# How behavioural law can promote sustainable development

## An overview of the potential and challenges

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The idea that human society and peoples should develop in a sustainable way can be traced back to ancient cultures, practices and legal traditions. However, only recently there is an observable increase in conflicts throughout the world between the demands of economic development, the environment, and human rights. This has led to an emphasis on sustainable development in national, European, and international law and policy. This emphasis on sustainable development in law and policy calls for a deeper understanding on how sustainable development can be effectively achieved through these instruments. Behavioural insights may provide such a deeper understanding. Within this contribution I will explain how behavioural insights could be taken into account in international law- and policy-making to promote sustainable development. In addition, I will provide an overview of the current challenges of integrating behavioural insights in international law- and policy-making, and suggest avenues for future research.

**Potential of behavioural law to promote sustainable development**

Behavioural insights are especially welcome in law where, for several decades, legal theory has been to a great extent dominated by the neoclassical economic analysis of law, using rational choice theory to model human judgment and decision-making. Rational choice theory assumes that people always strive to enhance their own well-being by choosing the available option that maximizes their expected utility. Behavioural insights challenge the notion of human rationality as implied by the concept of rational choice theory, showing that people are sometimes rationally bounded in judgment and decision-making. Contrary to rational choice theory, behavioural researchers often describe human judgment and decision-making in terms of System 1 and System 2 processing. Basically, System 1 operates quickly and intuitively, using mental shortcuts (also known as heuristics) to help in making decisions and judgements quickly without having to spend a lot of time researching and analysing information. People use System 1 in most of their daily tasks. System 1 may be overridden by a more deliberate and slower processing mode, known as System 2. System 2 processing requires effortful mental activity, employing rules that are explicitly learned. While System 1 is usually effective, it may also result in systematic and predictable deviations from the assumptions of rational choice theory. These deviations are also known as cognitive biases. Studies that examine when cognitive biases may occur in the context of laws and policies aimed at promoting sustainable development may, therefore, improve the effectiveness of such interventions.

To implement behavioural insights into law and policy in a way that increases the effectiveness of these interventions to promote sustainable development, we, thus, need to refine our understanding of human judgment and decision-making beyond rational choice theory. Behavioural insights can be relevant to law- and policy-making to promote sustainable development in three ways:

First, when cognitive biases hinder people from achieving their goals (e.g. consume more sustainably), law can help people to overcome such biases, negate their effect, or minimize the exploitation of such biases by others. For example, in EU food law, behavioural insights may provide insight so as to enable consumers to make a decision more in line with their values, and provide insights to courts in their assessment of whether consumers are misled by different forms of green-washing. Further research is needed to improve our understanding of how consumers process information in a supermarket setting, and to what extent such insights could be used in legal and policy interventions, as well as legal interpretation.

Second, behavioural insights can inform the law on how to improve human choices and behaviour. For example, nudge theory proposes the idea of using encouragement or suggestions to change people's behaviour while still giving them freedom to make their own decisions (in contrast to laws, rules, or taxes). Nudges may be useful in steering consumer behaviour to consume more sustainably, producers to produce more sustainably, and states to govern more sustainably. A prime example of the latter is the 2015 Paris Agreement that transformed global policy on climate change by shifting from legally binding targets, to a flexible system of non-binding self-imposed goals thereby imposing nudges on sovereign states. Further research is still needed especially in international law, where only quite recently, Anne van Aaken and Tomer Broude have set an ambitious research agenda for behavioural international law.

Third, legal decision-makers may also be affected by their own biases in law-making. Further clarity on how these biases affect legal decision-makers may be useful in promoting sustainable development. For example, environmental impact assessments (EIAs) are increasingly being used to examine the impact of legislative proposals in several legal systems. The underlying idea of EIAs is that before the authorization of a project is granted, the impact of environmentally harmful projects should be analysed. EIA has been embraced in national and international law and policy. Its procedure is influenced by rational choice theory and does not reflect biases of citizens' responses and of decision-makers. Further understanding is hence needed of the extent to which cognitive biases may affect legal decision-makers. This is especially important in the context of sustainable development, where several cognitive biases, e.g. confirmation bias, loss aversion, or myopia, may stand in the way of fighting global climate change.

**Challenges of behavioural law to promote sustainable development**

The psychological studies that have informed the analysis of the law are not free from critique. An important critique includes the external validity of experiments. It is especially questioned whether the cognitive biases found in an experimental study in a lab setting can be applied to peoples' daily lives. It is especially difficult to

make strong causal claims on cognitive biases when studying legal decision-makers due to the fact that the effect of cognitive biases on human decision-making often depends on the context. Hence, insights from other contexts or from experiments with lay-persons are often suboptimal. However, conducting experiments with heads of states, judges on international tribunals, and policymakers, is often not feasible. While a recent experimental study shows that in some cases student samples may be useful to explore cognitive biases in decision-makers, further research is needed to strengthen the validity of behavioural experiments studying cognitive biases of legal decision-makers in the context of sustainable development.

Another critique on the behavioural analysis of law focuses on the legal limits of using such behavioural insights. For example, nudge theory is often criticized for not being legitimate as nudges are considered either not sufficient enough or too excessive to ensure behavioural change that could be realized more easily through mandatory laws. Nudge theory has also been criticized as being more threatening to actor's autonomy compared to mandatory laws, arguing that nudges may undermine actor's control over their choices by exploiting their cognitive biases. The legal limits to further examine the legal limits for public authorities to use behavioural insights to inform policy, law-making and legal interpretation should, therefore, be examined.

Finally, another important challenge that needs to be addressed is the difficulty to cross disciplinary borders. Academic disciplines often differ in their vocabulary, assumptions, paradigms, and sometimes even ideological inclinations. Universities, journals, conferences, and publication houses should become more open to researchers with a multidisciplinary background and to bring researchers from different disciplines together, to improve multidisciplinary research in behavioural law to promote sustainable development.

**What's next?**

Applying behavioural insights in designing laws and policies to promote sustainable development has a great potential to (1) prevent that cognitive biases hinder people from achieving sustainability goals, (2) improve actor's choices and behaviour, and (3) reduce the impact of biases by legal decision-makers. Additional research is necessary to further advance the potential of behavioural law to promote sustainable development, especially to strengthen the validity of behavioural experiments and to examine the legal limits using behavioural insights in law and policy design. In addition, research institutions and outlets should further promote multidisciplinary research in behavioural law to strengthen international legal research in general, and in the context of sustainable development in particular.

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