO are equal bodies of law, that each should respect the competence of the other, and that consequently MEAs, and not the WTO, should have primary competence to determine both the legitimacy of the

[159] For support of this interpretation see EC measures concerning meat and meat products (Hormones) (AB-1997-4, paragraph 124). Available at p. 27 of http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub07_en.pdf

[160] See in general Brown Weiss, Edith and John Jackson. *Reconciling Environment and Trade.* Transnational Publishers, 2001.

[161] Gonzales T. Aimee and Matthew Stilwell. *Towards Coherent Environmental and Economic Governance*. Switzerland, Gland: World Wide Fund for Nature. October 2001.

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environmental objectives pursued by national governments and the proportionality or necessity of MEA-related trade measures.[162]

3.4 Governance for Sustainable Development

At the time of the meeting of the UNCED in Rio, there was already an articulation of sustainable development as something more than merely integrating or "mainstreaming" the environment as an important factor in decision-making. Thus, the Conference articulated the idea of sustainable development as depending on participation and containing the economic, social and environmental dimensions in Agenda 21, its Plan of Action. At the institutional level - instead of charging UNEP with the task of monitoring and reporting on the process of implementation - this broader understanding of the meaning of the policy concept found expression in the creation of the Commission on Sustainable Development (CSD)[163] to ensure effective follow-up of UNCED.

The preparatory process for the Summit included research and consultations on governance for sustainable development.[164] In this process, there seems to have been a certain differentiation and broadening of the issues related to international environmental governance[165] and to sustainable development governance.[166] The first includes questions regarding the future role and financing of UNEP within the UN system and the discussion on the lack of a coherent framework for development of multilateral environmental agreements (MEAs). Sustainable development governance

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[162] Other recommendations of the CIEL paper include: i) Affirm that MEAs can provide international standards for the purposes of WTO Agreements such as the TBT and the SPS Agreements, for instance by agreeing on instituting a reversed burden of proof if an international standard exists. ii) Instruct the General Council to accept all future requests by MEAs and/or UNEP for observer status in relevant WTO bodies, including the Committee on Trade and Environment, the Committee on Agriculture, the Council for Trade in Services, and the Council for TRIPS - See, generally http://www.ictsd.org/weekly/03-02-19/story4.htm which reported that "During the special session of the WTO Committee on Trade and Environment on 12-13 February 2003 (CTE) WTO member states have agreed to grant the Secretariats of six multilateral environmental agreements (MEAs) provisional observer status at meetings of the WTO. Member states made clear that the observer status would apply only to negotiations carried out within the special session of the CTE. The committee also began negotiations on paragraphs 31 (i) concerning the relationship between WTO rules and specific obligations in MEAs and regarding the liberalization of trade in environmental goods and services."

[163] Council Decision (ECOSOC) 1993/207 and GA resolution 47/191 of 22 December 1992.

[164] See http://www.earthsummit2002.org/es/issues/Governance/governance.html . Accessed 19 March 2002.

[165] International Environmental Governance, Doc.UNEP/IGM/5/2, 16 January 2002.

[166] Report by United Nations University (UNU/IAS), *International Sustainable Development Governance -The question on reform: Key Issues and Proposals*. August 2002. Available online at http://www.ias.unu.edu

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is broader and appears to be perceived as a mechanism to ensure overall policy coordination in the international governance architecture, as is reflected in the quote below.

The critical importance of the institutional framework for governance was recognized during the conference, as reflected in the following quotation[167] from the address by the Chairman of the Summit to the Roundtables:

> There is a lack of coherence and consistency across a range of policy areas dealing with sustainable development. The existing institutions and policy making bodies both at the domestic and the international level lack the capacity to integrate goals of economic growth, social development and environmental protection. Sectoral lines of authority continue to dominate decision-making. Horizontal linkages between line departments/organizations at every level need to be strengthened to enable these institutions to pursue sustainable development in a holistic manner. At the global level, the institutions need to ensure broad based participation and greater transparency in the process of decision-making.

However, the outcome[168] of the debate concerning the institutional framework for governance for sustainable development was not conceived as particularly helpful by any of its commentators. In the words of Tom Bigg: "One area in which the WSSD really failed to grasp the nettle was sustainable development governance"[169].

3.5 From the UNEP and CSD to the Agenda of the General Assembly and the Millennium Goals

The Overview of Progress Towards Sustainable Development report[170] from 2004 mentions that the UN and other organizations have facilitated partnerships, and that the UN regional commissions and development banks have incorporated the concept of sustainable development into their programmes, thus integrating economic, social and environmental aspects and building partnerships with civil society and the private sector.

The UN is integrating the partnership approach into its governance structure through a number of initiatives and phenomena. As mentioned in the previous section, the approach represents a shift in the pattern of governance and cooperation, which can be

[167] See supra n. 53.
[168] See supra n. 4, Johannesburg, Chapter XI of the Plan of Implementation.
[169] See supra n. 80, Bigg,
[170] See supra n. 81, at 26.

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interpreted as an integration of the existing fields of private and public activities. This emerging transformation, allocating new roles for communities, markets and governments, is very much part of the sustainable development paradigm of integration and it is empirically demonstrated through the follow-up process to the Johannesburg "Plan of Implementation" under the aegis of the CSD.[171] The UN integration initiatives include the introduction of the "Global Compact"[172] and of the Corporate Social Responsibility scheme, and further the initiatives advance the inclusion of a growing number and variety of civil society organizations into all phases of the work of the UN, including problem identification, input to decision-making, implementation in the field, and enforcement through reporting on violations of regulatory schemes covering, for example, human rights and environmental protection.

As a cooperative strategy, the "Global Compact" does facilitate a principled approach to corporate governance and the integration of overall social responsibility into business operation, even though the UN has been criticized for lending its name to activities beyond its control.

The above-mentioned Progress Report throws light on national strategies and the problems of integrating sectoral policies, but it does not reflect on progress within the institutional framework of the UN concerning governance for sustainable development. However, paragraph 143 of the Johannesburg Plan of Implementation did recommend action to be taken by the UN General Assembly in this regard:

> The General Assembly of the United Nations should adopt sustainable development *as a key element of the overarching framework* [my emphasis] for the United Nations activities, particularly for achieving the internationally agreed development goals including those contained in the Millennium Declaration, and should give overall political direction to the implementation of Agenda 21 and its review.[173]

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[171] *See* http://www.un.org/esa/sustdev/partnerships/partnerships.htm - http://www.un.org/esa/sustdev/ http://www.un.org/esa/sustdev/csd/

[172] The Compact has nine principles, which are derived from
- The Universal Declaration of Human Rights,
- The ILO Declaration on Fundamental Principles and Rights at Work, and
- The Rio Declaration on Environment and development

See http://www.unglobalcompact.org .

[173]. E-mail communication of November 4, 2002.

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According to the Secretariat of the CSD, in 2002 the role of paragraph 143 was considered in broader terms, specifically with regard to possibly re-organizing the agenda of future sessions of the GA's Second Committee, which, in addition to WSSD and related outcomes of the Millennium Assembly, would need to consider the outcomes of the Monterey Conference on Financing for Development.

In 2003, the UN established an Open-Ended Ad Hoc Working Group of the General Assembly [174] (hereinafter the WG) to develop a framework for an integrated and coordinated follow-up to major conferences. These conferences include, among others, the Millennium Development Goals (MDG), the Monterrey Conference on Financing for Development, the Johannesburg Summit on Sustainable development and the Doha Round. The mandate of the WG was limited to considering a format for review of progress in the implementation of the outcome of major UN conferences and summits and to specifying the role of the various actors within the UN system and at national, regional and international level. These actors include Member States, the UN system including the Bretton Woods institutions, relevant institutional stakeholders, and other relevant stakeholders including civil society and the private sector. The mandate of the WG refers to the authority of UNGA resolution 50/227 of 24 May 1996, which concerns the revitalization of the organization and its effectiveness. Beyond this coordination function internal to the international organization, there is apparently no particular reflection on the role of the policy of sustainable development "as a key element of the overarching framework for United Nations activities" as recommended in paragraph 143. During the subsequent 58th Session of the UNGA the Second Committee reported on sustainable development under the following headings:

- Sustainable Development and international economic cooperation (document A/58/483), and
- Environment and sustainable development.

In 2000, well in advance of the Johannesburg Summit in September 2002, the General Assembly adopted the Millennium development goals [175] as reflected in the United Nations Millennium Declaration. The Declaration refers to interdependence among

[174] According to GA resolution 57/270 of 24 January 2003.
[175] GA Resolution A/Res/55/2 of 18 September 2000 - http://www.un.org/millenniumgoals/ http://www.unep.org/gc/gc23/documents/MDGSANDRULEOFLAW-REVISEDbyBR18.01.05.pdf Advancing the UN Millennium Goals through the Rule of Law

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nations and peoples and uses the term sustainability[176] only in relation to the environment. Section I concerning values and principles states in part that:

> We reaffirm our commitment to the purpose and principles of the Charter of the United Nations, which have proved timeless and universal. Indeed, their relevance and capacity to insure have increased, as nations and peoples have become increasingly interconnected and interdependent.

And concerning the environment, Section VI states in part that:

> We reaffirm our support for the principles of sustainable development including those set out in Agenda 21 agreed upon at the United Nations Conference on Environment and Development.

The Declaration "reaffirms our faith in the Organization and its Charter as indispensable foundations of a more peaceful, prosperous and just world" and articulates the actual goals under the following headings:

- Values and principles
- Peace, security and disarmament
- Development and poverty eradication
- Protecting the vulnerable
- Meeting the special needs of Africa
- Protecting our common environment
- Human rights, democracy and good governance
- Strengthening the United Nations.

3.6 Conclusion

In the preceding account of the evolving institutionalisation of the environment and sustainable development, I have attempted to demonstrate the magnitude of the challenges involved in trying to integrate new knowledge about the relationship between environment and socio-economic development, and about the interdependence of the social, economic and environmental factors, into world affairs. In particular, I intended to demonstrate how in the implementation phase the more normative or substantive aspirations, which can be freely and hortatively expressed in the policy formulation phase, become subjected to a number of structural realities of both a conceptual/ideological and a methodological/practical nature. Such realities include problems of obtaining adequate resources, establishing coherent units, employing qualified people and educating decision-makers, and also include

[176] See, e.g., Morgera, Elisa "The 2005 World Summit: UN Reforms and Protection of the Environment". in the 2006 forthcoming *EUI Working Paper* - Law. Selected Issues in International, EU and Comparative Environmental Law.

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difficulties integrating new policies into the existing procedures, and distribution of power among nation states and within an international system, which is perceived as consisting of separate and largely technical units, including the UN (the political aspects; peace and prosperity), the IMF (the financial aspects), WTO (the commercial aspects) and the World Bank Group (the economic aspects).

Adding to this complexity, a conceptual problem arises in the move from the narrow focus on integration of environment to the broader vision of sustainable development. When the environment emerged as a sector, the challenge of integration was somewhat clear. Specifically, it was necessary 1) to develop and be guided by environmental factors in decision-making within the prevailing development model, and 2) to adjust the pattern of international co-operation among nation states in several ways, including more participation of non-state-actors or stakeholders. With the shift to sustainable development, the situation has become more difficult because it is a composite concept, on the one hand, construed with knowledge of interdependence as the foundation of the development process, but, on the other hand, for which knowledge there is no clear reference in our existing taxonomy, because, although the physical unit earth is understood as an interdependent unity, socially and politically there is only a plurality of actors organized in various groups. This tension is also reflected in the GA draft outcome report for the Millennium Summit.[177] The report does contain a section concerning international environmental governance. However, the section on global governance and systemic issues concerns only international economic decision-making and norm-setting, which is based on functional specialisation and does not have a language to express awareness of interdependence. Sustainable development is consequently institutionalised as a goal to be reached through compensatory concrete activities and not through a change of the quality of the overall development process.

Such a pragmatic approach, focusing on output instead of impact, to the question of the role of the policy of sustainable development is understandable because the concept is relatively young and not well developed theoretically and because the

[177] Draft Outcome Document [A/59/HLPM/CRP.1/REV.2] Available on http://www.un.org/ga/59/hl60_plenarymeeting.html accessed 14 September 2005.

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United Nations is under pressure to reform in constitutional, administrative and policy areas of its mandate.

Although understandable, I suggest that it may not be adequate to conceptualize sustainable development merely as a goal; because, as evidenced by the following quotes, this focus on concrete action, aggregating sustainable development activities with the existing development process, cannot capture the complexity and uncertainty implied by the meaning of the concept.

In January 2004, the Guardian[178] reported that:

> According to the first comprehensive study into the effect of higher temperatures on the natural world, climate change over the next 50 years is expected to drive a quarter of land animals and plants into extinction. The sheer scale of the disaster facing the planet shocked those involved in the research. They estimate that more than one million species will be lost by 2050, however according to the research scenarios massive numbers of species could potentially be saved from this fate if minimum, rather than maximum, climate warming can be realized, if conservation action is taken. To take action means converting to cleaner technologies rapidly and widely. Estimates are only up to 2050 and most climate projections suggest, that, as much climate warming will take place between 2050 and 2100 as between now and 2050.

Ahead of the Summit in 2002, the Wupperthal Institute reported that:

> Recent research suggests that growth consume eco-efficiency gains.[179]

And the OECD Observer posted an article regarding the difficulties in reaching the Millennium Development Goals.[180]

> Unfortunately, the poor have benefited proportionately little from 'average' progress to date, as evidenced by widening disparities in terms of income, education and mortality in many developing countries. - In sum averages are deceiving. We already know that, so why do we keep applying it? - Some countries appear to be on track for reaching a particular target, based on average progress; yet the situation for disadvantaged groups in those countries is stagnant or deteriorating. So not only was global progress towards the millennium development goals inadequate in the 1990s, much of it bypassed the poor. For them, being "average" still means

[178] See the front page of The Guardian.co.uk on January 8, 2004.
[179] http://www.oekoeffizienz.de/english/index.html or generally www.wupperinst.org/ Accessed on 6 December 2002.
[180] Vandemoortele, Jan "The Millennium Development Goals: Looking beyond the averages." September 12, 2002 at http://www.oecdobserver.org/news accessed on 11 March 2004.

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> dying too young or surviving to remain illiterate and excluded. Development goals should be more targeted than that. So should we. When it comes to poverty reduction we really have to perform much better than average.

I suggest that focusing on "action and results" and integration of new considerations into the existing conceptual and institutional framework for the development process might not alone represent a viable path towards sustainable development, because "action and results" can only provide quantifiable outputs and does not change the structure - i.e., the knowledge base - or the fundamental rationality of the development process. [181]

Integrating new considerations into the development process can only moderate or break down the existing framework of functional specialisation; it does not provide the resources for articulating a viable new structure. Therefore, in Chapter 4, I examine the possibility of construing a unitary rationality of sustainable development beyond an aggregation of the components of the core meaning.

[181] Rapid urbanization in the developing world is challenging countries' capacity to keep up with demand, not only for safe drinking water and sanitation but also for decent, affordable housing. Nearly 1 billion people worldwide – almost 1 in 3 city dwellers – live in slums, and about 200 million new slum dwellers were added to urban communities between 1990 and 2001, representing an increase of 28 per cent http://millenniumindicators.un.org/unsd/mi/mi_coverfinal.htm - In that perspective the MDG of "achieving significant improvement in lives of at least 100 million slum dwellers by 2020" seems starkly insufficient even if the goal is reached.
See also http://www.globalpolicy.org/socecon/inequal/2005/0826glequal.htm
Despite unprecedented economic growth in recent years, the rich have become richer and the poor even poorer, says a new U.N. report that also shows women facing more hardship than men in all walks of life.

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Chapter 4 Theorizing the Policy

In this chapter, I argue that the shaping of the sustainable development policy is evidence of an epistemic shift. I further claim that an analysis of this shift in knowledge concerning the nature of our material condition provides a theoretical insight that represents a paradigm shift that is analytically distinct from the policy itself. I propose that for heuristic purposes these shifts in knowledge can be expressed or construed as models, which can serve as a framework for normative and institutional developments. The principal difficulty encountered in attempting to express the models is that the paradigm shift both preconditions and is enabled by the epistemological model of sustainable development, which entails the substantive normativity of the policy. Although difficult to reduce to a simple formula, I endeavour to present the steps of the analysis in a concise and ordered manner. In the subsequent chapters of this thesis, I show how the epistemic shift, in turn, can provide a basis for thinking coherently about law, governance and sustainable development in a global age.

Historical aspect. The analysis in this chapter gives rise to a claim of a certain magnitude, namely that the sustainable development policy has generated the conceptual resources needed to provide not merely a critique but a profound alternative to the currently dominant epistemology, which, in essence, is based on the philosophy of Descartes.[182] However, just as Michael Foucault said that his analysis of power had become possible only because of the 1968 "revolution", the ensuing analysis is made possible only by our present global circumstances: the evolving sustainable development process[183] in combination with economic, scientific and technological progress and related professional and methodological advances.

[182] See Section 1.4 below.

[183] It has only been possible to identify the ontological and epistemic importance of "interdependence", and thus the "theory of change" underlying the strategy of integration and the rationality of sustainable development, because it is a global, explicit and open process, which persistently has been unfolding over a long period of time. This can be seen as being different from the policy and institutionalization process emanating from 1945, where both the political and technological conditions for access to information and participation were much more limited.

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Why law. As we move into the field of epistemology, the interdependence of law and knowledge can be questioned. Although the present chapter delves into subject matter that is beyond the legal discipline alone, addressing, in however a rudimentary fashion, the fundamental epistemological question has emerged as a necessary step in the process of investigating the original research question of whether, in advancing the implementation of the policy of sustainable development, there is a role for law and legal theory that entails more than the development and implementation of concrete rules. As for the relationship of law and epistemology, I point out that the legitimacy of law is largely dependent on the plausibility of its theoretical underpinning, and further that a jurisprudential question considers the basic, general, universal and theoretical ideas of law, as well as their underlying premises. These premises relate to different conceptions of truth, knowing and meaning, and, perhaps, of values or moral premises.[184] As for the relevance of legal reasoning to epistemology, I argue that generating knowledge, in essence, is about the determination of the validity of a conclusion based on certain rules, such as the scientific requirement for measurable and verifiable testing of empirical observations.

Context. The present analysis has also become necessary because, in parallel with the evolving sustainable development policy, there is increasing pressure on the legitimating power of the existing legal-institutional system seen in a global context.[185] The existing system is based on a neo-liberal economic development paradigm[186] that embodies a theory and a philosophy that, according to the interpretation of sustainable development policy presented in this thesis, no longer corresponds fully to our knowledge and to the state of a world, where there is an emergent insistence on the need for the articulation of a normative perspective on the global reality and on an evolving global polity.[187]

Summary of the meaning of sustainable development as characterized in previous chapters. As demonstrated in the previous chapters, the policy of sustainable development has evolved from a vague and ambiguous notion to a

[184]See, e.g., Hayman, Robert L. and Nancy Levit. *Jurisprudence, Contemporary Readings, Problems and Narratives*. St. Paul, Minn: West Publishing Co., 1994. pp 1-9.
[185] See Chapter 5.
[186] See Section 2.4.
[187] See, e.g., Chapter 7.

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bounded concept. Sustainable development can now be characterized as a development that, from the perspective of meeting the needs of the present without compromising the ability of future generations to meet their own needs,[188] requires participation as a mode of operation and is about "the integration of the interdependent and mutually reinforcing pillars of economic development, social development and environmental protection."[189]

This broad understanding of the policy concept, where sustainability is seen as a property of the development process and is not limited to particular sectors or geographical or social areas, crystallized during the process leading to the WSSD and in the ensuing follow-up to the Summit.

Response from legal discipline. In Chapter 3, we saw that law plays an important role both in policy development and implementation, and that there has been a number of methodological developments within the legal discipline to accommodate the strategy of integration, the demand for participation, and the need to protect life-sustaining systems. These developments have further led to conceptions of regulatory paradigms - such as global pluralism, multilateral accountability, and informational regulation - and have even resulted in the emergence of a distinct field of law: international sustainable development law.

The problem. Rooted in the scientifically based reality of ecological interdependence, from the outset sustainable development prescribed "integration" as a necessary strategy to address an interdependent world. Despite the impressive response to the sustainable development policy from all sectors and regions of the world, implementation of the policy in terms of changing the nature of the overall development process and reaching concrete goals is still perceived as lacking. This is partly attributed to the fact that the approach to implementation is sectorial,[190] with "add-on" concrete programmes appearing merely as elements in an essentially

[188] See supra n. 3, *Our Common Future.*
[189] See supra n. 4, Johannesburg, in the introduction to Resolution 2: *The Plan of Implementation.*
[190] It can be seen as an indicator that according to the reports of the ENB from CSD meetings in Feb. 2004 environment ministers are still in charge of CSD and it is difficult to get finance and infrastructure ministries to participate. Also, the UN Secretary-General Kofi Anan addressed the CSD for the first time at meeting in April 2004.

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economic development process, the nature and rationality of which is largely perceived to be responsible for the un-sustainable state of the world.

The analysis. In what has preceded, it is acknowledged that the policy has been evolving to embody an increasingly comprehensive concept[191] and that concrete policy implementation practices are integrating sustainable development considerations. However, the actual development process and the rationality underlying the process have not changed. In this chapter, I therefore investigate whether and how a more theoretical approach to "integration" can contribute to the development of a method to incorporate a notion of "sustainable" into the very process of development. Within a predominantly general systems theoretical framework[192], I argue that it is necessary and potentially helpful to articulate explicitly the conditions under which knowledge can be generated - i.e., the ontological starting point - as integral to the concept of knowledge. This leads to the construction of sustainable development as a shift from a mechanical to a dynamic paradigm. It is a shift which can be represented in a purely abstract model, but which contains also a more normative aspect when construed as a distinct epistemological, but *still abstract*, model of sustainable development. Against this background, I briefly provide some evidence that the insight from practice - the shift from a mechanical to a dynamic paradigm - is fully compatible, although possibly different in terms of consequences, with developments within science, in particular physics and psychology.

In this context, I point to a number of potentially wide-ranging philosophical or theoretical challenges emanating from the postulated change. In short, based on the vision of sustainable development, I explain the epistemic shift as

1. An abstract model of knowledge - a paradigm shift;
2. A normative model - i.e., an epistemological model of sustainable development - which assumes but has also generated 1; and, in Chapter 7,
3. An institutional version, which assumes 1 and 2.

[191] From being about integration of environment and development to requiring a change in the nature of the development process from consideration of economic factors to acknowledgement of sustainability factors.

[192] Teune H., "Integration" pp 235-264, in Sartori, G. (ed.) *Social Sciences Concepts. A Systematic Analysis*. London: Sage, 1984.

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These versions of the model are inherently related, but for analytical purposes they are described separately. It is not possible to make a definite distinction, particularly because the exercise concerns defining a theoretical insight from the policy level, and the policy is thus providing the main perspective from which the analysis is presently relevant, even though the claim to relevance is well beyond concrete policy implementation. I stress, furthermore, that, however rudimentary the model construction undertaken in this *chapter* might appear, having a model is crucial to developing a shared mode of processing information and generating knowledge, and thus to communication. Accordingly, in the last chapter of this thesis I point to the need for a multi-disciplinary elaboration and reconsideration of the proposed models.

The next step of the analysis addresses the question of the role of law in enabling the integration of the epistemic model into the actual development process as is further elaborated in following Part II. In closing this chapter, for heuristic purposes, I point to differences between the present dominant neo-liberal paradigm and the emerging paradigm of sustainable development or of "developmental sustainability", which I introduce here as a provisional term for acknowledging this particular paradigmatic conception of the policy.

About abstractions. Because it addresses a theoretical insight from a global, empirical process, this chapter spans a wide scope. So, moving up and down the ladder of abstraction, the references range from very concrete instances to entirely theoretical considerations. This means, for instance, that at the level of abstraction encompassed in the following analysis, individual conduct is considered an essential unit of the overall development process and the terms are therefore used interchangeably as referring to human action in general. A few other terms, such as interdependence, are used in a purely conceptual manner, since at this stage it is crucial to distil and expose the analytical implications of the policy concept in as lean a form as possible in order to be able to develop a theoretical model.

Significance: articulation of a commonality. In summary, I present the analysis and the application of the model concept to support the claim that the real significance - far beyond the policy itself - of the evolving sustainable development process is the theoretical insight it provides. As is shown in the following, it is an insight through

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which we know that there is a factual and shared reference point beyond a particular process, be it discourse or interaction, for generating knowledge for policies and actions. This reference point, the material fact of interdependence and our comprehension of this fact, epitomized in the vision of the planet, can be voided and denied but no longer ignored. The reference point exists and is surfacing in our collective knowledge.

The implications of acknowledging and translating this insight into our conceptual machinery can only be rudimentarily addressed in this thesis. However, I consider opening the debate crucial because none of our existing narratives are sufficiently wide-ranging to provide a framework for articulating a commonality that can enable a shared conception of legitimate and accountable conduct in the face of a global reality.

Section 1 Sustainable Development as Evidence of a Global Epistemic Shift

1.1 The Strategy of Integration

As demonstrated in the two previous chapters, the integration strategy of the sustainable development policy[193] was originally conceived as a way of reconciling environmental considerations and economic development, and thus addressing their inherent interdependence. In theory and practice, such integration can be accomplished through the existing development practice - dealing with the two elements separately - in that the two elements are reconciled through a consideration of the other without changing the underlying rationale of the overall development process or of the particular sector or discipline involved. This "integration by aggregation" has been the predominant approach[194] and was preached during the WSSD, which called for the integration of economic development, social development and environmental protection, as a strategy for meeting concrete development goals.[195] However, addressing specific sectors separately does not capture the acknowledged universal condition of interdependence. Instead, addressing

[193] See Chapter 3, Section 2.
[194] See Chapter 2 about the economic conception of sustainable development.
[195] What I in Chapter 2 have dubbed the "action and results" approach; see supra n. 37, GA Resolution 155/199.

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the comprehensive nature of the policy requires focusing on the development process itself and not outcomes and results alone.

A logical inference from the comprehensive understanding of the term sustainable, as referring to a property of the very development process, is that we are facing infinite complexity and not merely a matter of addition. I suggest, therefore, that integration cannot be achieved effectively in theory and in practice through a pragmatic approach addressing concrete actions and programs alone.[196] Instead, implementing the vision of sustainable development also requires an explicit change in the very concept and definition of the process of development.[197]

Addressing the integration strategy at the conceptual level implies addressing what has been perceived as an inherent conflict in order to conceptualize a common denominator that can capture the defining characteristic of the composite concept of sustainable development. Now, as we have seen in the previous chapters, the policy of sustainable development is an empirical entity implying certain kinds of ideas - i.e., awareness of interdependence, the necessity of participation, the need for upholding the biosphere and satisfying basic needs - but it lacks a theoretical framework to specify these ideas and particularly their internal relationship. Therefore, there is a need to investigate the requirements of such a theoretical framework to determine the perspectives and defining properties it should be able to capture. However, most theories are bound to a particular discipline[198] and hence not appropriate for something as sweeping and interdisciplinary as the global development process. Instead of drawing on existing, more or less particularistic, theories, I here draw on general social science methods for concept analysis and theorizing in an attempt to identify a theoretical insight about the rationality of the sustainable development

[196] To use a metaphor from the pollution control sector, one can say that "action and results" amount to an "end-of-pipe approach" (reducing emissions of pollutants after they have been formed), while what is required is a "cleaner technology approach" (avoiding forming pollutants and emissions in the first place, by using different materials and processes).
[197] See supra n. 16, Sartori (ed), Riggs, F.W. "Development" pp 125-204.
[198] See supra n. 192, Teune at 237 "A second conclusion [regarding the use of the concept of integration in political science] is that theoretically central concepts often get appropriated by a disciplinary sub field and then entrapped in little phenomena such that their generality and power in explanation gets lost in almost medieval schoolmen controversies." "-…- Related to this, are the notion of "fusion" and the emergence of new social, economic, and political entities. And explaining the coming into being of such entities surely taxes the theoretical capacity of social science."

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policy that can be applied to the exercise of integrating a notion of sustainability into the very meaning of development.

1.2 The Concept of Integration

From the outset sustainable development prescribed "integration" as a strategy for policy implementation. However, as shown in *Social Science Concepts - A Systematic Analysis*[199], the term "integration" refers to a highly complex concept. Henry Teune, the author of the chapter concerning integration, provides an historical account of the rise and fall of the concept of integration within the social sciences - i.e., sociology, economics and political science - after World War II. He notes that, in international relations, the term "interdependence" seems to have replaced integration since the world oil crisis of 1973. It is, however, the more theoretical and methodological points that are of interest in relation to the integration strategy advanced by the sustainable development policy.

According to Teune integration is a relatively precise logical concept*:*

> Integration belongs in the class of concepts that relate to the very core of what we believe we know about the social world. It directly involves the age-old problem of "can the whole be more than a sum of its parts?" -…-The concept of integration says that indeed the whole is more than the sum of its parts in particular ways and that answer implies ideologies. [237]

It is also a general concept*,* which can be applied to a wide variety of phenomena, because:

> Despite the apparent diversity of meaning of the term integration, there is a core one. The basic idea of integration is old. It is part of the concept of a system: 'The root idea of system is that of structure or organization, of integration into an orderly whole that functions as an organic unity' (Rescher, 1979). So conceived, integration is a property of relationships among components or parts of a system**.** [256]

Further, Teune says that:

> Because it is a "connection*″,* integration can refer to both a static state and to a process by which things come together, or indeed, are taken apart (disintegration)*.* …Knowing the state of something at one point in time does not necessarily say anything about past and future states. And, as will be discussed, this is a source of conceptual confusion, for what must be

[199] Id., Teune.

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> known to define a state of a system is different from that to define a system process. The first requires a language for measurement the latter a theory of change. [239]

In Chapter 3, we have seen that an impressive "language of measurement" has been generated for sustainable development, and I suggest that this dual meaning of integration, referring to both state and process, is creating not only conceptual confusion but also difficulties in the concrete implementation of the sustainable development policy, where there is an emphasis on taking action towards achieving a measurable state of sustainable development while leaving the fundamental core - the basic assumptions - underlying the development process barely recognized, let alone explicitly addressed.

Concerning the general concept of integration, finally, Teune notes that:

> A core idea of system is structure and structures determine some range of behavior of a system. To define and explain political, social or economic behavior requires defining the structures of systems that condition their behavior. Conditions are structural if they are determined largely by factors other than the integration processes themselves. [242]

In the following section, I apply the above outlined understanding of integration to sustainable development based on the core vision, conditions and strategy described in the previous chapters.

1.3 Conceptual Integration of Sustainable Development

As shown in Chapters 2 and 3, the rationality underlying the strategy of integration and the fundamental focus on participation within the sustainable development policy is principally based on a recognition of the fact that environmental, economic and social phenomena of the development processes are interdependent, and that all actions may thus in principle have an intended or unintended, known or unknown impact on an elusive whole linked to our collective ability to prosper or perish. These universal aspects of actions, be they in the private or the public sphere, are not reflected in the institutional system for governing the development process. Instead, the latter is confined to what is considered the public sphere and compartmentalized into sectors with narrow mandates, preventing consideration beyond the perspective of a particular sector.

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Recognizing the universality of interdependence, the sustainable development policy concept acknowledges the maintenance of the biosphere and satisfaction of needs as necessary but not sufficient conditions for sustaining life and creating conditions of prosperity for this and future generations. Awareness and respect for the rationality of these imperatives should therefore be integral to human conduct and all development activities. The strategy, or in Teune's words, the theory of change, of sustainable development is thus determined by *knowledge* of interdependence and by the *social interpretation or choice* that, as an implication of this rationality, the development process - i.e., conduct in general[200] - should respect this knowledge by integrating the requirement for an overall focus on sustaining needs and maintaining the biosphere if mankind is to prosper individually and collectively.

Against this background, I propose that the theoretical insight embedded in the vision of sustainable development is related to our knowledge of "what is", i.e. to the ontological starting point for our perception of the nature of reality and how we can acquire knowledge about it. Consequently, the unit of analysis for integration at the conceptual level - i.e., for construing a common denominator that can capture the defining characteristic of the composite concept of sustainable and development - is our system of knowledge**.**

The vision of sustainable development captures the insight that the development process is conditioned on the absolute fact of interdependence. Interdependence is a fact that epitomizes the vulnerability of the human race and the planet. We can change the way we deal with this fact about our material condition, but it is a commonality we cannot escape.

Interdependence is thus a condition determined by factors other than the human processes themselves and, applying Teune's theoretical framework for integration as defined in the preceding section, it is structural. Developmental sustainability - the

[200] See supra n. 53, Roundtable address at 3:
"The very nature of sustainable development is such that each and every segment of society should be allowed to participate in every day decision-making that has direct impact on their lives. Similarly, they have to be part of the implementation endeavors. Much more need to be done to promote democratization of decision-making and broad-based participation in implementation". .

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common denominator acknowledging a conceptually integrated understanding of sustainable development - thus implies a development that focuses on sustaining the biosphere and satisfying needs, and that, in order to do so, must acknowledge and respect interdependence as a structural condition for communication and action. This construction, which designates a structural condition for the generation of knowledge at the core of a conceptually integrated understanding of sustainable development, explains knowledge as created in a relationship between an absolute fact about our material condition and a collective and individual interpretation of this fact. Understanding knowledge as created, instead of found, requires and enables a dynamic and hence many-valued conception of reality. This claim points to a long standing philosophical debate, and in the following I attempt to provide evidence that the insight from practice - policy development and implementation - is fully compatible, although possibly different in terms of consequences, with the findings within science, in particular physics and psychology.

1.4 Underlying Philosophical and Theoretical Issues in Relation to Ontology and Epistemology

Construing sustainable development as an epistemic shift takes the analysis into the realms of ontology and epistemology, areas of the most fundamental and classical philosophical exploration that cannot be addressed within the framework of this thesis. I can here only point to the philosophical relevance of the construction and to some potentially productive areas for further investigation.

In the following, I briefly refer to the foundation of the existing model of knowledge and the rationality on which the present, dominant, neo-liberal policy paradigm is based, and to the relationship between philosophy and more recent developments within the field of science. The underlying philosophical issues in our conception of reality are related to "what is" and how we acquire knowledge about it. Is it through observation of the world or through our individual connection with a God or a world beyond? Is knowledge based on a revelation or on an interpretation of our relationship to the outer world, and what role does this foundation play in thinking? As Werner Heisenberg discusses in his *Physics and Philosophy,*[201] from classical antiquity to the

[201] Heisenberg, Werner. *Physics and Philosophy*. George Allen and Unwin Edition, 1959. Chapter five.

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middle ages, western thought moved from a focus on observable facts of the world to a focus on the soul. The Renaissance and the dawn of Modernity saw a revival of an interest in nature, which in the seventeenth century became part of the basis for development in philosophical ideas that accompanied a new understanding of knowledge and science. This renewed interest in empirical knowledge, which was combined with an interest in mathematics (Galileo), was perhaps partly due to the quest for acquiring knowledge that could be kept completely apart from the theological disputes raised by the Reformation and dominating the political power struggles of the age.

The first great philosopher of this new period, Rene Descartes (1596-1650), accepted neither revelation nor the evidence of the senses as a basis of knowledge, but with his method of doubt[202] he arrived at the famous statement 'cogito ergo sum′ as a basis for what he saw as a new and solid ground for a philosophical system. Descartes proceeded from establishing the existence of the "I" to prove the existence of God and of the world. This system is radically different from that of the ancient Greek philosophers, who looked for order in the infinite variety of things by looking for some fundamental unifying principle. Descartes tried to establish order starting from a fundamental principle--cogito ergo sum--and then proceeding based on a fundamental division of mind and matter, i.e., between I, the world, and God. In Descartes' system, God appears as a common reference point that establishes the relation between the I and the world, and the necessity of the relation is acknowledged.

However, in the following centuries a polarity developed between 'res cogitans' and 'res extensa', and this Cartesian division has since dominated the development of science. It was only seriously disputed in the middle of the twentieth century with the emergence of quantum theory. One can say that starting from the assumption that one can describe the world without speaking about God or ourselves seemed like a necessary condition for the progress of natural sciences in general, and even though the difficulties of maintaining the separation in the material world could be clearly seen from the beginning, the division was for several centuries extremely successful. In fact, this thinking remains productive today in so far as, according to the

[202] Descartes, Rene. *Discourse on Method and Meditations on First Philosophy.* Indianapolis/Cambridge: Hackett Publishing Company, 1998.

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Copenhagen interpretation of quantum theory, we can indeed proceed within science without mentioning ourselves as individuals, but we cannot disregard the fact that natural science is formed by humans.

The underlying difficulties in the questions regarding reality and perception have continued to be crucial to philosophical developments to this day, and the questions are also central to, for instance, empiricism (Locke, Berkeley and Hume) and German idealism represented by Immanuel Kant (1724-1804). Kant's *Critique of Pure Reason*[203] has been highly influential in developing our understanding of the relationship between reality and perception, but his *a priori* concepts, which he considered an indisputable truth, are, according to Heisenberg, no longer contained in the scientific system of modern physics. Still, they form part of the system of science in a different sense, because the classical concepts are used in describing that part of the world that does not belong to the object of experiment. What Kant had not foreseen was that these *a priori* concepts could be the conditions for science and at yet have only a limited range of applicability. For instance, his concept of causality does not accord with the theory of relativity, according to which, if one wants to know why, say, a certain particle was emitted at a particular time, we would have to know the microscopic structure of the whole world including that of ourselves, which is not possible.

Heisenberg concludes that, notwithstanding the insights from modern physics, Descartes' partition has penetrated deeply into the human mind, language and institutions during the last three centuries, and it will take a long time for it to be replaced by a really different attitude towards the problem of reality.

The development within science in the middle of the twentieth century, where quantum theory, the theory of relativity, Heisenberg's uncertainty principle, and Bohr's theory of complementarity all point to the same overall conclusion that "what is" is contingent and in a state of flux, has also been taken up in a number of social science publications.[204] The relevance of these scientific developments to social

[203] *Immanuel Kant's Critique of Pure Reason*. Translated by Norman Kemp Smith. London: MacMillan Education Ltd., 1989.
[204] A note of caveat:

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science is, for example, the subject of *Complementarity and Political Science*[205] from 1987. The principle of complementarity is also part of the theoretical framework of Morten Ougaard's *Political Globalization* from 2003.[206] He argues that the introduction of the notion of complementarity is concerned with extracting epistemological lessons, i.e., lessons about the conditions for acquiring knowledge about the external world. He further explains that Bohr's notion of complementarity was an attempt to develop a satisfactory philosophical understanding of problems related to quantum physics, which "implies the impossibility of any sharp separation between the behavior of atomic objects and the interaction with the measuring instruments which serve to define the conditions under which the phenomena appear" [16]. As a result, "evidence obtained under different experimental conditions cannot be comprehended within a single picture, but must be regarded as complementary in the sense that only the totality of the phenomena exhausts the possible information about the objects" [19].

The relevance of quantum theory is also addressed in a research project conducted by Alexander Wendt on a quantum epistemology of social science.[207] The research reconfigures the positivist-interpretivist debate in the light of the breakdown of the subject-object distinction in quantum mechanics, arguing for their inherent

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Physicist Alan D. Sokal caused a very heated debate, if not a scandal, when he in 1996 got *Social Text* an American journal of cultural studies, to publish an article "liberally salted with nonsense" and written by him with the sole purpose of testing the "prevailing intellectual standards" in certain precincts of American academic humanities. The debate extended to Europe and Asia and went on for several years. Here, however, it suffices to serve as a warning - careful, lean and rigorous analysis is a necessary basis for interdisciplinary co-operation; mere generalizations and adaptation of fashionable terminology and ideology will not do. It should also be mentioned that the journal *Metascience* Vol 9 No.3, 1998 included a book review [Sokal, Alan D. and Bricmont, Jean *Intellectual Impostures: Postmodern Philosophers' Abuse of Science*. London: Profile Books, 1998] by Henry Krips defending the social science e.g., by showing how in general terms metaphoric extensions are justified in science, because of their heuristic or mnemonic value in helping readers visualize and think about the process described. He further argues in some detail that it is Sokal and Bricmont who misunderstand and display a superficial acquaintance with Lacan, who is the focus of the critique.
Sokal, Alan D., "Transgressing the Boundaries: Towards a Transformative Hermeneutics of Quantum Gravity" in Social Text # 46/47, pp 217-252 (spring/summer 1996)
Sokal maintains a website with online access to the various articles written within the framework of the debate http://www.physics.nyu.edu/faculty/sokal/
Papers by Alan Sokal on the "*Social Text* Affair A Physicist Experiments with Cultural Studies. Accessed on June 28, 2004

[205] Rasmussen, Erik. *Complementarity and Political Science*..Odense: Odense University Press, 1987.

[206] Ougaard, Morten. *Political Globalization*. UK: Palgrave, 2003.

[207] Wendt, Alexander."Quantum Epistemology of Social Science," an ongoing research project according to the web-site of Alexander Wendt in 2004. In 2005 the work is referred to as a book manuscript on *Quantum Mind and Social Science* http://psweb.sbs.ohio-state.edu/faculty/wendt/. Accessed on 24 April 2005.

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"complementarity" in Bohr's sense. Further, the research puts forth the suggestion that man and society really are quantum phenomena, and looks into the implications of such a thesis for the understanding of the nature of human agency, the nature of society, and the epistemology of social inquiry.

The studies mentioned explain the epistemological lessons for the conceptual machinery of social science based on science-based conceptions of insight. Thus, the primary empirical material - social and political practice - becomes secondary to the scientific method, the standard of knowledge of the scientific theoretical framework. Although this relativity is arguably productive for quantitative and descriptive social sciences, law, has to translate policy and thus the knowledge and rationality on which it is based into action. Therefore, the challenge of articulating the implications of the epistemological lesson is different for law as is further argued in Part II.

However, in what follows I provide a summary of an article[208] as a further example of a social science approach to connecting the discourses between science and social science. The author, Serpil Oppermann, provides an overview of a number of philosophical and theoretical debates critiquing the dominant paradigm of western thought, which is described in some detail in the introduction of her article, but can be summarized in the following quote:

> The Cartesian and Newtonian conceptions of reality, acknowledged as the only valid model of an already unquestioned scientific and social paradigm, had drastic results in creating an ongoing division, fragmentation and disorientation in human consciousness.

Oppermann shows parallels between quantum theory, ecosophy and deep ecology, and claims that they all coalesce into a new postmodern paradigm. The analysis is remarkable in terms of its subject, viewing the perception of reality within science and social science as interrelated. However, the method and approach to analysis and the concluding claim that "an eco-centric postmodern discourse producing rhizomic narratives represents a great revolution in our very modes of thinking and acting in the world" and "Rhizome can be useful in describing the epistemic shift in the status of our knowledge" illustrate that social science itself and its methods are part of the

[208] Oppermann, Serpil. "Toward an Ecocentric Postmodern Theory: Fusing Deep Ecology and Quantum Mechanics." *The Trumpeter* Vol.19, No. 1 (2003).

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problem it critiques. This is because Oppermann's analysis linking the discourses within science and social sciences is descriptive/prescriptive in nature and does not provide any theoretical identification or explanation of an analytically addressable interface between mind and matter that would potentially overcome the critiqued "division, fragmentation and disorientation". Thus, the analysis presented does not succeed in escaping the same paradigm that it later critiques as "downright erratic".

However, Oppermann's article brings together a number of discourses in an interesting way and the following account draws out the main points of relevance. The author explains that according to the dominant paradigm of the Cartesian and Newtonian conceptions of reality the laws and concepts of natural science were strictly defined. The fact that they were basically conceptual and incomplete was discovered in the beginning of the twentieth century with the rise of the new physics, when Einstein's General Theory of Relativity (1913) demonstrated an interaction between matter and energy that questioned long-held assumptions about reality. Later work has shown that everything in physical reality is fundamentally interconnected.

After this introduction, Oppermann provides an account of the holistic view of quantum theory and its relation to ecological discourses. She claims that the necessary evidence for a non-dualistic worldview is provided by the ontological interpretation of the quantum theory at large that has been developed by physicist David Bohm, whose ontological theory of wholeness has significant philosophical implications. According to Bohm, "we need to create a new insight not only into the world as a whole, but also into how the instrument of thought is working. Such insight implies an original and creative act of perception into all aspects of life, mental and physical." As a solution to the problem of the logic of the mechanic paradigm being embedded in our language, he develops an alternative mode of language, which he calls "rhemode," that can reflect more accurately the true dynamic nature of the physical world. Bohm's holistic vision, that we are fundamentally interconnected in a web of life, is by no means new to the environmental philosophy and ecological discourse. Ecosophy, the philosophy of Arne Naess, views reality as fundamentally relational, and has led to the development of a comprehensive concept of an ecological self. Both Bohm and Naess give ontological primacy to interrelation instead of fragmentation, to process instead of state, and to holism instead of dualism.

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Ecosophy has evidently informed the formulation of the platform principles of the deep ecology movement. However, in deep ecology, the metaphysical notion of interrelatedness of all things is replaced by the "intrinsic value" of the natural world. Deep ecology is thus not so relevant to the paradigm shift as Bohm's and Naess' thinking, which avoid the problem of privileging one perspective over the other. According to the author, this point links the quantum and ecological discourses to critical theory, because post-modernism should not be confused with the actual problems it defines, such as fragmentation and the break down of coherence, because postmodernism's discourse involves thought patterns that transcend the binarism of Western thought [21] and thus, according to Oppermann, avoids creating another totalizing theory.

From this viewpoint, Oppermann sees the common perspectives among postmodernism, deep ecology and quantum theory coalesce into an "emergent postmodern paradigm," thereby enacting the unfolding process of holistic logic that overcomes the myth of fragmentation. This perspective can enable a holistic worldview to be the only relevant reference point in building a new paradigm. "Today, lingering in relativistic theorizing becomes meaningless, what is required is 'the unicity of the referent as a guarantee for the possibility of agreement' as Lyotard aptly puts it." [89]. Thus, the author claims that what we need is a *discursive transformation* in the whole of human perception of the world such as the Cartesian partition achieved. Political practice alone, or social activism, cannot transcend the still dominant disciplinary formations. The new paradigm shift can only be fully realized and infiltrate mass consciousness and cultural forms by a fundamental change in our thinking, our attitudes and practices, and in our entire knowledge of the world. According to Oppermann, such change can come by crossing the boundaries between ecological, cultural, ethical and critical theory and by building new discourses based on ecocentric values as well as absorbing the lessons and holistic theory of quantum physics. The author suggests applying the concept of "rhizome" developed by Deleuze and Guattari. Rhizome is defined as "a connection" that "brings into play very different regimes of signs, and even non-sign states. It is composed not of units but of dimensions, or rather directions in motion". [64fn] Rhizome is thus seen to provide a conceptual opportunity to formulate the central relations among postmodern

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ecological and quantum theories. As such, it is a transformative concept to show how interconnections between different discourses meet to provide a potential for discursive change.

In conclusion, the author notes that all the arguments from the different environmental discourses on moral, social, cultural, economic and ideological grounds fail to create a consensus. Although all the work done in this area is very important in calling attention to the need for holistic discourses, they have nevertheless not been able to affect a discursive shift. Therefore, Oppermann claims that: "It can be argued that, at this historical moment, bringing postmodernism, quantum theory and the philosophy of deep ecology together in the context of their common emancipatory ideas is of crucial significance".

However, as should be clear by now, I claim that bringing discourses together will not suffice for developing alternatives to the critiqued paradigm, since it is crucial that the approach to an analysis attempting to bridge theory and practice must identify the interface not between theories but between practice and theory in a manner that is accessible for analysis. Studying practice will, according to my research, reveal that the much sought after change in knowledge has occurred, and it is the conceptual machinery with which we describe the world that must be developed to enable social and political change instead of only prescribing and describing it.

In my opinion, explaining anything, for example, the generation of knowledge at the macro socio-political level, requires explaining the micro philosophical/psychological aspects of the phenomena. In order to explain certain issues in the current debate, I draw on *Geography of Thought*[209], in which the author, Richard E. Nisbett, claims that he has discovered that thinking and perception are not universals.[210] To the contrary, based on empirical research, he argues that there are major differences between East and West, and he attributes these differences largely to differences in the ecological condition of ancient Greece and ancient China. Nisbett debates some of the implications of these findings for co-existence, and his final conclusion is that,

[209] Nisbett, Richard. *The Geography of Thought: How Asians and Westerners Think Differently ...and Why*. New York: The Free Press, 2003.
[210] Other disciplines such as sociology has discussed the subject already in the sixties. See, e.g., Berger, Peter and Thomas Luckmann,. *The Social Construction of Reality* London: The Penguin Press, 1966.

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since the social practices are changing all over the world and becoming more alike, our thinking will probably also converge. "East and West may contribute to a blended world where social and cognitive aspects of both regions are represented but transformed - like the individual ingredients in a stew that are recognizable but are altered as they alter the whole."

Although the book is a popularisation of academic work, Nisbett is highly regarded in his field and the first social psychologist in a generation to be elected to the National Academy of Sciences. Therefore, I single out his work as a very recent example of mainstream academic work uncovering the fact that there are different ways of perceiving the world, and that perception has implications in the life of politics, and for the relations among people as well as for philosophy and science.

In his book, Nisbett describes the empirical research undertaken to support the claim that very different systems of perception and thought exist and have existed for thousands of years. He further backs his contention with reference to historical and philosophical evidence as well as evidence from modern social science research including ethnographies, surveys and laboratory research. Although he apologizes for his sweeping generalizations when discussing Easterners and Westerners as representing the system of thought of Aristotle and Confucius, his ideas are nevertheless presented as a scientific theory, because it leads to predictions that can be tested and tested in the psychological laboratory. Nisbett does not present the differences between Easterners and Westerners perception as differences between two systems of logic. For him, the term logic seems to refer to the system of formal reasoning introduced by Aristotle that is based on the principles of the law of the excluded middle, the law of contradiction and the law of identity.

Today it is acknowledged that one can talk about logic that can be more complex. In Aristotelian, or categorical, logic, a statement can only be true or false, not both at the same time. In modern logic, there can be alternative valuations of a statement. In fuzzy logic, we can speak of the proportion of truth in each statement. Colloquially, one can speak of, for example, economic logic and the logic of war.

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The Confucian way of reasoning is presented as dialectical, - meaning that it focuses on contradictions and how to resolve them or transcend them or find the truth in both. Three principles are articulated as being characteristic:

- The principle of Change
- The Principle of Contradiction
- The Principle of Relationship, or Holism

This leads to a long list of opposites characterizing Westerners and Easterners, respectively. [211]

The research undertaken makes for engaging reading and here is an example.

> We presented participants with sets of three words (e.g., panda, monkey, banana) and asked them to indicate which two of the three were most closely related. The American participants showed a marked preference for grouping on the basis of common category membership: Panda and monkey fit into the animal category. The Chinese participants showed a preference for grouping on the basis of thematic relationships (e.g., monkey and banana) and justified their answers in terms of relationships: Monkeys eats bananas.

Nisbett does reflect on the fact that a variety of tests including this type are used to label people as cognitively impaired and learning disabled. He, however, does not reflect on the possible implications of the findings for his own research. In fact, concluding that cognition is not universal, he seemingly conflates the process of cognition with the physical faculty of cognition, as his unit of analysis includes the properties of two concrete instances of categorizing perception, and not two different cognitive physical faculties. Metaphorically, I propose that the physiological aspects of the cognitive system, the hardware as it were, is universal. However it can run on different operating systems, which in turn enables different applications. The structuring function of the worldview determining cognition and epistemology is universal because for us to make sense of the world, to connect between the I and the

[211] I have picked the following from different pages in the book:

- individual agency versus collective agency
- static- dynamic
- object - relationship
- control of the world - self control
- concerned with finding the truth - concerned with finding the right way
- separate (object) - whole (context)
- backward orientation (the truth) - forward (the right response)
- freedom - harmony
- linear - circular
- wisdom = knowledge not inherent to action - wisdom=knowledge in action
- nature =universe -human beings

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world, we require a constant, an ontological starting point, that functions as a standard for rules that determine the validity of conclusions about the world. Such a standard seems to be a necessary condition for human beings to make sense of a complex world, and I propose that, although implicit, it is inherent to all systems of cognition or thinking. As I try to demonstrate in the next section, the real contribution of the sustainable development policy is that the process of developing the policy has made the cognitive role of the worldview and its ontological starting point visible and thus accessible to analysis. The policy further provides the material for developing an epistemological model of sustainable development and in fact, so it is argued, offers a way of enabling an integration of prevailing perspectives of Western and Eastern "operating systems."

Section 2 Towards an Epistemic Model of Sustainable Development

2.1 Outline of an Abstract Model of Knowledge

In Section 1.3 I have attempted to disentangle the rationality underlying the sustainable development policy. I now propose that the epistemological significance of the rationality of the sustainable development policy is the fact that the policy acknowledges and demonstrates that our knowledge about "what is" is contingent on the condition of interdependence. Further, the policy process has shown that we *de facto* apply our fundamental conception of the nature of "what is" as an ontological starting point for organizing our perception of the world. And according to the strategy for policy implementation, such knowledge about these fundamental facts should rationally be reflected in actions and institutions. Based on this, I claim that, implicitly, this requires that a notion of the nature of "what is" - i.e., the ontological starting point - be integrated into our conception of or standard for how we generate knowledge.[212]

[212] I derive this claim from the rationality of sustainable development, but further investigations of the claim should draw on cognitive science also. The following article - comparing a linear logistic test model approach with a structural equation modeling approach is interesting in that it shows how the method applied is to a certain degree deciding for the outcome of the research: Dimitrov, Dimiter & Raykov, Tenko. "Validation of Cognitive Structures: A Structural Equation Modeling Approach.",*Multivariate Behavioral Research*, 38 (1), pp 1-23.

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I argue that this epistemological lesson from sustainable development represents a shift from a mechanical to a dynamic paradigm of the reality of "what is". I attempt to show how this lesson can be construed as an abstract model outlining the relationship between the different elements of the rationality underlying sustainable development, i.e., the nature of "what is". The different elements involved are the fact of interdependence, the perception of interdependence, and the implications of fact/perception for the organization of cognition, conduct and institutional development. For analytical purposes, I attempt in the following to explain how the evolving sustainable development policy has generated empirical material for construing a distinct, purely abstract model of knowledge as relational and thus dynamic. In the following section I discuss a more elaborated version of the model, which contains the full normativity of the sustainable development policy.

Applying Teune's theoretical framework as laid out above in Section 1.3. to the above interpretation of the rationality as an epistemological lesson, the abstract model consists of knowledge seen as a system and including:

- A structure part containing a conditioning factor
- A process part consisting of two aspects:
  - Awareness of the structural conditions and general categorization
  - Particular interpretation and choice of course of action

The sustainable development insight into the factual and conditioning nature of "interdependence" is the basis for understanding knowledge as a system containing both structure and process as analytically distinct components.[213] It enables us to construe an understanding of our ability to know about "what is" not as a substantive denomination but as generated in a dynamic exchange between structure and process, between knowledge and choice. Such a dynamic conception of knowledge can therefore capture not only a "state" of "what is" but also "what is" as being in "a state of flux".

Accepting and using this model has potentially vast implications of an epistemological, theoretical, normative, political and cognitive nature concerning knowledge, definition of rationality and the conception of the relationship between

[213] See Chapter 6, e.g., the analysis of Jurgen Habermas': "A Proceduralist Paradigm of Law."

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self and community, and, possibly, even to the relationship between self and "the beyond." Change in these fundamental conceptions in turn implies changes in the (professional) conceptual machinery with which we communicate and categorize the world. Going deeper into these fields is, however, premature, and here I point only to the two most fundamental implications:

> Acknowledging "interdependence"[214] as the core of the rationality underlying sustainable development, logically necessitates acknowledging the idea of a whole, however elusive, and thus the understanding of the particular as being inherently related to the whole and vice versa. We cannot have the one without the other and, as such, there is in the abstract no *a priori* argument for the importance of the one over the other.
>
> Acknowledging the "butterfly effect" is also a logical extension of acknowledging interdependence. The "butterfly effect" is a metaphor for the fact that action at the particular level will affect the whole and not only the separate target and identifiable externalities, because the whole is infinitely complex in its interrelatedness and, as such, not predictable. This is a general condition and can only be acknowledged in principle.

These logical implications change the foundation of perception and communication into questions of degree along a continuum rather than questions of an absolute state.

Without fully facing the challenge of the above claimed consequences - namely, how to integrate a many-valued conception of reality into our conceptual machinery - science has addressed its understanding of complexity and partial irreversibility as fundamental conditions for knowing with Heisenberg's uncertainty principle and with Bohr's principle of complementarity. In law and policy, the precautionary principle

[214] Acknowledgement of "interdependence" is at the heart of the theory of change or the rationality underlying the sustainable development policy. But "interdependence" is overwhelmingly recognized as central within a vast number of issues. The pervasiveness of the debates can be confirmed by a simple internet search on the term, the themes range from composition of music over development of a global "Declaration of Interdependence" http://www.davidsuzuki.org/ ; to web casting from the World Economic Forum: "The Future of Global Interdependence" in January 2004. The meeting was introduced by Kofi Annan, chaired by Paul Martin, Prime Minister of Canada and the Master of Ceremonies was Klaus Schwab, Founder and Executive Chairman, World Economic Forum. http://www.weforum.org/

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has received widespread acceptance at the global level within the last twenty years as a way of dealing with complexity and uncertainty.

The claim to epistemic significance of sustainable development has been raised within a variety of different frameworks. However, the studies identified[215] all remain within the epistemology of their particular professional area and thus are not directly relevant to the present analysis of the insight in which the very policy concept is embedded. The existing studies found are all examples of a "nested paradigm" approach, to use Kuhn's terms.

The present analysis of the knowledge generated by the sustainable development process has resulted in construction of a structurally different epistemology, moving from a bipolar (static) to a many-valued (dynamic) conception of knowledge. Hence, the real significance of a sustainable development epistemology as construed above is not only the actual content of the knowledge system but the fact that it shows the role and importance of the ontological starting point in perception, knowledge generation and institutional development. This disclosure articulated in a model perspective provides a more comprehensive mental infrastructure and language fit for matching the dynamic reality facing us in a global polity.[216]

Now, synchronizing our conceptual machinery with our knowledge might appear insurmountable. However, it is significant for the imperative nature of the claim presented here that: first, the analysis is based on developments within global policy and governance; and second, the structure of the epistemology is well known within other subject areas ranging from general systems theory to Buddhist (legal)

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[215] See, e.g. , Harris, Jonathan. (ed.) *Rethinking Sustainability - Power, Knowledge, and Institution.* University of Michigan Press, 2000.
International Workshop on Interfaces between Science & Society, Milan 27-28 November 2003 organized by the European Commission - Joint Research Centre, Institute for the Protection and Security of the Citizen - Knowledge Assessment Methodology Sector. - http://www.nusap.net/article.php?sid=18&mode=thread&order=0&thold=0
Berlin conference on *Knowledge for the Sustainability Transition the Challenge for Social Science* Berlin 6-7 December 2002 organized by the Environmental Policy and Global Change Section of the German Political Association Global Governance Project of the Potsdam Institute for Climate Impact Research the Environmental Policy Research Unit of the Free University of Berlin. http://www.glogov.org/front_content.php?idcat=92

[216] To use a metaphor this exercise is essentially about installing a new operating system because it existing one can no longer run the latest applications, which have been developed in response to the output requirements of the market/productive forces.

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scholarship.[217] Therefore, I hope that I have argued convincingly that the present embryonic epistemological model based on sustainable development deserves further investigation.

While the challenges of ontology and epistemology are seriously debated issues in professional and philosophical fora,[218] the significance of interpreting sustainable development as an epistemic shift is that this shift is generated based on a global political process that in principle captures the whole and is not *a priori* limited by a particular approach to the concept of knowledge embedded in professional disciplines and/or more particularistic cultures.

An epistemic model defining the rules by which we can know about "what is" is by nature normative because of the structure and authority it establishes. The normative effect cannot be escaped even in an abstract model because, even if the structure is not recognized and named, the lack of explicit authority becomes implicit authority because of the cognitive need for a reference point. Therefore, it is also difficult to distinguish between the abstract model and the normative version of the model, particularly when developing implications that go beyond logical inference.

2.2 The Vision of Sustainable Development and a Normative Model

The importance of presenting two distinct versions is to underline the significance of the awareness of the need for integration of the ontological starting point independently of the actual policy content, and to separate analytically what might be a fact by logical inference and what might contain an implicit choice. The finer categorization is therefore at this stage not crucial, and in the following I continue to elaborate the model in relation to its normative version, although some elements might logically need representation in the abstract model also.

The vision of sustainable development as originally formulated by the WCSD was expressed as: "Sustainable development is a development that meets the needs of the present without compromising the ability of future generations to meet their own needs." This vision is, in fact, a model in that the vision represents a dynamic whole,

[217] See Chapter 7.
[218] See Chapter 7.

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which can be understood as a reference point. It is a perspective from which we can examine a situation - the global development process - too complex for human beings to imagine.

The rationality underlying this model has to be interpreted within an understanding of the whole policy process, from Stockholm to Johannesburg and beyond. This process has been shown to present sustainable development as having evolved into a principled and universal policy concept, which is based on the acknowledgement of interdependence and which requires participation as a mode of operation and which gives priority to upholding the biosphere and satisfying basic needs. Institutionally, it includes a micro foundation through the explicit inclusion of the individual actor. The policy is universal in that it relates to both the objective of development and the process of achieving it, and also in that it can apply to multiple levels of society. In particular, starting from the Johannesburg Summit it is clear that the policy is conceived of as relevant to the processes of globalisation and governance and to the idea of global governance.[219]

Thus, the central normative meaning in the sustainable development policy prescribes that the *de facto* interdependence or contingency of existence should be respected and accounted for as a standard for the determination of rational conduct, because fundamentally there are no absolute rights or freedoms without the inherent restraint of interdependence. Further, it shows that such acknowledgement of *de facto* interdependence is a structuring factor for individual and collective cognition, which means that the participation of the individual is also a requirement that is logically implied in the abstract meaning of sustainable development. At a more concrete level, the demand for participation is supported by the fact that all human conduct has an impact on the conditions of the collective and that all human beings are vulnerable to other people's conduct. Therefore, participation is required to enable people to take charge of and be responsible for their individual power and to give them an opportunity to voice their vulnerability and inform the collective.

[219] See supra n. 4, Johannesburg, in Resolution 2: *The Plan of Implementation* Chapter V and Chapter XI respectively .

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Further, the logical implication of interdependence as the defining principle linking the whole and the particular - i.e., that there is no a priori argument for giving priority to one over the other - lends, in the abstract, strong support to an equality norm that is inherent in the sustainable development policy and that requires that resources should be upheld (protection of the biosphere) and be used so as to satisfy the needs of all and all to come. It can thus be argued that the question of distribution is integral to the rationality for decision making and conduct, and that the model contains a concept of equality that is not only formal or based on moral obligations but which is a substantive part of the equation for determining rational and legitimate conduct.

According to the model, there is an objective fact about our material conditions, namely that life is contingent on interdependence. This is an objective fact that is equally valid for everybody, not relative but of equal relevance for all. Thus, a factual commonality is articulated. The sustainable development model can thus contain the individual awareness that we are all part of or belong to a whole, so to act rationally we must take a broader perspective including the social and physical habitat on which we depend. The normativity of the sustainable development epistemology thus represents a collective choice of respecting boundaries for freedom set by the imperative of the continued existence of the elusive whole, i.e., the prospering of the biosphere and the human species. The articulation of the model is therefore reinforced by the fact that people today can have a visual representation of the planet seen from space, a vision that became technologically possible sometime around the middle of the last century.

2.3 From Model to Practice

I have attempted to show how we can conceptually integrate the rationality of sustainability into the definition of development through the articulation of an epistemic model. This exercise produced a language for connecting an understanding of the conditioning nature of the material reality with our understanding of knowledge. And it produced a result beyond the politics of sustainable development by making analytically distinct the premise of rationality underlying values, thus expanding the mental infrastructure underlying communication and deliberation. Now the question is how to integrate - institutionalise - the epistemology of the policy into

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the language and practice of the actual development process. This is an abstract, theoretical and a practical problem.

Addressing here the abstract aspect of the problem, it is necessary to theorize. According to Rosenau,[220] theorizing - or moving up the ladder of abstraction - starts with asking, "of what is this an instance?" When applied to the challenge of institutionalising the epistemology of the policy into the development practice, policy can be seen as an instance of normativity and the development process can be seen as an instance of human conduct.

Normativity and human conduct are instances of mind, and thus, institutionalising "developmental sustainability", requires, fundamentally, that the epistemology be embedded in individual agency, i.e., in the very standard of what constitutes knowledge and rational and legitimate behaviour. Institutionalising via particular disciplines or concrete rules and institutions will not suffice. This line of argument is continued in chapter 6 and 7.

2.4 A Preliminary Conclusion

In what follows, I briefly contrast the dominant economic[221] and the emerging sustainable development paradigms, mainly to demonstrate why the exercise of articulating the policy as an epistemic shift may be helpful in enabling change towards sustainable development. In doing so, I assume that referring to the neo-liberal paradigm as the presently globally dominant policy paradigm is not controversial. This is arguably also true for the following simplified and schematic characterization of the policy paradigm.

First, the philosophies and the theory of change underlying the neo-liberal paradigm are based philosophically on Descartes and subsequent economic theory. Its roots span 200 to 300 years. Here, however, I only refer to a crude model represented in today's politics. The theory of change underlying the neo-liberal policies - which

[220] See supra n. 8, Rosenau and Durfee.
[221] The present thesis in no way claims to contain an analysis or any particular critique of the existing paradigm. Critique is not considered a viable method for the present exercise, because the object of critique determines the knowledge to be included, therefore the relevance of a different perspective can only be postulated and not argued on its own premise.

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holds that our conditions will improve when the individual is left free to pursue his or her interest and government should be charged with providing only the minimum security and welfare conditions - can be seen as epitomized in Margaret Thatcher's famous statements "there is no such thing as society" and "there is no alternative".

The important insight from the sustainable development policy is that practice reports back to the political, philosophical, and academic quarters that the theory of change underlying the neo-liberal economic paradigm no longer corresponds to our collective knowledge, because we know that we are conditioned on interdependence, and that, no matter how we choose to conceptualise and construe the implications of this knowledge, there is, therefore, an alternative. Now there is a need to develop new theories and a political philosophy that can coherently explain the logic of the alternative and the consequences of interdependence.

It has only been possible to identify the epistemic importance of "interdependence" through the "theory of change" underlying the sustainable development policy because it is a global and explicit process. This explicitness has disclosed the reductionism of the present neo-liberal paradigm, which cannot account for its relation to the material world and its ideational foundation without reference to a logic embedded in economic theory.

Under the sustainable development paradigm, the knowledge model consists of a structure based on an absolute fact about our material condition, and actual knowledge is generated as an interpretation of this fact according to a general ideational foundation developed within the policy of sustainable development and according to an individual and particular contribution. This enables the model to explain the source of the legitimating claim of the paradigm. The model is relational - knowledge is created in the relation between the material fact of interdependence and human interpretation as expressed in conduct - and thus many-valued, which enables it to capture the dynamic and complex nature of the material reality of which we are part.

However, from the policy point of view, a final argument for trying to develop this perspective is that under today's technological conditions it is clear that no external

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authority can keep a leash on human power by force [of positive law] alone, and at the same time secure and promote the security, freedom and prosperity on which we depend. Therefore, I argue that an explanatory institutional model is required which can demonstrate that, fundamentally and in accordance with our collective knowledge, there is a factual, restraining, and enabling commonality that we cannot escape, namely, shared knowledge about the nature of our shared conditions, and that in a global age authority and accountability is assigned and universal, and not only delegated and particular. These points are taken up in greater detail in Part II.

According to this account of the theoretical insight from sustainable development, I claim that, if a global policy practice together with the social and natural sciences have reached the same or a compatible conclusion about the nature of reality and the material conditions under which we can acquire knowledge, it is conceivable that this shared knowledge - the articulation of a commonality - can change the conditions of the debate and serve as an important platform for communication and co-existence in a global age, where agreement on truth and absolute values, such as the freedom of the individual, cannot be reached. This claim is elaborated in the last chapter of this thesis concerning a future research agenda, where I argue that a legal conception of this insight about the nature of reality may capture crucial aspects that cannot be captured by science, which is largely concerned with description and quantification and cannot capture the element of accountability and responsibility that is inherent to action and interdependence.

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Part II
Sustainable Development and the Concept of Law in a Global Age

Chapter 5 From the International Law of Co-operation among Sovereign States to Law and Global Governance

> Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange and even paradoxical ways as the question "what is law?"[222] Even if we confine our attention to the legal theory of the last 150 years and neglect classical and medieval speculation about the "nature" of law, we shall find a situation not paralleled in any other subject systematically studied as a separate academic discipline.[223]

Today, the literature, journals, and the law school programs[224] concerned with the relationship between law and a global society are burgeoning. Part II of this thesis is focused on the concept, or, more precisely, the conceptualization of law in a global age. Its purpose is to present the central issues under debate to identify general problems facing the legal discipline in the ongoing transition to what might become a global polity.[225] The problems identified in Chapters 5 and 6 are addressed in Chapter 7, which re-describes the concept of law from the perspective of sustainable development. However, I make no claim nor have any pretensions to resolving any particular proposition from these debates, which are presented only to support the claim that the overall problem of the relationship between law and society under conditions of globalization is acknowledged as being of vital importance.

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[222] This includes the question of "what is legal theory" as evidenced also by the postscript to the second edition of H.L.A. Hart's *The Concept of Law*. Oxford: Oxford University Press, 1994, which includes Hart's response to Dworkin's continued critique.
For a short definition of jurisprudence and legal theory, see supra n. 184, Hayman and Levit at 5. Mark Van Hoecke provides a general introduction to the concepts and terminology of jurisprudence and legal theory in *What is Legal Theory?* Leuven: Acco, 1985. Robert Alexy focuses in *The Argument from Injustice*. Oxford: Clarendon Press, 2002 on the inadequacy of positivist concepts and demonstrates the practical relevance of the theoretical debate.

[223] See Hart, supra n 222 at 1.

[224] See, e.g., the New York University Institute for International Law and Justice (IILJ), which in 2002 hosted a workshop to establish the agenda of the Institute's centerpiece Research Project: Legitimacy, Democracy and Justice in International Governance. A report of the inaugural workshop is available on http://www.iilj.org/. Accessed on 8 April 2005. The site provides links to other sources concerning global law.

[225] A note on scope: the subject is law and jurisprudence in a global age, thus it would be highly relevant to include material from other cultures and languages groups. However, the limited selection of international English language material covering only the western experience should be seen as exemplifying a response to the common problems facing law in the world at large, while the question of the contribution from other cultures and language groups to the further development of a global legal culture is acknowledged in Chapter 8 containing a future research agenda.

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As the introductory quote from *The Concept of Law* points out, the question of the nature of law and its role in society has been intensely debated for centuries. Even now in today's global age, there is little theoretical consensus regarding the nature and significance of law.[226] However, despite the cognitive dissonance created by the gap between the de facto and the theoretical situation, there is an ever-growing body of functional law at the global level.

Still, the prevailing formal institutional system consists of sovereign, co-operating Nation-states,[227] international organizations, and at least two distinct bodies of rules, namely national or municipal law and international law. Perhaps legal positivism, in particular Hart's conceptual machinery explaining law in terms of primary and secondary rules, is the most widely accepted and influential framework for understanding and explaining the system of law today. However, modern versions of natural law theories influence the debate as well from a more philosophical perspective. Although in Hart's original perspective, international law is an immature version of national law, [228] conceptions of universal law and law among sovereign states are inherent in philosophical and legal writing.

In the present global age, there is, in the abstract, a universal constituency. Therefore, it is relevant to elaborate on Natural Law, a system of justice held to be common to all humans and derived from our nature. However, current natural law theories, such as John Rawl's A *Theory of Justice,* are not highly visible in the debate over law and global governance. Possibly, this is so because, contradictory as it might seem, the theories are tightly bound to a particular cultural value system, which does not necessarily have global scope and appeal. Nonetheless, the conceptual machinery of

[226]Cutler, C. "Law in a Global Polity" in Ougaard, M. and r. Higgot (eds.). *Towards a Global Polity* London: Routledge, 2002. pp 58-78.

[227] International law as a distinct area of law dates back to Westphalian Peace Accords in 1648 but the present system of international law and organizations was established after the Second World War. See Buergenthal, T. & Maier, H. *Public International Law, 2nd Ed.* St.Paul, MN: West Publishing Co., 1990; and for a historic perspective e.g., Gross. "*The Peace of Westphalia: 1648-1948"* 42 AJIL 20-41 (1948).

[228] See supra n. 222 at 3, where Hart describes how the status of international law as a legal system is being questioned:

> Primitive law and international law are the foremost of such doubtful cases, and it is notorious that many find that there are reasons, though usually not conclusive ones, for denying the property of the now conventional use of "law" in these cases.

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Natural Law is relevant to the relationship between law and sustainable development. Thus, the topic is included in Chapter 8 concerning a future research agenda.

Although Hart's theory addressed most directly national law, today other writers have adapted the conceptual machinery of Hart's work to describe law generally and in the context of international law.[229] This expansion is also a result of the fact that international law doctrine traditionally has been developed from a national perspective; consequently, a globally universal body of legal philosophy and theory has not emerged. Today, however, there is a growing body of literature addressing law from an international or global perspective, because the political, institutional and socio-economic landscape underlying law is rapidly changing and the new realities require new ways of looking at the question of "what is law". International law is no longer about co-operation between sovereign nation states only, but instead there is a move towards "universal" influence on the decision-making processes shaping law and governance at a global level,[230] and towards covering a growing number of regulatory regimes, such as, for example, human rights, trade, and environment. These regimes are seen as constitutionalising[231] themselves, and this phenomenon has led to or reinforced the debate about coherence or "unity or fragmentation" of international law as is debated in Section 1 of this Chapter.

Coherence, democracy, justice, peace and prosperity are the traditional sources of normative legitimacy. In the following sections I describe the debates arising from *de facto* global governance and the role of law in establishing this emerging order. In

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[229] See, e.g., Kingbury, Benedict. "The International Legal Order" IILJ Working Paper 2003/1, History and Theory of International Law Series. p 11.

> In the 1970s it seemed reasonable clear to most international lawyers that an international legal system could be identified in terms of H.L. Hart's union of primary and secondary rules. All participants acknowledged a large part of primary rules of state conduct. Enough agreement on sources of international law existed to satisfy in at least a rudimentary way Hart's requirement of a rule of recognition. The system struggled with a theory of legal change but was at least able to consolidate and memorialize change through global conferences or authoritative decisions. A reasonable orderly structure of adjudication had emerged centered on the ICJ and complemented by some arbitral jurisprudence and by a few specialist regional adjudicatory bodies.
>
> As the volume and scope of the practice falling within the domain of international law have grown, however, the complacent assumption that it all forms part of a single system has seemed increasingly precarious.

[230] See, e.g., Part I**.**

[231] See, e.g., Trachtman, Joel P. "The International Economic Law Revolution" in 17 *U.Pa. J. Int'l Econ. L.* (1996) and more recently e.g., Helfer, Laurence R. "Constitutional Analogies in the International Legal System" *Loyola of Los Angeles Law Review*, Vol.37, Issue 2, pp. 93-239. (2003)

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addition, I attempt to describe what is its fundamental idea or justification addressing whether it is a normative or mainly a technical order?

Within the global policy debate, the requisite political,[232] material and communicative conditions enabling a discussion of the idea of a global community and the *de facto* role of law in shaping global governance are widely debated.[233] Even space exploration has played a part in shaping the debate, if only because photographs taken from outer space have made it possible to visualize the earth as a whole. At a general level, this visualization has enabled a universal acknowledgement of the spatial and material unity of a global framework, in which the cultural, political, legal and economic diversity and plurality of the world is nested. Capturing this fundamental "unity in diversity" underlying the term "global" is a systemic challenge for the legal discipline as discussed in Chapter 3.

In the discussion that follows, although the subject is elaborated through both empirical and theoretical material, the conclusions coalesce: the search for an overarching perspective has not discovered a shared reference point for law in a global age. The legal discipline, therefore, confines itself to improving "functionality" and "limiting itself to its classical role: to furnish compensation for and curb damage to human and natural environments" as will be described in particular in the following Sections 2.2 and 3.1.

This Chapter is meant to explain the nature of the debate over the role of international law and jurisprudence. Unfortunately, within the scope of this chapter, I cannot do justice to the richness of the work underlying the debate. Here the selected materials serve only to show that, regardless of perspective, the general conclusion can be summarized as follows: we are behind the curve and without the language to describe

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[232] Ladeur, K-H. in "Perspectives on a Post-Modern Theory of Law" in Teubner, G. (ed), *Autopoietic Law: A New Approach to Law and Society*. Berlin/New York: Walther de Gruyter, 1988, emphasizes the importance of acknowledging also the historical perspective, pp. 242-82.

[233] There is a debate about jurification or legalization of world politics see, e.g., Slaughter, Anne-Marie. *A New World Order*. Princeton, N.J.; Oxford: Princeton University Press, 2004.
Kratochwill, Friedrich. "The 'Legalization' of World Politics?" Symposium on the "International Legal Order"; Vienna, Nov. 4-5, 2002. Proceedings published in Leiden Journal of International Law. Issue 16 (2003) 4. "Constructing World Orders", the Fifth Pan-European International Relations Conference, Section 1 of the Conference: *Legalisation and World Politics*. The Hague, September 9-11, 2004.

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what is facing us. And further, that the problems in law, as exemplified by the following quote, are part of a larger picture of a changing socio-economic reality.[234]

> … What they [the articles included in the chapter] do seem to share - and what places them in this chapter - is a sense that the conventional ways of thinking and talking about law are no longer adequate to describe law as it is practiced and law as it lived. And they arrive at this point not because law has become divorced, in their view, from mainstream epistemologies, but rather because these epistemologies are no longer adequate to convey a sense of the world. The crisis of justice, in short, is concurrent with the crisis of truth.[235]
>
> That crisis of truth may become more particularly described as a crisis of representation. It is essentially (and hence superficially and far too generally), a three-fold crisis, generated by radical challenges to the traditional conceptions, first, of reality; second, of the language we use to describe that reality; and third, of the subject who perceives and describes that reality, that is, the self. In the postmodern world these categories largely dissolve: the demise of the objective, of the real, is accompanied by the destruction of the subjective.[236]

We will see that the problem of dissolving categories is not limited to the abstract sphere of the subjective/objective but also occurs at the empirical level within the legal disciplines influencing, for instance, the private/public, the international/national, and the environment/economic dichotomies. Chapter 6 will touch upon the distinction between self and community[237] from the perspective of conceptualizing governance and the individual as both the author and the addressee of the law.

Section 1 International Law: Unity or Fragmentation?

1.1 The Empirical Debate

The world order institutionalized after the Second World War with the establishment of the United Nations and the ratification of the Bretton Woods Agreement was built on the idea of international law as a distinct body of law. However, although the framers of the system envisioned a role for the international community in making the world a better place, the UN Charter, which was created to assist the existing international system of sovereign nation states better coexist and co-operate to promote peace and prosperity, did not establish any form of general law making power. Yet, for example, Article 2 of the Charter, which establishes the principle of

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[234] See, e.g., Santos, Boaventura de Sousa. "*Law:*A Map of Misreading. Toward a Postmodern Conception of Law" 14 J.L. Soc'Y 279 (1987); Koskenniemi, Martti and Laino, Paivi, "Fragmentation of International Law? Postmodern Anxieties," 15 *Leiden J.INT'L. 553* (2002).
[235] Cf. Seyla Benhabib, *Epistemologies of Postmodernism: A Rejoinder to Jean-Francois Lyotard,* in FEMINISM/ POSTMODERNISM 107, 124 ("Questions of truth …are questions of justice as well.").
[236] Hayman, Robert and Nancy Levit m" in *Jurisprudence - Contemporary Readings, Problems, and Narratives.* St. Paul, Minn.: West Publishing Co., 1994. p. 509.
[237] Dufour, Dany-Robert. "The Individual in Disarray" (Le Monde Diplomatique, Feb. 2001 pp. 8-9.).

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sovereign equality of all its Member States, specifies that the Organization has an obligation to refrain from intervening in domestic affairs, and, importantly, articulates constraints on the threat of or actual use of force. Thus, some have suggested that the UN Charter can be compared to the constitution of an international society.

However, such a constitutional dimension of the Charter was comprehensively debated on the occasion of the fiftieth anniversary of the Organization.[238] Article 103, which reads "in the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail," enables a comparison of the Charter to that of a national constitution in relation to domestic law, by placing the Charter at the apex in the hierarchy of international norms.[239]

As a concrete matter, international law is developing under the auspices of the UN and several major developments have been achieved and initiated[240] during the "Decade of International Law".[241] The role of the Security Council has recently been likened to a world legislator,[242] and, concerning the role of the International Court of

[238] See, e.g., Dupuy, Pierre-Marie. "The Constitutional Dimension of the Charter of the United Nations Revisited" *Max Planck Yearbook of United Nations Law*, 1996. However, the legal dimension of the Charter was addressed early on see e.g., Landauer, Carl. "Antinomies of the United Nations: Hans Kelsen and Alf Ross on the Charter." EJIL (2003), Vol. 14 No. 4, 767-799.

[239] See, e.g., EJIL volume 8, issue 3 & 4 and Volume 9, issue 1 & 2, which include essays from a conference on `The Changing Structure of International Law Revisited' in March 1997. The Conference was convened by the Institut des hautes études internationales and the European Journal of International Law, bringing together a group of European and American scholars, to discuss the current state of international law in the light of changes that have occurred, both on doctrinal and practical levels, in recent decades. The symposium identified four areas of investigation: The state between fragmentation and globalization; Is there a hierarchy of norms in international law?; Is international law moving towards criminalization?, and; Where does the international community stand? The symposium provided an analysis of the role of the various organs of the UN system in a constitutional perspective, i.e., regarding substantive aspects and legislative, executive and judicial functions.

[240] These ranged from the negotiation and adoption of several key international treaties in such areas as international environmental law, international economic law, international criminal law and the legal regulation of international terrorism, to the creation of new international organizations and entities. In addition, significant advances were made in several long-term projects in the codification and progressive development of international law, including that of State responsibility. See http://www.un.org/law/ and http://www.un.org/law/1990-1999/index.html . Accessed on 14 December 2004.

[241] **...** By its resolution 44/23 of 17 November 1989, the General Assembly declared the period 1990-1999 to be the *United Nations Decade of International Law.*

[242] The Security Council as World Legislator? - Theoretical and practical aspects of lawmaking by the Security Council available at www.nyuiilj.org/events/ documents/2004_11_04_**council**_000.pdf Accessed on 20 November 2004.

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Justice, Pierre-Marie Dupuy has advocated a more dynamic vision of the international judiciary function, because of the increasing number of international jurisdictions, and not just States, but also new, specialized judicial bodies, needing guidance from the ICJ in interpreting the substance and scope of the basic principles of international law.[243]

On the one hand, this idea of a fundamental unity of the international legal order composed of general international law recognized by the UN system is supported by a growing recognition of what can be seen as a universal constituency comprised of States, individuals, groups, economic entities and international organizations.[244] On the other hand, the increasing number of actors involved and the broadening array of tasks assigned to the international level[245] threatens the idea of unity.

Various aspects of the topic of the unity of international law have been critically debated within the last decade.[246] The problems are rooted in the overall globalisation process and the development of particular governance regimes based on specific rationalities within areas such as human rights, the environment, trade, and

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[243] Dupuy , Pierre-Marie "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice" International Law and Politics Vol.31.(1999) pp. 790-807. See also
the "International Courts and Tribunals" project, which now has identified around 125 international institutions, in which independent authorities reach final decisions. Available at http://www.pict-pcti.org .Accessed on 22 November 2004.

[244] See, e.g., Onuf, Nicholas "The Constitution of International Society" 5 EJIL (1994) pp.1-19.

[245] Under the traditional definition only states were subjects of international law as reflected in the definition from the *Oxford English Dictionary*:"[I]*nternational law, the law of nations*, under which nations are regarded as individual members of a common polity, bound by a common rule of agreement or custom; opposed to *municipal law* , the rules binding in local jurisdictions." However, the landscape underlying the international system has been changing radically over the last 25 years and, for instance, the definition by the American Law Institute has been expanded in 1987 to reflect the ongoing changes and now reads: "International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical." *ALI Restatement 3rd*. Section 101, International Law (1987). See also Part I of this thesis about the legal implementation practice of sustainable development.

[246] See, e.g., Leben, Charles. "The Changing Structure of International Law Revisited: By Way of Introduction" 8 EJIL (1997) pp. 1-5; Dupuy, Pierre-Marie, "International Law: Torn between Coexistence, Cooperation and Globalization. General Conclusions" 9 EJIL (1998) pp. 278-285; Dupuy, Pierre-Marie, *L'unité de l'ordre juridique international : cours général de droit international public* Collected courses of The Hague Academy of International Law. Leiden/Boston: Martin Nijhoff publishers, 2003.
"Fragmentation and Constitutionalization in International Law" The Sixteenth Helsinki University Summer seminar on International Law, Finland 18-29, August 2003.

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international crimes.[247] Such regimes often combine specific primary rules (rules laying down particular rights and obligations) with specific secondary rules (rules about rule-creation and change, responsibility, and dispute settlement) that follow their own rationality and can assert a certain autonomy from general international law. Such autonomy sometimes leads to conflicts between specialized regimes and the rules of general law, as well as between different sets of specialized rules, thereby threatening the unity of the system. Apart from the overall challenge of how to reconcile the rationalities of the particular regimes with the system of general international law in concrete situations and cases, the lack of a coherent theoretical framework can - as pronounced by several scholars quoted in the following sections - in the long-term possibly lead to a loss of the legitimacy of international law altogether, because law is dependent for its effectiveness on a coherent explanatory framework. In other words, law must in some very basic way make sense or it becomes irrelevant superfluous or even counter-productive.

To date, the debate about the unity/fragmentation question has culminated with the inclusion of the topic in the long-term programme of work of the International Law Commission (ICL). In 2002, a Study Group was established and a tentative plan of topics to be studied agreed upon, according to which the work should set aside the institutional and financial/economic implications of fragmentation and focus on substantive questions, such as hierarchy in international law, including *jus cogens*, obligation *erga omnes*, and Article 103 of the Charter of the United Nations as conflict rules. In 2003 Martti Koskenniemi was appointed Chairman of the Study Group and his first report on "The function and scope of the *lex specialis* rule and the question of "self-contained regimes." is reflected in Chapter X of the 2004 Commission report.[248] According to the ILC report the Study Group has confirmed that its intention is to develop a substantive, collective document as the outcome of its

[247]For an empirical analysis, see e.g., "Clarifying the Relationship Between Economic and Environmental Governance: Some Key Challenges" A Center for International Environmental Law Issue Brief for the World Summit on sustainable development http://www.ciel.org; and "Human Rights and Trade" a briefing paper prepared by the Office of the High Commissioner for Human Rights for the 5th WTO Ministerial Conference, Cancun, Mexico 10-14, September 2003.

[248] Chapter X: *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law*. pp. 281-304. Report of the International Law Commission (fifty-sixth session (3 May-4 June and 5 July-6 August 2004). - General Assembly, Official Records, Fifty-ninth session. Supplement No. 10 (A/59/10)

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work. This document would be submitted to the Commission in 2006. Further, the intention is to study both positive and negative aspects of fragmentation as an expression of diversification and expansion of international law.

The Chairman's report is prefaced with a typology, which makes a distinction between three types of fragmentation: a) through conflicting interpretations of general law; b) through emergence of special law as exception to the general law, and c) through conflict between different types of special law.

> Fragmentation appears differently in each of such types of conflict. The first type is really about the effects of differing legal interpretations in a complex institutional environment, and therefore falls strictly speaking outside the frame of the ILC study, the latter two denote genuine types of conflict where the law itself (in contrast to some putative interpretations of it) appears differently depending on which normative framework is used to examine it.

The report underlined the relational character of the distinction between general and special and that the legal-systemic environment always conditions the operation of special regimes. The Chairman suggested that the term "self-contained regime" was a misnomer in that no set of rules – whether in the narrower or the broader sense – was isolated from general law. He doubted whether such isolation was even possible: a regime can receive (or fail to receive) legally binding force (validity) only by reference to (valid and binding) rules or principles outside it. The Study Group endorsed the systemic perspective taken and the conclusion that general international law functions in an omnipresent manner behind special rules and regimes. This aspect was further accentuated in the section of the report concerning self-contained regimes,

> The Chairman stated that the main conclusion of his study was that the present use of *lex specialis* maxim or the emergence of special treaty-regimes had not seriously undermined legal security, predictability or the equality of legal subjects. These techniques gave expression to concerns about economic development, protection of human rights and the environment, and regionalism that were both legitimate and strongly felt. The system was not in a crisis.

The work of the ILC and the scholarly work, which led to the inclusion of the topic in the work programme of the Commission, establish that, although the material and institutional conditions for production and implementation of international law are

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constantly changing, there is a notion of a core unity of the international legal system functioning at the global level.

1.2 Jurisprudential Aspects

The question of the unity of the international legal order is closely related to a more theoretical debate. As early as 1963, in his discussion of "the new world order in the making", Earl Warren, former Chief Justice United States Supreme Court, argues[249] that it is a problem that law has not theoretically kept abreast of science, because a society that is governed by law will not permit grand scientific discoveries to be used for destructive purposes and "a world without law is hell-bent for destruction with or without scientific discoveries." He uses the invention of the optical maser as an analogy for the need for a more analytical and proactive approach to legal research and development of law for "the new world order in the making."

> How much better the world would be if we could develop a kind of Maser for the Rule of Law – if the elemental principles of law and justice could be broken down and reflected and re-reflected, striking sparks from all who want freedom under law, and if the mixture could produce a beam of coherent light of immense power capable of revealing the Rule of Law in its full glory to any and every part of the earth

This rather poetic vision aside, it has recently been argued that we should revive the debate about development of a general jurisprudence.[250] A general jurisprudence is an account of law and legal phenomena that is applicable to all societies, according to Brian Z. Tamanaha.[251] With his socio/legal positivist approach, Tamanaha critiques Hart's abstraction from state law as too limited a base upon which to construct a general jurisprudence. However, it retains Hart's abstraction of primary and secondary

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[249] Warren, Earl. "Science and the Law: Change and the Constitution." 12 J. Pub. L 3 (1963).

[250] See e.g., Twining, William *Reviving General Jurisprudence* - essay written to a series of lectures on "General Jurisprudence" delivered at the Universities of Tilburg and Warwick in 2000-1. The main thesis is that there is a need for a revival of a general jurisprudence as a foundation for an increasingly cosmopolitan discipline of law in response to the challenges of "globalisation". Published in: Likosky, Michael (ed), *Transnational Legal Processes* Cambridge University Press 2002. "
The Social Concept of Law: Towards a General Jurisprudence" was also the subject of the 2004 summer course directed by Martti Koskenniemi at the Hague Academy of International Law. http://www.ppl.nl/summercourses/ .
For a historic perspective see also, Friedmann, Wolfgang. "The Use of "General Principles" in the Development of International Law" 57 AJIL 279-299 (1963).

[251] Tamanaha, Brian Z., "Socio-Legal Positivism and a General Jurisprudence." *Oxford Journal of Legal Studies,* Volume 21, Issue 1, pp. 1-32. For further elaboration of the thesis, see also Tamanaha's "Law and Society" 2002 prize winning book: *A general jurisprudence and society.*

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rules at the core of the legal system, while eliminating some of Hart's conditions of functional and normative character, such as, for example, that the populace must obey primary rules and that legal officials must accept the secondary rules. In particular, the "separation thesis" that there is no necessary connection between law and morality is expanded to "there is no necessary connection between law of whatever manifestation or kind, and morality or functionality".[252] And the "social source thesis", which holds that law is the product of a complex of social practices, is similarly modified so that the thesis can be applied not only to state law but to all manifestations and kinds of law, including primitive law, international law, religious law and natural law. Instead of defining or dictating the nature of law, the latter thesis asks how groups of people talk about law, and, instead of assuming what law does, it examines what people do with law.

Tamanaha concludes that after nearly half a century of ascendancy, a period of remarkable social, economic and legal developments, Hart's theory might now have reached its limits, because the conceptual dominance of the state law model may hinder our ability to take account of legal developments in an era of globalisation.[253] However, with regard to Hart's overarching framework, the principal amendment of the socio/legal positivist approach is the recognition of different manifestations and types of law, rather than just a single concept of law.

Related to the search for a general jurisprudence is the need for a more encompassing philosophical grounding of law.[254] It is this need that underlies the claim that universalisation of international law is the most urgent task for those who want to advance the discipline, as advocated in *Universalising International Law,*[255] where C. G. Weeramantry stresses that, while international law in its present form has evolved from a small group of European states in the seventeenth century, it now administers a universal system and, therefore, its fundamental philosophy must be reconsidered in a universalistic context. This is seen as essential to making international law matter, and to win for it the acceptance and allegiance of the vastly extended community of

[252] Id. at 36.
[253] Id. at 51.
[254] "The Philosophy of International Law" was the subject of the 2004 summer course directed by Philip Allott at the Hague Academy of International Law. http://www.ppl.nl/summercourses/
[255] Weeramantry, C.G. *Universalising International Law.* Leiden/Boston: Martin Nijhoff Publishers, 2004.

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nations that has evolved since the era when the discipline first emerged. The book focuses on four areas, namely, 1) general aspects of universalisation, 2) universalistic approaches to sources of international law, 3) peace, and 4) specific areas of international law. The last includes a chapter on the importance of sustainable development. Weeramantry draws attention to the rich sources of philosophy, religion and law of non-western cultures. In particular, he elaborates on the potential of Buddhist and Islamic traditions for fertilizing the future of international law. The book covers a wide range of important questions about international law and draws attention to problem areas of philosophical and technical nature, such as the public/private divide in international law, which allows private companies to profit from arms production and sale under the auspices of private law even though their activity facilitates major damage to the global society as a whole. Weeramantry views the topic of the interrelationship between international law and philosophy against five phases of evolution and development starting with the natural law phase in the 16th and 17th centuries and concluding with a vision of a fifth state beyond globalisation where:

> The inadequacies of globalisation, the paucity of its philosophical base, the inability of the earth resources to sustain its requisite of continuous expansion, its monolithic nature and the tendency it breeds of accentuating economic divisions both domestically and globally will all combine to force upon the scholarly community a consideration of alternatives and out of this will emerge a new realization of the importance of making international law a truly multicultural system drawing on the richness of the universal cultural inheritance.[256]

Section 2 International Law: Democracy and Justice

2.1 Input Legitimacy: Democracy

In "The Geology of International Law"[257] Joseph Weiler addresses the global governance debate and links the concept of the rule of law and that of democracy. He demonstrates how for much of the 20th century there has been a considerable widening and deepening of the scope of the international legal order, which de facto represents a form of governance of the international order beyond the formally existing state transactional system of international law. He then addresses the

[256] Id. at 5.
[257] Weiler, J. H.H. "The Geology of International Law - Governace, Democracy and Legitimacy" *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* , (ZaöRV) Vol. 64 (2004) pp. 547-563.

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dimensions of authority of this development, and states that both the change in sensibility towards the legitimation of power in general and the turn to global governance, including a distinct legal dimension, constitute a considerable normative challenge to the international legal order. Further he argues that this challenge to the legitimacy of the legal order has not been fully appreciated or adequately met. [561] However, he says that [560] when there is governance it should be legitimated democratically, because

> … in the international sphere as elsewhere the end can justify the means only so far. That a legitimacy powerfully skewed to results and away from process, based mostly on outputs and only to a limited degree on inputs, is a weak legitimacy and sometimes non at all. [562]

Weiler demonstrates that the rule of international law is not tied to democracy either at the level of doctrine or process [555], and that international law's claim to and justification of obedience is not rooted in notions of democratic legitimation. Instead, international law is understood to be about trading and to be premised on a world order composed of equal sovereign states pursuing their respective national interests through enlightened use of law to guarantee bargains struck. Democracy is no more relevant in this context than it is to domestic contract law.

In section II of the article: "Transaction, Community, Constitution and Regulation and the emerging Legitimacy Crisis of International Law" Weiler describes the expansion of the legal order into global governance. Using the metaphor of geology, he categorizes international law into transactional, communitarian, and regulatory layers, and demonstrates how international law manifests itself as governance within the various layers by legislating and managing specific content areas and regimes. He further argues that, although governance requires legitimacy, the different layers of international law - transactionalism, communitarianism and governance - each present different normative challenges - different discourses of democracy and legitimacy - and require different remedies. However, given that the vocabulary of democracy is rooted in notions of demos, nation and state, there is no easy conceptual template from the traditional array of democratic theories one could employ to meet the challenge, since these notions are missing at the international and global level. [561]

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Thus, to accept that democracy is merely relevant to international law cannot just be an extension from a domestic setting.

> Instead the issue is how in the face of international community which "appropriates" and defines common material and spiritual assets and in the face of international governance increasingly appropriates administrative functions of the state, can establish mechanisms which, in the vocabulary of normative political theory, would legitimate such government. If an answer is not found to this, the huge gains attained in the systemic evolution of law making and law enforcement may be normatively and even politically nullified. [561]

Weiler is not calling for a wholesale dismantling of the international legal regimes but he concludes the article by saying that meeting the challenge:

> …also means calling into question of those very norms by those very States in the name of that very same value, liberal democracy.

2.2 Output Legitimacy: Justice, Peace and Prosperity

"Global Public Goods - International co-operation in the 21st century"[258] provides an overall analysis of the international order as established in 1945. The book characterizes the overall purpose of the system as one providing global public goods, and it includes a perceptive analysis of the political and socio-economic problems facing the international community, including an integrated overview of the institutional framework. Although the book argues for equity and justice, protection of the environment, health and peace and security[259] at the international level, it does not include a reflection on the role law in promoting these goals.

[258] Kaul, Inge; Grunberg, Isabelle and Stern, Marc (eds.) *Global Public Goods*. New York, Oxford: Oxford University Press, 1999.

[259] I shall in the following not touch upon the relationship between international law and the use of force. The article "On the Relationship Between Ethics, International Law and Politico-Military Strategy " [Apel. *European Journal of Social Theory.*2001; 4: 29-39] is mentioned only because it addresses a normative vacuum also within this area of international law. In summary the paper argues that in reconstructing and commenting upon the Kosovo conflict, the cognitive interest of practical philosophy does not evade a political judgment but is primarily led by the interest in answering the question of what normative yardsticks are available (to politicians and to the public) for coping with a situation where the international order of law fails to provide a legal solution to the problem of preserving peace and, at the same time, protecting human rights that are severely violated by a sovereign state. The paper proposes an answer from the point of view of an ethics of history-related responsibility, which takes into account three normative levels based on ethical, legal and political considerations..

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In contrast, Thomas Pogge convincingly demonstrates the way in which international law plays a decisive role in delivering or not delivering global public goods.[260] He shows that international law is complicit in perpetuating the injustice of the world by supporting a global order where any group controlling the means of coercion within a country is internationally recognized as the legitimate government of this country's territory and people, regardless of how it came to power and the extent to which it is supported or opposed by it's populace. To support this claim, Pogge provides an analysis of what is termed "the international resource privilege" and "the international borrowing principle".

The international resource privilege is the legal power to confer globally valid ownership rights in the country's resources, including power to effect legally valid transfers of ownership. Thus, a corporation that has purchased resources from the Saudis or Suharto, or from Mobuto or Sani Abacha, has thereby become entitled to be recognized anywhere in the world as the legitimate owner of these resources.[261] Pogge points out that this resource privilege is a remarkable feature of the global order and starkly contrasts with the national order. A group that overpowers the guards and takes control of a warehouse may be able to sell some of the merchandise to others, but the one who pays them becomes merely the possessor, not the owner, of the loot.

To show the potential perverse consequences of the international borrowing privilege, Pogge refers to the case of Rwanda:

> Perhaps there was no better reflection of the world's shabby treatment of post genocide Rwanda than the matter of the debt burden incurred by the Habyarimana government. The major source of the unpaid debt was the weapons the regime had purchased for the war against RPF, which had then been turned against innocent Tutsi during the genocide …incredibly enough, the new government was deemed responsible for repaying to those multilateral and

[260] Pogge, Thomas. "Severe Poverty as a Human Rights Violation" in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* Oxford: Oxford University Press 2005. For an overview of Pogge's work see http://www.columbia.edu/~tp6/ and also http://www.etikk.no/globaljustice/ . Accessed on 19 January 2005.

[261] Nigeria is mentioned as a case in point. The country produces about two million barrels of oil per day, and whoever controls this revenue stream can afford enough weapons and soldiers to keep himself in power. Therefore, it is not surprising that during 28 of the last 32 years Nigeria has been ruled by military dictators who took power and ruled by force. Although civilian rule was reestablished in 1999, the well-intentioned and experienced Olusegun Obasanjo appears to be caught between the customary prerogatives of the military and the international order supporting the system, and has failed to change the pattern in any significant way.

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> national lenders the debt accrued by its predecessors. The common-sense assumption that Rwanda deserved and could not recover without special treatment and, that the debt would have to be wiped out more or less automatically, had no currency in the world of international finance. Instead of Rwanda receiving vast sums of money as reparations by those who had failed to stop the tragedy, it in fact owned those same sources a vast sum of money' [262] [The financial rules are enforced by excluding defaulting governments from international financial markets].

To repair the injustice being done, Pogge proposes "moderate and feasible reforms of the Global Institutional Order," including the establishment of a Global Resources Dividend of one percent, which by his account would generate 86 times what all the affluent countries are now spending on basic and social services in the developing countries. This dividend, though it re-channels money from the consumers of resources to the global poor, is not a form of aid. It does not take away some of what belongs to the affluent. Rather, *it modifies conventional property rights* so as to give legal effect to an inalienable moral right of the poor. For libertarians, this is the right not to be deprived of a decent start in life through a grievously unjust historical process. For Locke, this is the pre-institutional right not to be excluded, without equivalent substitute, from a proportional share of the world's resources. For broadly consequentialist theorists of justice, this is the right not to have imposed upon oneself an institutional order that is unjust by virtue of the fact that under this order, foreseeable and avoidably, many human beings cannot meet their most basic needs.

Section 3 International Law: Global Law

3.1 Questioning the Taxonomy

The need for redesigning and rethinking the categories and fundamentals of (international) law and democracy, as advocated in the previous sections, is also at the center of Claire Cutler's analysis of law in a global polity.[263] She argues for an imminent need to develop new understandings of the concept of law because the prevailing forces of globalization create difficulties in relation to the role of law. For some, the globalization of law signals a loss of national and domestic control over significant policy areas, eroding the foundation for democracy and participatory forms

[262] International Panel of Eminent Personalities: Rwanda: The Preventable Genocide, 7 July 2000 (www.visiontv.ca/RememberRwanda/Report.pdf), sections 17.30 and 17.33).
[263] See supra n. 226, Cutler.

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of governance, while empowering supranational sites of governance that lack democratic traditions and credentials. Others regard the globalization of law as filling governance gaps created by economic globalization, thus providing much needed public goods in the form of economic security and certainty.[264]

Cutler reviews both the conventional and the less conventional[265] jurisprudential approaches to fundamental questions concerning the normative contra objective nature of law, the sources of law, and the concept of a legal subject from an international perspective. She shows how the more conventional approaches tend to apply the domestic analogy to sources of law, to exhibit formalism concerning subjects, and to conceive of law as relatively autonomous, neutral and objective, while the less conventional approaches see law as a social construct and inherently normative in design and impact, and they accept pluralism of both the subjects and sources of legal regulation. In particular, the "New Haven" approach challenges the conventional legal positivist view that law is a body of rules, instead positing that it is an authoritative decision-making process involving a multiplicity of participants and choices between competing norms and values. That there are many participants involved in the process of authoritative decision-making reflects the natural law position that membership in international society is not limited to states but extends to individuals as well.

On the background of this discussion of conventional and unconventional approaches to the role of law at the international level, Cutler demonstrates how a new generation of critical scholarship in international law and international relations builds on the critical legal approaches, and posits that law plays a generative role in constituting the underlying structure and normative framework for the global polity. She further claims that according to the critical approach law exists not as a fixed body of neutral and objectively determinable rules, but as a construct of, and thus deeply embedded in, international society. The author describes the globalization process as

[264] This includes according to Cutler the enhanced significance of soft law, informal, discretionary and ad hoc and private legal regulation, which facilitate cost effective trade and economic relations, but which can be seen as being quite inconsistent with and perhaps even eroding the foundation of the rule of law as a system of global governance.

[265] Conventional: positivism, Austin, Hart, Kelsen - the more unconventional: natural law, Stoics, Cicero and Aquinas, Grotius - the New Haven approach developed by Myres McDougal and Harold Lasswell, Critical legal studies and feminist theory.

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transforming the nature and role of law thereby rendering the traditional positivist forms of legal regulation quite anachronistic and even irrelevant. This suggests that there is an increasing pluralism in the nature and source of legal regulation. Indeed, the virtue of soft law, in the form of model laws, optional codes of conduct, and statements of principle, is precisely that it is easier to implement, modify, and agree upon, and in addition, it is more cost effective. This reflects a preference of commercial participants for flexible, discretionary private and ad hoc standards that allow maximum freedom in commercial relations. However, as such standards do not necessarily provide for equity and fairness, the author advocates for the constructive task of developing a normatively legitimate or more equitable form of transnational legal regulation in a global setting.

Without articulating it directly, Cutler convincingly illustrates that law and legal scholarship, instead of facilitating co-operation in an international society, become part of the problem by maintaining a formalist approach that is blind and deaf to the developments in the real world, thus prohibiting an operational understanding of transformations in the global polity. Her overall conclusion is that law plays de facto and implicitly a polity building function in connection with globalization. The discrepancy between the *de facto* situation and the social explanatory construct is creating a number of problems relating to legitimacy and the sources of law in particular. Consequently, there is a call for theorizing the ongoing development in order to articulate an understanding of the nature and role of law in the global polity, one that captures reality and, thus, better assists communication and co-operative action.

Other authors, such as Gunther Teubner and Andreas Fischer-Lescano, are calling on the international community to "lasciate ogni speranca" concerning the ability of global law to play a more pro-active role in enabling global change.[266] In *Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law* Teubner and Fischer-Lescano state that the problem of

[266] Fischer-Lescano, Andreas and Teubner, Gunther. "Regime-collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law". *Michigan Journal of International Law* Vol. 25: pp 999-1046. Summer 2004.

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> The fragmentation of global law is more radical than any single reductionist perspective - legal, political, economic or cultural - can comprehend. Legal fragmentation is merely an ephemeral reflection of a more fundamental, multidimensional fragmentation of global society itself.
>
> Any aspirations to a normative unity of global law are thus doomed from the outset. A meta-level at which conflicts might be solved is wholly elusive both in global law and in global society. Instead, we might expect intensified legal fragmentation.
>
> Legal fragmentation cannot itself be combated. At best, a weak normative compatibility of the fragments might be achieved. However, this is dependent upon the ability of conflicts law to establish a specific network logic, which can effect a loose coupling of colliding units.[267]

The article, which is comprehensively referenced, provides detailed examples of the main claims made in relation to transnational copyright, patent protection for medicines, Lex Constructionis (the international code of conduct for construction/engineering) and Desaparicion (people disappeared and not accounted for, citing, in particular, the Argentinean and South American problems).

To understand what is happening *de facto*, according to the authors, it is necessary to give up a number of social and legal theory conceptions: for instance, the idea that a legal system in its strict sense exists only at the level of the Nation-State. Instead, one must proceed from the assumption that law has also, in line with the logic of functional differentiation, established itself globally as a unitary social system. However, the unity of global law is no longer structure based, as in the case of the Nation-State, within institutionally secured normative consistency. Rather it is process-based and derived simply from the modes of connection between legal operations that transfer binding legality between even highly heterogeneous legal orders. Legal unity within global law is redirected away from normative consistency towards operative 'inter-legality'. In line with the political principle of territoriality, the traditional differentiation into relatively autonomous national legal orders is thus now overlain by a sectoral differentiation of global law into transnational legal regimes that define the external reach of their jurisdiction along issue-specific rather than territorial lines and that claim a global validity for themselves, including

[267] Id. at 1004.

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autonomous private legal regimes[268]. This leads to further societal fragmentation upon law that requires us to extend our concept of law to encompass norms lying beyond the legal sources of Nation-State and international law.

> Our interim result: *lasciate ogni speranza*. Any aspiration to the organizational and doctrinal unity of law is surely a chimera. The reason is that global society is a "society without an apex or a center." [NIKLAS LUHMANN, POLITISCHE THEORIE IM WHOLFAHRTSSTAAT 22 (1981)] Following the de-centering of politics, there is no authority in sight in a position to undertake the coordination of societal fragments.[269]

If, however, one takes the more realistic stance that there is no final hierarchical decisional instance within regime conflicts law, the question remains whether or not common legal principles can be assumed within the hierarchical orders of diverse autonomous regimes. The existence of ius cogens within trans-national law is not merely a problem for political regulatory regimes established by international treaties; instead, it poses particularly acute problems for autonomous private governance regimes, for example, for the "lex mercatoria" or the "lex digitalis". Here we face a seemingly insoluble dilemma: if the private governance regimes stem from contractual relations between private global players, where is the legal source of a mandatory law that we would need to create and enforce against the wishes of the parties to the contract?

According to the authors, the answer is that we are left with network logic beyond the alternatives of either central coordination or autarky of closed regimes. Thus, in spite of their autonomy, regimes can build on the assumption of common reference points, which is, of course, nothing but an operative fiction. Building on this fiction, each of them can subordinate themselves to a necessarily abstract, seemingly common philosophical horizon, to which they orient their own rule making. This horizon of non-dispositives possesses no common founding text as a common grammar has not been found. The article ends on the note that:

> …in the context of societal fragmentation, law will be forced to limit itself to its classical role; to furnish compensation for and curb damage to human and natural environments. - Teuber in other contexts hail law as the integrater just reactive no enabling integrater

[268] Id. at 1009.
[269] Id. at 1017.

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3.2 Rethinking Law

Others are taking a more explorative approach. In "*Elements of an interactional theory of international law*"[270] Brunne and Toope, apply what they term an analytical constructive approach. They suggest that law might be evaluated by the influence it exerts rather than by formal tests of validity rooted in normative hierarchies, and suggest that we should stop looking for the structural distinctions that identify law and examine instead the processes that constitute a normative continuum bridging from predictable patterns of practice to legally required behavior**.** This approach recognizes that there is not a radical discontinuity between law and non-law, and that the process of building legal normativity requires many of the same building blocks as other forms of social normativity. The debate further posits that communication is potentially generative of international institutions and that the central purpose of law is to facilitate communication. Such arguments naturally link any research on the role of law and the challenge of global governance tightly to ideas of deliberative democracy, communicative rationality and proceduralisation theory.[271]

With the stated objective of offering new insight into the phenomena of law, a recent book[272] on legal theory demonstrates the wide scope of diverse meanings of law. The author, Mark Van Hoecke, acknowledges that law might be used as a relatively neutral tool for solving problems and for organizing society, but it is also true that there is a worldview underpinning the law and legal language that influences the way we perceive reality. The author says that law inevitably follows changes in society with some delay, and he illustrates how prevailing theories are adapted with even longer delay to the changed role of law in society, emphasizing that every theory (in law) has to be understood and located in its historical, societal context. For instance,

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[270] Brunnee, Jutta and Toope, Stephen J., "Elements of an Interactional Theory of International Law," (2000) *39 Colum. J. Transnat'l L. 19.*

[271] Prodeduralisation has been defined by as, "Proceduralisation as a form of replacing a substantive decision by a legally established process of consultation, participation, or balancing conflicting interests, is quite frequent as a pragmatic approach. Its value can only be considered adequately if the relationship between law and its cognitive infrastructure is taken into account; the law has increasingly to generate knowledge by its decisions instead of drawing on experience". Ladeur in De Schutter, Lebessis and Paterson (eds.), *Governance in the European Union (*Luxemburg: Office for Official Publications of the European Communities, 2001). - See also Chapter 6 addressing the issues in relation to e.g., Habermas, "Paradigms of Law".

[272] Van Hoecke, Mark. *Law As Communication*. Oxford and Portland, Oregon: Hart Publishing , 2002.

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the historical reasons for the rise in the nineteenth and twentieth century of a positivist approach to law - which was then necessary to work out a more rational doctrine and to enable the birth of the discipline we call legal theory - have today disappeared, and all the weak points of a pure positivist approach to law have become apparent.

Van Hoecke claims that, in fact, very few theories go beyond their historical context and sustain a broader perspective in time and space for future generations and for other legal cultures, because the development of theories is more closely linked to a way of interpreting reality than most of us are aware. For example, a whole body of jurisprudential literature collapsed together with the Wall, because in the social sciences theory building is mainly the construction of a framework for the interpretation of reality and not the result of discovery of a fact or related to a newfound truth.

The book structures the traditional topics of jurisprudence, such as the characteristics and functions of law, the concepts of a legal norm and a legal system, and the methodology and legitimation of law from a communicational perspective. In conclusion, the author develops an argument for communicative legitimation of law in the context of argumentation theory and a theory of democracy. He argues that analyzing the legal phenomena in terms of communication has the advantage that it approaches law as a means for human interaction and not some autonomous end. Further, it captures the process aspect, and it does not lead to elaboration of a closed system, but, on the contrary, remains open-ended, since emphasis is on the communication processes and not on fixed elements, e.g., "norms". The concept also refers to a relational situation that captures the idea of the recognition of the other instead of the unilateral authority of a traditional perspective on law. Finally, he acknowledges that:

> There is a also an enhanced need for more attention to be paid to human interaction and communication in the light of new theories, which are less individualistic and emphasize some form of community, which transcends the sum of its members, such as ecological theories, that emphasize intergenerational duties of men or autopoetic theories, which shift the attention from the individual actor to society as a system. In these theories the individual is seen less as an atomic entity, which could be isolated from any concrete community, but rather as part of a whole, which does not only offer added value to the sum of isolated individuals - but is a necessary condition and framework for any form of individual good life.

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The book points out that changing conceptions of the world make it apparent that many problems in legal theory and practice are linked to the underlying philosophical concept of rationality underpinning them. According to Van Hoecke, the logico-deductive approach of Cartesian thinking in continental European legal theory and practice over the last two centuries is increasingly under attack. Apart from historical and cultural contingency, theories of law are always reducing and simplifying reality because describing reality means structuring it. One needs a framework to be able to describe, and this theoretical construct is determined first by the general worldview of a specific culture in that time. Of course, the rules and structures are different for law in different times and cultures, but the most important difference lies at the level of the epistemology of the underlying worldview.

I return to communication and the Habermasian "proceduralist paradigm of law" in Chapter 6, which is about linking law and polity in a global age.

3.3 Rethinking the Problem

Referring to the debate outlined in the previous sections, I propose that the International Law Commission has acknowledged that logically there is a functional unity of the international legal system, because a particular regime cannot claim validity without reference to a broader system.

However, there is no clear model explaining this systemic and dynamic unity. Instead, we have Pogge, who concretely suggests how we might develop the conceptual and institutional machinery to compensate for the injustice created by the system, and we have environmental law, which develops mechanisms to make the system function. Finally, Teubner ties these two approaches neatly together by concluding that in global law we have gone from normativity to functionality and that all we can expect from global law is the classical function of providing compensation in an unjust world. Thus, law in a global age is seemingly more justification than justice, in other words, a technical machinery that can compensate for any wrong but which is in need of substance, re-conceptualization and unity of reference. Because as Kennedy says:

> It would be tragic for our "projects" when an anemic concept of law, focusing solely on judizialization or legalization, is confronted with an equally implausible concept of politics

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> conceived only as force or (potential) violence. The project of a human (e) life in the aftermath of Sept 11 and in the face of the unsettling changes that are transforming our world requires a different conception of both. [273]

To begin, I pose a question, namely, is focusing on the existence of unity or fragmentation, democracy or tyranny, and justice or injustice missing the point? If so the concrete strategies proposed to address the situation are, even on their own terms, addressing symptoms instead of the problem. I propose that the problem, the focus of analysis, so to speak, is the fact that there is unity and fragmentation, and the real challenge is to explain the relationship between the two instead of arguing either/or. And furthermore, but integral to the former problem, that we do not have language to describe the dynamics between the particular and the whole or the plurality and the singular, and that the conception of the whole or the singular has not been elaborated or even identified but only acknowledged in principle.

Therefore, before embarking on any re-description to capture these aspects, I suggest that it is necessary to park the existing taxonomy dividing the world into, for example, international/national or private/public, politics/law, and to return as a point of departure to the most generic definition we have of law. In its most general and comprehensive sense, law signifies a rule of action and it is applied indiscriminately to all kinds of action: whether animate or inanimate, rational or irrational. In its more confined sense, law denotes the rule, not of actions in general but of human action.

I propose that the first rule of human action is concerned with what constitutes the rule for reaching valid conclusions about what is. It is the condition *sine qua non* that human beings can act and communicate beyond the instinctual level. Therefore, we must address the question of what underlies our rule of validation for what is law and legal theory. Looking at law at this level of abstraction transcends our present distinctions, and we can explore other differentiations and a new terminology that might more accurately capture today's world. It might then be possible to engage with David Kennedy when he asks the quintessential post-modern question:

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[273] See supra n. 233, Introductory remarks for the Symposium on the "International Legal Order".

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> What should global politics become? How might the international legal order be harnessed to that political vision? Might international law become a framework for the development of new forms of governance - forms that goes beyond the traditional repertoire of liberal and social democratic constitutional traditions? Can we imagine a project for law to build a political life, a vibrant global politics on the shifting sands of diverse claims about the distribution of resources and the conditions of social life? [274]

I return to this question in Chapter 7, which is about re-describing the concept of law in the perspective of sustainable development.

[274] See supra 273.

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Chapter 6 Linking Law and Polity in a Global Age

In the previous Chapter I demonstrate that there is a perception of a formal, unitary system of international law that plays a constitutive role in upholding the prevailing global socio-economic and political system. I further demonstrate that, although law - i.e., international law, soft law, and private law - is a crucial element of the various regimes constituting what amounts to global governance, the relationship between law and community is not well explained. Accordingly, there is no conception a global community or polity underlying global governance beyond the aggregate of particular categories, such as states, international organizations, non-state actors, and non-governmental organizations, transnational corporations, and epistemic communities. Consequently, there is no unequivocal leadership of the prevailing order to provide legitimacy and accountability beyond poly-archy and the aggregate of regimes and networks. However, for any order to prevail and prosper, it has to be understood and accepted as legitimate by the members of the order.[275]

Thus, while Chapter 5 addressed the legal order as a self-contained system, the emphasis in this Chapter is on the relationship between law and community or law and a "virtual" polity within the prevailing global order so as to identify and conceptualise the necessary subjects of theory development. The analysis is premised on the assertion that for governance to be legitimate[276] some degree of democracy[277]

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[275] Rosenau, James and Ernest-Otto Czempiel. (eds.) *Governance without Government: order and change in world politics*. Cambridge, UK: Cambridge University Press, 1992. p. 294.

[276] Legitimacy can be defined as "a shared expectation among actors in an arrangement of asymmetric power such as the actions of those who rule are accepted voluntarily by those who are ruled because the latter are convinced that the actions of the former conform to pre-established norms." Schmitter, Philippe C. *What Is There to Legitimize in the European Union... and How Might This Be Accomplished?* Florence, Italy: European University Institute, 2001. p. 2

[277] The following anecdote is provided instead of a reference to relevant literature.

> When Jiang Zemin, the Chinese president, visited the United States in 1997, he caused much fuss by suggesting that the idea of democracy originated 2000 years ago with Chinese philosophers. Liberal American commentators thought this to be absurd. But as Elvin Geng, a graduate in Asian studies, points out: "The word minzhu first appeared in a classic work called Shuji where it referred to a benevolent 'ruler of the people,' that is, a leader whose legitimacy rests on the people's welfare. In Chinese, the one term can mean 'rule of the people' as well as rulers of the people.' Both uses of minzhu share the sense that the government ought to meet the needs of the people." This criterion may be fulfilled by an enlightened dictator or a Leninist regime as well as by a U.S.-style constitutional democracy. The concept of 'human rights' equally leads to misunderstanding between China and the West because of the Confucian ideal of natural harmony lingering in the word quan, which can mean both power and rights. No adversarial relationship is assumed between the state and the individual or

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is required. And further, there can be no democracy without a political identity[278] that is shared as participants in a common agency.

The scope of law in global governance is not restricted because in large part private international law contributes to governance within all aspects of life and the *de facto* order resulting from global governance encompasses the planet. But how can governance be perceived from a democratic perspective if there is no centre of power? What is the nature of the collective agency that can decide and act and to which one can attribute choice? Here it should be noted that historically the first modern revolutions also transferred power from the monarch to the "nation" or the "people", and this, as well, required invention of a new kind of collective agency in the abstract and the development of concrete (secondary) rules and procedures to realize the new orders.

Hence, the first question to be explored must be this one: Can we conceive of a community or polity that could underlie global governance? Second, what would be the nature of such a community and how could it be linked to generation of law at a global level? And third, would it find legitimacy through an inter-subjectivity created through a deliberative process or in other ways?

Schemes fostering legitimate governance can be devised in a number of ways. Although some aspects may be sine qua non or, at least, more important than others, the aspects or features of legitimacy are co-dependent even though relevant and viable to varying degrees depending on the particular practice or governance scheme. This relativity can be illustrated with reference to international law principles,[279] according to which there is a distinction between jurisdiction to prescribe, to adjudicate, and to enforce. Thus, increasing authority is accompanied by increasing demands for

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between individuals. - Moore, C. J. "What's in a world? Often, a whole culture." International Herald Tribune, January 6, 2005.

[278] Questions regarding the possibility of transnational governance is extensively debated also theoretically. See e.g., http://www.polity.co.uk/global/default.htm. A web page devised by David Held and Anthony McGrew.

[279] See, e.g., Browlie, I. *Principles of Public International Law.* Oxford: Oxford University Press, 1998. pp 159-160.

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legitimacy. In the very concept of legitimacy, law shows its Janus face in that legality is part of the legitimation process itself. Accordingly, behaviours in conformity with legal rules are perceived as legitimate and those not in conformity are perceived as illegitimate. Still legitimacy through the rule of law might be jeopardized, if the legitimacy of the legal process itself or its outcome comes into question.[280] For heuristic purposes, I have below distinguished various feature of legitimacy to serve as a reference for the exploration of the questions related to legitimacy in the following sections.

- Territorial legitimacy.
- Formal legitimacy - legitimacy based on reference to authority such as a constitutional document. Authority can be religious or secular.
- Community legitimacy - legitimacy based on belonging or sense of belonging.
- Substantive legitimacy - the acceptability of the overall aim or value inherent/implicit to a law and governance system such as: peace, justice and freedom of the individual.
- Worldview legitimacy - the standard of rationality underlying the worldview of the governance scheme.
- Procedural legitimacy, process legitimacy.
- Operational legitimacy - transparency, accountability and predictability.
- Regime legitimacy - the overall institutional framework, within which the law and governance scheme is constituted, e.g., the WTO regime.
- Output or performance legitimacy - law and governance scheme is instituted to achieve certain purposes.

In Section 1 following, based on evidence from political science, law and philosophy, I argue that, when searching for legitimacy of global governance, the individual is a necessary, although not always a sufficient, subject of theory development. Thus, from the perspective of governance, it is necessary to address the question of autonomy and the balance of rights and duties. In Section 2, I investigate the possible link between the individual and the generation of legitimate law through a review of Habermas' theory of a proceduralist paradigm of law, according to which legitimacy is linked to an "internal connection" between private and political autonomy that constitutes the democratic meaning of a legal community's self-organization. The

[280] See generally, e.g., Clark, Ian. "Legitimacy in a global order" *Review of International Studies* (2003), 29: 75-95, Cambridge University Press. And according to the presentation of his forthcoming book: *Legitimacy in International Society.* Oxford*, UK:* Oxford University Press, 2005. "Legitimacy is not to be discovered simply by straightforward application of other norms, such as legality and morality. Instead legitimacy is an inherently political condition. What determines its attainability or not is as much the general political condition of international society at any one moment, as the conformity to particular rules."

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paradigm is, however, critiqued as incomplete as the normativity of the rationality embedded in the paradigm remains implicit and thus transcendental. Finally, based on the outlined debates, I identify the contours of an abstract model of a possible global community linked to law and governance.

Section 1 Global Governance - in Search of Community

1.1 Looking for the Unit of Analysis

"Which community?" is the first question asked in addressing the relationship between *de facto* global governance and an underlying community? This question is followed quickly by "How is such a community organized?" and "Who are its members?". The relative importance of the institutions (macro level) and individuals (micro level)[281] *in* governance systems and change is debatable. The answer depends to a large degree on the area of study and on the theoretical framework chosen. In the following, I support the claim that the individual is theoretically the fundamental unit of a governance system or practice, since macro structures and processes by their very nature are generated by actions of numerous individuals. Therefore, I propose that embedding change at the level of individuals appears a necessary, though not sufficient, factor to address from a governance perspective.

As shown in the previous chapter, although the world is no longer composed of states only, it is not a world society but a societal world, which, according to Ernst-Otto Czempiel in "Governance and Democratisation"[282], is pervaded by transnational actors and economic, social and ecological interdependence. Therefore, the overall international system can be seen as a system of governance.[283] Governance is defined

[281] Most inquiries treat the distinction between the macro level and micro level as that between a system and its subsystems, here the micro level is confined to individuals and face-to-face groups, while all more encompassing aggregations are regarded as located at the macro level. For a discussion of possible reasons for drawing the distinction in this way, see, e.g., Rosenau, James. *Turbulence in World Politics,* Ch. 6 lists a number of references.

[282] See supra n 275, Rosenau and Czempiel, pp 250-272.

[283]The term "governance" is used pervasively in relationship to deliberation and decision-making on any level of society and in any organizational and geographical context [environmental governance, economic governance, good governance, corporate governance]. The term is at the same time often poorly or loosely defined leaving the more precise understanding implicitly to the particular context in which it is used.
Philippe Schmitter (2001) has provided a definition according to which governance can be seen as meaning: "a method/mechanism for dealing with a broad range of problems/conflicts in which actors regular arrive at mutually satisfactory and binding decisions by negotiating and deliberating with each other and cooperating in the implementation of these decisions." Government might participate in

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by Czempiel as "the capacity to get things done without legal competence to command that they be done". Czempiel addresses three particular areas: security; economic well-being; and the system of rule and participation, which connotes the relationship between the society and its political system. The last mentioned, the system of rule, decides upon distribution of political values and property rights and it prescribes and distributes sacrifices. The system of rule is the most important issue of the three, as it relates to and integrates the issues of security and economic well-being. Czempiel further states that the system of rule is the most crucial variable for dealing with military violence in modern industrialized societies. To support this point, he holds that the former East-West conflict developed out of insecurity and uncertainty with regard to future behaviour/actions of the other side. It was not necessary to assume the existence of aggressive intentions but only that the ongoing co-operation of the opposing side could not be taken for granted. Accordingly, each side attempted self-help as prescribed by neo-realist theory. In conclusion, the article claims that understanding international systems and modern conflicts as systems of governance is to grasp the growing importance of societies and the degree of interdependence between them and it leads to the insight that foreign policy includes not only the state but also the individual, in that systems of rules do not affect anonymous entities but human beings with their aspiration for economic well-being and democratic co-determination.

In "Citizenship in a changing global order", James Rosenau[284] argues along the same line for the importance of considering the individual in relation to an emerging global order. He readily acknowledges that addressing the individual as an important variable at the institutional level is to some extent controversial within political science/international relations, because conceptions of global order and governance normally treat macro collectives and institutions as the bases for whatever form the order may take, while the micro level tends to be treated as composed of constants, namely citizens, who comply with the directives and requirements of the macro collectives.

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governance arrangements, but the term is meant to be generic covering any structure for social action be it corporations, local associations or supra national phenomena such as the EU.

[284] See supra n. 275, Rosenau and Czempiel, pp 272-294.

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Rosenau explores a possible relationship between the emergence of a new global order and the changing intellectual and emotional competences of people throughout the world. In so doing he seeks to demonstrate that such vast transformations as the emergence of a new order at the macro level of politics cannot occur without corresponding, or at least compatible, changes taking place among citizens at the micro level. He holds that the centrality of changing micro actors cannot be empirically proven at this early stage of the development of a new order. One can only show how the course of events is consistent with a theoretical and functional explanation that locates individuals at the core of the transformations processes. Hence, Rosenau refers to a number of occurrences, such as the erosion and dispersion of state and governmental power, the revolution in information technologies, ever increasing interdependence, enhanced analytical skills of the individuals due largely to global television, and the widening use of computers, to support his argument that importance is attached to the micro level.

Rosenau also lists a number of political incidences that demonstrate that the micro level should be recognized and better integrated into theory and practice because structures at the macro level seem increasingly vulnerable to shifts in the skills and orientations of the publics they encompass, and because activities at the micro level have macro consequences.[285] He understands the driving force for change to be developments in technology that entail a progressive learning process whereby the emotional and intellectual skills and perceptions of people expand and thereby enable them to perform better the task of group membership and to engage more effectively in varying kinds of citizenship.

To understand that micro level variables are relevant to world politics, it is necessary to set forth some initial premises concerning the central tendencies at work at the institutional/macro level. According to Rosenau, the following three perspectives offer a framework for understanding the underlying dynamics moving world politics towards new global structures. The first focuses on the tension that arises from the

[285] See, e.g., New York City University. The Threat from Non-State Actors How Grave, How Remedied? Roundtable Conference, 4 March 2004. Available at http://www.un-globalsecurity.org/pdf/reports/NonState_Actors_Report.pdf (Accessed on 14 March 14 2005) reporting on the threat coming from the power of the individuals/networks to participate in the global power game.

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clash of centralizing and decentralizing tendencies that are unfolding in all parts of the world and in every level of organized activity. These conflicting forces result in an expanding awareness and understanding of interdependence and simultaneously in an increasing integration as well as fragmentation. Within this perspective, the challenge is to maintain the coherence vested in the institutions and to avoid excessive fragmentation. A second and more empirical way of describing these dynamics is to conceive of them as arising from contradictory principles of world order: a territorial principle and a globalising principle. A third and still more elaborate conception of the fundamental changes at work involves a simultaneous breakdown of three basic parameters that have long served as the boundaries within which international politics have been conducted:

- Within the overall structure of the global system diverse "sovereignty free" collectives have evolved apart from and in competition with the state centric world, which is sovereignty bound.

- A second prime parameter of world politics, namely the macro-micro parameter, consists of authority relationships whereby macro collectives achieve the compliance of the micro actors, who comprise their memberships. New networks of groups and strategies are appearing and authority has today become problematic, where it once was given in world politics.

- A third global parameter undergoing change operates at the micro level of individuals, where people in every corner of the world can be viewed as having acquired more analytical skills and cathectic capacities than their ancestors. These are talents that better enable them to discern where they fit in the course of distant events to appreciate the virtues of collective action, and, thus, to congregate in the squares of the worlds cities at those times when the aggregation of micro actions into macro outcomes can have significant consequences.

In summary, equipped with greater capacities, citizens have more avenues along which to pursue their interests. The evolution of governance mechanisms decoupled from formal government affords them a multitude of new points of access to the course of events encompassing non-territorial networks or, conversely, to retreat to more close-at-hand outlets for their needs and wants and interests. The possibility of citizens having opposing reactions, either conceding to emotional demands for sub systemic autonomy or responding to thoughtful preference for systemic coherence, requires identifying and describing those elements that determine people's choices. For his part, Rosenau points to two prime factors. The first involves perceptions of how others are making such choices. It is difficult to opt for systemic values when

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others are pressing their narrow views. This overall perception of what constitute self-interest is seen to depend largely on how leaders respond to conflicts. More specifically, whether inter-subjective rationales develop that will allow for the concurrent pressure of powerful transnational and sub-national tendencies depends on what transpires at the ideational level. The complexities do not lend themselves to simplified ideational perspectives. In fact, it may be that the primary premise of whatever inter-subjective understanding of global order lies ahead will be one of tolerance of pluralistic tendencies, where conflicts are resolved on the basis of ad hoc bargaining among combinations of groups whose composition varies from issue to issue, and where an acceptance of complexity is considered sufficient to enable world politics to move intact through time. A pluralist order tends to disaggregate the centres of decision, but it too requires a measure of governance if it is to endure.

Rosenau writes from the vantage point of the early 1990s. Today, it is hardly controversial to maintain that the individual is an important variable in international politics,[286] with both positive and negative impact. Still, theoretically, individual agency and the relationship to community, law, and global governance are rarely addressed, beyond specific regimes. Even the concept of international community is vague and it is difficult to perceive of individuals as belonging to something undefined. However, within the discipline of political and social theory, and particularly in the context of the EU debate, the conditions and requirements for establishing mechanisms by which people can become part of a community in democratic governance schemes are being vigorously debated. Although these debates refer to a more limited geographical scope and more concrete institutional settings, I consider the arguments that are exemplified in the following important to the theoretical debate concerning a global community.

1.2 The Twin Problems of Integration and Motivation

One of the much-debated claims is that democracy - reconciling freedom and political rule - is viable only against the background of a single nation understood in linguist-cultural terms. This claim is addressed and refuted in the article "Does Liberal

[286] See Chapter 3 about participation in international environmental law.

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Democracy Presuppose a Cultural Nation?" by A. Abizadeh.[287] The author's stated objective is to clear the way for a normative theory of liberal democracy in a multinational and post-national context. In so far as the analysis opens a field for other more general theories, it is relevant to the debate about a global community. The article is elaborated here because of the method applied and the pairing of the motivation/integration requirements for theory building concerning polity development and democracy.

The article first outlines a theoretical framework for the analysis. Building on Durkheim and Habermas, the author distinguishes between system integration, which co-ordinates action via strategic interaction, and social integration, which coordinates action via linguistically mediated norms and processes for reaching understanding. Abizadeh concludes that the problem of socio-political integration and the processes of cultural reproduction and socialization involved therein require non-strategic action. Thus, if socio-political integration requires non-strategic action, then explaining what accounts for integration at the macro socio-political level requires explaining the motivational basis for non-strategic social action at the micro philosophical/ psychological level. This he calls the twin problems of motivation and integration.

Investigating how modern liberal democratic societies can solve the twin problems of motivation and integration, Abizadeh contrasts a communitarian "cultural nationalist" theory with an ethnic nationalist thesis. According to the latter thesis motivating and integrating a polity's members requires appeal to shared ethnicity - i.e., myth of common descent - to provide an affective identity capable of motivating non strategic social action and serving as the pre-political basis for the polity's social integration. This is rejected as too thick, because of its racist overtones. On the other hand, he rejects as too thin a neo-Kantian constitutional patriotism as represented by Jürgen Habermas, because it does not identify an object of collective attachment sufficiently strong to motivate the affects required and, thus, fails to solve the twin problems.

[287] Abizadeh, Arash. "Does Liberal Democracy Presupposes a Cultural Nation?" *American Political Science Review* Vol. 96, No. 3, 2002. pp. 494-509.

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Within that perspective, the author analyses the plausibility of the following four arguments

1. Socio-political integration required for a legitimate order in a liberal democracy requires shared norms and beliefs.
2. The necessary level of trust can only develop between co-nationals.
3. Democratic deliberation requires communicational transparency.
4. Economic viability of specifically industrialized liberal democracies requires a single national culture.

He rejects all of these based on a number of arguments that are not elaborated here. The author concludes that his analysis opens the debate to the possibility of a normative theory of liberal democracy in a multinational and post national context. He also suggests that integration in liberal democracies is not contingent upon cultural nationalists assimilation policies. To the contrary, faced with cultural heterogeneity, state-sponsored nationalist projects of cultural assimilation justified by reference to some supposed need for homogeneity have increasingly proven to be not merely ineffective but counterproductive to the goal of integration.

His general conclusion is that, even if we grant that social integration essential for order and legitimacy requires non-strategic action and that the requisite non-strategic action necessarily depends upon a shared affective identity of some kind, it does not follow that the non-strategic action indispensable to social integration requires a shared national public culture. This is logically verified from the fact that barriers of difference never fully correspond to a single specifiable collective boundary.

1.3 Autonomy and Responsibility

Jürgen Habermas' theory, which is presented in Section 2, that private autonomy cannot be secured without simultaneously promoting public autonomy, although embedded in the existing institutional order, does not have any particular global focus. A more empirical approach to the question of individual autonomy in a global age is taken by Thomas M. Franck, who in "Community Based on Personal Autonomy"[288]

[288] Franck, Thomas M. *The Empowered Self - Law and Society in the Age of Individualism*. Oxford, UK: Oxford University Press, 1999. pp. 76-101.

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provides an account of changes relating to global governance and democratic renewal based on personal autonomy. He acknowledges that:

> While 'autonomy' has many meanings and, thus, can confuse as well as inform, the usage in this study is quite clear. Personal autonomy means the law-given, socially accommodated right of each person to make moral, social and political choices, particularly those that define the self. [See James E. Fleming, 'Securing Deliberative Autonomy', 48 Stanford L. Rev. l, 30-1 (1995).][289]

Franck sees personal autonomy as the fundamental building block in global governance, where an emerging global civil society will be applying autonomy not only to personal ends but also to family and community interests. However, the argument that a society that wants to constitute itself as a political unit requires a collective identity and cannot function without common culture or languages has deep roots. Franck addresses the question with reference to the *Maastricht* decision of the German Federal Constitutional Court and the subsequent debate. He also stresses Habermas' point that

> . There is a circular mutually reinforcing flow between the 'institutionalisation of citizens' communication' and the growth of communications itself. He [Habermas] thus argues that the existence of a shared sense of social community does not constitute the a priori precondition for establishing transactional institutions from which joint values, policies, and actions emanate. [Jürgen Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution"', 1 Eur.LJ 307 (1995)].[290]

Franck offers as evidence that when fates of people are closely linked there is a sharing of some concern for human society that crosses national borders. For example, such sharing is displayed by the effective network of national and transnational citizens groups concerned with preservation of the environment – which has already demonstrated its ability to transform both the international and the national discourse placing sustainable development high on the agenda. He sees an emerging society, which features growing, interactive transnational factions, passionate global value-and-policy discourses, and public and private transactional networks: in short, a community of communities, in which, for the first time, individuals are comparatively free to choose the multiple components of their identities and to choose their affinities.

[289]Id. at 92.
[290] Id. at 96.

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Consequently, Franck does not see any particular analytical problems, theoretical aspects, or normative considerations to be explained or addressed concerning the relationship between the individual, the groups and networks and the wider community. However, he acknowledges:

> That liberation has begun, but it does not yet engage the majority of the world's people. It may never do so, leaving the world half-determinist and half autonomous. The direction, however, is towards an eventual outcome in which the dynamism of growing individual freedom engulfs the lingering static forces that confine personal choice by mandating racial, cultural, national, linguistic and religious particularity. What will then have been wrought is not necessarily world government - some aspects of which, by necessity, are already in place - but, rather, a liberal global neo-community, a civil society based on socially and legally protected individualism.[291]

In other chapters of the book Franck takes up a number of aspects relevant to the growing individualism in a global age. This includes the important debate about the relationship between personal freedom, personal responsibility and their democratic reconciliation. In the final summing up chapter, he says that the contemporary human condition has created fissures in the façade of communitarian identity, and he suggests that the search for a balance between the rights triad - individual, state, and group - should begin with acceptance of a survival principle. Since only the individual is a natural construct, an un-deconstructible objective fact, the right of the individual should be given priority. However, according to the author, this does not imply predominance. He acknowledges the gap between universal rights and universal social responsibility, but he considers it too general for adjudication and, therefore, it is referred to the political process. This makes it essential that the political process by which such social allocations are made should be generally accepted as democratic and legitimate. All too often international political institutions fall far short of this democratic legitimacy. However, he sees the emergence of an internationally recognized right of democracy as a possible way of assuring people the ability to choose the government that appoints the diplomats involved in the international process:

[291] Id. at 100.

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> We have the building blocks. A new democratic impulse, together with growing respect for individual rights and an awakening sense of international social responsibility; together these can build foundations of universal constitutional democracy.[292]

Although Franck addresses responsibility, his main focus is on autonomy of the individual. There is, however, ample empirical evidence that the challenge of conceptualising and implementing individual responsibility and accountability within global governance beyond the nation state is central.[293] For instance, accountability not only internal but also external to aspects of the wider system has been fairly well prescribed for transnational corporations. The evolving nature of this obligation in relation to the environment is discussed by Elisa Morgera in "From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment".[294] She reviews the documentation related to development of corporate responsibility and accountability from the global Summits and compares a number of language versions. Accountability implies widening the scope of stakeholders and has developed in the broader context of the debate on global environmental governance. The term refers to the way in which public and private actors are considered accountable for their decisions, while the concept of corporate responsibility seems to refer to the existence of substantive standards as it is based on the perception that multinationals should no longer base their actions on the needs of their shareholders alone, but should recognize obligations towards the society in which they operate. Morgera concludes that:

> … the two approaches are at different stages of development and acceptance at the international level. Controversy still surrounds the question of identifying substantive standards for corporate responsibility. Important indications in this regard will emerge from States' reaction to the norms elaborated by the UNCHR in 2004. On the other hand, according to the World Resources Institute (2003), global consensus has emerged on the basic principles

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[292] Id. at 285.

[293] See, e.g., "World Bank: Focus on Sustainability 2004," available at http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20343060~menuPK:34463~pagePK:64003015~piPK:64003012~theSitePK:4607,00.html . Accessed on 9 March 9 2005. The report is the first of its kind completed by a multilateral development bank. It breaks new ground by looking at the Bank's activities through the lens of corporate social responsibility reporting criteria -- applying these standards to an institution where the bottom line is not profit, but poverty reduction. The report examines the Bank's environmental and social commitments, as demonstrated through its lending portfolio, knowledge-sharing, policy advice and technical assistance, as well as its workplace policies and practices. It is based on the Sustainability Reporting Guidelines of the Global Reporting Initiative, which are supported by the United Nations system.

[294] Morgera, Elisa. "From Stockholm to Johannesburg: From Corporate Responsibility to Corporate Accountability for the Global Protection of the Environment". RECIEL 13 (2) 2004. pp. 214-222.

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> of good environmental governance: access, participation, transparency, appropriate scale and ecosystem basis. The concept of corporate accountability seems likely to gather general acceptance in the short term, within the broader framework of global environmental governance. [295]

Accountability and responsibility beyond the nation state[296] are addressed in general terms by Robert Keohane,[297] who argues that, in a poorly institutionalised setting such as the *de facto* global order, there is a need to develop a theory of the duties that parties owe to one another. Keohane cautions that, although some envision a prospective movement where governance at the global level will be "shaped and formed by an overarching cosmopolitan legal framework", common values are lacking on a global scale. Instead governance[298] of the persistent global interdependence of the present time can be conceptualised as evolving within a framework of a "non universal global society within a global system" or a "society within system". A number of societies will exist where fundamental values will be antithetical to one another, and, therefore, coercion and bargaining will be the chief means of influence in the wider system. However, the author allows that within certain areas progress towards a cosmopolitan ideal might well occur.

According to Keohane the entities that wield power and make rules are often not authorized to do so by general agreement, because there is no global constitution. Therefore, their actions are often not regarded as legitimate by those affected by them. Further aggravating the challenge of establishing democratic principles and standards at the global level is the complexity of the pattern of politics, which involves everybody thereby making it very difficult to trace causal relationships and determine patterns of influence. Thus, proponents of global governance understand that a move to cosmopolitan democracy cannot be based on a strict analogy with domestic democratic politics with its electoral accountability. And the key question addressed by Keohane remains: what do democratic principles, properly adapted, imply about

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[295] Id. at 222.

[296] See generally, e.g., Aman, Alfred C. "Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest." Lecture at the Lauterpacht Center for International Research, Cambridge, published in *Global Legal Studies Journal* Vol. 6 (1999): pp. 397-419.

[297] Keohane, Robert, O. "Global Governance and Democratic Accountability" the Miliband Lectures, London School of Economics, Spring 2002. Available at http://www.europeanbooks.org/commun/recent-review.htm Accessed on 8 April 2005.

[298] Id. at. 3: Governance can be defined as the making and implementation of rules, and the exercise of power, within a given domain of activity. 'Global governance' refers to rule- making and power-exercise at a global scale, but not necessarily by entities authorized by general agreement to act.

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desirable patterns of accountability[299] in world politics? Which entities should be held accountable, to whom, in what ways?

Keohane goes on to debate relevant kinds and mechanisms of accountability and the characteristics of a number of entities, such as intergovernmental organizations, corporations, trans-governmental networks, religious organizations and movements, covert terrorist networks, and powerful states. He sees three justifications for accountability, namely: authorization, support and impact. Authorization and support are the basis for what is called internal accountability, because the principal provides legitimacy or financial resources to the agent.

However, Keohane claims that the most serious normative problems arise with respect to what he calls external accountability, that is accountability to people outside the acting entity whose lives are affected by it. Still, too many consultations would have to be held if merely being affected is sufficient to create a valid claim. Keohane does not seek to resolve the problem but notes it as a problem that political philosophers should address. To develop a theory of external accountability, it may be necessary to construct a theory of the duties that parties owe to one another in a poorly institutionalised but increasingly globalised world. He continues to identify the potential conflict between internal and external accountability, mentioning both corporate management as accountable to the shareholders and not to the wider community, and the Roman Catholic Church, which has been forced to accept external accountability in connection with the paedophilia scandal in the US in 2002. In conclusion, Keohane states that global institutions are not sufficiently strong to impose a satisfactory measure of external accountability on powerful states, corporations, or religious organizations. Thus:

> Our principal task as scholars and citizens who believe in more accountability is to build support within our powerful, rich countries for acceptance of more effective and legitimate multilateral governance to achieve human purposes, for stronger transnational bonds of empathy, and for the increased external accountability that is likely to follow. [300]

[299] Id. at 12: We can speak about authorized and institutionalized accountability relationship when the requirement to report and the right to sanction, are mutually understood an accepted.

[300] Id.at 31. Concerning the problem of inter-community relationships see also generally: Weinberg, Ota. "The Conditio Humana and the Ideal of Justice" in MacCormick, Neil and Ota Weinberger. *An Institutional Theory of Law*. Dordrecht, Holland: D. Reidel Publishing Company, 1986. p. 220:

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1.4 An Alternative Conception of Political Community?

It appears from the debates described in the previous sub-sections that the answer to the question about the conditions and the nature of an affective phenomenon enabling motivation and integration of individuals into a political community is relatively open both theoretically and empirically. However, there is a need for a theory of a community of individuals underlying the *de facto* global governance, because ad hoc and concrete approaches cannot capture the global and universal dimension of the question.

The questions concerning motivation/integration, autonomy and responsibility are approached from a philosophical perspective in *Vulnerabilities of Agency: An* Alternative *Conception of Political Community*.[301] According to the article, the discourse of political philosophy often considers a shared habitat, origin, status, history, practice or language sufficient to constitute a community of individuals whose identities as members justify their *political* rights and obligations. Such claims, in turn, raise worries about the identification, authority, and demands of such a community turned polity. However, it is also possible in the abstract to conceive of political rights and obligations as determined independently of individual's membership of such a community. Thus, membership in a community is considered a secondary, contingent, and even voluntary feature of the individuals' circumstances. However, this raises worries regarding an apparent commitment to a moral isolation of the individual - at least in a predominantly secular understanding of the world.

To demonstrate a different approach, the article offers an interpretation of the conception of community in the political philosophy of Kant and Nietzsche and suggests that this conception offers certain substantial advantages for the treatment of community in political thought in a post-national world, insofar as it treats political obligations as determined, in principle, neither by individuals' membership in a

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> The actual problem is no longer merely one of standing up for the community *but rather one of the organisation of inter-community relationships*. Here in matters small and large lies the first precondition of the survival of mankind in the light of modern weapons and of the existing constellations of communities in the world today. The ideals of justice of our time should be harnessed to the service of this problem.

[301] Baily, Tom. "Vulnerabilities of Agency: An Alternative Conception of Political Community." Paper presented to the "Fourth Essex Graduate Conference in Political Theory" University of Essex, Department of Government. 9-10 May, 2003. Paper on file with author.

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community constituted by a shared habitat, origin, ethnicity, status, history or practice nor by the concerns of morally isolated individuals. Rather it treats political obligations as possible only insofar as agents are not morally isolated as their agencies are mutually vulnerable and as they are thus subject to certain requirements for respect for agency (sphere of power) among them.

Such an abstract conception of community as constituted in the relational space between mutual vulnerability and respect for agency can be helpful to the present situation[302] as the only obvious physical delineation of a community underlying global governance is geographical: it is a community of the earth, because the environment and the fundamental resources are shared *de facto*.[303] Thus, the contradictory principles of world order perceived by Rosenau - i.e., a territorial principle and a globalising principle - might just as well be perceived as principles representing a unity. However, to what degree the principle of interdependence and thus mutual vulnerability can be conceptualised convincingly to motivate integration into a political community,[304] cooperating based on an assumed biological drive to survive and prosper, is questionable. An important factor in the debate is the question of the relative influence of individual behaviour and systems of institutional incentives, because conceptions of motivation hinge on knowledge or speculation about the relationship between knowledge, social organization and human nature.[305]

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[302] Keohane, supra n. 297 at p.31 suggests:

> In the long term, the only remedy for this situation is that networks of connection, and empathy, develop on a global basis so that democratic publics in powerful states demand that the interests of people in weaker states be taken into account. That is, people need to adopt a moral concept of reciprocity as described above, and as articulated by Rawls.

[303] See infra Diamond at 518: The highest blood levels of toxic industrial chemicals and pesticides reported for any people in the world are for Eastern Greenland and Siberia's Inuit people, who are also among the most remote from sites of chemical manufacture or heavy use.

[304] This question is addressed in *Collapse - how societies choose to fail or succeed.* USA: Viking Penguin, 2005, where Jared Diamond gives an impressive historical and current account of how societies - with disastrous results - seemingly acts against their best knowledge. However, he also tells a story about talking to Dutch friends about the reason why the Netherlands has such a high awareness and acceptance of the necessity of environmental protection and management and was told: "Just look around you here. All of this farmland that you see lies below sea level. One-fifth of the total area of the Netherlands is below sea level, as much as 22 feet below, because it used to be shallow bays, and we reclaimed it from the sea by surrounding the bays with dikes and then gradually pumping out the water. We began draining them nearly a thousand years ago and we have a saying, 'God created the Earth, but we Dutch created the Netherlands'. These reclaimed lands are called 'polders' and we are so aware of the environment, because we have learned through our history that we're all living in the same polder, and that our survival depends on each other's survival." p. 520 - the above is a shortened version of Diamond's quote.

[305] See generally, e.g., Grutner, Margaret. *Law and the mind: biological origins of human behavior.* SAGE Publications, 1991.

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That subject is pursued in more detail in Chapter 7. The following section touches upon ideas of paradigms of law and the power of law to integrate the individual and community based on individual autonomy.

Section 2 The Relationship between Community and Law

2.1 Introducing the Idea of Paradigms of Law[306]

Within the last 50 years, Jürgen Habermas has been deeply involved with questions regarding the relationship between law, political community and democracy.[307] For example, in Van Hoecke's *Law as Communication*,[308] Habermas is presented as one of the principal contributors to an alternative philosophical framework for law and governance that could replace traditional natural law normativism and positivist rationalism. Habermas' ideas are conceptually embedded in the existing system of sovereign nation states and international law, but they have - by virtue of being theories - an implicit claim to universalism. Although not developed within a global perspective, these ideas are today part of the debate concerning, among others, transnational democracy and world civil society. With regard to the necessary conditions for political community, Habermas himself has rejected a cosmopolitan vision of a global community. He believes such a vision emerges only on the basis of harm done to others, and, therefore, it is insufficiently pro-active and forward-looking to steer political life.[309]

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[306] Habermas, Jurgen "Paradigms of Law" in Rosenfeld, Michael & Arato, Andrew (eds.), *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, 1998) pp. 13-24. (Paradigms)

[307] For an extensive bibliography, see http://www.habermasonline.org . His Major publications are *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy.* (BFN) Cambridge, Massachusetts: The MIT Press, 1996. In BFN Habermas works out the legal and political implications of his *Theory of Communicative Action* from 1981, which builds on elements of his first book *The Structural Transformation of the Public Sphere* published in 1962. Since BFN Habermas has increasingly addressed the international sphere see, e.g., "Das Kantische Project und der gespaltene Western" (*Der gespaltene Western,* Frankfurt am Main, Edition Suhrkamp, 2004) which has been critiqued for instance by Neil Walker in EUI Working Papers, Law No. 2005/17. However these contributions from Habermas are more philosophical than theoretical and therefore, not included in this text. Here, I try to demonstrate that the analysis underlying Habermas' "author of the law" is incomplete on its own terms. This analytical theoretical problem has implications for the plausibility of his theory when it is applied to concrete settings/empirical material.

[308] See supra n. 272, Van Hoecke.

[309] Chalmers, Damian "Talking European - Deliberative Rationality and the Quest for Political Community " A Review Essay published online: http://www.europeanbooks.org/europeanbooks/essaysreviews/essayreviews_06_part01. Accessed on 8 April 2005). In the article the author, Damian Chalmers elaborates an interesting analysis of the European Union as a deliberative polity focusing on discursive as opposed to coercive means to bringing about its policies. He mentions the uncomfortable fact that empirical evidence, clinical work and case studies carried out in the United States show that deliberative government can lead to

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Thus, although Habermas did not address the global situation directly, it may be productive to consider how his thinking might relate to and shed light on the relationship between law and global governance. His ideas about "people as authors of the law " and the inherent relationship between private and public autonomy may be pertinent to global governance as well. For example, the growing acceptance of the participation of individuals in various global governance regimes and within international financed development projects[310] can be understood as an expression of the same developments with which Habermas is concerned. Specifically, Habermas might enhance our understanding of the sensitivity to legitimation of law and governance beyond the existing formal nation state system. Further, his deliberative democracy approach to politics is being debated and tested within a variety of settings, including international arenas.[311] Also, one of Habermas' central conclusions, that "private autonomy cannot be secured without simultaneously promoting public autonomy", can be seen as an equivalent to the international human rights theories on the interdependence and indivisibility of human rights.[312]

By any measure, Habermas' work has been thoroughly discussed, and it is beyond the purpose of this thesis to engage in an elaborate analysis of his philosophy. Instead, I provide a brief introduction and then focus on "Paradigms of Laws" in which he presents a conception of people as "authors of the law" which - theoretically speaking – can be understood as a way of making the interdependence of the constitutive and controlling aspects of law explicit, a relationship which today is implicit in

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extremely unpleasant politics. Recent evidence of direct democracy in the Untied Kingdom points in the same way. He argues that the reason for the faith in deliberation is that it structures the political process around four values those of transformation, validity, relations and self-government. It is acknowledged that these values conflict but in a world where increasingly few legal norms or polices can be evaluated simply according to whether they enhance or restrict freedom, these values, combined, are seen to provide as compelling a standards as any. The author presents an analysis of deliberation in relation to language, institution-building, problem-solving and the quest for political community. His overall conclusion is that " Faith should be had in the capacity of the political processes throughout Europe - be these supranational, national, regional, local or quasi-public - to mediate political conflict through the application and justification of these norms. [those of self-overcoming, modernity, relationality and self-government.]. See also Chalmers, Damian, "The Reconstitution of European Public Spheres". European Law Journal, Vol. 9, pp. 127-189, April 2003. Abstract available at http://ssrn.com/abstract=410983 .

[310] See Chapters 3 and 5.

[311] "Empirical Approaches to Deliberative Politics" Workshop, May 21-22, 2004 European University Institute, Department of Political Science.

[312] See, e.g., Donnelly, Jack *Universal Human Rights in Theory & Practice.* Cornell University Press, 1989. pp. 28-46.

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constitutional democracy. According to Habermas, the term “paradigm of law” refers to the images of society inscribed in a legal system. The “social vision” or the paradigm so inscribed implicitly provides the background for interpretation of the system of basic rights, and it orients the project of realizing an association of free and equal citizens.

"Paradigms of Law" is published as a separate article, and encapsulates Habermas' principal ideas concerning the integrative power of law and the relationship between political community and the generation of law.[313] Based on a detailed presentation of this text I aspire to show that his analysis supporting the proposed proceduralist paradigm - which he, in philosophical terms, sees as going beyond the present dichotomies of objectivism and relativism[314] - is incomplete and does not succeed in demonstrating the likelihood that it will be more appropriate than the two other paradigms, which Habermas criticizes as insufficient. Certainly, reviewing only one text does not do justice to Habermas' vast contribution, and I only justify my approach by asserting that the analysis that follows captures an essential point of relevance to my thesis, namely, that a central barrier to overall systemic change - the need for which is driven by the global perspective of practice - is that scholarly analyses do not account for the relative influence of the underlying worldview. Thus, the implicit normativity of the prevailing epistemology remains inaccessibly for analysis thereby resulting in the development of variations of the criticized paradigm instead of in the change, which is proclaimed as necessary as part of the critique supporting the articulation of the proceduralist paradigm.

Thus, I do not fully support Van Hoecke’s contention that Habermas' work can be seen as an alternative theory or explanatory model to replace traditional natural law normativism and positivist rationalism, which are considered inadequate under today's complex condition. Although Habermas provides original and valuable insights to the debate, his approach suffers from the same fundamental malady as normativism and positivism, namely, it lacks a plausible ontological commitment regarding the

[313] See also n. 396 Habermas, BFN. Chapter 9 "Paradigms of Law" pp. 388-446.
[314] See infra Badillo, Chapter 1. "The Objectivist/Relativist Dichotomy: The Habermasian Alternative."

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rationality or worldview underlying the theory,[315] and, as such, his theory can be seen as a necessary but not sufficient contribution to development of a more satisfactorily explanatory model of the relation between law and polity under today's complex conditions. It supplements the existing theories but does not replace them, and it provides an explanatory framework and theoretical support to the growing institutionalisation of "participation" within various governance regimes at the national and the global level by demonstrating the link between individual autonomy and the integrative power of law.

2.2 From a Formal to a Proceduralist Legitimation of Law.

In "Paradigms of Law" Habermas introduces a proceduralist paradigm of law and suggests that it "is more appropriate for complex societies than the two paradigms that have competed up to now", namely, a 'formal' and a 'material' paradigm'. He states that the background for the development of the proceduralist paradigm is the ever-increasing dynamic and complex nature of the development process. The activities of society have become too complex and too interconnected to be left to the individual actor's arbitrary decision-making or to be regulated by imposition of laws only commanding substantive ends. Regulation of conditions and framework is also required by the growing awareness of the magnitude of the potential harm of the activities. Habermas' theory of communicative action is an integral but implicit element of his proposed paradigm of law. The theory is based upon the linguistic dimension of social interaction, and, by my reading, the more normative implications are implicit in the rules of languages, which guide communication and discourse. Essential for his consensus theory of communicative rationality is that, rather than being an "objective" truth from which conclusions might be inferred, rationality is something that is constantly made through communication with others. In this way Habermas postulates an epistemic shift, but he does not make the ontological basis of his claim an integral part of the theory. In his discourse theory universalising

[315] The question of the cognitive has been part of Habermas' thinking from the very beginning of his career. In *The Emancipative Theory of Jurgen Habermas and Metaphysics*. The Cultural Heritage and Contemporary Change Series I Culture and Values, Vol. 13, 1991. (Accessed 8 April 2005 at http://www.crvp.org/book/Series01/I-13/contents.htm) Robert Peter Badillo provides a thorough analysis of Habermas' cognitive interests theory. The book is a continuation of a doctoral dissertation (Washington, D.C.: The American University, 1990) *A Critical inquiry into Habermas's Philosophy of Emanacipation: Toward an Ontology of the Human Person*. Although the analyses presented explain Habermas's thinking, this explanation does not change the foundation of the present critique and it shall, therefore, not be pursued any further in the following.

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principles enter through the medium of language being constitutive of all social relationships. Law does not receive its normative sense through an *a priori* moral content or through its form *per se*, but instead through a procedure that is based on the discourse principle. According to Habermas, the characteristics of the rational discourse concept, which is understood to be integral to the deliberation process relevant to the proceduralist paradigm, can be elaborated as follows:

> The form of communication that qualifies rational discourse in general can be analyzed in terms of necessary pragmatic presuppositions: publicity and inclusion, equal communication rights, truthfulness and absence of compulsory constraints from within and outside the actual setting.[316]

Habermas' text first describes formal and materialized law and then it elaborates on the proposed proceduralist paradigm. To illustrate the inherent connection between the private autonomy of the individual and the public autonomy of citizens in a democracy - the understanding of which is a defining property of the new proceduralist paradigm - the article finally provides an account of feminist legal theory.

The **"f*ormal***" paradigm of law is linked to a liberal state model. Habermas describes it as grounded on the normative premise of equality and basic rights, coupled with an understanding of the sphere of the state and of the common good as separate from the economic society, within which the members of the society are left to pursue their individual interests.

This normative premise is based on economic assumptions concerning equilibrium in market processes and on sociological assumptions concerning the distribution of wealth and social powers, according to which, equality within the economic society will facilitate transformation towards realizing an image of a just and prosperous society. In this context, the role of law is to institutionalise the autonomy of the individual and the rules of the game for the economic society, e.g., property rights,

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[316] Habermas, J. "A Short Reply". European University Department, Department of Law. 1998. On file.

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freedom of contract. The right of each individual to do as he pleases within the limits of general laws is understood as legitimate only if the law formally guarantees equal treatment. Further, it is assumed that by delimiting spheres of individual liberty through guarantees of a negative legal status, social justice and actual equality can also be achieved.

The more theoretical assumptions behind this model made it vulnerable to socio-economic realities, which increasingly have demonstrated that the universal right to equal individual liberties cannot be guaranteed through the negative status of the legal subject. Rather it has proved necessary to specify the content of the existing norms and to introduce new categories of basic rights, grounding claims to a more just distribution of socially produced wealth and more effective protection from socially produced danger. Such a materialization and introduction of new rights are justified normatively as equal distribution of individual liberties, because it is seen as a necessary revision of the liberal paradigm, not as a fundamental change.

"Materialized" law is linked to a welfare state model, which, in principle, grants each person the material basis for a humanly dignified existence. However, a welfare state with such ambitious provisions almost inevitably imposes supposedly "normal" patterns of behaviour on its clients. This normalizing pressure obviously runs the risk of impairing individual autonomy, precisely the autonomy it is supposed to promote by providing the factual preconditions for the equal opportunity to exercise negative freedoms. According to Habermas, the change from formal to materialized law can be observed in all modern societies. This point is supported by a detailed reference to a study concerning developments in US tort law. The study also confirms that:

> ..the change does not express a radical shift in the political and legal premises but rather a trend in liberal thought from the vision and ideology of a more individualistic society stressing the facilitative state framework for private activity to the vision and ideology of a more managerial, re-distributive welfare state. [317]

So both the formal and the materialized paradigms of law are perceived as based on a liberal socio-economic policy vision of society and on the normative premises of individual rights and equality.

[317] Paradigms at 15.

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Now, the problem identified by Habermas is that the legal strategy for implementing the social vision of the welfare state and for providing both formal rights and material conditions for equality is not effective. In fact, he maintains that regulation to promote equality becomes part of the problem, because formal law facilitates differential use of the formal rights and in this way increases inequality. Materialized law takes away the autonomy it was supposed to facilitate by interfering in people's lives. Both of these paradigms see citizens and the state as participating in a zero sum game. Namely, what is given to the individual in the form of autonomy is taken from the competence of the state and what is awarded to the state in its capacity for social regulation is taken from the individual in the form of private autonomy.

To remedy the identified shortcomings and to pursue a legal order at a higher level of reflection, Habermas proposes **"**a proceduralist understanding of law**"** that is centred on the procedural conditions of the democratic process. The idea of this third paradigm builds on an elaboration on how legitimacy is linked to an "internal connection" between private and political autonomy, which constitutes the democratic meaning of a legal community's self-organization.[318]

The dispute between the liberal and the social welfare conceptions is focused on specifying the material preconditions for the equal status of the legal person as an *addressee* of the legal order. However, if we start from a fully developed concept of private and public autonomy, legal persons are autonomous only insofar as they can understand themselves as *authors* of the law to which they are subject as addressees.

According to this view, the legal order is structured not by the measure of individual legal protection for private autonomous market participants or by the measure of comprehensive social security for the clients of welfare-state bureaucracies. Rather, in the proceduralist paradigm of law,

> the vacant place of the economic man and or welfare client is occupied by a public of citizens who participate in political communication in order to articulate their wants and needs, to give

[318]Paradigms at 18.

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> voice to violated interest and, above all to clarify and settle the contested standards and criteria according to which equals are treated equally and unequals unequally.[319]

Further, it is asserted that an understanding and acceptance of this conception will make it clear that:

> when discussing how to satisfy the expectations of social justice, the focus in general shifts from the level of *actors* qualities, competences and opportunities to the *forms of communication* in which an informal and non-institutionalized opinion and will-formation can develop and interact with the institutionalized deliberation and decision making inside the political system.[320]

It is explained that there is

> a circular relationship between the fact that a well-served private autonomy helps 'secure the conditions' of public autonomy just as much as, conversely, the appropriate exercise of public autonomy help 'to secure the conditions' of private autonomy. This mutual dependency is reflected in the creation of valid law. This is because legitimate law emerges from and reproduces itself only in the forms of a constitutionally regulated circulation of power, which should be nourished by the communication of an un-subverted public sphere that in turn is rooted in the associated network of a liberal civil society and gains support from the core private spheres of the life-world. Public sphere and civil society the centerpiece of the new image, form the necessary context for the generation and reproduction of communicative power and legitimate law. [321]

The key to a proceduralist understanding of law is summarized as follows:

> a legal order is legitimate to the extent that it equally secures the co-original private and political autonomy of its citizens at the same time, however, it owes its legitimacy to the forms of communication in which civic autonomy alone can express and prove itself.[322]

To elaborate on the theory proposed, Habermas applies his idea to feminist legal theory. The first generation classical feminism in the nineteenth century understood equality primarily as equal formal rights of access to participate in economic and public spheres of society. The differences between the sexes were assumed to lose social relevance once the differential access to the relevant spheres was overcome. However, in several areas the feminist legislation soon followed a social-welfare

[319] Paradigms at 18.
[320] Paradigms at 19.
[321] Paradigms at 18.
[322] Paradigms at 19.

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model promoting equality in legal status via compensation for disadvantages. In the next stage of the feminist movement, attention is focused on unintended consequences of the successfully implemented protective legislation. For example, legal provisions for pregnancy and maternity have only increased risk of women losing their job. Because the special regulation intended to compensate for disadvantages of women in any sphere of activity rests on an interpretation of differences in gender situation, the regulation consolidates the stereotypes of gender identity. As a consequence, the solution, the protective regulation, becomes part of the problem inequality and discrimination.

However, if the problem is located in the "sameness/ difference approach," the target is missed, according to Habermas, who sees the problem as an instance of the need for the affected parties themselves to conduct public discourse in which they articulate the standards of comparison and justify the relevant aspects. Accordingly, private autonomy cannot be secured without simultaneously promoting public autonomy.

2.3 Examination of the Paradigm and the Question of Accountability

The introduction of the theory of a proceduralist paradigm is an attempt to provide a solution to the problem identified by Habermas, namely, that law, or, more precisely, the formal and the materialized paradigms of law, is not effective in attaining the objectives or in realizing the normative premise of the related policy vision of equality and basic rights.

In developing the proceduralist paradigm, Habermas is concerned with identifying causes and prescribing remedies for the inefficiency of the formal and the materialized paradigms of law. In doing so, he analyzes the relationship between the citizen and the state and postulates that, from the vantage point of the rights and equality “social vision”, there is an inherent relationship between being “both the authors and the addressees of law”, which in a complex society goes beyond representative democracy. In applying their rights, individuals can pursue their own happiness and deliberate as to what they should do as a collective. Habermas asserts that the cause of the problem is that both the formal and the materialized paradigms fail to appreciate the inherent connection between the private and public autonomy of

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the individual and, as a consequence, did not focus on the deliberation aspect of law making and application.

According to Habermas, policy and law are inseparable, because a logical consequence of the principle of deliberation inherent in the proceduralist paradigm is that law and politics are mutually conditioning. Thus, although he does not specifically articulate it in relation to the proceduralist paradigm, Habermas implies that legal paradigms are linked to or inscribed with a vision of a just and prosperous society on which the policy ideas and the related basic assumptions concerning the consequential results of regulation are premised.

I concur that, in principle, the essence of law and policy can be conceptualized as parts of the same process. However, for analytical purposes, it is necessary to explicate the two elements and their underlying assumptions separately. Otherwise, the analytical framework will be neither comprehensive nor sufficiently differentiated to capture and address relevant fundamental factors influencing the field of analysis. Thus, it is necessary to examine whether the proceduralist paradigm is based on a change in the "social vision" and in the normative premises or whether it is merely a more sophisticated version of the formal and materialized paradigms of law relating, in essence, to the same vision.

According to the text, the formal law strategy is based on a model whereby an economic society institutionalised in the form of private law was separated from the public sphere of the common good and the state. Implicitly, the proceduralist paradigm represents a radical shift from this understanding of the "social vision" because it demonstrates the logical interconnectedness between the private and the public autonomy. The text, however, only relates the inherent interconnectedness to the legitimisation of the legal order and not to any implications for the "social vision".

Further, Habermas states [323] that the legal paradigms of both the welfare state and the liberal state share the *productivistic* image of a capitalist industrial society. There is, however, no mention of whether the proceduralist paradigm shares the same image.

[323] Paradigms at 18, last sentence of first section.

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Since *productivistic* is in italics it could be interpreted to mean that the liberal and welfare-state paradigms provide the structure for the right of the individual to participate in the implementation of the productivistic vision, while the proceduralist paradigm enlarges this perspective by providing conceptual channels to participate in communication and deliberation also beyond a vision of a productivistic social framework. In this way, individuals through dialogue continually legitimimate not only positive law and regulation but also the legal/political order. This reading of Habermas' claim is inferred from the text, but it is in no way explicit in his account. However, later, without further explanation, Habermas states that:

> "the intention [of introducing the proceduralist paradigm] is to tame the capitalist economic system.... This means linking the administration to communicative power and immunizing it better against illegitimate power." [324]

Thus, I consider it unclear to what degree Habermas himself considers his theory applicable beyond a general western, liberal, capitalist state based institutional system.

To summarize, the proceduralist paradigm appears to be based on the same fundamental image of society and on the same philosophical rationality as the formal and the materialized paradigms, with the implicit modification that Habermas' proceduralist paradigm, in principle, opens a conceptual path for questioning the fundamental understanding and image of the "social vision" as an integral part of the deliberative process of legitimating the legal order. In such a construction, the image and the legitimacy of society as a capitalist industrial society cum welfare state can be questioned and "tamed" via the dialogue, but no other image of society is explicitly provided. Simply stated, the issue is not addressed.

I suggest that, to be methodologically consistent and comprehensive, the rationality of governance, the premise behind the "social vision", cannot be left unidentified and unexamined. An explicit analysis of the normative premises and the related assumptions behind the "vision" is required to

1) Investigate whether there are contributing causes of the inefficiency related to the foundation and assumptions of the "social vision", and to the lack of appreciation

[324] See at.19, second section, second sentence.

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of the interdependence of the public and private autonomy in the legal paradigms. And to

2) Develop a conceptual model of the "social vision" and its political man, which is compatible with the implications of the proceduralist paradigm of law.

In other words, to orient the material content and to set a standard for the rationality of the deliberation beyond pragmatic presuppositions, the logical connection between the public and the private autonomy must be demonstrated explicitly in the conception of governance. Otherwise, the existing social vision, thereby limited to a liberal capitalist cum welfare concept, will constitute a structural barrier for the implementation of proceduralisation proper, by which, I mean that the dominant rationality and its related institutionalised competences can be questioned.

To sum up, I argue that the theoretical approach to developing the proceduralist paradigm is incomplete. Therefore, it cannot be expected to be more efficient than the formal and the material paradigms in delivering the just and prosperous society. Nevertheless, the theory still provides fertile insights to the problem identified by demonstrating the conceptual interdependence between the private and public autonomy. My main criticism is that Habermas conflates law and policy by including a policy image or a "social vision" in the paradigms of laws, which is not separately addressed or accounted for in the analysis. As a consequence, this implied normativity may unbalance the equation of the citizen being "both the authors and the addressees of law," thus - with potential adverse consequences for practice - creating dissonance between expectations created and actual political influence.

In implementation, the paradigm is very demanding politically, economically, and professionally.[325] It is, therefore, very timely that Julia Black in "Proceduralizing Regulation"[326] has provoked a discussion of how to take the proceduralist paradigm

[325] Concerning e.g., the Aarhus Convention see, e.g., http://www.unece.org/env/pp/compliance.htm and Tuesen, G. and Simonsen, J.H., "Compliance with the Aarhus Convention" in *Environmental Policy and Law* 2001.

[326] Black, J., "Proceduralizing Regulation: Part I and Part II *OJLS,* (2000) 20 (4) pp. 597-614 and *OJLS,* (2001*)* 21 (1) pp.33-58.
The article advances in particular that proceduralisation as technique or normative strategy cannot be considered without addressing the broader substantive concerns. In doing so the article includes e.g., a review of Teubner's normative strategy of reflexive or procedural law, where proceduralisation is conceived as a technique, which can be separated from substantive values. It is shown how Teubner's

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from the level of principle to the level of concrete application within the administration of positive law. If not clearly delimitated, the idea may contribute to frustration and loss of motivation, because individuals participating in deliberation have a legitimate expectation of being able to make a difference, e.g., to question the implicit assumptions, the premises, the means and the agenda of the law making process. Expectations are not limited to the right to talk, but extend to influence beyond bargain power. Therefore, if the deliberation is premised on an undeclared hegemonic rationality ingrained in a particular culture and political system that cannot be changed by ad hoc practice alone, it is plausible that the process of deliberation can become an exercise in justification with no apparent contribution to the creation of justice and of legitimate law.[327]

Also, if one examines, for example, the EU and the regulatory difficulties in accommodation and harmonization within the legal order, it becomes clear that when one moves from the principle of the proceduralist paradigm of law to realities there are a number of other factors that need to be assessed. For instance, how many people outside telecommunication and chemical substances, for example, are able to understand the issues concerning regulation of these highly technical and specialized industries?

Further, because the model does not explicitly include the normative elements in which it is embedded, Habermas is leaving the individual in the role of author of the law with no theoretical support or guidance beyond a synthetic discourse principle. Thus, a flawed analysis - a theoretical problem - results in a substantive problem for practice, and without support it is understandable if people fall back on bargaining or

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theory, contrary to his explicit claim implies a substantive orientation. The first part of the article sets out two possible models of proceduralization. The second part of the article begins to develop one of those forms, 'thick proceduralization, building on but modifying Habermas's model of deliberative democracy in two important respects. First, it is argued that it is not sufficient simply to call for deliberation for there is a real likelihood that even if all deliberants can be brought together true communication will be blocked by differences; difference in the modes of discourse, the techniques of arguments, language, and validity claims. Discourse may therefore have to be mediated through the adoption of strategies of translation, mapping, and dispute resolution. Whether regulators can or should perform such a mediating role remains however an open question. Second, it is argued that deliberative modes of policy formation and regulation are compatible with more pluralist and polyarchical arrangement than Habermas allows.
See also Steele, Jenny. "Participation and Deliberation in Environmental Law: Exploring a Problem-Solving Approach". *Oxford Journal of Legal Studies* (2001) 21 (3) pp.415-42.

[327] See Chapter 3 introducing the example of the World Bank's *Inspection Panel*.

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strategic behaviour within the political deliberation process. Hence, if the equation for the proceduralist paradigm is not enlarged with a distinct policy and/or knowledge component, it is likely that, when the explanatory model of the proceduralist paradigm is applied as a normative strategy, it will not provide a solution, but will become part of the problem in the same way as the formal and the materialized paradigms examined in Habermas' text.[328]

2.4 Linking the Author and the Addressee of the Law with Political Community in a Global Age?

Based on the questions addressed in this chapter, I suggest that an explanation of **the relationship between law and polity** in a global age - within the poorly institutionalised global order - can be grounded on the idea of an abstract model of a community of autonomous individuals, who are both the authors and the addressees of law. In the following chapter, I pursue the question of to what degree it is possible to imagine any further elaboration and concrete institutionalisation of such a conceptualisation. In what follows, however, I first outline some elements of such an abstract model as derived from this and former chapters.

The elements, which have been identified as relevant so far, are:

- The earth is the territorial principle delimiting the community.

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[328] For critique see also Ladeur, Karl-Heinz, "Globalisation and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End of the Nation State?" EUI Working Paper LAW No. 2003/4. p. 11:

> Jürgen Habermas (1996) has recently started again from this construction, in seeing the democratic *process* as the source of the law's legitimacy, in so far as it must understand itself as a rational procedure of formulating the general will (Descombes 1999:35, 46; Ladeur 2000a). Its rationality follows from the fact that the process follows the rules of inter-subjective 'communicative reason'. But here one might join Descombes in asking what sort of universalism it is that can be based on nothing but a consideration about the conditions of rational discussion (as Habermas derives from it the concept of a world civil society, we shall return to this below). This 'deliberative' re-formulation of the democracy concept is only conceivable on the basis of an already existing unity, but it cannot itself establish this. In this way, Habermas wishes to transcend the law's tie to religion, but ultimately the law's link with social reality is also abandoned. However, the law – as an autonomous thing emerging from the connection between morality and religion – consists of nothing other than the emergence of ties and linkage patterns that make the uncertainty of the new modern order bearable and enable the formation of expectations under conditions of partial knowledge. Law functions on the basis of the capacity and willingness of the individuals (and organizations) to internalize the self-organizing constraints and operate with the possibilities contained in them (Descombes 1999:48).

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- Individual agency and vulnerability is the core element of any organizational form of the community.
- Interdependence is a defining property of the relationship between entities, i.e., between agencies or agency (ies) and territory.
- The idea of law is derived from the physiological need for cognition, distinguishing "what is" and rules for how we can know about it.

These elements are considered universally valid, thus they can potentially provide the material needed to conceptualise a model of law and political community in a global age.

In so far as all participants share the same fundamental conditions and are dependent on shared resources for survival, the nature of the community is one of fate. Thus the physical rule of interdependence integrates the individual into a community. This integration is factual and, in principle, it does not depend on human understanding and conceptualisation.

The progression from *a de facto* community to a political community is one of moving from a situation where there is no common understanding of the identity of the community to a situation where there is a common understanding and acceptance of the mandate and authority to participate in a shared agency.

Thus, I argue that understanding the principle of interdependence could motivate individuals to progress from a *de facto* community to a political community. The recognition that actions have consequences beyond our control, thereby reflecting a fundamental identity of the community, could be the guiding framework for the policy process, rule making and institutional development. The idea of law is created in the human mind and it represents, in the abstract, an understanding first of relationship between the “I” and the world and second of how knowledge thereof can be acquired. According to Ladeur as quoted supra, law emerges from the connection between morality and religion and functions on the basis of the capacity and willingness of individuals (and organizations) to internalise the self-organizing constraints and operate with the possibilities contained in them. Although I agree on the latter point, I suggest that in a global age the system of knowledge is more

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adequate to establish the relationship between the I and the world, while religion and moral can be perceived as personal knowledge that can inform the choices of the individual and inform the interpretation and assessment of facts and their implications but not play the defining role. Thus, while presently institutional practice does not provide a conceptualisation of a global unity, the conceptualisation suggested herein will embed social interaction in a framework of a shared, universal condition based on knowledge of the fact of interdependence. The individuals of the community are autonomous because there is no *a priori* argument for authority among them. They are, however, bound together, if not by a common past, by a common future. The community is based on autonomy. As autonomy[329] implies self-rule - i.e., people are both authors and addressees of the law - how can authority be conceptualized? Building on Tom Baily's account of political community[330] I suggest that respect for knowledge of mutual vulnerability and the power of individual agency could define political obligation, thereby reconciling rule and the freedom to choose and delimit the space within which autonomous individuals assign authority to each other to act. Thus, I argue that so defining self-rule from the perspective of knowledge of interdependence as defining the political community may constitute a framework for rulemaking within which legitimacy of action can be assessed.[331]

[329] Concerning the concept of autonomy in moral and political philosophy see generally e.g., http://plato.stanford.edu/entries/autonomy-moral/

[330] See supra note 301.

[331] See generally supra note 7. The historical chapters of the book demonstrate how the twin dimensions of legitimacy – principles of rightful membership and of rightful conduct – have been thought about and developed in different context, thus showing the need for 'calibrating' the two dimensions when social organization and conceptions of agency change.

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Chapter 7 The Call for a Normative Perspective on the Global Reality

> [In reference to public opinion after Eddington's initial 1919 confirmation of Einstein's General Theory of Relativity:]
>
> > But for most people, to whom Newtonian physics, with their straight lines and right angles, were perfectly comprehensible, relativity became more than a vague source of unease. It was grasped that absolute time and absolute length had been dethroned; that motion was curvilinear. All at once, nothing seemed certain in the movement of the spheres. 'The world is out of joint,' as Hamlet sadly observed. It was as though the spinning globe had been taken off its axis and cast adrift in a universe, which no longer conformed to accustomed standards of measurement. At the beginning of the 1920s the belief began to circulate, for the first time at a popular level, that there were no longer any absolutes: of time and space, of good and evil, of knowledge, above all of value. Mistakenly but perhaps inevitably, relativity became confused with relativism.
> >
> > Paul Johnson, *Modern Times: The World from the Twenties to the Nineties (Revised Edition)*, Harper Perennial (1992), p 4.

In the previous chapters, I have identified a particular meaning of the sustainable development policy by relating it as much to the process of development as to its outcome, and to a knowledge paradigm as much as to knowledge about particular sectors. In addition, I have shown that the evolving conceptualisation of a global polity and the related challenges to law and jurisprudence are embedded in a dispirited post-modern framing of the relationship between law and the *conditio humana*: "lasciate ogni speranza". Although there is debate as to the degree the system is in crisis, the normative and epistemological inadequacy of the international legal order is hardly disputed.

Higgot and Brassett's article "Building the Normative Dimension(s) of a Global Polity"[332] can be read as a summary of the debate over the post-modern paradox[333] by calling for the articulation of a plausible normative dimension to the evolving global reality. In what follows, I examine the arguments made in some detail. However, I consider the value of the article is found less in its concrete recommendations and more in the manner in which it expands the debate on how to theorize global

[332] Higgot, R. and J. Brassett. "Building the Normative Dimensions of the Global Polity" *Review of International Studies*, 29, 2004: 29-55. (Higgot and Brassett)

[333] The fact that according to postmodernism there is no privileged perspective, but this theory in so far as it expresses an absolute becomes privileged and thus self-contradictory.

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governance and on how to characterize its inherent problems, including identifying the implications for methods and for the accountability of academia.

The authors advance the argument that, although the practice and perception of globalisation is changing from a focus principally on economic and technological issues to also encompass a political dimension, the normative dimension of globalisation is seriously underrepresented. The authors observe that the extant global space provides for a different and emerging form of politics that requires an alternative theoretical elaboration. Accordingly, the article offers a way of carving out space for ethical thinking beyond the borders of the modern state. Building on Richard Rorty's philosophical pragmatism[334], the authors argue that an ethical re-description of globalisation needs to be the starting point for the process, and that philosophers, theorists, and practitioners of international relations must join the economists as key players in this process, because it is only through creation of a dialogue across the domains of economics, political theory and policy practice that meaningful mechanisms for reform can emerge. Higgot and Brassett argue that because there is not a positive agenda for global change, it is necessary to pursue a reformist strategy of re-description on the assumption that reform of capitalism is possible. Curiously, these authors make no mention of a sustainable development policy in their quest for an agenda for change.

The authors argue for a conceptualisation of academia's personal and collective responsibility, because the pursuit of understanding is not simply a de-politicised application of technical mechanisms for generating knowledge. Instead, it is itself a political act that casts a pervasive shadow over policy.[335] Accordingly, any academic approach requires accountability and demands justification. For example, the authors

[334] Richard Rorty's philosophical pragmatism is briefly presented as containing 3 interrelated facets, namely: contingency, fallibility and experimentalism, which imply that knowledge and adherence to a particular conceptual approach represents more a set of choices than a set of discoveries.

[335] Cooper, Robert. *The Post-modern State and the World Order*. London: Demos, 2000. pp 8-9 http://www.demos.co.uk/

> Understanding the kind of world we live in is important. The cost of intellectual errors in foreign affairs is enormous. Wars are sometime fought by mistake. Suez was a mistake, at least for Britain: it was fought against a threat to order, but neither the threat nor the order really existed. Algeria was a mistake: it was fought for a concept of the state that was no longer sustainable. Vietnam was a mistake: the United States thought it was fighting the Cold War, when in practice it was continuing a French colonial campaign. These conceptual errors had heavy costs. Clarity of though is a contribution to peace.

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state that the academic framing of the globalisation debate in dichotomies - such as cosmopolitan versus communitarian or state versus market, and in analytic critical terms, such as the post-modern critique of rationalism - can in itself be a limiting factor in articulating the normative aspects, which requires an exercise in synthesis. They suggest that academia may simply be wasting too much intellectual energy attempting to define "what is" in order to legitimise their arguments for what "should be". In its place, debating the philosophical question of what "could be" might be more enabling for an evolving and dynamic global practice. However, the authors contend that to develop the required synthesis calls for a different, more interdisciplinary and interconnected approach to research and thinking. Thus there is a need for "a permanently reflexive relationship between meta-theory and social, political and economic theory and policy practice at the global level."

The authors then explain their idea of a re-description of globalisation as a political issue or as "the ethical dimension of the global polity". First, they discuss community and the global polity and refer to the idea of social embeddedness represented in Hegelian thought. For Hegel the person is someone who is encumbered by social relations while still able to realize freedom within them. The state provides the context, the element of unity, in which individuality and rules can be internalised so they are no longer regarded as constraints. However, the authors argue that there are very few straightforward conclusions to be drawn from this "situatedness" of social experience - except that life is contingent.

Then follows an account of communitarian and cosmopolitan positions concerning the relationship between community and the individual in a global world. This includes a brief presentation and critique of "the art of synthesis" as represented by Andrew Linklater who postulates "emergence of communities of fate" and calls for development of a Habermasian discourse ethics. Still, the communicative rationality is dismissed as not relevant to the global polity for the reason that, in the final analysis, the central issue in developing any normative agenda for the global polity concerns human conduct and, more particularly, our ability to influence it.

> It is not a solution to argue for recognition and respect for the other in terms of his, her/ their inclusion in the sphere of equality and entitlement. For inclusion only postpones the

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> unresolved problem of determining, which facets of the others conduct ought to be recognized and respected and which not - exclusion and inclusion ultimately is not about class, sex, race, caste, nationality and other sociological categories; it is about human conduct period.[336]

The article asks new and important questions and is a welcome change in approach to addressing an emerging global polity. However, the concrete proposal for the way forward via an ethical re-description proposed by Higgot and Brassett can be characterized as "a new coat of paint" because it does not address or identify the role of the underlying knowledge paradigm on which their language and concepts of re-description are based, and there is no reference to any useful ethical thinking beyond the Western culture.

The authors conclude the article with a crucial question asking to what extent the potential of the international institutions for promoting global welfare can be realized through acts of pragmatic re-description intended to support incremental change in rhetorical agendas, and whether there is a space for developing new understanding of "we-ness" in the global polity. However, according to the authors such a construction of "we-ness" cannot look backwards and find some trans-historical trans-cultural "proof" of human community or equality. Instead, a pragmatic ethic must look forward to finding a "we" that can talk more usefully about issues of transnational interdependence.

Although Higgot and Brassett do not invite the legal discipline to participate in the debate,[337] I argue that law is indispensable if policies and ideas are to be moved from the abstract level into "meaningful mechanisms for reform". Therefore, in the following I take up the idea of re-description and provide a new way of looking at law and political community in a global age. Law, with its emphasis on practice and its insistence on being instrumental, is not generally held as relevant for analysis of the theoretical relationship between knowledge and policy. However, I argue that the

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[336] Higgot and Brassett at n 50.

[337] Higgot and Brassett at 32:

> Throughout the 20th century political philosophers and international relations scholars ceded the policy ground to economist - in the domain of global economic governance in the 21 century they must battle the economist for the role of pragmatic re-describers - let us remember Keynes' famous quote about the power of ideas in full. 'The ideas of economist and political philosophers both when they are right and when they are wrong are more powerful than is commonly understood. Indeed, the world is ruled by little else.

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nature of law is properly understood as emancipatory and not merely controlling, because in defining the game and setting the rules, law enables people to constitute, co-operate and co-ordinate in accordance with new knowledge, but this requires also defining by which rules new knowledge is valid. This dimension of law is under-theorized, because the focus is principally on explaining the authority of existing positive law and legal systems and less on how the phenomena of law relates to society in a broader sense. Finally, I concur with Higgot and Brassett that dialogue is needed between theory and practice; and, therefore, I propose to theorize and re-describe the normative dimension of the global polity based on the express choice of practice, namely, on the policy and implementation process of sustainable development, the emergence of which is described in the previous chapters.

In what follows (Section 1), I argue the proposition that the sustainable development policy provides the resources necessary to articulate a paradigm shift, in that science has provided knowledge about interdependence that is both part of and a basis for the emergence of the policy and practice of sustainable development.[338] In turn, this policy has now generated the resources for changing the rule about what constitutes valid knowledge. These resources could not emerge within science alone, because science has a limited scope, while policy, on the other hand, is comprehensive and includes human conduct as a variable. I further suggest that only the legal discipline can provide the necessary, although not sufficient, resources for the required synthetic analysis explaining a relationship between knowledge and policy, a claim that is further detailed in Section 2.

Because of the nature of the topic, I am constrained to focus on what is necessary to make my case and to leave out the vast philosophical and scientific debates on which the analysis is preconditioned. However, accounting for these debates and their relative importance to the present analysis is beyond its scope, which is to articulate the new instead of critiquing the old. Finally, the subjects addressed: normativity and knowledge are embedded in vast debates of their own, therefore, I urge that my

[338] See Chapters 2 and 3. According to *Our Common Future* the basis for the integration strategy is the science-supported knowledge that we are far more interconnected than previously believed. Said differently: it dawned on world that" it is a delusion that the solution to pollution is dilution".

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findings be seen as opening a field of analysis and as an invitation to engage more than as a presentation of any concluding insight.

Section 1 Normativity and Knowledge

1.1 The Relationship between Knowledge, and the Policy and Practice of Sustainable Development

According to the analysis of the policy and the legal implementation practice of sustainable development presented in Part I of this thesis, the meaning of sustainable development is not only about concrete action and institutional development to integrate economic, social and environmental considerations, but also about an overall global development process of a different nature. The analysis provided in Chapter 4 demonstrated that the theory of change underlying the "why" of initiating the sustainable development policy process is based on our evolving knowledge of the interdependent nature of "what is", i.e., about the *conditio humana*. This means that the policy can be understood as representing a wider epistemic shift. Therefore, to effect the sought after change in the development process, the appropriate subject of analysis is the very concept of knowledge underlying the process and not merely the more narrowly defined aspects of the process, such as, for example, the relationship between economics and environment.

In the previous Chapters 5 and 6, I demonstrate that this evolving knowledge emanates from an all-encompassing philosophical crisis, which is observable in the debates concerning the global institutional structures, and law and community in a global age. Post-modern theories have characterized it as a crisis of truth.

> That crisis of truth may become more particularly described as a crisis of representation. It is essentially (and hence superficially and far too generally), a three-fold crisis, generated by radical challenges to the traditional conceptions, first, of reality; second, of the language we use to describe that reality; and third, of the subject who perceives and describes that reality, that is, the self. In the post-modern world these categories largely dissolve: the demise of the objective, of the real, is accompanied by the destruction of the subjective.[339]

[339] See supra n. 184, Hayman and Levit at 509.

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Thus, the emergence of the sustainable development policy is embedded in a philosophical crisis of knowledge, and it has been created to put into practice new knowledge of the nature of reality, i.e., interdependence combined with an evolving understanding of the tension or incompatibility of that knowledge with the existing knowledge paradigm institutionalised in the prevailing global order.

To summarize, the sustainable development policy can be understood as a response to evidence provided from philosophy, science and practice that the knowledge on which the current global institutional system is based is no longer adequate; this insight is the driving argument behind the strategy to change outlined by the policy.

1.2 Summary Explanation of the Epistemic Shift

In the following, I present a summary conceptualisation of the nature and the elements of what can be understood as the epistemological aspects of sustainable development. This epistemology is partly descriptive and partly normative in its claim to knowledge about the world and to what constitutes rational or right policy and practice.

In Part I of this thesis about the meaning of sustainable development, I demonstrate that at its core the concept of "sustainability" implies:

- Recognition of interdependence
- Maintenance of the biosphere
- Satisfaction of needs
- The process of participation.

The recognition of interdependence is often characterized as in conflict with the institutional system, which is organized in separate sectors. Moreover, the variables of the sustainable development policy have been perceived as having conflicting objectives. However, the policy prescribed "integration" as a way of resolving the perceived conflict. As also demonstrated in Part I, in practice the world set out to integrate environmental and later social considerations into the existing economic development process(es), and the problems of conflict were solved by what can be seen as compensation, i.e., development of new approaches complementing but not changing the process of development.[340] Theoretically, however, integration is a

[340] See in particular Chapter 3, section 2.

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central and complex concept, which involves determining the relationship between the variables as discussed in Chapter 4.

My analysis of the relationship among the variables of sustainable development resulted in identifying "interdependence" as the structural framework of the processes. Interdependence represents a fact about reality that cannot be changed by the development process. Furthermore, it is universal, valid and equal for all. In short, it can be seen as a calibration factor in a global world of immense complexity. "Satisfaction of needs and upholding of the biosphere" are the particular concrete goals or values, which can be influenced by human conduct and by the process of development, and the participation of all is the resource necessary to undertake the process. In short, the epistemological model is a worldview from where to approach a complex world, and it is constituted as a model, where the relationship between the universal and the particular is defined based on knowledge about the nature of reality and how we can know about it. Thus, to repeat from Section 1.1, theoretically the unit of analysis is the system of knowledge and not particular fields only.

1.3 Representing the Epistemic Shift

The epistemology of the sustainable development policy is built on an evolving knowledge of the nature of "what is" as being interdependent thereby replacing an understanding of reality as consisting of separate objects which we can generate objective knowledge about by observation. Thus, I propose that, to fully put the policy into practice, a comprehensive elaboration of the implications of this knowledge is required. To that end, in what follows I identify a few of the fundamental implications involved in accepting interdependence as the defining principle for the relationship the *conditio humana*

First, in the abstract, interdependence implies complexity and uncertainty as a defining feature of the relationship between the I and the world and the *condition humana*, and this, in turn, implies that human beings can know something, but also know that we cannot know everything.

Second, interdependence also implies a conceptualisation of the universal as distinct and as being constituted by the totality of interdependent particulars as apposed to the

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aggregate of particulars. Such conceptualisation is not necessary if "what is" is seen as separate objects because they can be aggregated, so the universal is not different from its aggregates and thus the universal is non-existent as a distinct entity.

Third, the conceptualisation of the integration of the policy elements results theoretically in establishing a framework and an objective for a dynamic process of generating knowledge for development [341] instead of merely indicating desired conditions such as freedom or economic growth. Furthermore, it reveals that knowledge is not only to be found by observation, but is equally created by the participating in the knowledge generating process. Finally, seeing and understanding "what is" as defined by interdependence also encompasses a conception of the process of relating between objects or states.

The policy and strategy of sustainable development has emerged in reaction to a model of knowledge according to which "what is" are objects. The theoretical implications of interdependence, therefore, cannot be adequately expressed within the present rules for the generation of valid knowledge, which are structured as a binary logic.[342] This problem - i.e., being unable to express accurately what is known to be true - has to date been dealt with through complementarity.

The result is a concept of adequate knowledge, because although, for example, Newtonian mechanics suffices for landing spaceships on the moon, and Ptolemeic astronomy can be sufficient for navigation, the theories would be empirically false if claimed valid for all purposes.

Now I propose that the need for representing complexity, uncertainty, and dynamic co-creation as aspects of the generation of valid knowledge for the global development process first requires integration of these aspects into the form of representation of the ontological starting point for generating knowledge. In other words, it requires an elaboration of a many-valued ontology to enlarge and to

[341] Levy, Yoram, and Wissenburg Marcel. "Sustainable Development As a Policy Telos: A New Approach to Political Problem-Solving." *Political Studies* 52, no. 4 (2004).
[342] The concept of the material object as characterizing reality has gradually been replaced as the fundamental concept of physics by that of the field acknowledging the necessity of accounting for the context.

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complement the existing dualistic (binary) concept that represents the nature of reality as being adequately described as a material object or as a state.

To support the plausibility of such an approach, for now I want simply to provide an example of what is involved and to indicate that the idea of a many-valued conception of reality has been addressed constructively within other professional fields such as holism and general systems sciences,[343] and also in a legal context within other cultures.

Thus, although the epistemologies of the various fields might not be particularly relevant to policy and law in a global age, there is ample experience available concerning application of the approach within other specific areas. The purpose of the following example is to support my argument that the ontological starting point and the related structure of social and linguistic representation of knowledge about "what is" can be changed, and that this could have a crucial impact on central concepts such as valid knowledge and the conception of self. In the following, I try to illustrate how the rules for generating and representing or expressing valid knowledge about "what is" can differ, which means that they are socially constructed and can be changed according to what is adequate to the nature of the prevailing knowledge about "what is."

The text is taken out of its original Buddhist perspective on international law[344] and adapted to the present purpose of illustrating the technicalities involved in representation of different systems of knowledge, i.e., different ontological starting points.

> *Aristotelian logic proposes:*[345]
>
> i) the universe is finite (Aristotle)
>
> ii) the universe is not finite (Newton)

[343] See Chapter 8, section 1.

[344] Jayatilleke, K.N. *Dhamma, Man and Law* Singapore: The Buddhist Research Society, 1961. p.18 Originally entitled "The Principles of International Law in Buddhist Doctrine", this series of five lectures read before the Academy of International Law investigates the Buddhist attitude to law and the Buddhist conception of law, including international law. The late author, Prof. K.N. Jayatilleke, studies both at Cambridge and London universities, was a fellow of the World Academy of Arts and Sciences and was recognized as one of the leading Buddhist philosophers of his time.

[345] In science this can be seen as having been adapted to the "interdependence" world view in the sense that Einstein would say that space can be finite or infinite - but it's probably finite.

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> In a Buddhist perspective, it is proposed that the mutually exclusive and together exhaustive alternatives would be brought into better focus by a four-fold form of predication as follows:
> i) the universe is finite (in all dimensions);
> ii) the universe is infinite (in all dimensions);
> iii) the universe is (partly) finite and (partly) infinite, i.e., both "finite" and "infinite"
> iv) the universe is neither finite nor infinite, i.e., both "finite and "infinite" cannot be predicated of the universe because the universe or space is unreal.

The four-fold form would allow for a more differentiated and thus accurate representation of knowledge about the world and could capture its complexity and uncertainty, which is implied in choosing interdependence as a defining characterization of "what is." For example, as an integral part of our reasoning, the fourfold form both enables and requires us to reflect on what is known and what is largely unknown, thus making knowledge generation analytically distinct from but integral to choice. In particular, it enables expression of aspects relevant to both the particular and to the whole, thus making external accountability[346] integral to internal accountability as two aspects of the same action.

The four-fold form also reflects the fact that knowledge is not just found but is co-created, since not only the object, but also the choices of the subject have to be accounted for in the knowledge generation process. The reasoning and the action taken are based on a perspective that represents a choice and not a universal truth.

In short, it becomes possible to express valid knowledge as an approximation, and to communicate about reality as being a point or a degree of graduation along a continuum rather than an absolute state. It is a question of more or less, not either or.

1.4 Wider Theoretical and Philosophical Implications of Sustainable Development

The epistemological model of sustainable development is derived from and applies to the political and institutional field of the global development process. However, as has been shown above, in the process of developing the epistemic shift, the policy has at the same time generated the resources needed to articulate a more abstract

[346] See Chapter 6, section 2.3.

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knowledge model that captures the dynamic relationship between the known and the knower and that requires a many-valued model of reality for representing valid knowledge. In that light, I attempt to sketch how the sustainable development policy, distinct from its substantive impact, provides the theoretical resources for responding to the wider post-modern crisis of "reality, language and self" and for moving from "absolute relativism" to "relativity" as an explanatory perspective on the global reality.

Before proposing the possibility of articulating the epistemic shift as a distinct new paradigm of knowledge in the next section, I first summarise what I consider the theoretical contribution of sustainable development. First, the theory of change underlying the sustainable development policy appeals to knowledge as the authority legitimatingboth the choice of approach and the objectives of the overall development process. Thus the policy has implicitly disclosed the normative nature of knowledge. Second, by explicitly building on interdependence as a defining characteristic of "what is", the policy of sustainable development represents an epistemic shift that analytically requires a change in the way the ontological starting point is expressed, i.e., represented. Thus, the policy provides both the argument and the resources needed to articulate a model of representation that can adequately reflect a change from a dualist to a many-valued conception of reality. In providing the empirical resources - i.e., the practice - to enable the present articulation and thus the argument for a transition to a many-valued paradigm, the policy has made a distinct theoretical contribution beyond concrete action to improve the environmental, social and economic situation of the world.

This change from a dualistic to a many-valued conceptualisation can be seen as providing the foundation of a meta-theoretical knowledge paradigm that builds on relations (process) instead of objects (state) as the ontological primer. In principle, the new foundation can be applied also to other (than sustainable development) polices or to political philosophies just as the dualist paradigm has been the basis for both communism and capitalism.

Third, the theory of change underlying the policy of sustainable development, as presented in Chapter 4, implicitly affirms that there is a conception of the nature of

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the world and how we can know about it that is institutionalised and underlies values, policy and strategies for action. Thus, linking policy development and knowledge provides evidence that the existing institutional system, including its reasoning processes, is conditioned on a particular conception of the knowledge generating process, and thus belies its own premise that there is no privileged perspective. This conflation of structure and process is understandable because the ontological starting point of the economic development paradigm is premised on separation and observation. Therefore, theoretically the relationship between knowledge generation and policy formation cannot be acknowledged and, as a consequence, the relationship has not been accessible to analysis from within the confines of the existing institutional and theoretical system. This disclosure by the sustainable development policy and practice opens the possibility of debating not only different epistemologies but also different ontologies and of debating the related normative implications for conceptualisation of reality, language and self and the influence of these conceptualisations over discourse and global politics.

Fourth, I argue that this disclosure enables new perspectives on the relationship between the human mind, knowledge generation, normativity, and the institutional system, and that it enables us to form an hypothesis about that relation, which can aid in understanding law and institutions in a global age.

Humans, the source of policy formation and the global institutional system, are part of an infinite totality. We can't grasp reality in its infinity or even the totality of one thing. Therefore, our cognition depends on abstractions. We have the ability to abstract in several forms, but this first abstraction - i.e., deciding on the nature of "what is" and how to represent it - conditions perception and cognition and functions as a rule for variety reduction that validates a particular approach to generating knowledge**.** The ontological starting point is thus not about the truth about the world, but it is a perspective, adequate to its time, from which to examine a situation too complex for human beings to perceive. Thus the choice of perspective becomes the structuring - i.e., normative basis of development of language and of conceptions of self and the *conditio humana*.

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This is an explanatory model, where the tension between the universal - the *conditio humana* - and the particular - human conduct - is mediated through the system of knowledge that is not any particular knowledge, but the cognitive possibility and necessity of knowledge. Thus this mediation identifies analytically the *de facto* foundational space for generation of normativity and societal law.

So far the nature of the concrete forms of knowledge (e.g., religion, science) that can mediate the relationship has concealed the normative nature and the physical universality of the mechanism. I propose that the mechanism identified by the present analysis of the sustainable development policy might be based on a physical and psychological fact about the human mind that seemingly cannot function within the field of the infinite complexity of the world without a pre-linguistic orientation enabling meaningful cognition.

The following overly simple chart is provided in an attempt to spell out a main point of the present analysis: that the epistemology of the existing economic development model represents a barrier to change at the theoretical level, because its logical structure and related linguistic expression is too narrow to encompass the complexity of reality.

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	Model 1 1945 Economic Development Separate Objects	**Model 2** 1992 Sustainable Development Interdependence Relations	**Model 3** **Proposed by this thesis** 200x Sustainable Development Interdependence Relations	**Model 4** **Abstract** X Development Interdependence or choice of representation of shared fact about "what is"
Ontological Starting point				
Structure of the representation of knowledge about "what is" decided by choice of ontology	Dualism, binary	Dualism binary	Many-valued	Many-valued
Policy	Economic development	Economic development and compensatory concrete "action and results"	Sustainable development	X
Characterization	Functional specialization	Integration via complementary output/methods	Integration via process rationality	

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1.5 Towards a New Paradigm of Knowledge

Such a many-valued representation of reality, which I argue is necessary for effective implementation of sustainable development, could, in turn, constitute the ontological foundation of a potentially meta-theoretical epistemology, i.e., a new paradigm of knowledge.[347] To take root, the implications of such a paradigm would have to be conceptualised in general and within the various disciplines. I provide a first input to such a conceptualisation in Section 2, where I develop ideas on how we might "re-describe the concept of law within the perspective of sustainable development." I chose this approach (model 3), as opposed to basing the re-description on a wholly abstract model (model 4), in recognition of the fact that a paradigm can never be fully separated from the context within which it has been developed. At the same time, sustainable development is also the only relevant empirical test case for the present theoretical analysis.

I argue, however, that even in the abstract there are normative implications of the foundation of the knowledge generation process, and this is an important aspect to recognize in relation to law and social science. Although here I do not enter a philosophical debate, still, to indicate the potential magnitude involved in the shift outlined in this thesis, I posit that articulating an interdependent perception of reality tied to a many-valued representational form is a necessary but not sufficient condition for developing peace and prosperity among equals. Under a dualist paradigm, among others, we can trade, make contracts, suspend hostilities, and suppress each other with military or other coercive powers. However, we cannot govern a global polity of equals, because dualism forces us to decide on friend or foe and there is no conceptualisation of a uniting framework. In fact, one could hypothesize that the dualist paradigm systematically entails conflict in forcing an answer to either/or.

[347] "Paradigm Shift: When anomalies or inconsistencies arise within a given paradigm and present problems that we are unable to solve within a given paradigm, our view of reality must change, as must the way we perceive, think, and value the world. We must take on new assumptions and expectations that will transform our theories, traditions, rules, and standards of practice. We must create a new paradigm in which we are able to solve the insolvable problems of the old paradigm." A University of Arizona course on methods. Available at http://ag.arizona.edu/futures/era/paradigmsmain.html

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I do not claim that a many-valued knowledge paradigm based on interdependence represents a final resolution but merely a more adequate paradigm to represent our present knowledge about the world. Furthermore, as its theoretical contribution, the policy has enabled identification of the normative and structuring role played by the knowledge system and enabled a debate about possible perceptions and systems of logic for communication and global institutional development.

The changes implied by a paradigm shift are potentially radical and could affect language, category development and perception of self, community, and rationality. It is, however, important to underline that the change is an expansion of the present knowledge system and not a complete "shredding" of what we have. Within its broader perspective the present paradigm would keep its form while becoming a part of a larger system and no longer the structure of the overall system.

Change is possible because the policy has conceptualised the framework and because we have been developing techniques within a number of knowledge areas and our practices are providing a substantial databank of experiments. What is missing is the philosophy and the theory tying together a new concept of knowledge and its relationship to society and institutions. To provide that requires a rigorous and imaginative exercise involving a multi-disciplinary approach. Law is the discipline necessary but not sufficient to effect such a transition, because the challenge is to accommodate the idea of normativity within the rules for what is considered valid knowledge.

Section 2 Enlarging the Concept of Law in the Perspective of Sustainable Development

2.1 Relating Normativity and Knowledge

In Chapter 4, I have proposed that the analysis of the theoretical integration of the elements of the sustainable development policy has disclosed the role of knowledge, not only specific and concrete knowledge of the relevant subjects areas, but an underlying concept of "what is" in policy formulation and implementation. Hence, the analysis has enabled me to form the hypothesis that a culturally dominating concept of "what is" might evolve into a "variety reduction rule" that influences

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development of language and any particular knowledge, worldviews and the policies on which institutions are based. Such a socially distributed "variety reduction rule" - i.e., an underlying concept of the nature of reality - thus premises how knowledge is acquired and justified. However, I argue that the rule simultaneously functions as a source of implied normativity.

Although beyond the confines of legal analysis, demonstrating a link between knowledge generation and normativity is important to the central argument of the thesis. Thus, I hope that, even though brief and sketchy, the hypothesis developed in what follows supports the plausibility that the points made are worth further investigation. It should also be clear that my main claim is not about the particular details of the hypothesis. Instead, the claim is that there *is* a relationship between knowledge generation and normativity, the nature of which is largely opaque but influential in the global development process. Therefore, the relationship warrants further investigation.

With reference to my claim in Chapter 6 that explanations at the macro socio political level require an explanation of the micro philosophical/psychological aspects of the phenomena, [348] I elaborate on the argument of this section by attempting to show how the individual's capacity for knowledge and normativity can be perceived as originating in a rule-based interdependence between four elements: the known, the knower, and the process, and the representation of knowing.

I now expand on the relationship between the four elements of the rule-based process of generating knowledge within the perspective of sustainable development.[349] First**,** according to the sustainable development policy, what is known is that "what is" is "interdependent". This is the ontological starting point of the policy; it is a fact that, in principle, can be proven, because it is a physical law about the nature of reality.

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[348] See also Hurley, S.L. "Rationality, Democracy, and Leaky Boundaries: Vertical vs. Horizontal Modularity" Journal of Political Philosophy (1999), vol. 7, no. 2 pp. 126-146

[349] In my view the function or the mechanism creating the sustainable development epistemology is the same as the one underpinning the epistemology of economic policy model. However, for the economic policy model, the substance of the "variety reduction rule" (i.e., separate entities) prohibits insight into the relationship between the "variety reduction rule" and the process of generating knowledge *cum* normativity for policy and institutional development. According to my analysis this relationship has been made accessible by the policy and practice of sustainable development, or, more precisely, by the theory of change underlying the argument for shifting from economic to sustainable development.

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However, this fact also represents a choice, because "interdependence" is not the only possible description of the nature of reality. Thus, an ontology of "interdependence" simultaneously represents a physical fact and a normative statement**,** i.e., a rule about what should be considered the nature of reality. According to the analysis in Chapter 4, this ontological starting point is structuring the process of generating valid knowledge and it allows us to construe an understanding of our ability to know as generated in a dynamic exchange between the ontological structure and the process of creating knowledge. In Chapter 4, I point out that choosing "interdependence" as the ontological starting point implies that complexity, uncertainty, co-creating knowledge, and a conception of a whole that is different from the aggregate of the particulars, are all acknowledged as fundamental given elements of the human condition and part of the epistemology of sustainable development

Second, the knower is the individual human being, since knowledge is embedded in the human mind.[350] There is, however, seemingly sufficient disagreement about how the process of perception, cognition and the acquisition of knowledge occur. For example, according to Gestalt theory, which has had a foundational influence for modern cognitive psychology, something like a paradigm or a "variety reduction rule" is a prerequisite to perception itself, because when an organism first experiences a perceptual field, the organism will impose order on the field in a predictable way.[351] Thus, I suggest that the human mind requires and enables the individual human being to impose some kind of order on a conceptual field, because without such order humans cannot function socially or individually.

Third, the process of knowing is thus fundamentally driven by humans' need for orientation, more precisely for an orientation towards self-directness[352] in an uncertain world; or, said differently, for getting a handle on the world. It is a need that is

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[350] For a conceptualization, which distinguishes between the minds ability to divide and to experience unity, see e.g., "Baker said that he generally uses the words consciousness and awareness to distinguish between the human mind's ability to divide and separate (consciousness) and its ability to blend and experience unity or all-at-once-ness (awareness). In the case of consciousness, this faculty in humans is what enables us to experience the phenomenal world as separate from us." Evolutionary Theory - Conference, October 5 to 10, 2003 http://www.esalenctr.org (Last accessed June 2005).
[351] William James' idea of the baby's impression of the world "as one great blooming, buzzing confusion" *The Principles of Psychology* (1890) p. 462 http://plato.stanford.edu/entries/james/ -
[352] Christensen, Wayne, "Self-directness: a process approach to cognition" Axiomathes 14, pp 171-189 (2004)

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embedded in physiology and that reflects a necessary connection or a channel of communication between the particular, i.e., the individual, and the universal, i.e., the nature of "what is". Thus, I suggest that the ontology structuring perception and cognition - i.e., the "variety reduction rule" - is premised on a physiological and psychological need of the individual for orientation. An ontological starting point is in fact required and enabled by physical law. Next, I suggest that the individual process of creating fundamental order in a human development perspective is informed by cultural and social processes and, therefore, most likely will be based on a "variety reduction rule" that is culturally embedded. At the level of the individual, the process is driven by the need for orientation towards self-directness, which means survival and beyond, while in a sustainable development policy perspective, this necessary guidance has been distinctly articulated as a need for upholding the biosphere and for satisfying basic needs. Now, cognition is naturally a constant and continuous activity, and knowledge is generated in many layers, but, to stay with my metaphor from Chapter 4, the many different layers will all have to be accommodated within the "operating system" which is created by the prevailing view of the world.

Fourth, the linguistic form or the model of representation of the epistemology depends on the various implications of the ontological starting point, e.g., how to capture complexity, process, normativity, and the fact that we know that we do not know. However, the important point to acknowledge is that the linguistic form is a unit of analysis that is both integral to and a distinct element of the epistemology.

Based on the above narrative of a relationship between the known, the knower, and the process and representation of knowing, I claim that fundamental sources of the possibility of normativity (and thus, as I argue in the next section, a core of jurisprudence and societal law) are physical laws and human understanding, or, to state it on other terms, the individual's quest for orientation and understanding of the nature of the world. While the underlying physical facts of interdependence and need for cognition cannot be changed, our understanding and societal rules concerning the facts can be changed.

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2.2 Jurisprudence, Knowledge and Normativity

I have now conceptualised knowledge within the sustainable development paradigm as being generated in a dynamic, rule-based interdependence between the known, the knower and the process and representation of knowing; and as an epistemology that acknowledges normativity as inherent to knowledge generation, because knowing implies a choice of perspective on the nature of reality.

This conceptualisation is based on the physiological needs for cognition of the individual human being and are thus fundamentally of a physical nature. Such physical rule-based process can be understood and expressed as a set of societal rules:

- A variety reduction rule: a rule of cognition representing both a fact and a judgment as to the nature of reality,
- Rules of orientation for action: the teleological implications of the ontological starting point,
- Rules of inference: the logical implications that have to be respected, and
- Rules of representation: the nature of knowledge about "what is" and the logical implications that must be accommodated within the linguistic structures of communication. [353]

Even if such rules might be understood as part of the process - integral to perception, knowledge and action - of creating normativity and, thus, as I argue below, play a role in legal systems and positive law, an explanation of the rules is beyond the legal profession, since the rules are all embedded in both natural and social sciences debates. Therefore, in the following I endeavour to elaborate on a description of the rules only to exemplify how such a concept of cognition and language can be understood.

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[353] Jensen Siggaard, Hans. "A History of the Concept of Knowledge." *Zagreb International Review of Economics and Business* 3, no. 2 (2003): 1-16.

> The guiding thread throughout the history of the concept of knowledge has been "linguisticness", the ways in which we were able to recognize or express cognition in language. Over the past centuries incredible emphasis has been placed on understanding knowledge as allowing the facts to take the floor, letting them speak for themselves.

Siggaard Jensen's article refers to the Western World while Piero Scaruffi teaching History of Knowledge at UC Berkeley (2004) takes a more global approach. See http://www.thymos.com/index.html, and http://www.thymos.com/know/knowledg.html. Last accessed June 2005.

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The rule of cognition - i.e., the variety reduction rule - refers to the ontological starting point of the epistemology of sustainable development, according to which the nature of reality of "what is" is interdependence and this means that we can only acquire valid knowledge by acknowledging this fact in some way. This ontology represents a change from the economic development vision, which is based on an ontology of separate objects, meaning that we can know about the nature of reality by studying objects in isolation. The ontological starting point of this vision is partial and narrow. On the other hand, characterizing "what is" as interdependence, as does sustainable development policy, is partial and broad, because it expresses relation, implying the existence of both process and objects**.** However, the nature of the starting point has implications for the adaptation from the physical/physiological field to the societal/psychological field. Seeing the nature of the world as separate objects does not require development of concepts of process and relations as integral to the understanding of the nature of the world. Instead process and relations are expressed through the linguistic representation of objects**,** thereby supporting a mechanical worldview where integration is equivalent to aggregation and there is no language for understanding relational complexity or the existence of a whole interacting dynamically with the particulars.

This in turn takes us to *the rule of representation* and I refer here to Section 1.3 concerning the theoretical implications of the epistemic shift. Section 1.3 shows a model of representation, which linguistically, and thus conceptually/logically, can capture the contingent nature of reality derived from adopting interdependence as the ontological starting point.

The rule of orientation is hypothesized based on the fact that an ontology of interdependence requires an understanding of concepts or phenomena not only as units or steps but also as processes. This implies a continuum of process rather than absolute and separable states extending from perception through cognition and knowledge generation towards action. In the perspective of individual human development, it is assumed that a unified field of the experience of being human informs the process. I mention this only to underline that my reference point is not an exclusively rational process. For the individual, this orientation, the "purpose" of cognition and action, is presumed to be founded on basic instincts such as survival.

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However, at the societal level such teleological implications translate into a worldview. In the case of sustainable development, the fundamental rules of orientation are upholding of the biosphere, satisfaction of needs and the participation or unfolding of each individual life. In the case of economic development, the fundamental rules are related to peace and prosperity - i.e., freedom of the individual and economic growth[354] - while the implied impact was believed to be not much different than the vision of sustainable development. In practical terms, this difference means that to realize sustainable development, global institutional systems and incentives have to be developed to focus on the biosphere, needs and individual life, while economic growth and freedom become the means and not the ends of policy. Thus the rule of cognition and the rule of orientation make explicit that values and the implied ideas of purpose and right conduct, which are contained in a worldview, are the result of mental reasoning processes, the communication of which requires that the starting point and not only the end point be explicitly articulated and accounted for in the equation. Values represent the conclusion of a reasoning process premised on belief and knowledge about the world. The details of this process might be inaccessible to the individual; however, I propose that *de facto* values are embedded in some kind of 'meaning giving' conceptual field, which must be analytically explicit when translated into rules of action.

Interdependence signals a relation and implies entities and process. Thus, if the nature of reality is interdependence, the rules of inference for generating knowledge implie logically acknowledging:[355]

- An idea of a whole, however elusive, which is more than the aggregate of the particulars. Thus the understanding of the particular as being inherently related to the whole and vice versa implies that we cannot have the one without the other and, therefore, there is, in the abstract, no a priori argument for the importance of the one over the other.
- Complexity i.e., the "butterfly effect". In general terms, this expression can be explained as a metaphor for the fact that action at the level of the particular will affect the whole and not only the separate target and identifiable externalities,

[354] These are conceptual schemes developed in separation from the physical nature of the *conditio humana* in accordance with the underlying knowledge paradigm of the policy.
[355] See Chapter 4.

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because the whole is infinitely complex in its interrelatedness and as such not predictable. This is a general condition and can only be acknowledged in principle.

- Complexity in turn implies uncertainty and the facts that knowledge is not only found but also co-created and that it is valid knowledge that we do not know

2.3 Thinking About Law and Tertiary Rules

It is not within the scope of this paper to speculate on the possible implications of calibrating these rules to a standard of interdependence for our understanding of the wider societal and psychological fields. However, importantly for the legal discipline, I propose that the introduction of the idea of a whole as a necessary feature for knowing about "what is" provides the resources for arguing that a concept of equality can be deduced from the ontological starting point of the sustainable development epistemology. The *idea of equality* is thus inherent to an epistemology built on interdependence as the concept of reality, because interdependence implies that we cannot have the whole without the particular and, as such, there is no a priori argument for the importance of the one over the other. Equality is at the centre of ideas of justice, and the grounding of the principles of justice is a crucial question of legal philosophy.[356]

The knowledge and normativity generated in accordance with these rules is demonstrably embedded in the individual and in the relationship between the individual, society and the physical world. Therefore, I argue that this conception of knowledge provides a channel of communication between society and law and jurisprudence. Building on *The Concept of Law*[357] but without providing any specific analysis of Hart's seminal work, in what follows I attempt to demonstrate a fundamental relationship between the proposed concept of knowledge and the concept of law.

Within the framework of the system of representative democracy and national and international law, Hart developed his theory of law based on a union of what he distinguished as primary and secondary rules. Primary rules are rules that state how

[356] See, e.g., Warnke, Georgia. *Justice and Interpretation*. Cambridge: Polity Press, 1992. The book presents an analysis of the interpretative turn in political theory, focusing on the work of Michael Walzer, John Rawls, Ronald Dworkin, Jurgen Habermas, Charles Taylor, and Alasdair MacIntyre.
[357] See supra n. 222, Hart pp 79-99.

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people are obligated to behave. Secondary rules are rules about establishing, changing, and applying primary rules:

> Thus they [secondary rules] may all be said to be on a different level from the primary, for they are all *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined. [358]

Hart goes on to make the general claim

> …That in the combination of these two types of rule there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, 'the key to the science of jurisprudence'.
> …We accord this union of elements a central place because of their explanatory power in elucidating the concepts that constitute the framework of legal thought. [359]

I, however, argue that understanding legal thought in a global age implies or requires a vision or theory of the process linking law to society beyond the nation state and positive law, and encompassing within its explanatory scope a notion of the process of creating law and the vast array of heterogeneous cases that are referred to when using the term law. Therefore, I suggest that the set of rules expressing the concept of knowledge, which contains the individual need and capacity for normativity, should be seen as, and be termed, "tertiary rules". These tertiary rules underpin social action, communication and institutional development, and, thus, they are an important part of the processes "that constitute a normative continuum bridging from predicable patterns of practice to legally required behaviour"[360]. Consequently, these rules should theoretically be understood as being an integral part of the concept of law.

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[358] *Id*. at 94.
[359] *Id.* at 81.
[360] Brunnee, Jutta, and Stephen J. Toope. "Elements of an International Theory of International Law." *Columbia Journal of Transnational Law* 39 (2000).
Brunne and Toope, apply what they term an analytical constructive approach. They suggest that law might be evaluated by the influence it exerts rather than by formal tests of validity rooted in normative hierarchies, and suggest that we should stop looking for the structural distinctions that identify law and examine instead the processes that constitute a normative continuum bridging from predictable patterns of practice to legally required behavior**.** This approach recognizes that there is not a radical

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Accordingly, to capture the aspect of process and the role of the individual in creating normativity beyond the representative democracy, I suggest, to paraphrase Hart, that law can be understood and re-described as "a process of building a relationship between the I and the world and consisting of a union of primary, secondary and tertiary rules". I suggest that the concept captures within its scope both an underlying informal normativity transmitted through legal culture[361] and formal legal systems.

Hart's primary rules are duty-imposing, i.e., they demand certain conduct. Secondary rules are power-conferring, or, in other words, they make certain sorts of situations possible. I suggest that the tertiary rules are integrating and relation-building, i.e., they explain theoretically the inherent interdependence of the individual and the social and physical worlds

Hart's most important secondary rule, the "rule of recognition", is a social construct and refers to "what is done" as law. However, according to Hart, international law has no rule of recognition because it is an incomplete system. By contrast, I suggest that the basis of what can be termed a global legal culture underlying law in a global age could be seen as "the rule of cognition", namely the shared knowledge that "'what is" is interdependent and contingent. This "rule of cognition" thus refers to "what is done" as knowledge, or said differently, as the basis for structuring the process of generating knowledge for policy and conduct.

In conclusion, I argue that such an enlarged concept of law based on shared knowledge about "what is" that captures a spectre of normativity from individual conduct to institutionalised coercive systems could be helpful in providing an equilibrium[362], thereby enabling communication, cooperation and building of trust in a global age, where complex patterns of interaction cannot be captured by the systems

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discontinuity between law and non-law, and that the process of building legal normativity requires many of the same building blocks as other forms of social normativity.

[361] See supra n. 12, Hoffmann at 117, where legal culture is referred to as "behavioral patterns concerned with legal ideas".

[362] See supra n 229, Kingsbury at 18.

> In the context of increasingly dense international institutional governance, the theory of international law must take account of law's function in regime design and maintenance: establishing rules as focal points that provide an equilibrium in situations requiring coordination, where thereafter no participation has an incentive to defect from the rule.

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of positive law alone. This is an expanded concept of law that includes a conception of the individual as a source of normativity in society.

However, terminology is an issue in itself. As noted in Chapter 5, the term law is already a generic term, which is used in many very different areas. Therefore, I argue that it is appropriate to maintain the term "concept of law" as the most encompassing notion of normativity, even though, admittedly, new distinctions have to be thought through. I suggest that, for example, one could distinguish between a horizontal and a vertical concept of law referring to the concept of law and to positive law, respectively. Such a horizontal conceptualisation can capture features needed to explain law and regulation in a global age, since it includes, for example, not only the controlling function of law, but also its enabling or constituting functions as well, and it can capture the process aspect of developing normativity as emanating from the individual. Furthermore, a horizontal conceptualisation can provide form to the political agency of the individual - the author of the law - as is shown in Section 2.4.

2.4 Towards Individual Agency in a Global Polity

As demonstrated above, global governance is a functioning reality. There is a call for an explicit normative orientation and a theoretical framework, because the system and underlying culture[363] are fragmented and because technological and economic forces dominate the political process. In response, I outline a coherent interpretative framework for a global polity, based on the theoretical insight from sustainable development and the enlarged concept of law embracing individual agency as presented in the previous sub-section. First, I address the community/polity aspect and, following that, the question of the political agency of the individual.

Political science and international law have explained world governance in terms of macro structures and institutional actors. However, as examined in Chapter 6, there is growing evidence, including the focus on participation in the sustainable development policy, that explaining our globalising world requires also a theoretical micro foundation focusing on the role of the individual. When debating global governance in such a perspective, the units of analysis are not limited to institutional actors

[363] *Globalization* can be characterized as the growth and enactment of world culture according to the glossary of globalization. Available at http://www.sociology.emory.edu/globalization/theories.html.

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organized within a structure of nation states, but also include the physical entities underlying the existing institutional system of global governance, namely the individual and the collective of individuals organized, however multi-layered and fragmented, within the physical structure of the earth. I attempt to demonstrate how and to what degree this collective of individuals can be understood as being integrated and motivated and thus to form a global community, demos and polity.

First, I propose that the collective of individuals through the physical law of "interdependence" is integrated de facto into a community of the biosphere.[364] Accordingly, integration is a fact that is not dependent on individual awareness or acknowledgement. As exit is not an option for the living, a community of the biosphere is a community of fate and not of contract or belief. The open question is whether we can conceive of this community as a demos and a polity linked in some manner to global governance.

Awareness of interdependence might turn the community of the biosphere into what metaphorically could be termed an epistemic community[365] or a community of minds. The sustainable development policy and implementation practice have facilitated development of such awareness, as did our newly found ability to see planet earth from outer space and thus visualize the boundaries of a common space. Still the question remains if such awareness of shared conditions, although prevalent, can form the basis of a conception of a common good, and if it can motivate us to engage in the "non-strategic action" in decision-making and conduct necessary for constituting, or even discussing, a demos and a polity.

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[364] Since the 90's the idea of ecological citizenship has been debated in the context of e.g., cosmopolitan democracy and environmental justice. See, e.g., Saiz, Angel Valencia *Globalization, Cosmopolitism and Ecological Citizenship* paper presented to the European Consortium on Political Research, Joint Session Workshop "Citizenship and Environment, Uppsala, 2004. Available at http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/uppsala/ws5/Valencia.pdf (Accessed June 2005).

[365] P. Haas introduced a notion of epistemic communities as "a network of knowledge-based experts (…) with an authoritative claim to policy-relevant knowledge within the domain of their expertise" in "Introduction: epistemic communities and international policy coordination" *International Organization,* 46 (1): 1-35, winter 1992.

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Secondly, I propose that we can conceive of a global demos.[366] The no-demos thesis referred to in Chapter 5 and articulated by Weiler focuses on the lack of transnational political relations between individuals and is related to the *legitimacy* of global decision-making processes. Weiler rejects the idea of a global government and he says there *is not* and *cannot be* a global demos. However, considering individuals and not only institutional actors as political agents and depositories of normativity, then a collective of individuals can, in principle, act without any central authority by applying a compatible normative matrix, which promotes not only functionality and economic efficiency but also the common good of upholding the biosphere and satisfying needs. Perhaps then, a demos does not necessarily require a concrete world government but only a conceptualization of a polity through which a collective of individuals could act and make decisions in whichever organizational setting they might function.

A polity can be characterized as a "system of creating value through the collective conferral of authority."[367] Conferral of authority requires an author and addressee. Nevertheless, I argue that it is not implausible to think of the collective of individuals as a polity, which turns knowledge about the shared condition of interdependence into the organizing principle for decision-making and human conduct. Absent any external institutional structure, but based solely on mental infrastructure, for the individual conferral of authority can be conceptualised as an act of constraint. In other words, individuals can be understood as mutually conferring authority to create value in accordance with a principle of constraint in respect of interdependence.

Regrettably, pointing to the possibility of a demos and a polity united in action through the existing institutional system but with a broader perspective than functionality and economic efficiency, does not solve any problem in itself. It can only change the premise of the political and professional debates by showing that equilibrium or a shared point of reference is conceivable, and that there is a path for communication and co-operation beyond fragmentation.

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[366] The classic characterization of what it means to constitute a demos is found in Dahl, Robert *Democracy and its Critics*. Yale University Press. 1989

> Demos should be understood in the political sense of a group of person who, rightly considered, should govern themselves in a single democratic unit, political power should be shared by all. At 198

[367] Se supra n 363, glossary.

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I wish to underline that this way of thinking about the relationship between the institutional system and the underlying culture is not dependent on the substance of the issue, e.g., whether it is economic or sustainable development that is being debated. Instead, the crucial question is whether it is possible to change from one paradigm to another and whether we can identify the necessary preconditions for change.

One answer is the pragmatic re-description developed by Rorty. Although I am in accordance with the malleability of human nature implied by his theory, I suggest that the answer to the question of change of paradigm also depends on the competence of academia, i.e., to what degree an adequate mental and institutional architecture can be developed to facilitate trust building, communication, and action in accordance with the implications of the insight fostered by the sustainable development policy. For people to develop the understanding and trust needed to act in accordance with the knowledge of interdependence requires the support of a robust theory encompassing a many-valued logic combined with a coherent framework guiding action towards respecting interdependence in the creation of global public goods. Merely re-describing the paradigm is unlikely to do the job, because of the institutionalised binary code barrier in language and logic.

The question of human nature and the relative importance of institutions and human nature in shaping conduct are other vast fields of science and philosophy of importance to an understanding of the implications of an epistemology of sustainable development. However, research does indicate that human nature is malleable, with a vast potential for good and evil and wisdom and ignorance. Thus, no conception of the human being should be excluded *a priori*. The conception of the individual underlying the existing institutional system is at best narrow (utility maximizers, voters, consumers etc.) and at worst fossil. Within the last 20 years, as the physiological and psychological sciences concerning the human being have advanced considerably, no new political theories changing the underlying assumptions about human nature have emerged.

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The sustainable development epistemology can be seen as attempting to address the post-modern crisis of truth (introduced in Chapter 5), a crisis "first, of reality; second, of the language we use to describe that reality; and third, of the subject who perceives and describes that reality, that is, the self", by providing a different perspective on reality and by requiring different rules for the language with which we describe it. This is a perspective and language that hopefully can convey a sense of the world and thus influence the wider societal and psychological fields. However, addressing the crisis requires investigating the implications for the concept of self, which might be dramatically changed by developing an understanding of the relation to a whole of which the self is a part both psychologically and physically. These questions fall within different disciplines and even art, therefore, here I confine myself to the question of the political agency of the individual.

The idea of a rule of cognition firmly embeds law and thus political agency in the individual. The open question is what is the role of the individual in a global polity. As described in Chapter 3, the institutional infrastructure for participation of the individual in global governance has developed extensively in the last 10 to 15 years. However, the infrastructure has developed on the background of the nation-state system, and there is no theoretical support for debating the mandate and accountability of individuals working through various interest groups and participating in a form of deliberative democracy.

In accordance with the proposed horizontal concept of law, the individual is both the author and the addressee of the law implying both authority and self-control. I suggest that awareness of the global physical and societal interdependence can provide a motivational factor for commitment to a common cause and thus acceptance of authority. Hence, theoretically, the act of self-constraint - i.e., showing respect for mutual vulnerability and for an individual sphere of power - creates the conditions for freedom and the legitimacy of unfolding individual life in accordance with the values of sustainable development. Although separable for analytical purposes, the constraining and the unfolding are united in action. Each individual's authority to be author of the law is thus recognized by others under the acceptance of the mandate to uphold the biosphere and satisfaction of needs.

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2.5 The Constitutional Metaphor

In the former subsection, I have suggested that the epistemology of sustainable development provides the resources required to develop a theory of a horizontal concept of law understood as "a process of building normativity and a union of primary, secondary and tertiary rules" that captures within its scope both an underlying legal culture and formal legal systems. Now taking the analysis from knowledge and law back to its point of departure - i.e., global policy - I suggest that such a concept of law provides the basis for developing a language for the political agency of the individual within a global polity. As the political agency of a state is symbolized by its constitution, the political agency of the individual can be symbolically represented as a "constitution of the mind". This conceptualisation can provide a necessary channel of communication linking knowledge, law and policy, on the one hand, and the individual, the global polity and the planet, on the other.

Why talk about sustainability as a "constitution of the mind"? Considering the well-established legal/political discourse concerning constitutionalism, is it not a misleading term to use in relation to the individual, and should we not rather talk about the "constitution of interdependence" or the "Earth Charter" for that matter? Although in the existing system of international law, individuals have basic rights, the equivalent obligation is articulated only at the institutional level of state and international organizations. For the individual this has adverse consequences that are not often articulated as strongly as in the following

> Few areas of contemporary international law have been presented as challenging the past and have excited as much rhetoric about transformation as human rights. The "turn" to the individual, the "valorizing" of the individual, the "piercing of the statal veil" et cetera. That international law has taken an interest in human rights as it has in the environment is of course an important material development. That it has defined them as common assets is an important structural development. Situating human rights along side the environment is helpful. For, seen through the prism of political theory, international law deals with humans the way it deals with whales and trees. Precious objects, which require very special regimes for their protection. The surface languages of international legal rights discourse might be neo-Kantian. Its deep structure is utterly pre-modern. It is a rights notion that resembles the Roman Empire, which regards individuals as an object on which to bestow or recognize rights, not as agents from whom emanates the power to do such bestowing. It is a vision of the individual as an object or, at best, as a consumer of outcomes, but not as an agent of process. In one respect the international legal system is even worse than the Roman Empire: International law generates

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> norms. But there are no, and cannot be, a polity and citizens by whom these norms are generated. The individual in IL is seen, structurally, only as an object of rights but not as the source of authority, is no different from women in the pre-emancipation societies, or indeed of slaves in Roman times, whose rights were recognized - at the grace of others. [368]

Weiler's main point - that in institutional and academic terms, individuals are conceived of only as objects - demonstrates the need to develop the idea of a "constitution of the mind" to move political discourse concerning the *de facto* political agency of the individual from voting and consumption to the individual as "author of the law."

So, how can this purpose be achieved by proceeding with the term "constitution" instead of continuing the conventional approach within the "rights" discourse and call for a right to sustainable development?[369] I argue that the term "constitution" is a necessary metaphor because it signals precisely the composite character of the individual as embodying both the subject and the object, or the author and the addressee of law and governance, in a socio-political context. As a national constitution simultaneously constitutes and limits the powers of the various state organs, the "constitution of the mind" articulates the political agency of the individual, while simultaneously legitimating it by an act of self-binding commitment to exercising this power according to explicit normative limits.

The problem of translation as it relates to the transfer of concepts of constitutionalism from the state to post-national settings is widely debated both in a European and in a global context. In the paper "Post-national Constitutionalism and the Problem of Translation"[370] Neil Walker examines a number of issues related to the twin pillars of constitutionalism as a symbolic and as a normative frame. The analysis, including the reflection on the problems of methodology, is discussed in what follows because it is

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[368] Se supra n 257, Weiler at 554.

[369] Anderson W. Gavin *Legal Pluralism and the Politics of Constitutional Definition* RSCAS/European Discussion paper October 2003. n. 6

> …, rights constitutionalism is arguable the dominant mode of constitutional discourse today: when people speak of 'world constitutionalism', they generally refer to the global reach of judicially administered charter of rights, entrenched as higher law.

[370] Walker, Neil. "Post-national Constitutionalism and the Problem of Translation". *International Law and Justice Working Paper 2003/3, History and Theory of International Law Series*. New York: New York University, 2003.

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productive to the idea of developing the theoretical insight from the sustainable development policy into a "constitution of the mind." With reference to the work of the social theorist Ralf Dahrendorf, Walker proposes that the use of basic co-ordinates - i.e., core values of social cohesion, material well-being and personal freedom - can provide a rudimentary framework through which it might be possible to translate constitutional concerns from the state level to the supranational level. Walker states that questions concerning the value and function of constitutional institutions and principles in a post-national setting should be addressed from a starting point that does not assume a superficial institutional or doctrinal similarity with the state level. Instead, we should move from the general framework of core values, which are identified as social cohesion, material well-being and personal freedom, through their particular manifestation in the political community to what is required to develop a viable and legitimate regulatory framework. To reinforce the value of the approach taken, Walker emphasizes that the inseparability of the three core values should be appreciated recognizing that there is an inherently reflexive element involved in the process of translation.

> Where there is no one 'centre' from a particular simple or compound constituency perspective - regional, national, Union, functional group, expert - and in a particular simple or compound governance modality - legislative, executive, administrative, judicial, executive - the particular constitutional puzzle with which it is concerned *in the light of the* same complex master-puzzle involving the optimal articulation and balance of core values, and always bearing in mind the need to complement the contribution of each of the other differently constituted and tasked institutions towards the same master-puzzle. In terms of constitutional discourse, this development point to the increasing significance of the relational dimension generally within the post-Westphalian configuration. In this plural configuration, unlike the one-dimensional Westphalian configuration, the 'units' are no longer isolated, constitutionally self-sufficient monads.

I argue that the use of the constitutional metaphor for the theoretical insight derived from the sustainable development policy satisfies Walker's test of adequacy that constitutionalism should provide a normative frame of reference to build on its symbolic power. There is a need for an ideational framework that justifies and civilizes its ideological power and succeeds in elucidating the questions that must inform and animate constitutionalism in its search for a viable and legitimate

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regulatory framework for political community in post-national settings. Walker admits that a mere framing and elucidation of some common questions is a modest result, but hopes this is an unavoidable consequence of the fact of "the particular character of constitutionalism as a deeply contested but indispensable symbolic and normative frame for thinking about the problems of viable and legitimate regulation of the complexly overlapping political communities of a post-Westphalian world."

Then again, in a note Walker states that

> In my view, there is a third sense in which constitutionalism provides an important frame for post-national regulation, namely as an *authoritative* frame. This is a complex and controversial claim that cannot easily be defended in a few paragraphs. Moreover, it is not necessary to defend this claim for the purpose of the present argument, as the case for translation can rest adequately enough on the twin pillars of constitutionalism as a *symbolic* and as a *normative* frame.

With reference to the analysis provided in Chapter 4, I argue that the question of authority must be included in the analysis of the questions to be asked and elucidated, because authority also relates to the question of how the core values or the basic co-ordinates are generated in the first place and because law translates values from rhetoric into action. In this latter process, law is premised on rules of valid knowledge. Accordingly, if there is no agreement as to its authority, although trading between equals might be possible, governance is not because the world visions might be poles apart even if the rhetoric of values sounds similar. Walker appears to agree to this conclusion despite his initial satisfaction with a narrower framework for the analysis.

> Still part of the constitutional discourse is also concerned with the representation of the particular authority and ordering power of a distinctive polity or authoritative site.
> More fundamentally, the argument can also be defended as a necessary feature of the ordering power of law in general. Legal norms may claim legitimacy on various grounds, but these invariably include a claim based on the internal authority of a particular legal order, whose initial claim to authority itself is presented as self-authorizing and so independent of any other authoritative claim. Insofar as constitutionalism is concerned with the presentation and representation of the fundamental norms of the legal order, it provides a necessary register in which this claim of self-authorization rather than simply being assumed, can be articulated, justified and refined.

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Using the metaphor a "constitution of the mind' signals that governance, norms and institutional knowledge production are derivative of minds, thus opening the door for lodging responsibility and accountability where it belongs. Just as the state has a need for the normative guidance and limits provided by a constitutional framework, people likewise have a need for a constitution to administer their collective power to be the authors of the law. Constitutions create, limit and organize power as well as give it direction. A constitution is a collective, reciprocal commitment to co-operate and co-ordinate according to agreed norms.

"Constitution of the mind" signals that the basis of normativity is cognitive and not transcendental in nature, and that the foundational legitimating source of the "constitution" is ontological, an objective fact that is equally valid for everybody. This knowledge, this fact is separate from but consistent with the normative implications of the political choice of the principle of sustainability, which, as shown in the former chapters, is an equation including both process, distribution and maintenance of the resource base within its normative meaning.

"Constitution" signals that the normativity involved can be dynamic, and that, it is of a co-ordinating nature and not concerned with measuring accuracy to norm. This normativity is created on a sliding scale from action over governance to law. It means, for instance, that there might be private and public aspects of all the phases, but the world is not *a priori* separated into distinct public and private spheres of action. Instead it recognizes that the private has an impact on the public and the public has an impact on the private.

In summation, I claim that viewing the theoretical insight from sustainable development as a "constitution of the mind" could provide a conceptual and communicative space for integrating the individual as both author and addressee of law in a global polity. This integration could be instrumental in developing a vision of the role of the individual in a global polity and in providing new perspectives on problems relating to deficits of democracy, legitimacy, accountability, equality and security, because it provides a horizontal web of common understanding of a shared situation to be respected by human conduct.

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Conclusion: Opening a New Field of Inquiry

Chapter 8 A Research Agenda for a Global Legal Culture

In the previous chapters, I have attempted to demonstrate that the theoretical insights arising from the policy of sustainable development are responsive to the challenge of the post-modern crisis of truth, and, as such, it represents a wider epistemic shift.[371] The policy provides us with the resources needed to develop our understanding of the world and to envision a new paradigm, within which existing concepts, such as that of law, can take on new form.

Philosophically, the policy of sustainable development is concerned with fostering a new understanding of the human condition. Through it we can understand reality as relational and the self as existing within the unified field of a biosphere that cannot be directed and controlled by humans. I do not suggest that the world has changed, quite the contrary, but that our way of comprehending it is changing. Although this presents a challenge to philosophy and psychology, I propose that for the social sciences in particular this change presents a challenge of a very theoretical and technical nature. It does so because it changes the polity equation by revealing that the channel of communication between self and the world is mediated through knowledge based ideas, and that these ideas are the source of normativity and legitimate societal law, which are themselves contingent on coherence and rational acceptability. The substantive orientation of knowledge paradigms, such as, for example, religion and the idea of objective science, have obscured this relationship and made it analytically inaccessible.

As a technical, theoretical matter, the policy is concerned with conceptualising and explaining knowledge and the idea of rational and adequate conduct under a dynamic instead of under a mechanic worldview, and with integrating the new understanding into global institutions. This thesis can only provide some building blocks for the possible development of a viable theoretical framework. Accordingly, in what follows, I identify and address the most important aspects, namely:

[371] See Chapter 5.

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- The dynamic ontology, the many-valued concept of the reality debate, and the related questions of logic and language.
- The epistemology of sustainable development as a theory of rule-based cognition integrating self and the world.
- The relationship between cognition and a legal culture, and the relationship between legal culture and positive law and institutions.

The analysis of this thesis aims to demonstrate that an important insight drawn from the sustainable development policy is that practice is reporting back to academia that the philosophy and theory of change underlying the present dominant economic development paradigm no longer fully corresponds to our collective knowledge. Now we know that human beings are conditioned on interdependence, that we are distinct but not separate from the rest of the biosphere, and that we know that our fundamental understanding of the world is an integral part of our approach to constructing knowledge and to deciding and acting. And no matter how we decide to conceptualise and construe the implications of this knowledge, it should be integrated into the theoretical framework within which we explain global policies and institutional development.

It has only been possible to identify the epistemic importance of "interdependence" through the "theory of change" underlying the sustainable development policy, because development and implementation of the policy are global, explicit, and widely communicated processes. This explicitness has implicitly disclosed the function of the present economic development paradigm as a meta-science underlying global institutions, a science where the individual, theoretically understood, is reduced to a utility maximizer, voter and an object of government. Consequently, the challenge now is to develop a theoretical framework and a political philosophy or worldview from which an understanding of self can emerge that captures our interdependent relationship to the material world in the very rules we use to determine the validity of knowledge and the adequacy of conduct.

We are first presented with a fundamental problem of a technical nature: how can we construe and linguistically represent a different conception of reality, and, second, how can we integrate this new representation into professional disciplines and

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institutional development. Although matters to be taken up by all professions,[372] law can play an instrumental role, because the challenge is to change the rules of what constitute valid knowledge in accordance with the insights arising from sustainable development, and to reflect this new understanding in law and policy. Law is the tool to make the paradigm operational, because the epistemology of sustainable development is not concerned with measurement and observation but with accommodating accountability as inherent to knowledge and conduct, and with connecting and integrating the individual, society and the physical world instead of analysing each in isolation.[373] Thus, I suggest that it could be helpful to consider a global legal culture, i.e., to think of a de facto global community of the biosphere integrated and motivated by a concept of law informed by the vision of sustainable development and based on an awareness of cognition as a set of tertiary rules that determine fundamental rationality. Finally, I note that law, in turn, is the profession in serious need of a new paradigm to situate itself legitimately and to develop its conceptual machinery so as to adequately respond to an emergent global polity.

I propose that if the problems presented here are not addressed in tandem with development of a political philosophy of sustainable development, then a change from economic to sustainable development might not happen in our time, because presently the impact of the economic development process by far outstrips the compensatory capacity of the activities undertaken within the sustainable development sector and within the framework of the Millennium Goals. Ironically, activities undertaken to compensate for what is considered a misguided or unjust[374] development process might perpetuate it by providing it legitimacy, because addressing the problem - i.e., the conception of reality underlying the present institutions - is a third order problem

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[372] See supra n. 255, Weeramantry.

[373] Coleman, Brady " Are Clarity and Precision Compatible Aims in Legal Drafting?" *Singapore Journal of Legal Studies* 1998 pp 376-408. at 376.

> Abstractly, law and language share three qualities, as both are: (1) rule-governed symbolic systems; (2) uniquely human; and (3) essential to the fabric of society' - Of course, as the primary tool of communication and thought, language plays a constitutive role in nearly all human fields and endeavors, from theology to the theater, from zoology to astrophysics. But with law, there is a special relationship. Law employs language to create relationships between people and institutions, and these language-defined and language-created relationships can be of enormous import. Danet, B. "Language in the Judicial Process" [1980] 14 Law & Society Review 3.

[374] See for instance Chapter 5. T. Pogge' suggestions for a "Global Resources Dividend".

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that cannot be effectively accomplished through a first order production of outcomes alone.

Alas, the rules of the game have to change. We must expand our understanding from a notion of reality as consisting of an aggregate of particulars functioning separately to a notion of particulars dynamically interacting within a whole, the nature of which is concerned with upholding of the biosphere.[375] We are impeded in this process by the professional machinery we apply to develop new understanding, because the quantitative and descriptive machinery itself is a product of the current paradigm. In what follows I aim to demonstrate that much work has been done in different professional fields[376] that reaches the same conclusions concerning reality and knowledge as that work upon which sustainable development builds. However, the professional disciplines can only transcend their self-referential analytical framework through transcendental speculation. None of them, therefore, provides the technical and pragmatic resources of policy and law for constructing an alternative. That is why we must harvest the insights of sustainable development.

Section 1 The Philosophical/Theoretical Field

1.1 The Dynamic Ontology - the Debate on the Many-Valued Concept of Reality

> **Dynamic Ontology** The four-centuries-old Galilean vision of science inadvertently but inexorably seems to be giving way to a new one in which formal, material, mental and social sciences are developing new forms of interaction and are beginning to integrate with each other. Many aspects of this new scenario are still unknown; many others are emerging; and many blind alleys lie in wait, especially if we lack awareness of where we are and where we

[375] Albert Einstein proposed that the world could be understood in terms of field dynamics rather than in terms of independent atoms.

[376] The question of an underlying conception of reality cuts across all professional categories. Also evolutionary theory, which is a field of analysis that aims at explaining why and how life changes over time seems to be in a process of change. According to the existing dogma natural selection is the major determinant of biological complexity. However, there is an emerging evidence that physical law not natural selection (or "survival of the fittest") is determining because in the subcelluar realm the cell must necessarily make extensive use of natural forms, which self-organize under the direction of physical law. See Denton, Dearden and Sowerby. "Physical law not natural selection as the major determinant of biological complexity in the sub cellular realm: new support for the pre-Darwinian conception of evolution by natural law. Biosystems, Vol. 71, Issue 3, October 2003. pp 297-303. Within the field of theoretical physics changes are also proclaimed. See, e.g., Wolfram, Stephen. *A New Kind of Science* http://www.wolframscience.com

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> are heading. A selected group of well-known and innovative scholars working in different fields sociology, psychology, computer science, mathematics and philosophy will present and discuss the basic conceptual issues of this new, incipient vision[377]

This quote is taken from the web-announcement of a 2004 conference in Trento, Italy. According to Roberto Poli, the conference's organizer, considerable interest in ontology[378] has developed since 1990. The interest is to some extent driven by development within the fields of information technology, database design, and artificial intelligence. However, a great number of professional fields[379] have a stake in some aspect of the ontological question, which is inherently related to the questions of social and individual aspects of cognition. Poli lists areas where ontology is helpful, including part-whole theories, and he provides a list of possible definitions[380] of the term. He also frames some of the important questions currently debated, such as, for example, what are the common borders of ontology to epistemology, logic and linguistics and what is the structure of ontology.

Others have addressed ontology from the particular perspectives of entity, process, or relation, as is evidenced from the quotes listed below from Andreas Goppold's writings on the cognitive model of relation and on information and third order ontology. The quotes are rather extensive, because I find that his explanations, as they stand out of context, illustrate the points made in Chapter 7 on the problems of enabling a relational ontology.[381]

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[377] Conference on Dynamic Ontology (http://www.unitn.it/events/do/). Accessed on 15 June, 2004.
[378] See e.g., Ontology - A resource guide for philosophers http://www.formalontology.it/index.htm
[379] A variety of disciplines are involved in the cognitive science enterprise; most commonly artificial intelligence (a branch of computer science). linguistics (esp. study of generative grammar, formal semantics, and natural languages processing), neuroscience (a branch of biology), philosophy (esp. ontology, epistemology, and semantics, and cognitive psychology (a branch of experiemental psychology).http://psychology.ilstu.edu/gredding/MachineVisionCurriculum/cognitivescience.ht.
[380] Poli, Roberto, *Framing Ontology - Overture*. Some definitions given in recent papers claim ontology is*:* A formal description of the objects in the world (Musen 1992); an explicit specification of a conceptualization (Gruber 1993), a meta-layer theory (ontology as a viewpoint) (Wielinga *et al*. 1994); a world model (Mahesh and Nirenburg 1995); the content of logical pure forms (Sowa 1995); a declarative model of the terms and relationships in a domain (Eriksson, Puerta and Musen 1994); a collection of general top-layer categories and associated relations and assumptions (Skuce and Monarch 1989). http://www.formalontology.it/polir.htm
[381] Projekt Leonardo-Leibniz http://www.uni-ulm.de/uni/intgruppen/memosys/. Accessed on 15 June 2005.

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Information and Third Order Ontology

The examples of *entity*, *process*, and *relation*, give a primary triadic categorization of being (i.e. a many-valued ontology), even though western philosophy would refrain from admitting at all that relation and process can be ontological categories. As the discussions between the Parmenides and Heraklit schools show, anything in the world can be perceived either as state (entity) or in flow (process), and it was noted in the beginning (and by the Buddhist philosophy), that the world can also be perceived as a system of relations, thus showing that non-entity oriented systems of ontology are entirely feasible, and whole civilizations have been built on these foundations.

The morphology of metapatterns: the Triad of Entity-Relation-Transaction. These are fundamental categories of cognition as they are {channeled / filtered} through a (slightly) Sapir-Whorfian language grid. The presently dominating indo-european language models make ready provision for two of the epistemological categories {Entity/State/Substance} and {Transition/Process}, while obliterating (or treating as insignificant) the possible third category of {Relation}.

The third cognitive model of *relation* is that of interconnectedness, and of pattern. While the first two cognitive models are fairly easy to understand for Western thinking, the third one is not. To achieve this perception, another *metanoia* is needed like it was demonstrated in the re-tracing of the awakening of the Buddha, Whitehead's society paradigm, and Macy's description of dependent causation in the model of general systems theory. The pattern view has been described by Bateson (1979: 18) as "a pattern that connects", referring to Goethe (p. 17). Bateson's definition of *context* (1979: 15) "*as a pattern through time*" is the essential platform for the present systematics of the cultural pattern.

Goppold also explains that throughout the history of philosophy, different schools of thought have weighed their world models according to these linguistic categories:

1) *by Parmenides, Zeno*, and *Platon*, we can entertain a fundamental cognitive model based on {static entities / unchanging substances / persistent objects / eternal, immutable ideas}. (Parmenides 1974).

2) *by Heraklit,* we can entertain a fundamental cognitive model based on {*process / transaction / transition*}. (Heraklit 1976).

3) *by the Buddhist philosophy of pattica samuppada,*we can entertain a fundamental cognitive model based on {*inter-relation / inter-causality / inter-processuality*}.

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Goppold uses the term "flip" to capture our orientation to the different categories and says about his research that:

> It is within the individual freedom of the observer by which side of the flip she will construct her reality and if and how long she will let herself get stuck on any of them. (As is evidenced by the fact that whole civilizations have been stuck on one or the other end of the flip for centuries and even millennia). This discussion is not presented towards the aim that any one these possible flip patterns is inherently better or more useful than the others, and by no means is it implied that there is anywhere a "real world" that follows this structure. Quite to the contrary. The educating effect of entertaining various versions of a Gestalt flip is to learn to make the perceptive system so flexible that one can flip forth and back at will, and not be stuck to any one of the positions.

The part/whole problem mentioned also in Chapter 4 of this thesis is a consequence of an ontology of relation, and in Goppold's address to the 40th Anniversary meeting of the International Society for Systems Sciences in 1996, he emphasized the part-whole question and the relationship to cognition.

> *The Whole, the Parts, and the Holes* Why should it be that the Whole is more than the sum of its parts? If this is so, then there must be a systematic hole in our cognitive system, a blind spot that makes us overlook a decisive aspect of the part-whole relation. I call this "the missing ontology of relation". What I propose is that the Whole is not Monistic but Pluralistic. In the language of formal logics used by Gotthard Guenther, a similar principle is called Poly-Contexturality. True metaphysical equiposition of the "You" and the "We" can only be achieved with a multi-valued ontology, and consequently a multi-valued post-aristotelian logics.[382]

There has been much debate as to the holistic nature of the world for at least the last 50 years, but that it is difficult to integrate this understanding into the various professional disciplines is evidenced by the following quote from the International Society of Systems Science (ISSS), which was established in 1956 because:

[382] Available at **http://www.newciv.org/ISSS_Primer/seminar.html**

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> The systemic (holistic) aspect of reality was being overlooked by conventional disciplines, which emphasize specialization and thus we sought to create a professional organization that would transcend the tendency toward fragmentation in the scientific enterprise. In the half century since the founding of ISSS, humanity has archived a remarkable synthesis of science and technology. Some fragmentation has been overcome enabling us to apply science and technology to the construction of our physical, social and cultural reality on a massive scale. However, significant, and deep-rooted fragmentation remains. We have been less successful in establishing a graceful or even, workable relationship between humanity, nature, science and technology.[383]

Now, bridging theory and practice, I propose that the Whole is not monistic or pluralistic but dynamic and that the brilliance of the sustainable development policy is that it has focused on interdependence as the driving logic behind its understanding of how this world works. Interdependence is a noun that signals a state but whose meaning is a process of relating. It therefore captures the ideas of state, process and relation. If, on the one hand, we understand the Asian conception of the world as a whole with humans conflated with nature, and the Western, on the other hand, as fragmented with humans separated from nature, interdependence cuts out the middle way transforming a simple equation of dependence or independence into an equation of dynamic interaction.

1.2 Cognitive Aspects

As mentioned at the beginning of this section, research into the nature of the ontological starting point is inherently related to questions of social and individual aspects of cognition. The question of cognition and the relative importance of physiology, biology, culture and institutions is also a field of research that is progressing quickly.[384] Today we know things about the brain that were scarcely imaginable ten years ago, and the whole field of research on how decisions are made has taken on a new dimension with the advent of brain imaging.

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[383] I see this statement as confirmed within the legal field by the work of Niklas Luhman (who was a member of ISSS), who par excellence has advanced the idea of the autonomy of the legal system and of social systems as such - they might occasionally bleed or irritate each other, but otherwise there is no possibility for communication between the systems.

[384] The document "Visions of the Brain: Update 2003" gives an overview of recent progress and hail exploration of the brain as the greatest intellectual adventure in modern times. http://www.dana.org/. The Dana Alliance is a nonprofit organization of more than 200 pre-eminent scientist dedicated to advancing education about the progress and promise of brain-research.

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For instance, the neural basis of moral judgment is no stranger to brain-imagining inquiry, and it leads to questions such as: "What is the neural substrate of value representation? Will a better understanding of the (neuro) biological basis of moral cognition and behaviour modify our philosophical/ethical framework? There may be legal implications as well: If a moral judgment has a neurobiological basis, what is the subject's responsibility?"[385] Neuroscience has also shown an interest in the Buddhist mind training techniques[386] in order to stretch the field's assumptions about human possibilities, and, in the last decade, there has been a move from the dogma of the brain unchanged to the concept of neuro plasticity, the notion that the brain continually changes as a result of our experiences. However, the brain is only one subject of cognitive sciences, which is the multidisciplinary study of intelligent behaviour, i.e., an agent's interaction with the environment. It is a field of research that has been influenced by a number of theoretical and methodological approaches, including systems analysis and cybernetics, which has a constructivist approach to the epistemological question,[387] and also by the fields of artificial intelligence, linguistics, neuroscience, philosophy, and cognitive psychology, among others.

In summery, cognition is a complex operation consisting of perceptual, memorial and judgmental processes, and the particular knowledge concerning the "machinery" of cognition is related to the different fields under investigation.[388] Therefore, the idea

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[385] Id. at. 6.

[386] See, e.g., "Investigating the Mind 2005: The Science and Clinical Applications of Meditation Exchanges between Buddhism and the Bio behavioral/Medical Sciences. - Can modern medicine make use of Buddhism's 2,500 years of investigating the mind/body connection through meditative practices? " Conference:Co-Sponsored by Johns Hopkins School of Medicine and Georgetown University Medical Center. Available at http://www.mindandlife.org/ml.itm05.conf.html

[387] Constructivism has its roots in Kant's synthesis of rationalism and empiricism, where the subject has no direct access to external reality, and can only develop knowledge by using fundamental in-built cognitive principles ("categories") to organize experience. One of the first psychologists to develop constructivism was Jean Piaget, who developed a theory ("genetic epistemology") of the different cognitive stages through which a child passes while building up a model of the world. In cybernetics, constructivism has been elaborated by Heinz Von Foerster who noted that the nervous system cannot absolutely distinguish between a perception and a hallucination, since both are merely patterns of neural excitation. The implications of this neuro-physiological view were further developed by Maturana and Varala who see knowledge as a necessary component of the processes of autopoiesis ("self-production") characterizing living organisms. The Principia Cybernetica Project. Available at http://pcp.lanl.gov/CONSTRUC.html

[388] For various perspectives see, e.g., Turner, Stephen. "Tradition and Cognitive Science, Oakeshott's Undoing of the Kantian Mind." Philosophy of the Social Sciences Vol.33, No. 1, pp. 53-76 (2003). - Maturana, H. "Autopoisis, structural coupling and cognition: a history of these and other notions in the biology of cognition." Cybernetics & Human Knowing Vol. 9. No.3-4, pp. 5-34 (2002).

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advanced in this thesis of a physiologically based cognitive function of ontology as a complexity reducing rule underlying policy and institutional developments cannot be verified by existing studies, but must be investigated on its own terms.

1.3 Towards an Epistemology of Sustainable Development - the Unity of Knowledge, the Meta-Science Debate

Understanding and describing the relationship between mind and matter is an age-old challenge. Historically, mind and matter have been perceived as separate. Now I suggest that the epistemic lesson of the sustainable development policy[389] requires that we conceptualise cognition as a channel of communication between the I and the world, an interface or a point of mediation between mind and matter. The relationship is of a *de facto* biological/physical nature and expressed as the need for engaging in the process of connecting between the individual and the world, i.e., for knowing about or getting a handle on the world.

Although ontology (the study *of being* focused mainly on questions of what kinds of entities exist) and epistemology (the study *of knowing* focused essentially on questions concerning what is knowledge and how it is possible) are key areas in philosophy. However, the relationship between them is not well developed and explained from an individual or a societal perspective. For instance, in post-modern philosophy, it is usual to either deny the ontological starting point, as for example, to deny that reality exists apart from our knowledge (usually understood as our linguistic representations), or to deny that our knowledge in any way reflects the world as it exists in and of itself.

Still, in practice, this philosophical position is self-undermining because, to have an idea about knowledge, we must necessarily have a presupposition about what the world is like, i.e., we must assume that the world exists in such a way that it makes our knowledge possible. In fact, there is no escaping a theory of ontology, it is only a question of whether it is consciously acknowledged or whether it is an implicit

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Langan, Christofer Michael. *The Cognitive-Theoretic Model of the Universe - A new Kind of Reality Theory* available at www.ctmu.net . Published in *Progress in Complexity, Information, and Design.* Vol. 1.2 and 1.3, April-September 2002.

[389] Concerning relationship between development and epistemology see also Summer, Andrew and Michael Tribe. "The Nature of Epistemology and Methodology in Development Studies: What do we mean by 'Rigour'/' - DSA Annual Conference, " Bridging Research and Policy". November 2004.

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presupposition of one's theory of epistemology, as is the case in the philosophical grounding of the economic development paradigm.

Presently all knowledge fields subscribe to the implied meta-science that there is no shared ontological starting point. Thus, there is not a shared standard outside the conceptual machinery of the individual disciplines to which they refer. For example, there are self-referential epistemologies for law, economics, political science and psychology. This issue is reflected in the sustainable development debate on implementation, where the policy from the outset prescribed integration - meaning multi-disciplinarity, inter-disciplinarity, and trans-disciplinarity.[390] There are attempts at integrating the different disciplines theoretically, but they still take as a point of departure the separation between environment, economic and social sectors,[391] and no vision of a unified field of reality has emerged.

It is a demanding task to work out the proper relationship between ontology and epistemology within a sustainable development policy perspective both from the viewpoint of the individual and from an institutional perspective. In Chapter 4, in particular, I have suggested possible ways of approaching an investigation of the questions involved. However, an important task is to develop a vision of sustainable development structured around the key characteristics of interdependence: upholding of the biosphere, satisfaction of needs, and universal participation. Developing a worldview and a language of such a unified, but dynamic, field of reality within which the individual can develop a new understanding of self as an integral part of the physical and social aspects of the biosphere[392] would create a perspective from which we could begin to question.

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[390] This is also reflected in the activities in relation to the United Nations Decade of Education for Sustainable Development (2005-2014), which was adopted in December 2002 by the United National General Assembly UNECSO was designated as lead agency for the promotion of the Decade. Available at http://portal.unesco.org/education/en/ev.php-URL_ID=27234&URL_DO=DO_TOPIC&URL_SECTION=201.html

[391] Munasinghe, Mohan. "The sustainomics trans-disciplinary meta-framework for making development more sustainable". *International Journal of Sustainable Development* Vol. 5. No 1/2, 2002. pp 125-182.

[392] Mae-Wan Ho. "Natural Being and a Coherent Society" in Khalil and Boulding K.E. eds. *Evolution, Order and Complexity* London: Routledge, 1996.

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If we can begin to understand the individual as a concrete instance of a broader field of life, then it becomes plausible to think of improving the whole as improving individual conditions and of exploiting/destroying the whole as destroying individual options. The point is to look for social and individual conduct that addresses both the individual and the conditions of life so as to expand the perspective for judgment. Expanding the perspective implies revising our questions. For example, in place of how can we grow so that individuals prosper, we can ask how can the biosphere be maintained so that individuals prosper. It also implies different assumptions about human beings, who for instance can be understood as sharing the common purpose of unfolding their individual lives and not as competing for scarce resources.

The development of these elements of ontology and epistemology into a proper theory of knowledge, of an epistemology of sustainable development, is a research priority, because in making this understanding operational it is necessary to reconfigure the disciplines through which we generate knowledge for societal action.

However, the question of the possible linguistic representation of this change is of outmost importance. In Chapter 7, I have provided an example of how a many-valued conception of reality has been theoretically developed and expressed within an Asian legal tradition. There may still be expertise in the scholarly communities that could be employed for the difficult task of advancing a language of a many-valued conception of reality. As mentioned in Chapter 4, Western attempts to suggest new languages to express interdependence have been ideational and self-referential, and, consequently, not immediately relevant to the practice of sustainable development.

According to the theory of change underlying sustainable development, an epistemological model is integral to policy and institutional development. Therefore, as suggested in Chapter 7, the epistemological point of departure should be integrated into the theoretical framework for understanding law and policy. In the final section following, I elaborate on developing the idea of a set of tertiary rules that conceptually constitutes the individual as a fundamental source of law and normativity.

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Section 2 The Legal/Theoretical Field

2.1 Integration Through Legal Culture

According to the theory of change underlying the sustainable development policy, action and institutional development should be based on knowledge about the interdependent nature of the world. In a very pragmatic way, this demonstrates that there is a relationship between the vision of the world, the ontological starting point, generation of knowledge, and action, and, furthermore, that, although not theoretically explained, this relationship is descriptively and prescriptively acknowledged.

Also the idea of basing policy and action on knowledge about the unity of the biosphere has been prescribed but not analysed in relation to cognition, epistemology and ontology.[393] The following excerpt illustrates this point. Ironically, it is from the same conference where Goppold presented his theory of the missing ontology of relation. In "Moral Behaviour on a Small Planet - Groundwork for a Biospheric Systems Ethics", Ervin Laszlo[394] states that the biosphere as a whole is a natural system, but, without further explanation, he continues that it is still too vast a system to permit the derivation of practical codes for moral behaviour. Nevertheless, he concludes by articulating a maximum and a minimum code as follows:

> The definitive formulation of the maximum code can thus read: act so as to maximize the chances of reaching, and then sustaining, a humanly favorable dynamic equilibrium in the evolution of the biosphere.

For formulating the minimum code he suggests that we take our cue from Kant's categorical imperative: "act so as to allow your action to become a universal maxim."

> In the context of a biospheric systems ethics the minimum code thus says that it is imperative that all people should act in a way that could be replicated by any and all other people without pushing the evolution of the biosphere beyond the threshold of humanly favorable dynamic stability.

These codes are, however, only prescribing a substantive norm and thus they are mechanical in nature and do not explain their sources.

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[393] Traditionally ethics as the theory of ideal conduct is developed in the abstract based on ideas, and with no explicit ontological starting point. For instance Kant asserted both the categorical imperative and the self-value of each individual, but he failed to resolve the essential implicit contradiction in such an Ethic, because of the lack of ontological reference.

[394] See supra n. 382, the Special Integration Group of the International Society for Systems Sciences (ISSS) The presidential address at the 40th anniversary meeting in 1996 by Ervin Laszlo.

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An ethics of conduct is a component of every culture. In the 1960s, Lawrence M. Friedman introduced the concept of a legal culture as being a part of a general culture. Friedman postulates that a legal system is comprised of three sets of basic components: legal structure, substantive law, and legal culture.[395]

> Structure and substance are real components of a legal system, but they are at best a blueprint or a design, not a working machine. The trouble with … structure and substance was that they were static; they were like a still photograph of the legal system… the picture lacked both motion and truth … and is like an enchanted courtroom, petrified, immobile, under some odd, eternal spell. [396]

According to Friedman, the missing element, which gives life to a legal system, is legal culture. Legal culture refers to the attitudes, values, and opinions held in a society with regard to law, the legal system, and its various components. It is those parts of general culture - customs, opinions, and ways of doing and thinking - that bend social forces toward or away from the law. As such, legal culture is part of the overall culture of a society. Among the three components of a legal system, legal culture is the most elusive and yet, according to Friedman, the most important. As detailed in Chapter 7[397], the idea of a legal culture as a set of tertiary rules that integrate the cultural aspects into a coherent concept of law could support the theory of a legal culture. However, the idea is not without its critics.[398]

Patrick Glenn has more recently written a comprehensive overview of legal traditions of the world.[399] Glenn does not elaborate specifically on the theoretical grounding of a

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[395] Friedman has written about this subject in a number of publications see, e.g., Friedman, Lawrence M. *The Legal System: a social science perspective* NY: Standford University Press, 1975. pp 11-16.
[396] Supra at 15.
[397] The importance of integrating the ontological question into concepts of law and legal culture from a methodological perspective is advanced in Leskiewicz. "Towards an Ontological Revival of Legal Theory, Part II: Methodological Ethics. Paper presented to the 2004 Australian Legal Philosophy Students Association Seminar Series (www.alpsa.net). The author claims that legal theory cannot develop in isolation from ontological, epistemological, and methodological developments in the human sciences. Methodological ethics requires legal theorists to develop an appropriately variegated and falsifiable taxonomy of legal culture where time-space extensions of everyday practices are identified and described by reference to complex accounts of the dynamic interplay between agency and structure. The work of Pierre Bourdieu, Anthony Giddens and Michael De Certeau is considered and their insights are promoted as methodological resources legal theorists cannot afford to ignore.
[398] Cotterrell, Rodger. "The Concept of Legal Culture" in Nelken, David, ed., *Comparing Legal Cultures*, Dartmouth Publishing Group, 1997. pp 13-14.
[399] Glenn, Patrick, H. *Legal Traditions of the World.* Oxford: Oxford University Press, 2000.

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concept of law but his book is a very rich source for understanding how law is working and has worked in different societies of the world. According to Glenn the cultural aspects of law are to a higher degree conceptually accommodated in the Asian legal traditions.[400] The idea of "Li"[401] in China fosters a conceptual unity among positive law, informal normativity and religious law, and thereby spans each person's official and everyday performance. Although legal traditions are changing all over the world, cultural aspects of law still play a decisive role in Asia including in the regulation of private business.[402] Potentially, this academic tradition can provide important experience for further research on the possibilities of elaborating on a concept of a global legal culture, including a set of tertiary rules integrating knowledge and action and integrating the individual into society, thereby opening a space for integration into a global polity. Such integration can constitute a discursive space for the individual as author and addressee of law and as subject and object in world politics**.** This space raises the need for further developing the norms to be followed and the role to be played by the individual.

The normative aspects of such a global legal culture can be developed in accordance with the meaning of sustainable development. From a legal perspective, the question is whether interdependence in itself generates substantive norms such as equality. However, its most important contribution is that interdependence provides a shared point of reference that can serve as a constant in the polity equation. Potentially, a theory of accountability and legitimacy of action answerable to the whole of the human condition and not merely to the parties involved (within a community) can be generated from there.

As demonstrated in Chapter 3, although there exists a well-developed infrastructure for the participation of the individual in global affairs, it is built on a division of roles between public authorities and the choices of private interests groups. However, the debate about what is the role of the individual as a political agent is underdeveloped from a theoretical perspective. In fact, the missing ontology of relation referred to in

[400] Id. pp 282-290.
[401] Li is about seeking to persuade and induce rather than command and punish and is represented by the teachings Confucius, while Fa represents formal law and formal sanctions according to Glenn at 282.
[402]See, e.g., Tabalujan, Benny "Why Indonesian Corporate Governance Failed - Conjectures concerning Legal Culture." 15 *Colum. J. Asian L. 141 (2001-2002)* - Vol. 15, No. 2, Spring 2002.

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Sub-section 1.2 can also be perceived as a systematic gap in the cognitive system in relation to the conception of human motivation and behaviour in relation to political structures. Fortunately, there is an ever-growing awareness[403] of the primitivism and limitations of the existing assumptions and the resulting potential for conflict created by such assumptions when institutionalised in policy and governance structures.

Opening the space theoretically and linguistically for aligning personal conduct and world politics within a normative framework based on a conception of an interdependent unified field of reality might offer social and political choices beyond domination and conflict, because we can leave the binary "either or" structure of thinking and replace it with a more accurate understanding that can be validly expressed as being a point or a measure of degree along a continuum instead of as an absolute.

[403] Within political science e.g., Mansbridge, Jane J., *Beyond self-interest*. Chicago, University of Chicago Press, 1990.
Within economics e.g., Id. Sen K, Amartya. "Rational Fools: A Critique of the Behavioral Foundations of Economic Theory." and North, Douglass C. *Understanding the Process of Economic Change*. Princeton: Princeton University Press, 2005.
Within law e.g., Jones, D. Owen and Timothy H. Goldsmith. "Law and Behavioral Biology" Columbia Law Review, Vol. 105, pp.405-502, March 2005; Society for Evolutionary Analysis in Law, See http://www.sealsite.org/ ;The Gruter Institute for Law and Behavioral Research, 1981. See http://www.gruterinstitute.org/

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Appendix

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Table 2. Basic Distinctions Between Five Paradigms of Environmental Management in Development

Paradigm > Dimension	*Frontier Economics*	*Environmental Protection*	*Resource Management*	*Eco-Development*	*Deep Ecology*
Dominant Imperative:	"Progress," as Infinite Economic Growth and Prosperity	"Tradeoffs," as in Ecology versus Economic Growth	"Sustainability" as necessary constraint for growth/development.	"Green Growth": Co-developing Humans and Nature; Redefine "Security"	"Eco-topia": Anti-Growth "Constrained Harmony with Nature"
Human-Nature Relationship:	Very Strong Anthropocentric	Strong Anthropocentric	Modified Anthropocentric	Ecocentric	Biocentric
Dominant Perceived Threats:	Hunger, Poverty, Disease, "Natural Disasters"	Health Impacts of Pollution, Endangered Species,	Resource Degradation; Poverty, Population growth	Ecological Uncertainty Global Change	Ecosystem Collapse "Unnatural" Disasters
Main Themes:	Open Access/Free Goods Exploitation of Infinite Natural Resources	Remedial/Defensive "Legalize Ecology," as Economic Externality	"Economize Ecology" Interdependence	Generative Restructuring "Ecologize Economy" Sophisticated Symbiosis	Back to Nature "Biospecies Equality" Simple Symbiosis
Prevalent Property Regimes:	Privatization (Neoclass.) or Nationalization (Marx.) of all property	Privatization Dominant; Some Public Parks set aside	Global Commons Law for Conservation of: Oceans, Atmosphere, Climate, Biodiversity?	Recontextualize Private & Common Property regimes for Intra/Inter- Generational Equity & Stewardship	Private, plus Common Property set aside for Preservation
Who Pays?	Property Owners (Public at Large: esp. Poor)	Taxpayers (Public at Large)	"Polluter Pays" for Right (Poor bear impacts)	"Pollution Prevention Pays" Integrated Ecodevelopment	Avoid costs by foregoing development
Responsibility for Development and Management:	Property Owners: Individuals or State	Fragmentation: Development decentralized Management centralized	Toward integration across multiple levels of govt. (e.g., fed./state/local)	Private/Public Institutional Innovations & Redefinition of Roles	Largely Decentralized but Integrated design & mgmt.
Environmental Management Technologies and Strategies:	Industrial Agriculture; High Inputs of Energy, Biocide, & Water; Monocultures, Mechanized Production Fossil Energy Pollution Dispersal Unregulated Waste Disposal High Population Growth "Free Markets"	"End-of-the-Pipe" or "Business as Usual Plus a Treatment Plant" Clean-up. "Command and Control" Market Regulation: Some Prohibition or Limits, Repair, & Set-asides. Focus on Protection of Human Health. "Land Doctoring" Envir. Impact Statements	Impact Assessment & Risk Management, Pollution Reduction, Energy Efficiency, Renewable Resource/ Conservation Strategies, Restoration Ecology, Population Stabilization & Technology-Enhanced Carrying Capacity, Some Structural Adjustment	Uncertainty (Resilience) Management, Eco-Technologies, e.g: Renewable Energy, Waste/Resource Cycling for Throughput Scale Reduction, Agro-forestry, Low Input Agriculture, Extractive Forest Reserves Population Stabilization & Enhanced Capacity as RM	Stability Management Reduced Scale of Met Economy (inc. Trade) Low Technology Simple Material Needs Non-dominating Science Indigenous Tech. Systems "Intrinsic Values" Population Reduction
Analytic/ Modeling and Planning Methodologies:	Neoclassical OR Marxist Closed Economic Systems: Reversible Equilibria, Production Limited by Man-made Factors, Natural Factors not accounted for. Net Present Value Maximization Cost-Benefit Analysis of tangible goods & services	Neoclassical Plus: Environmental Impact Assessment after Design; Optimum Pollution Levels Equation of Willingness to Pay & Compensation Principles	Biophysical-Economic Open Systems Dynamics: Include Natural Capital, True (Hicksian) Income Maximization in SNAs Increased, Freer Trade Ecosystem & Social Health Monitoring; Linkages between Population, Poverty, & Environment	Socio-Technical/ Ecosystem Process Planning & Design Integration of Social, Economic, & Ecological Criteria for Technology Participation & Autonomy Indigenous Goals & Management; Land Tenure & Income Distrib. (Equity) Geophysiology	Grassroots Bioregional Planning Multiple Cultural Systems Conservation of Cultural & Biological Diversity Autonomy
Fundamental Flaws:	Creative but Mechanistic; No awareness of reliance on ecological balance	Defined by F.E. in reaction to D.E.; Lacks vision of abundance without scarcity	Still anthropocentric, Subtly mechanistic; Doesn't handle uncertainty	Magnitude of changes require new consciousness Doesn't manipulate fears	Defined in reaction to F.E.; Organic but not Creative; How reduce population?

M.E. Colby; Matrix 1- 9/5/89 (Frontier Economics) (Environmental Protection) (Deep Ecology)

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[i] The * marked documents are not mentioned in the thesis, but were important to overview or arguments relating to disciplinary fields outside law.

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