



Sustainable Development: Can Law Square the Circle?

REPORT ON THE 3RD SUSTAINABILITY SYMPOSIUM „SUSTAINABLE DEVELOPMENT: LAW IN PRACTICE“ OF THE ZLS ZURICH LAW SCHOOL AND KLS KALAIIDOS LAW SCHOOL HELD ON NOVEMBER 15, 2024



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Autor:
Prof. Dr. iur. LL.M. (Yale) Daniel Dedeyan

PREFACE

17 renowned experts from various practical and legal fields discussed the increasingly legally coined term „sustainable development“ in three panels: „Economy“, „Environment“ and „Society“.

In the panels, speakers first presented a small part of the results of the research project „Sustainable Development in Swiss Law“ sponsored by the Kalaidos Law Schools under the direction of **Prof. Dr. Charlotte Sieber Gasser (Geneva Graduate Institute, University of Zurich, ZLS Zurich Law School)**, **Prof. Dr. Rika Koch (Bern University of Applied Sciences)** and **Dr. Elisabeth Bürgi Bonanomi (University of Bern)** in keynote speeches. They then discussed their theses with outstanding experts from the field. An anthology with contributions from over 30 leading legal experts will be published by Stämpfli Verlag in Q1 2025.

The event was organized and moderated by **Prof. Dr. Daniel Dedeyan, LL.M. (Yale) (Walder Wyss, University of Zurich, Dean of the ZLS Zurich Law School)**, and **Prof. Dr. Charlotte Sieber Gasser**.

The following report from the panels is a subjective selection of exciting aspects from the presentations and the discussion. It does not claim to be a complete account of the extremely rich event:

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1 TAKEAWAYS

Here are just a few takeaways:

1. Sustainable development, in contrast to sustainability, refers to the interaction of systems. As a legal concept, as it is emerging internationally, sustainable development ultimately combines **elements of the constitutional task of the state per se**: the longterm prosperity of the community. The problems addressed by this do not disappear, regardless of whether „sustainability“ is currently en vogue or not.
2. The term is therefore not as vague as is commonly assumed. However, difficulties arise when it comes to **implementing** the associated objectives.
3. Sustainable development cannot be thought of independently of **digitalization** as a driver of ever greater energy consumption on the one hand and as a framework condition and means of implementation on the other, not least because of the growing need for data processing.
4. In order to reach a new level of implementation, the focus should not be on increasingly complex, bureaucratic disclosure requirements, but on **simplification and better communicability**. Too little emphasis is still being placed on **planning certainty**, which is key to implementation.
5. Simplification is also the order of the day when it comes to **data**, and the focus must **increasingly shift from completeness and measurability to comparability over time**.
6. In its abstractness, the term describes less concrete guidelines for action, but rather opens up an increasingly **institutionalized discussion platform** between different players with often conflicting interests, and it has the potential to challenge sectorspecific, entrenched processes.
7. The irreconcilable positions of different stakeholders often have to do with a lack of personal communication channels. If there is a platform, **surprising consensus** can emerge, as happened in one of the panels on site.
8. A **procedural understanding** is all the more necessary as the example of the more than 10,000 different persistent chemicals known as PFAS shows in practice that sustainable development cannot be introduced in one fell swoop by law. Rather, sustainable practice is a „moving target“ that requires continuous legal adjustment based on new scientific findings. The same applies to gradual processes such as demographic change, which tend to fade into the background of public awareness.
9. Furthermore, there is **no one right regulatory instrument**. Incentive taxes, for example, intervene in the economy in a gentle way via the price rather than via bids and bans. However, not all problem areas can be controlled via prices, such as gender equality.
10. What is needed is a better **integration of the financial industry and the real economy**, which can be achieved through increased stewardship by companies and by making the sustainability standards, which are still too much geared towards the financial industry, more specific to industrial companies.

2 INTRODUCTION

In his **welcoming address**, *Prof. Dr. Daniel Dedeyan* explained that the concept of sustainable development is increasingly being defined by the law and is spilling over into numerous areas of practice and law, where it is developing a life of its own, leading to inconsistencies, empty words and, not least, a thicket of regulations. The resulting key questions for the event and the research project are therefore:

- (1) What does sustainable development mean in the respective area today?
- (2) What difficulties arise in the implementation and
- (3) What measures need to be taken?

In order to tackle societal problems that can only be solved collectively, it is important to uncover congruencies and facilitate learning processes by sharing experiences from different areas. This is the aim of the event as well as the entire research project.

In the subsequent introductory presentation „**Sustainable development in law**“, *Dr. Elisabeth Bürgi Bonanomi* began by demonstrating that, contrary to prevailing opinion, „sustainable development“ is by no means just an undefined ambiguous clause, but is increasingly determined and legalized at international, constitutional and statutory level. The principle of sustainability can therefore be read as a concretizing „multidimensional methodological norm“, which similar to the principle of proportionality structures the balancing of interests. It contains an obligation to act insofar as it requires the public sector to tackle the major sustainability challenges. The „how“ is then to be determined in a weighing and optimizing process, taking into account all dimensions of sustainability. The principle not only safeguards existing expectations, but also calls into question what is taken for granted in various areas such as the economy, administration and society. In this respect, it imports a certain disruptive element into the various areas. The speaker used examples to show that the potential of the sustainability principle enshrined in the constitution is far from exhausted.

3 ECONOMY

The „topdown“ perspective from the concept of international and constitutional law was followed by the „bottomup“ view from the companies to the resulting regulations:

Prof. Dr. Beat Brändli (Schiffbau Attorneys at Law, KLS Kalaidos Law School, ZLS Zurich Law School) critically stated in his presentation **„Sustainability reporting and corporate responsibility: an odd couple“**, after an overview of the regulations in Switzerland and the EU, that the focus in the area of disclosure is shifting further and further away from sustainable development towards the processing of reporting bureaucracy. The current excessive regulation is producing almost unprocessable amounts of data, tying up scarce resources in this area and blurring responsibilities instead of making them visible, which would actually be an intrinsic function of transparency. What is needed are simpler rules that are also easier to communicate.

In his subsequent presentation **„Sustainable development through digitalization“**, **Prof. Dr. Rolf H. Weber (University of Zurich)** pointed out that sustainable development must be seen against the backdrop of the social megatrend of digitalization. Electricity consumption for digitalization is growing exponentially every year, which calls sustainability goals into question. At the same time, digitalization offers great opportunities for sustainable development, for example by making processes more efficient, improving medical treatment and reducing healthcare costs or giving people in areas of the world with poor infrastructure access to important services. In his analysis of numerous areas of law, Rolf H. Weber comes to the conclusion that the existing legal forms and regulations only partially cover this need, for example in the case of Decentralized Autonomous Organizations (DAO), which cannot be fully legally represented.

The subsequent **panel discussion** with the speakers and external panelists, moderated by **Daniel Dedeyan**, addressed the question of whether the regulation of sustainable development is heading in the right direction.

Christa Markwalder (Head of Public Affairs for Switzerland at Zurich Insurance Group) pointed out that in today's environment, it is in the intrinsic selfinterest of companies to work towards sustainable development, and she emphasized the relevance of implementation in internal company policies and standards. She regretted that far too little is known to the public about what companies are doing and described specific projects such as the „Swiss Climate Action Initiative“ or the „esg2go“ toolkit for SMEs, which is cofinanced by Zurich and reduces the complexity of regulation. In contrast to the overdetailed EU regulation with its far too many undefined terms, for example in the European ESRS II, principlebased regulation is suitable for leaving room for own initiatives. In response to the objection from the audience that sustainable development is a luxury product and that in a competitive environment, companies would barely hesitate to decide against measures at the expense of sustainable development if they would otherwise lose customers, Christa Markwalder pointed out that shortterm profit maximization without consideration for society and the environment would do more harm than good to a major market player in the long term.

Attorney Katja Brunner, LL.M. (Director Legal & Regulatory at Swiss Sustainable Finance SSF) was also critical of the EU regulation, but praised the Swiss principlesbased approach in combination with selfregulation. She pointed out that sustainability reporting is still too much geared towards the financial industry and that rules specifically adapted to the industry would have to be developed. With regard to those who would like to see a move away from ESG regulation and the current decline in interest in sustainability, she noted that ESG will not simply disappear, especially as the relevant problems remain and will continue to increase.

Matthias Narr (Head of Engagement at Ethos Foundation) countered the criticism of the current regulation and the EU regulation by stating that asset management and stewardship are pleased with the more detailed and comparable sustainability reports. Only this data enables a real assessment, wellfounded investment decisions and a dialog between the companies and a longterm oriented ownership interested in sustainability. On the question of measurability, he conceded that although this is a difficult issue in the case of stewardship and particularly in the area of engagement. However, the focus here is on observable relative changes over time rather than measurability in absolute figures. In response to a question from the audience as to whether ownership should not be rethought, he mentioned corresponding participatory models of some private equity companies in the USA, but questioned to what extent such models are becoming more widespread.

In the further discussion, **Rolf H. Weber** pointed out that the disclosure requirements cause difficulties for SMEs in particular and that large companies impose extensive supply chain requirements on SMEs, which they can hardly bear. In response to a question from the audience, he then noted that Switzerland is unlikely to adopt the EU taxonomy, even though the Swiss provisions on sustainability reporting permit a report in accordance with foreign regulations.

With reference to Rolf H. Weber's presentation, **Daniel Dedeyan** finally pointed out, using an example from his consulting practice on ESRS II, that the flood of data produced by regulation now requires digitization and in practice the use of artificial intelligence, which in turn produces data that can only be processed with artificial intelligence, which means that the focus on implementing genuine sustainable development is increasingly lost.

4 ENVIRONMENT

As *Charlotte Sieber Gasser* had anticipated, the tone in the second panel „Environment“, which she moderated, changed from a focus on regulation and bureaucracy in the area of business to environmental law based on factual issues and hard facts.

Dr. iur. Judith Schäli (Center for Environment and Development, University of Bern) described the new legal regulation of this concept in the Environmental Protection Act in her presentation „**Circular Economy: Opportunities and Challenges for Sustainable Development**“ (project together with *Dr. iur. Christine Bühler, INTERFACE Policy Studies*). However, she also highlighted critical aspects, such as the fact that the circular economy does not automatically lead to lower resource consumption. The transition is resourceintensive, resource losses in the cycle are unavoidable and there are also so-called rebound effects: more efficient and therefore cheaper resource consumption can become an incentive for more resource consumption. A onesided focus on the circular economy may also tempt us not to change anything in terms of consumer behavior and the economic system. The circular economy is then limited to the ecological side and ignores the social dimension of sustainable development. In the discussion, Judith Schäli argued that the concept of the circular economy has so far only referred to the use of resources, but that sustainable development should also reflect consumption, work and other related areas.

Prof. (FH) PD Dr. Mirina Grosz (Poledna RC AG, University of Basel) showed in her presentation „**Breakthrough in climate law thanks to an integrated concept of sustainable development?**“ that a uniform concept of sustainable development cannot be identified within the framework of Swiss climate law. The relevant federal laws are not based on the sustainability provision of Art. 73, but on Art. 74 and Art. 89 of the Federal Constitution. However, this does not mean that the concept plays no role in climate law. On the contrary, it is also inherent to climate law. The discussions surrounding the implementation of the netzero target and the consultation process for the new Climate Law Ordinance make this particularly clear. However, it will hardly be possible to achieve all sustainability goals at the same time and to the same extent. It will be a major challenge to set the right and urgently needed priorities.

MLaw Rahel Zimmermann (Ecosens AG, University of Geneva) was even more specific in her presentation on „**Legacy law and intergenerational justice: Are we on the right track?**“. The law on contaminated sites embodies the intergenerational justice aspect of the principle of sustainable development in accordance with international law and Art. 2 para. 3 of the Federal Constitution in an exemplary manner. It was launched 25 years ago with the intention of remediating contaminated sites from the time before the Environmental Protection Act (EPA) came into force in order to leave the cleanest possible soil and water to future generations, and in the belief that there would be no more contaminated sites once the EPA came into force. However, the more than 10,000 perfluorinated and polyfluorinated alkyl compounds (PFAS), which are difficult to break down and are harmful to health in many ways, have become apparent since. Even today, we are still using pollutants that lead to new contaminated sites. Despite this, PFAS have not yet been banned in Switzerland. In the EU,

on the other hand, efforts are underway to ban PFAS unless they appear indispensable from a social point of view. The procedure for authorizing new chemicals can also be identified as a specific weak point in Switzerland. In future, the persistence of substances should be given greater weight here. Legislation on contaminated sites therefore shows how sustainable development is a „moving target“ and cannot simply be ensured by law. On the contrary, it requires continuous legal adjustment based on the latest scientific findings.

In the panel discussion that followed, **Markus Reubi, lic. iur. HSG and MBA McGill/HEC (De-legate of the Federal Council for the 2030 Agenda, Federal Department of Foreign Affairs)** first pointed out the extremely broad concept of sustainability in the 2030 Agenda with its 17 SDGs and 169 subgoals. On the one hand, this encompasses many topics from poverty, unemployment, climate and biodiversity to good governance and on the other, it fundamentally affects all state and nonstate actors in 193 UN member states. It is therefore obvious that, depending on the specific environment, fundamentally different priorities and perspectives shape the understanding of sustainability. Additional juridification at this level is neither sensible nor effective. It would also be obstructive in many respects, as there is a risk of micromanagement that is neither adapted to the specific circumstances nor to the conflicting objectives and further leads to overregulation. As we are in the area of soft law, it is more important to negotiate specific measures and manage the conflicting objectives between the various social stakeholders. Planning certainty is crucial because sustainable development is fundamentally an incremental process. Recently in particular, the 2030 Agenda and thus also planning certainty have been called into question at times, which is not conducive to implementation by the various stakeholders. In the further discussion, Markus Reubi noted that negotiations for example on CO2 reduction paths in Switzerland and internationally (e.g. in relation to BRICS countries) are unlikely to become any easier.

Isabel Junker (Head of the Municipal Waste Section at the Federal Office for the Environment) mentioned numerous conflicting objectives in her area, including within the same department. There is no onesizefitsall solution for resolving such conflicts. It is a matter of constant negotiation and balancing. In order to promote the circular economy, it is important to think about how products can be recycled later when they are being designed. Products should be kept in the cycle for as long as possible and should not have to be disposed of after only a short period of use. In response to a question from the audience as to why thin plastic bags are being regulated in the discussion about plastics in the environment, but not the much more important rubber abrasion from tires, Isabel Junker explained that the regulation of plastic bags is being implemented as a voluntary solution by the industry, which is not the case with tires. Genuine sustainability requires farreaching global social changes. However, this will not happen overnight. Unfortunately, there are always new disposable products on the market and thus an opposing trend, as Isabel Junker went on to explain.

Fabian Etter (CoPresident of the umbrella organization Swisscleantech, CoFounder CE04Climate) impressively demonstrated the efforts of a large number of companies in pursuing climate targets. However, companies must be given the space to do so. Another problem with practical implementation is the complexity of the subject matter, which often leads to draft legislations and regulations not being understood, for example in the case of incentive taxes. Here, he would like to see more personal exchanges and platforms where companies and political players can exchange ideas directly. Recent opportunities for exchange with

party representatives of very different orientations reinforced this. He noted that, in his experience, the concept of sustainable development does exactly that: it opens up a communication channel that transcends party and ideological boundaries. He sees a further problem with implementation in the fact that many measures are implemented far too bureaucratically by the administration, so that companies that would in principle be willing to implement them withdraw. The aforementioned incentive taxes are a counterexample; they are widely accepted by companies. He regrets that sustainability in companies has in part become a mere compliance exercise that frustrates and does not motivate, which is why his association would like to focus more on the opportunities. He sees another problem area in the insufficient interlinking of the financial and real economy, for example, when only around 20% raised their hands at a recent ZKB event when asked which companies are supported by their bank in sustainability issues. The companies in his association were happy to have three pillars as points of reference: the Energy Act, the Climate and Innovation Act and the CO2 Act. However, Fabian Etter also sees planning security at risk. The Federal Council in particular is calling into question some of the provisions approved by the people. This hinders sustainable development and does nothing to close the gap between the law and its implementation. Fabian Etter exemplified this again with the CO2 incentive tax. In a subsequent discussion with the audience on the topic of consumer restraint, Fabian Etter argued that this would not be a basis for building majorities to bring companies onto the path of climate compatibility.

5 SOCIETY

Marc Elsener (Federal Finance Administration) opened the „Society“ panel with his presentation on „**Sustainable development through tax law**“. Sustainable development requires a solution to the problem of collective decision making (collective action), for which state measures are predestined, even if the mechanisms and incentives within the state itself do not always work perfectly. He explained that due to the monetary orientation of society, taxes are generally suitable as a means of operationalizing sustainable development. Among the various state measures, incentive taxes appear to be the ideal instrument because the state does not intervene in society by imposing rules or bans, but instead steers the economy via the price mechanism – the economy understands this language. However, Marc Elsener sees a difficulty – and here he picks up on a topic from Fabian Etter – in the fact that the government measures are often not understood, such as the important aspect that $\frac{2}{3}$ of the incentive tax is paid back per capita, which means that the tax is socially balanced. In response to the question raised during the discussion as to whether this does not show the limits of sustainable development due to a democracy’s limited ability to provide information and thus solve problems, Marc Elsener called for legal measures to be simplified so that they can be better understood and implemented.

Dr. iur. Eva Maria Molinari (University of Basel) expanded on the state’s contribution to sustainable development in her presentation „**How sustainable is social insurance law?**“. The concept of sustainable development is practically nonexistent in social insurance law. However, her analysis shows that numerous elements have emerged within the framework of the welfare state principle that can be found in the social dimension of sustainable development. She examined this on the basis of the specific areas of social insurance law: securing livelihoods and covering social risks, the principle of solidarity and remedying damage before compensation, by asking the question: Is the social dimension of sustainable development in social insurance law limited to the social aspect itself or is it aimed at a more comprehensive concept of sustainable development? The former is the case. Even if there are interactions with the economic dimension of sustainable development, social security law ignores ecological objectives. However, this need not be the case if we consider, for example, the links between health or working conditions and global warming. In this respect, the constitutional principle of sustainable development can provide impetus for the further development of social insurance, concluded Eva Molinari.

Sabrina Ghielmini (Office for Gender Equality Canton Bern) discussed the transition from state responsibilities to dealing with social structures in her presentation „**Gender Equality Law: Paradoxes of Gender Equality**“. She made it clear from the outset that the concept of sustainable development does not appear in gender equality law, in particular in the Swiss Gender Equality Act (GLG). However, it contributes to it, namely in the sense of SDG 5 and here 5.1 (end discrimination) and 5.c (corresponding legal enforcement mechanisms). However, the contribution is limited in that legal protection against gender discrimination by private individuals is patchy, partly because the scope of the GLG is limited to working life. But experience shows that gender equality can be promoted through regulation. There is still a lot

to be done, for example in the gender pay gap and the gender pension gap, or with regard to the income gap for women that continues to have an impact decades after a divorce. The latter could be reduced, for example, by a tax regime that favors an equal division of care and paid work. The concept of sustainable development can be used to achieve equality in various sectors. Overall, it has been shown that the concept and the constitutional goal of sustainable development have the potential to open up new channels – in the later discussion, she called this a discussion platform – for its realization.

In the subsequent panel discussion, again moderated by **Daniel Dedeyan**, panelist **Astrid Wüthrich (Deputy Director at the Federal Social Insurance Office)** admitted that the legislative and administrative processes in the social sector are indeed sometimes dysfunctional when it comes to pursuing sustainable development. Austerity packages, for example, put pressure on the administration and set certain limits to the pursuit of sustainable development. The question of sustainability is inherent in social insurance, for example in relation to financing or intergenerational justice. In the discussion on the question of what impact the concept of sustainable development, for example from the 2030 Agenda, has on administrative practice, Astrid Wüthrich explained that the concept is specified in strategies, but in view of the specific socio-political challenges, it does not receive sufficient attention while being implemented. She also pointed out that, from a social policy perspective, systemic rather than selective approaches are becoming increasingly important and also promise greater impact.

From a corporate perspective, this looks quite different, as **Dr. oec. publ. Alain Gut (Director Public Affairs at IBM)** noted in the discussion. Here, the SDGs and international standards are of great importance in the development of internal policies, governance and implementation. Companies can hardly escape this, as they are now under pressure from their stakeholders. Alain Gut countered the objection from the audience that companies would only take measures that do not hurt and would not hesitate to make money at the expense of sustainable development by stating that large companies in particular simply cannot afford to back down here. There are also issues where companies have a vested interest in helping to shape the social framework, for example with initiatives to incorporate AI into vocational training. In this context, Alain Gut pointed out that the public debate on sustainable development is underestimating key trends, such as the impact of changes in information technology on working life or demographic trends, which will change the framework conditions of our society faster than we would like to admit.

Eva Schmassmann (Director of the Agenda 2030 platform) argued that sustainable development costs money, especially in the social sphere, and that financing, in particular by means of an inheritance tax, which appears to be the most socially acceptable of all types of tax, must be discussed. However, she also pointed out that beyond the monetary primacy mentioned by Marc Elsener, measures for socially sustainable development should not be limited to price mechanisms. Companies should be held more accountable here and not just produce glossy brochures. However, corporate lobbying places severe limits on the implementation of sustainable development. When Alain Gut used concrete examples to show that the larger companies support the elements of socially sustainable development mentioned

in the panel, the panel asked itself the question: if not even the companies are against it, then why parliament?

The sudden consensus on the panel was the surprise of the evening.

6 SYNTHESIS

Prof. Dr. Charlotte Sieber Gasser rounded off the symposium with a look at the synthesis of the results of the research project. On the one hand, sustainable development as a legal concept has hardly any elements that do not already result from the general state mandate. On the other hand, it functions precisely through the medium of law as a discussion platform for negotiating urgent social problems. This can be seen in all the areas of law examined and therefore calls into question whether legislation fulfills the required degree of precision and regulatory density solely through the objective of „sustainable development“. In addition, a justiciable core content of the term has been established in case law. The anthology therefore proposes, firstly, to evaluate measures in a negative test to determine whether they are compatible with this core content. Secondly, legislation should strive for the necessary precision and depth to implement this core content.

To round off the day, **Dr. Christine Bühler (INTERFACE Policy Studies)** summarized her extensive findings from the symposium. The lively discussions continued into the night at the aperitif.

Autor: Prof. Dr. Daniel Dedeyan, LL.M. (Yale)