

The Problem with the Global Notion of “Environmental Sustainability”

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ABSTRACT

This article reflects on the international notion of environmental “sustainability” from the normative perspective. As a norm, it has been commonly analogised to “justice” – meaning the failure to uphold such would constitute a “wrong”. At its face value, this positive understanding should be welcomed as it signals and promotes the importance of sustainability. However, this article takes the role of the Devil’s advocate and argues that this analogy does more harm than good. It has over-glorified the notion of environmental sustainability because injustice is – at least in theory – an absolute wrong in all circumstances, but unsustainability is not. On the one hand, the public is being increasingly instilled with the normative idea that unsustainability is wrong. On the other hand, unsustainable acts are not necessarily outlawed and may even be endorsed. This undermines the rule of law and its perception because the law, in effect, is selectively allowing and sanctioning different acts involving the exact same wrong. This goes against the rule-of-law requirement of consistency. If the world truly cares about sustainability, it should be accorded the same paramount status as “justice”, so that it will be upheld to the greatest possible extent. If this is not possible, there is still a pressing need to state the standing of the norm, accurately, to avoid creating an expectation gap and causing further harm to the rule of law.



KEYWORDS

UN Sustainable Development Goals (SDG); Renewable Energy Transition; Carbon Emissions; Climate Change; Green Economy

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INTRODUCTION

“Environmental sustainability”, as a universally applicable norm,¹ has been frequently analogised to the basic norm of “justice” and other fundamental notions like “equality”.² This implies that the failure to uphold it would constitute a “wrong” from the normative perspective. This positive, trendsetting understanding should be welcomed as it signals and promotes the importance of sustainability.³

However, this article takes a Devil’s advocate role and argues that this analogy does more harm than good. It over-glorifies “sustainability” because injustice is – at least in theory – an absolute wrong in all circumstances, but unsustainability is not. Rather, sustainability is just one of the three balancing considerations alongside economic and social determinants.

On the one hand, the public is being increasingly instilled with the normative idea that unsustainability is unethical and wrong. On the other hand, unsustainable acts are not necessarily outlawed, and they may even be endorsed. Furthermore, the current integrated approach – which is adopted in law and policy frameworks and treats sustainability as a mere factor – underplays the importance of sustainability. These conflicting narratives undermine the rule of law (and its perception) because the law is selectively allowing and sanctioning different acts involving exactly the same wrong. If the world truly cares about sustainability just as it cares about “justice”, then sustainability should be accorded the same paramount status. Otherwise, they should not be analogised. This will avoid disappointment and causing harm to the rule of law when inactions, contradictions, and even regressions are happening under the governance of the norm.

This topic has strong practical relevance in a divided world. For example, Texas has recently introduced an “anti-woke fossil-fuel law” which protects fossil fuel companies.⁴ The law prevents the Government from contracting with businesses that

¹ See, e.g., Robert Goodland & Herman Daly, *Environmental Sustainability: Universal and Non-Negotiable*, 6 *ECOLOGICAL APPLICATIONS* 1002 (1996).; see also European Commission Press Release IP/16/3883, Sustainable Development: EU sets out its priorities (Nov. 22, 2016). (“the Sustainable Development Goals are universally applicable to all countries”); Graham Long, *The Idea of Universality in the Sustainable Development Goals*, 29 *ETHICS & INT’L AFFAIRS* 203, 209 (2015) (who explains that “universal application is to say that the goals must identify issues that affect all”).

² See *infra* note 28.

³ Technically, the term “sustainability” does not only refer to environmental sustainability. It could equally mean the sustainability of economic or social development. This article refers to the environmental aspect whenever the term “sustainability” is used.

⁴ See Ross Kerber, *Analysis: Texas ‘anti-woke’ fossil fuel law to be tested by BlackRock funds*, Reuters (Oct. 7, 2022), <https://www.reuters.com/markets/europe/texas-agency-may-keep-blackrock-funds-test-new-fossil-fuel-law-2022-10-07/>; see also Danielle Moran, *Texas Adds HSBC to Energy-Boycotters Blacklist in ESG Crackdown*, Bloomberg (Mar. 20, 2023), <https://www.bloomberg.com/news/articles/2023-03-20/hsbc-deemed-energy-boycotter-by-texas-in-latest-esg-crackdown#xj4y7vzkg>.

refrain from investing in fossil fuels — i.e., a legislation that is anti-environmental, social, and corporate governance [anti-E.S.G.].⁵ Similarly, Louisiana vowed to pull investments from Blackrock as the latter’s “blatantly anti-fossil fuel policies would destroy Louisiana’s [energy] economy”.⁶ The same trend extends to many other states such as Florida.⁷ In other words, some states have chosen to prioritise economic interests over environmental protection in their balancing exercise. Contrary to how the mainstream literature has boasted about the sustainability norm, this is one of the failures of its normativity (with more examples to be discussed in Section 3).

But at the other end of the spectrum, some countries, mostly in Europe, have taken the opposite turn to economic protectionism and abolished environmentally-outmoded practices. For instance, France has radically banned short-haul domestic flights that can be covered by train in order to cut carbon emissions.⁸

The neutral view (that does not prefer nor stand against environmental sustainability) would suggest that there is neither a right nor a wrong answer in the balancing exercise. Both “regressions” and “progressions” are controversial developments in the subjective eyes of either camp.

But ultimately, our society needs to re-assess the deserved status of the norm — which is the goal of this article — to be accurate and clear about its *actual* standing and apply it properly and consistently.

⁵ See Jordan Wolman, *Boycotting comes with a cost*, Politico (Jan. 12, 2023), <https://www.politico.com/newsletters/the-long-game/2023/01/12/boycotting-comes-with-a-cost-00077692>; See also Tex. S.B. 13, 87th Leg. (2021); Spencer Grubbs, *Fighting a Fossil Fuels Boycott*, Fiscal Notes (May, 2023), <https://comptroller.texas.gov/economy/fiscal-notes/2023/may/fossil-fuels/>.

⁶ Silla Brush, *BlackRock Faces More ESG Fallout as Louisiana Pulls \$794 Million*, Bloomberg (Oct. 6, 2022), <https://www.bloomberg.com/news/articles/2022-10-05/blackrock-faces-more-esg-fallout-as-louisiana-pulls-794-million#xj4y7vzkg>.

⁷ See Blanca Begert, *Kentucky becomes the newest battleground in Republicans’ fight against green investing*, Grist (Jan. 5, 2023), <https://grist.org/climate-energy/kentucky-becomes-the-newest-battleground-in-republicans-fight-against-green-investing/>.

⁸ See Saskya Vandoorne, *France bans short-haul flights where trains are available*, CNN (May 23, 2023), <https://edition.cnn.com/travel/article/france-bans-short-domestic-flights-climate/index.html>.

1. SUSTAINABILITY AS A UNIVERSAL NORM

Sustainability is considered a “norm” in terms of its contemporary socio-legal standing.⁹ It refers to “meeting the needs of the present without compromising the ability of future generations to meet their own needs”.¹⁰ Its key requirement is the *integrated* development approach which takes into account environmental, economic and social considerations all at the same time.¹¹

⁹ Normativity means how citizens ought to behave. See, e.g., Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. L. ST. 215, 215 (2011) (U.K.); Stephen Perry, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, 75 FORDHAM L. REV. 1171, 1174 (2006) (“A norm can thus only exist if it is practiced, accepted, believed in, endorsed, prescribed, recognized”). See also John C. Dernbach & Federico Cheever, *Sustainable Development and Its Discontents*, 4 TRANSNAT’L ENVTL. L. 247, 251 (2015) (U.K.) (“Sustainable development is a normative conceptual framework; it is not a legal framework. Yet, just as other normative ideas such as freedom, equality, and justice have been written into law, so sustainable development is being written into law”); Klaus Bosselmann, *Sustainability and the Courts: A Journey Yet to Begin?*, 3 J. CT. INNOVATION 337, 338 (2010) [Bosselmann, *Sustainability and the Courts*] (Bosselmann first identified the primitive view that sustainability may not yet be a norm because it is not sufficiently definitive. But he also acknowledged the caveats to this view as its “normative character can be in little doubt considering that . . . this imperative has been widely accepted across many cultures”); *id.* at 345 (“sustainability is the most fundamental of all environmental principles”); Klaus Bosselmann, *The rule of law in the Anthropocene*, in THE SEARCH FOR ENVIRONMENTAL JUSTICE 44, 53-54 (Paul Martin et. al. eds., 2015).

A *grundnorm* can be defined as a basic norm to bind governmental power in the same sense as the rule of law is generally perceived as a basic norm to bind governmental power . . . Surely, ecological sustainability has *grundnorm* qualities that any legal norm, including the rule of law, ought to respect.

¹⁰ Rep. of the World Commission on Environment and Development, *Our Common Future*, U.N. Doc. A/42/427 (1987).

¹¹ See Dernbach & Cheever, *supra* note 9, at 253, 259 (“foundational action principle of sustainable development is integrated decision making”); see also Natasha Affolder, *The Legal Concept of Sustainability*, Addresses before the Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage, in UNIV. CALGARY, March 2012, at 3 (sustainability “requires the balancing of three equally important “pillars” — economic, environmental and social”), 7 (“principle of integrated decision making”) (Can.); Eelis Paukku, *Sustainability as a basic principle for legislation: a case study of drafting laws in Finland*, 15 VISIONS FOR SUSTAINABILITY 80, 81-82 (2021) (It.) (noting that as “the three dimensions of sustainability”); Klaus Bosselmann, *Strong and weak sustainable development: Making differences in the design of law*, S. AFR. J. ENV’T. L. POL’Y., July 2006 at 39, 40 (S. Afr.) (“A further commonly accepted aspect is that [sustainable development] “requires integrating environmental, social and economic objectives. Regardless of the political debate about how such integration could be achieved, there seems no dispute over the goal of harmonizing and integrating them”.); Virginie Barral & Pierre-Marie Dupuy, *Principle 4: Sustainable Development through Integration*, in THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 157 (Jorge E. Viñuales ed., 2015); Rio Declaration on Environment and Development 1992, Principle 4 (“In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”); Consolidated Version of the Treaty on the Functioning of the European Union art. 11, May 9, 2008, 2008 O.J. (C 115) 47 [TFEU]. (“Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”).

Apart from the United States [U.S.] and Canada,¹² many other jurisdictions have also incorporated this notion as a legal norm as part of their domestic laws, such as the European Union [hereinafter E.U.],¹³ Finland,¹⁴ and New Zealand.¹⁵ For example, the New Zealand Resource Management Act 1991 requires sustainable management in the use of “land, air and water”.¹⁶ Some of these domestic legal norms are also making a transnational impact, as compliance is required from foreign entities wishing to do business.¹⁷

¹² In the U.S., see, e.g., Green Governments Illinois Act, 20 Ill. Comp. Stat. 3954, § 20 (2020) (requiring the local government to “integrate environmental sustainability”); Illinois Sustainable Agriculture Act, 505 Ill. Comp. Stat. 135 (2020); Cal. Health & Safety Code § 25209.10 (2021) (explicitly recognizing that “long-term economic and environmental sustainability of agriculture is critical”); Hawaii State Planning Act, Haw. Rev. Stat. § 226-108 (2013) (Hawaii State Planning Act) (encouraging “balanced economic, social, community, and environmental priorities”); 12-3 Miss. Code R. § 20-400.11; Md. Code Ann., Land Use § 1-201 (2020). For Canada, see Affolder, *supra* note 11, at 1 (“Over [eighty-five] Canadian statutes now recognize the legal concepts of sustainability and sustainable development”).

¹³ See Sander R.W. van Hees, *Sustainable Development in the E.U.: Redefining and Operationalizing the Concept*, 10(2) Utrecht L. Rev. 60 (2014) (Neth.)

The Charter of Fundamental Rights [C.F.R.] (which is binding on the [E.U.]) states that the [E.U.] should promote sustainable development. According to Article 37 [C.F.R.] sustainable development should also be taken into account in policy-making: “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development”.

¹⁴ Pauku, *supra* note 11.

¹⁵ See Hon S. D. Upton, *Purpose and Principle in the Resource Management Act*, 3 WAIKATO L. REV. 17 (1995) (N.Z.).

¹⁶ *Id.*

¹⁷ See Anu Lähteenmäki-Uutela et. al., *Legal rights of private property owners vs. sustainability transitions?*, J. CLEANER PRODUCTION 1, 6-7 (2021) (Neth.) (“players such as the [E.U.] or the [U.S.] can extend their sustainability or human rights policy beyond national borders by governing through trade”. For example, The Timber Regulation (EU) No. 995/2010 “extends sustainability criteria to supply chains starting outside the E.U. Timber produced by illegal loggings is not allowed to enter the E.U. market”).

Sustainability is not just a norm applicable to the public sector. To corporations, it is an emerging global business standard that forms part of corporate social responsibility and is used for measuring E.S.G. compliance.¹⁸ In 2023, the European Parliament passed the Corporate Sustainability Due Diligence Directive which requires companies operating in the E.U. to conduct environmental due diligence of their subsidiaries and other entities in their value chain.¹⁹

Besides, it is not just a national policy and legal norm. It is also an international policy norm adopted by the United Nations [U.N.] and U.N. Member States. The Sustainable Development Goals [S.D.G.s] are the much-discussed objectives which are taken up by heads of state and governments.²⁰ Contrary to the S.D.G.'s predecessor Millennium Development Goals [M.D.G.s] which are applicable only to developing countries, the S.D.G.s apply also to developed countries.²¹ This change makes the sustainability notion universal.²²

¹⁸ See Becky L. Jacobs & Brad Finney, *Defining Sustainable Business - Beyond Greenwashing*, 37 VA ENV'T L. J. 89, 95 (2019) (Governments help push sustainability by offering "tax incentives, trading credits, and other economic benefits to companies"); See Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L. J. 1217, 1253 (2022).

¹⁹ See Huw Jones, *EU parliament backs company checks on suppliers for human rights abuses*, Reuters (Jun. 1, 2023), <https://www.reuters.com/sustainability/eu-parliament-backs-company-checks-suppliers-human-rights-abuses-2023-06-01/>.

²⁰ G.A. Res. 70/1 (Sept. 25, 2015). A number of S.D.G.s concern environmental sustainability, including Goals 7.2 and 12.c on renewable energy; Goals 9.4 and 17.7 on environmentally sound technologies; Goals 11.6 and 12.4 on air and waste pollution; and Goal 13 on climate.

²¹ Long, *supra* note 1, at 210; G.A. Res. 2015, *supra* note 20 ("While the [M.D.G.s] applied only to so-called 'developing countries', the [S.D.G.s] are a truly universal framework and will be applicable to all countries. All countries have progress to make in the path towards sustainable development").

²² G.A. Res. 2015, *supra* note 20.

Furthermore, it is a legal norm of international standing which “has widely penetrated treaty law”.²³ It engages a number of international environmental law principles including “the principle of integration; the principle of intergenerational equity; the precautionary principle; the polluter pays principle; the principle of ecological integrity; and the principle of participation”.²⁴ The emerging view is that sustainability already constitutes a customary international law of “general normative reach”.²⁵

²³ See Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 EUR. J. INT’L L. 377, 384 (2012) (U.K.); *id.* at 388 (“References to sustainable development can indeed be found in 112 multilateral treaties, roughly [thirty] of which are aimed at universal participation”.); MAXIMILIAN EDUARD OEHL, *SUSTAINABLE COMMODITY USE: ITS GOVERNANCE, LEGAL FRAMEWORK, AND FUTURE REGULATORY INSTRUMENTS* 178 (Springer ed., 2022).

[P]rinciple 4 of the non-binding 1992 Rio Declaration first put the concept of [sustainable development] into the operational language of what resembles a legal norm by stating that [i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

see Louis J. Kotzé & Sam Adelman, *Environmental Law and the Unsustainability of Sustainable Development: A Tale of Disenchantment and of Hope*, 34 LAW & CRITIQUE 227 (2023) (Neth.) (“International environmental law has played a pivotal role in turning sustainable development into a normatively, politically, economically, and socially powerful concept”). It is also closely related to international human rights law: see Chuan-Feng Wu, *Challenges to Protecting the Right to Health under the Climate Change Regime*, HEALTH & HUM. RTS. J. 121, 126 (2021) (“courts have held that anthropogenic activities affecting climate may threaten a population’s standard of health and compromise its inviolable right to health”) (“if litigants can establish that the state’s failure to mitigate or adapt adequately to climate change resulted in damage to health or life, they then may claim a violation of the right to health” in some jurisdictions). See also *supra* note 18 in relation to the recent right to a sustainable environment.

²⁴ Affolder, *supra* note 11, at 5; Barral, *supra* note 23, at 380 (“Sustainable Development = (Intergenerational Equity + Intragenerational Equity) × Integration”); Dernbach & Cheever, *supra* note 9, at 253

A handful of principles support the integrated decision-making process. Parties should not use the absence of scientific certainty as a reason for postponing cost-effective measures to prevent environmental degradation (the precautionary approach). Generally, parties should be responsible for the damage they cause (the polluter-pays principle). The public needs to be informed and involved in the process of making decisions (public participation).

²⁵ Barral, *supra* note 23, at 385 (“In order to ascertain whether sustainable development benefits from a general normative reach, it must find reflection in customary international law”). Barral’s work helpfully explains the “fierce” debate on whether the notion of sustainability has become customary international law:

[S]ome see enough evidence of *opinio juris* and state practice to prove the existence of a customary rule, be it a very abstract and general one that requires case by case concretization, others avoid this difficult question by emphasizing that the relevance of sustainable development is to be found elsewhere than in its legal nature, and notably in the influence it exerts on international law as a new branch of that discipline: at 385.

Barral concludes that “sustainable development, as an objective, already constitutes a principle of customary law, even if this principle is a very general one, with a high degree of abstraction and which requires case by case substantiation.”: at 388. Barral considers that “sustainability” is an “obligation of means”, i.e., in the sense that international law obliges states “to strive or do their best to achieve it”: at 390-91. See also *Gabc̣íkovo-Nagymaros Project (Hung. v. Slov.)*, Judgment, 1997 I.C.J., 88 (Sept. 25) (separate opinion by Weeramantry, C.)

Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.

Skeptics suggest that it has not yet become a concrete norm in light of the absence of an international mechanism for enforcement (like many other major environmental instruments such as the Paris Agreement).²⁶ In reply, it can be argued that sustainability is a constantly growing norm as “[n]o one is naive enough to believe that free markets alone will bring the necessary transformation”.²⁷ The world is taking more and more action to enhance its standing and normativity.

²⁶ See, e.g., Kalterina Shulla & Walter Leal Filho, Achieving the UN Agenda 2030: Overall actions for the successful implementation of the Sustainable Development Goals before and after the 2030 deadline (Dec. 22, 2022), [https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702576/EXPO_IDA\(2022\)702576_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702576/EXPO_IDA(2022)702576_EN.pdf). (“[T]he [S.D.G.s] are not legally enforceable, [but] in precise terms they form a normative conceptual framework”). In relation to the Paris Agreement (2015), see Richard Sťahel, *Sustainable Development in the Shadow of Climate Change*, 19 CIVITAS: REVISTA DE CIÊNCIAS SOCIAIS 337, 345 (2019) (Braz.) (noting that -the “weakness” of the Paris Agreement 2015 “is that the goals to reduce greenhouse gas emissions set by individual states are voluntarily and there is no mechanism to enforce these obligations”.); William R. Moomaw et. al., *Sustainable Development Diplomacy: Diagnostics for the Negotiation and Implementation of Sustainable Development*, 8 GLOB. POL’Y 73, 79 (2017) (U.K.) (suggesting that, with no means of enforcement for the Paris Agreement, peer pressure becomes the only substitute for accountability).

²⁷ P.S. Elder, *Sustainability*, 36 MCGILL L. J. 831, 845 (1991) (Can.); Pauku, *supra* note 11, at 81 (“Regulation is often seen as necessary in order to bring about change in different actors’ actions so as they become more sustainable”.); John C. Dernbach & Joel A. Mintz, *Environmental Laws and Sustainability: An Introduction*, 3 SUSTAINABILITY 531, 532 (2011) (Switz.) (“law provides essential tools and institutions for governing sustainably”); Benjamin J. Richardson & Stepan Wood, *Environmental Law for Sustainability*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY 1, 2 (Benjamin J. Richardson & Stepan Wood eds., 2006) (U.K.)

Law—understood in the conventional sense of official state law—has come to be widely accepted as a central vehicle for environmental protection, because of its ability to create authoritative standards and decision-making procedures for land use planning, pollution control and nature conservation, among many other elements of modern environmental governance.

Lähteenmäki-Uutela et. al., *supra* note 17, at 2 (“Through setting new targets, environmental law is a significant factor in speeding up the adoption of greener technologies in society”).

2. UNSUSTAINABILITY AS INJUSTICE AND A WRONG

Notably, the “legal concept” of sustainability has been analogised to that of “justice”, and University of British Columbia Professor Natasha Affolder contends that it is “unjust” to be unsustainable — in the sense of compromising the future generations’ ability to meet their own needs.²⁸ This involves intra- and inter-generational equity and justice, and becomes an ethical matter.²⁹ The comparison implies that we have a “right” to the pursuit of sustainability (which is further reinforced in light of recent U.N. recognition of the right to the sustainable environment),³⁰ just as we have the right to justice and equality.³¹

²⁸ Affolder, *supra* note 11, at 2 (“Thinking about sustainability in a similar way to how we think about justice is not misguided. Living at the expense of future generations and the natural environment is unsustainable and unjust”); Bosselmann, *Sustainability and the Courts*, *supra* note 9, at 345 (“There are important parallels between the idea of sustainability and the idea of justice . . . [in the sense that] justice . . . is fundamental to civilized nations, similar to the principles of freedom, equality – and sustainability”).

²⁹ Bosselman, *supra* note 11, at 40

It is a widely accepted view that intragenerational and intergenerational equity form part of the wider idea of justice. There is no just world without fair distribution of existing resources among people living today and no future without regard for the needs of people living tomorrow. The concept of [sustainable development] expands the idea of distributive justice in “space” and “time”.

See also Upton, *supra* note 15 (noting that sustainability is a governing principle with “far more ethical weight and direction than a simple statement of purpose”).

³⁰ The “right to a clean, healthy and sustainable environment as a human right” is provided in G.A. Res. A/76/L.75 (July 26, 2022) and Human Rights Council Res. A/HRC/RES/48/13 (Oct. 8, 2021). See also Eric C. Ip, *From the Right to a Healthy Planet to the Planetary Right to Health*, 7 *THE LANCET PLANETARY HEALTH* E104, E104 (2023) (U.K.)

The right to a healthy environment cannot be found in the texts of important environmental treaties, such as the [U.N.] Framework Convention on Climate Change and the Paris Agreement. Nevertheless, this right has been enshrined in the constitutions of over 100 nations, located mostly in Africa, Europe, and Latin America, and in regional treaties ratified by at least 130 countries. Such widespread recognition constitutes evidence that this right is becoming part of customary international law.

³¹ In relation to the right to justice, see, e.g., R.I. CONST. art. I, § 5. (“Right to justice . . . Every person ought to obtain right and justice freely, and without purchase, completely and without denial; promptly and without delay; conformably to the laws”.); Peter Spiller, *The Judicial Legacy of Salmond J in New Zealand*, 38 *VICTORIA UNIV. WELLINGTON L. REV.* 797 (2006) (N.Z.) (noting the former judge of the Supreme Court of New Zealand John Salmond’s remark that the “primary purpose” of administration of justice is “to maintain right, to uphold justice, to protect rights, to redress wrongs”.); John L. Kane Jr., *Public Perceptions of Justice: Judicial Independence and Accountability*, 17 *J. NAT’L ASS’N ADMIN. L. JUDICIARY* 203, 208 (1997). (“There is an illusion that judges have no justice function . . . But the people who appear before us have the *right to expect justice*. This view that we have no justice function is clearly wrong. It overlooks the fundamental purpose animating our very existence — to accomplish justice within a framework of objective legal rules.”) (emphasis added). Regarding the right to equality, see, e.g., Colm O’Cinneide, *The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?*, 1 *U.C.L. HUM. RTS REV.* 80 (2008) (U.K.).

Sustainability's comparability with "justice" is a notable view that is being advocated (e.g., by the leading sustainability law expert Prof. John Dernbach).³² The New Zealand Ministry for the Environment remarked that "[s]ustainability is a general concept and should be applied in law in much the same way as other general concepts such as liberty, equality and justice".³³

Yet, their comparability is questionable. "Justice" is, at least in theory, the paramount consideration in law and policy even when there are competing and substantial interests involved.³⁴ By contrast, sustainability does not have an equivalent standing. It is just one of the three balancing considerations under the integrated approach alongside economic and social determinants.³⁵ In other words, achieving sustainability is not a must – not even in theory.

There are two possible explanations as to why the dubious comparison is made in the first place. First, the comparison aims to emphasise the perceived urgency of environmental transitions. The perceived harm caused by unsustainable acts gives rise to the call for "justice" (and the call for a "right" to safeguard against the harm).

In other words, the comparison is just a description of the (subjectively perceived) importance, but not of the actual normativity in law and policy. If this is the case, this should be clarified. As exemplified by the statement made by the New Zealand Ministry

³² See, e.g., Lähteenmäki-Uutela et. al., *supra* note 17, at 2

The sustainability transition itself is about providing environmental and social justice, including the rights of current and future generations to benefit from the ecosystem services . . . law must uphold what is just. This task for law applies also to transition management, where system-level change is necessary and driven for the sake of the public good.

Dernbach & Cheever, *supra* note 9, at 258 ("unsustainable development is also unjust development and unjust development is generally unsustainable"). See also Stephen Dovers, *Clarifying the Imperative of Integration Research for Sustainable Environmental Management*, 1 J. RSCH. PRAC., 2005, at 1, 7 (Can.) (Sustainability, the agenda that created the integration imperative, is a higher-order social goal akin to democracy, justice, or equity"). Dover's statement was widely cited with approval in, e.g., Kim Bouwer et al., 'Climate Change isn't Optional': *Climate Change in the Core Law Curriculum*, 43 LEGAL STUD. 240 (2022) (U.K.); Nicole Graham, *This is Not a Thing: Land, Sustainability and Legal Education*, 26 J. ENV'T L. 395, 415 (2014) (U.K.).

³³ Resource Management Law Reform Core Group, *Sustainability, Intrinsic Values and the Needs of Future Generations* (Wellington, Ministry for the Environment, Working Paper No. 24, Jul. 1989). This view was quoted with approval by many. See e.g. Upton, *supra* note 15; Affolder, *supra* note 11, at 2.

³⁴ See, e.g., *White v. Sebring*, 133 Misc. 784, 787 (N.Y. Super. Ct. 1929) ("The desire to do justice is the prime consideration of the courts"); *Temple v. Aujla*, 681 So. 2d 1198, 1200 (Fla. Dist. Ct. App. 1996) ("Courts must do justice, especially when the legislature fails to do justice."); *Sorey v. Sorey*, 718 A.2d 568 (Me. 1998) ("it is axiomatic that a court must do justice"); *Allstar Electronics, Inc. v. Honeywell Int'l, Inc.*, No. 8:10-CV-1516-T-30TGW (M.D. Fla. Oct. 13, 2011) ("the court's interest in the administration of justice is paramount"). See also the U.K. trite holding in *R v Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256 (U.K.) ("Not only must Justice be done; it must also be seen to be done"); The Supreme Court of the Philippines's judgement in *Rico V. Domingo v. Ramon Gil Macapagal*, G.R. No. 242577, (Feb. 26, 2020) (Phil.) ("The interest of justice is always paramount and genuine efforts must be exerted to attain it"). The oaths to be taken by judges before taking up the position usually include pronouncements on upholding justice. See, e.g., 28 U.S.C. § 453 - Oaths of justices and judges ("solemnly swear (or affirm) that I will administer justice").

³⁵ See *supra* note 11 on the integrated approach.

for the Environment,³⁶ it would not be easy for the public and professionals to discern whether a comparison refers to the former or the latter.³⁷ Misunderstandings could lead to an expectation gap between what the law states and what the relevant stakeholders must do pursuant to the norm. If one is led to think of sustainability as an established norm like justice, there will be issues like whether the government has properly adhered to the norm. The perceived failures and inactions of the law undermine the rule of law (to be explained in the next Section).

In relation to the second explanation for the comparison, it is possible that it has the benign intention of artificially inflating the standing and importance of the sustainability norm. This provides a louder claim for environmental movements and petitions. In other words, this “fake it till make it” approach is adopted exactly because environmental sustainability is *known* to be of secondary importance in reality.

Just like the first explanation, causing misunderstanding about the actual standing of the norm creates the same expectation gap. It therefore does not matter which explanation is more plausible. But the second one has far worse implications than the first explanation because it constitutes deception (despite its good intentions to promote environmental sustainability) *to the detriment of the rule of law*.

³⁶ See *supra* note 33.

³⁷ On the one hand, the statement unequivocally aligns environmental sustainability with justice and emphasizes its general applicability. On the other hand, it seems the government has not treated it as paramount in reality. For example, the New Zealand Government subsidizes fossil fuels and has made the decision in 2023 to extend it. See Anneke Smith, *Government’s fuel subsidy extension “extremely dumb economic policy”*, Radio New Zealand (Feb. 2, 2023), <https://www.rnz.co.nz/news/political/483481/government-s-fuel-subsidy-extension-extremely-dumb-economic-policy>; Thomas Coughlan, *Revealed: The climate cost of Chris Hipkins’ U-turns and fossil fuel subsidies*, New Zealand Herald (Mar. 15, 2023), <https://www.nzherald.co.nz/nz/politics/revealed-the-climate-cost-of-chris-hipkins-u-turns-and-fossil-fuel-subsidies/SFYEXGL2VALFDB3SKRYFL5U4Q/> (N.Z.).

3. UNDERMINING THE RULE OF LAW

In light of its acclaimed normative standing, it naturally means that unsustainability — which is claimed to be “unjust” — is a “wrong”.³⁸ This is becoming the general understanding as unsustainable acts have often been equated with unethical behaviour.³⁹ Accordingly, the rule of law requires the norm to be applied consistently to guide our behaviour.⁴⁰

³⁸ See, e.g., G.A. Res. A/76/L.75 (July 28, 2022)

(Recognizing also that, conversely, the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land and water, the unsound management of chemicals and waste, the resulting loss of biodiversity and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights).

See also John Stanton-Ife, *The Limits of Law*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2022), <https://plato.stanford.edu/archives/spr2022/entries/law-limits/> (“immorality or wrongdoing is generally taken by legal moralists to be a *prima facie* or *pro tanto* ground for the imposition of legal coercion”).

³⁹ See, e.g., Mastura Ab Wahab, *Is an Unsustainability Environmentally Unethical? Ethics Orientation, Environmental Sustainability Engagement and Performance*, 294 *J. CLEANER PRODUCTION* 1 (2021) (U.K.); Fabio Zagonari, *Environmental Sustainability Is not Worth Pursuing Unless It Is Achieved for Ethical Reasons*, *PALGRAVE COMM’N* Dec. 2020, at 1, 2 (U.K.) (“The literature has also recently begun to emphasize the role of ethics in achieving global environmental sustainability”).

⁴⁰ Marc O. DeGirolami, *Faith in the Rule of Law*, 82 *ST. JOHN’S L. REV.* 573, 592 (2008) (“there is a connection between the rule of law and a kind of stepchild of classical reason—a commitment to principled consistency, for example. Consistency is itself one of the virtues of formal legality”.); *id.* at 578 (“consistency is an important component of justice”); Karen Steyn, *Consistency - A Principle of Public Law?*, 2 *JUD. REV.* 22, 22 (1997) (U.K.) (“The requirement of consistency is deeply rooted in English law. The rule of law requires that laws be applied equally, without unjustifiable differentiation”.); Noele Crossley, *Consistency, Protection, Responsibility Revisiting the Debate on Selective Humanitarianism*, 26 *GLOB. GOVERNANCE: REV. MULTILATERALISM & INT’L. ORG.* 473, 473 (2020) (Neth.) (“Consistency is an essential characteristic of ethics and the law—inconsistent practice diminishes the prospects of the development of norms of protection and associated practices and institutions”.); STEPHEN A. SMITH, *RIGHTS, WRONGS, AND INJUSTICES THE STRUCTURE OF REMEDIAL LAW* 199 (2019) (U.K.) (“the most basic requirement of the rule of law—namely, to guide behaviour”).

3.1. THE FAILURE TO ACT IN ACCORDANCE WITH THE RULE OF LAW

But there is a gap between the claimed and the actual normativity. The laws and policies only *selectively* address some unsustainable acts. For example, there is plenty of evidence that a vegetarian lifestyle is more sustainable and that meat-eating is unsustainable to the extent of harming the environment.⁴¹ Scholars have been pressing for a “global” implementation of a plant-based diet, and consider this “a reasonable alternative for a sustainable future”.⁴² Had sustainability been a truly universal and respected norm, meat-eating should be regulated (e.g., proscribing or limiting the consumption of certain types of meat which have a higher carbon footprint;⁴³ or at least compelling mandatory sustainable cattle farming, etc.). There are many other examples that involve unsustainable behaviours, such as the use of private jets.⁴⁴ On top of the absence of sanctions, our society has even allowed anti-sustainability laws.⁴⁵

One may immediately oppose the rather extreme idea of compelling a vegetarian diet since it goes against long-established habits and individual liberty to choose (even

⁴¹ See, e.g., Joan Sabaté & Sam Soret, *Sustainability of Plant-Based Diets: Back to the Future*, 100 J. AM. CLINICAL NUTRITION 476, 476 (2014) (“Plant-based diets in comparison to diets rich in animal products are more sustainable because they use many fewer natural resources and are less taxing on the environment”); Bingli Clark Chai et al., *Which Diet Has the Least Environmental Impact on Our Planet? A Systematic Review of Vegan, Vegetarian and Omnivorous Diets*, 11 SUSTAINABILITY, no. 15, 2019, at 1, 1.(Switz.) (“Results from our review suggest that the vegan diet is the optimal diet for the environment because, out of all the compared diets, its production results in the lowest level of [greenhouse gas] emissions”); Blisse Kong, *Why have I heard that eating meat is bad for the climate?*, MIT Climate Portal (Mar. 16, 2021), <https://climate.mit.edu/ask-mit/why-have-i-heard-eating-meat-bad-climate> (“A pound of beef produces, on average, around [fifteen] times as much CO₂ as a pound of rice—and around [sixty] times as much as a pound of wheat, corn or peas”); Oliver Milman, *Meat Accounts for Nearly 60% of all Greenhouse Gases from Food Production, Study Finds*, THE GUARDIAN, (Sept. 13, 2021), <https://www.theguardian.com/environment/2021/sep/13/meat-greenhouses-gases-food-production-study>.

⁴² Sabaté & Soret, *supra* note 41, at 476.

⁴³ See, e.g., Patrick J. Skerrett, *Raising beef creates more pollution than raising pork, poultry, dairy, or eggs*, Harvard Health Blog (Jul. 22, 2014), <https://www.health.harvard.edu/blog/raising-beef-creates-pollution-raising-pork-poultry-dairy-eggs-201407227289>.

⁴⁴ See, e.g., Junzi Sun et al., *Environmental Footprint of Private and Business Jets*, 28 ENG’G PROC. no. 1, 2022, at 1, 1 (Switz.) (“Private flights are extremely environmentally inefficient and account for the most emissions per passenger in the aviation sector”); Joseph B. Sobieralskia & Stacey Mumbowerb, *Jet-Setting during COVID-19: Environmental Implications of the Pandemic Induced Private Aviation Boom*, 13 TRANSP. RES. INTERDISC. PERSP., Mar. 2022, at 1, 5 (U.K.) (“The number of private aviation flights has increased by approximately 20% resulting in an increase of private jet emissions by over 23%. These emissions are significant given that the total CO₂-equivalent emissions from private aviation account for 1.3% of all transportation emissions in the U.S.”).

⁴⁵ Dernbach & Mintz, *supra* note 27, at 535 (“the unsustainable beneficiaries of the present system are supported and encouraged by a variety of laws, and that they use these laws and existing legal institutions to resist change”); Dernbach & Cheever, *supra* note 9, at 257

An example of how conventional development often benefits some at the expense of others, and how the law supports that result, can be seen in *Sipriano v. Great Spring Waters of America, Inc.*, where a bottled water company used so much of a groundwater aquifer for its operation that its neighbours were deprived of water for their own use. The Texas Supreme Court upheld a grant of summary judgment against the neighbours, holding that the common law rule of capture protected the company from liability.

though this vegetarian example is just a random illustration of one of the unsustainable acts that society endorses). Yet, this objection reflects exactly the weak normativity of sustainability – in four ways.

First, there are already relevant precedents which uphold the sustainability norm on this matter. In 2018, the office-sharing company WeWork banned staff – out of sustainability considerations – from reimbursing meals containing meat, and also stopped their staff from serving meat at company events.⁴⁶ In 2023, Oxford City Council in the United Kingdom [U.K.] also adopted a similar sustainability policy that precludes meat and dairy in Council internal events.⁴⁷ Furthermore, student unions in the U.K. have been pushing for meat bans to be implemented at more university canteens.⁴⁸ In other words, both the private sector (e.g., WeWork) and the public sector (e.g., Oxford City Council and public universities) are enforcing the sustainability norm against meat.

Even if an immediate ban is not feasible, the city of Haarlem in the Netherlands is a demonstration of taking norm-compliant actions as much as possible. They will be the world's first to implement a ban on meat advertisements in 2024 in order to reduce the environmental impact of the meat industry.⁴⁹

These examples compellingly demonstrate that the sustainability norm – if taken seriously just as the Dutch city and the private sector have done – requires that actions be taken against the practice of meat-eating. In this sense, it is just a matter of whether one has the willingness to act on the norm.

By comparison, there are existing social norms which strictly prohibit the eating of certain meats, such as pork and dog meat. The underlying justifications relate to animal rights, cultural or religious reasons, etc. When those norms are being upheld stringently, why can the sustainability norm not address acts that would be considered wrong? The only inference is that “sustainability” is culturally and socially inferior to other norms like animal rights, as the former cannot deliver the same normative change.

⁴⁶ Emma Batha, *WeWork goes meat-free 'to leave a better world'*, Reuters (July 19, 2018), <https://www.reuters.com/article/us-environment-meat-ban-idUSKBN1K82AF>.

⁴⁷ Ed Halford, *Oxford City Council approves vegan food only policy*, Oxford Mail (Mar. 21, 2023), <https://www.oxfordmail.co.uk/news/23401386.oxford-city-council-approves-vegan-food-policy/>.

⁴⁸ See, e.g., Daniel Sanderson, *Meat and dairy set to be banned at University of Stirling after student union vote*, The Telegraph (Nov. 16, 2022), <https://www.telegraph.co.uk/news/2022/11/16/meat-dairy-set-banned-university-stirling-student-union-vote/>; Sarah Young, *Growing number of UK universities banning meat in a bid to tackle climate change*, Independent (Feb. 20, 2020), <https://www.independent.co.uk/life-style/university-uk-vegan-ban-meat-climate-change-environment-a9347256.html>; Olivia Petter, *Cambridge University significantly cuts carbon emissions after taking beef and lamb off menu*, Independent (Sept. 9, 2019), <https://www.independent.co.uk/life-style/food-and-drink/cambridge-university-carbon-emissions-food-beef-lamb-plant-based-a9097656.html>.

⁴⁹ Lydia Chantler-Hicks, *Dutch city Haarlem becomes first in world to ban meat adverts*, Evening Standard (Sept. 7, 2022), <https://au.finance.yahoo.com/news/dutch-city-haarlem-becomes-first-113452762.html>.

Second, there are bans which are just as radical as restricting the eating of meat. They include, for instance, the sale of new petrol cars in the E.U. and California (as the first in the world) in 2035; single-use cutlery in the U.K.; and even cigarettes in New Zealand (as the world’s first).⁵⁰ To those who embrace the sustainability norm, they may be “radical” but understandable — but to those who do not feel bound, the bans are “extreme”.

The contradictory approaches — that some take environmental actions whilst others do not — lead to confusion as to which side is correct: is it necessary to introduce those environmental measures? Or are they just an extra mile that is voluntary? This confusion will undermine the normativity and proper development of the norm as it will the rule of law.

Third, a properly functioning norm of governance would not carve out exceptions for a known wrong simply to cater for personal preferences and space (or convenience in the case of private jets). The rule of law expects equal application of the law.⁵¹

Fourth, many others, unfortunately, apply the norm instead as if it were a follow-suit norm — taking environmental actions only after some have done so first.⁵² This wrongly confuses the actual obligation under the norm: it requires sustainable actions but not footsteps following on therefrom (though it is still better than doing nothing). The normative force that actually drives law abidance by the followers comes not from the norm but from peer pressure.⁵³ What if no one takes the first step? In this regard, the norm has failed, not by itself, but by our inactions.

⁵⁰ See Kate Abnett, *EU lawmakers approve effective 2035 ban on new fossil fuel cars*, Reuters (Feb. 14, 2023), <https://www.reuters.com/business/autos-transportation/eu-lawmakers-approve-effective-2035-ban-new-fossil-fuel-cars-2023-02-14/>; Coral Davenport, Lisa Friedman & Brad Plumer, *California to Ban the Sale of New Gasoline Cars*, N.Y. Times (Aug. 24, 2022), <https://www.nytimes.com/2022/08/24/climate/california-gas-cars-emissions.html>; Marc Ashdown & Lora Jones, *Single-use plastic cutlery and plates to be banned in England*, BBC (Jan. 9, 2023), <https://www.bbc.com/news/business-64205460>; Tess McClure, *New Zealand passes world-first tobacco law to ban smoking for next generation*, GUARDIAN (Dec. 13, 2022), <https://www.theguardian.com/world/2022/dec/13/new-zealand-passes-world-first-tobacco-law-to-ban-smoking-by-2025>. There are many more examples. For example, the E.U. is planning to prohibit various types of electronic chemicals that are harmful to the environment. See Arthur Neslen, *EU unveils plan for 'largest ever ban' on dangerous chemicals*, Guardian (Apr. 25, 2022), <https://www.theguardian.com/environment/2022/apr/25/eu-unveils-plan-largest-ever-ban-on-dangerous-chemicals>.

⁵¹ See, e.g., Robert A. Stein, *What Exactly Is the Rule of Law?*, 57 HOUS. L. REV. 185, 194 (2019).

⁵² The footstep-following reasoning is prevalent. See, e.g., Trevor Pritchard, *NCC to cut gas-powered tools, and City of Ottawa could follow suit*, CBC News (Nov. 17, 2021), <https://www.cbc.ca/news/canada/ottawa/leaf-blowers-hedge-trimmers-small-tools-banned-ottawa-ncc-1.625238>; see also Gianna Melillo, *Several states will follow California’s lead in banning gas-powered car sales by 2035*, The Hill (Aug. 30, 2022), <https://thehill.com/changing-america/sustainability/infrastructure/3620985-several-states-will-follow-californias-lead-in-banning-gas-powered-car-sales-by-2035/>.

⁵³ See, e.g., Olivia Rudgard, *UK to ban shark fin soup, putting pressure on other nations to follow suit*, The Telegraph (Aug. 15, 2021), <https://www.telegraph.co.uk/news/2021/08/15/uk-ban-shark-fin-soup-putting-pressure-nations-follow-suit/>.

Very importantly, the supposed “look afresh” nature of sustainability is about changing our old mindset, long-held values and accustomed choices, which are entrenched yet unsustainable.⁵⁴ So, there should be no excuse to shield unsustainable habits from change.

The “doctrine of common concern of humankind” under international environmental law imposes a duty to take “autonomous measures”.⁵⁵ Not taking action is already wrongful in this sense. But even worse, the inaction by a country creates room for opposition to discredit the perceived urgency, correctness and authority of the sustainable actions. This is particularly undesirable when there is already a close turf between economic and environmental priorities.⁵⁶ This also goes against the international environmental law’s duty to cooperate, which expects governments to “proactively [work] together, serving objectives that cannot be attained by just a single actor”.⁵⁷

Even more, the negative environmental impact (such as pollution) could spill over to others, or could cancel out the positive progress made by another. Whilst the duty to cooperate expects equitable burden-sharing,⁵⁸ the inaction increases the burden of other countries. From another angle, the inert countries can be seen as inequitable free-riders. The failure to act is unfair to those who abide by the norm, and free-riding is considered wrongful from the jurisprudential standpoint.⁵⁹

⁵⁴ Affolder, *supra* note 11, at 11 (citing Case concerning the Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 92, at 78 (Sept. 25); Lähteenmäki-Uutela et al., *supra* note 17, at 7 (“Transforming the system, however, requires new rules that discriminate against unsustainable goods”); Dernbach & Cheever, *supra* note 9, at 263 (“Sustainability inspires us to change our way of life and develop new solutions to problems that are intractable if the only solutions are development or the environment, but not both”); Bruner, *supra* note 18, at 1225 (“Growing awareness of the sustainability imperative has driven the recent shift away from shareholder-centric corporate governance”); Elder, *supra* note 27, at 839 (“Also crucial for sustainability is law’s role in helping to educate and influence people about the boundaries of acceptable behavior”).

⁵⁵ IRYNA BOGDANOVA, UNILATERAL SANCTIONS IN INTERNATIONAL LAW AND THE ENFORCEMENT OF HUMAN RIGHTS 281 (2022) (Neth.) See also *id.* at 273 (“The concept of common concern emerged in international environmental law in the late 1980s”).

⁵⁶ See, e.g., Martin Armstrong, *Is the environment or economy a bigger priority? A view from the US*, World Economic Forum (Apr. 19, 2022), <https://www.weforum.org/agenda/2022/04/environmental-protection-vs-economic-growth/> (“The battle in the minds of people in the U.S. between prioritizing the environment (even at the risk of curbing economic growth) or the economy (even if the environment suffers), has been a bit of a rollercoaster over the last few decades”).

⁵⁷ Bharat H. Desai & Balraj K. Sidhu, *International Courts and Tribunals - The New Environmental Sentinels in International Law*, 50 ENV’T. POL’Y & L. 17, 25 (2020) (Neth.).

⁵⁸ Bogdanova, *supra* note 55, at 274, 279.

⁵⁹ Richard J. Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 ETHICS 616 (1982); Isabella Trifan, *What Makes Free Riding Wrongful? The Shared Preference View of Fair Play*, 28 J. POL. PHIL. 158 (2020).

3.2. THE PROBLEM WITH ARBITRARILY SELECTIVE AND INCONSISTENT ACTIONS

On the one hand, we ban the use of plastic straws or even bags despite the fact that they bring much-liked convenience; deliver user experience (in terms of drinking with straws); have legitimate health advantages (as regards to using straws for acidic drinks to reduce contact with teeth); and can be the more hygienic choice (in the case of using disposable plastic bags for wet products).⁶⁰ In addition, the environmental impact of plastic straws is considered proportionally limited (and to some extent the same for plastic bags).⁶¹ Also, society is pressing for environmentally efficient choices, such as the use of electric cars and public transportation.⁶²

On the other hand, we preserve the convenience of using private jets despite their environmental inefficiency.⁶³ But it is justified by comparable considerations such as luxurious user experience and hygiene considerations (with respect to skipping the airport crowd).⁶⁴ The rule of law emphasises consistency.⁶⁵ A proper norm would not have allowed such a dubious and contradictory logic in a rule-of-law society. It deepens the divide between the call for sustainability and the fondness for unsustainable luxury.

There is no apparent justification as to why some unsustainable acts are not prohibited when they involve the same “wrong” and harm of unsustainability. One might try to argue that the alleged unsustainable acts involve different degree of risk of environmental harm. In reply, the precautionary principle – which is encompassed by sustainability – provides that there does not have to be conclusive evidence before embarking on sustainable transitions.⁶⁶ This means the absence of full scientific

⁶⁰ See, e.g., Asphat Muposhi, Mercy Mpinganjira & Marius Wait, *Considerations, Benefits and Unintended Consequences of Banning Plastic Shopping Bags for Environmental Sustainability: A Systematic Literature Review*, 40 WASTE MGMT & RSCH.: THE J. FOR SUSTAINABLE CIRCULAR ECON. 248, 257 (2022) (U.K.) (“There was also general consensus in extant literature that the end of plastic shopping bags is not nigh due to their utilitarian benefits, and that a [plastic bag ban] is coercive and punitive”).

⁶¹ See, e.g., Rob Jordan, *Do plastic straws really make a difference?*, Stanford Earth Matters (Sept. 18, 2018), <https://earth.stanford.edu/news/do-plastic-straws-really-make-difference> (“Plastic straws are only a tiny fraction of the problem – less than [one] percent”); see also Riley Schnurr & Tony Robert Walker, *Why you shouldn't be a 'straw-man' environmentalist*, The Conversation (July 25, 2018), <https://theconversation.com/why-you-shouldnt-be-a-straw-man-environmentalist-100303> (“Like plastic straws . . . plastic bags are ultra-lightweight, they likely make negligible contributions to municipal waste”).

⁶² See, e.g., Hua Cai et al., *Environmental Benefits of Taxi Ride Sharing in Beijing*, 174 ENERGY 503 (2019). (Neth.); Bokolo Anthony Jr., *Integrating Electric Vehicles to Achieve Sustainable Energy as a Service Business Model in Smart Cities*, 3 Frontiers in Sustainable Cities 1 (2021) (Switz.).

⁶³ See Sun et al., *supra* note 44, at 1, 5 (noting private jets are “extremely” inefficient).

⁶⁴ See, e.g., Susan Hornik, *The new jet set - why private plane usage has soared*, BBC News (May 16, 2022), <https://www.bbc.com/news/business-61391638>.

⁶⁵ See *supra* note 40.

⁶⁶ Affolder, *supra* note 11, at 6 (“This principle asserts that in cases dealing with environmental harm, it is not necessary to await full proof or certainty of that harm”).

certainty is not an excuse for inaction. Nevertheless, it seems that the principle's requirement for early precautionary actions is not taken seriously. Even when there is strong proof (if not already common knowledge) for the unsustainable impact of certain acts like the excessive use of plastics, actions will not necessarily be taken.

The selective approach undermines the authority of the norm in many ways.⁶⁷ For example, the inactions against certain unsustainable acts (e.g., the use of private jets) could undermine the claimed importance, morality and urgency of sustainability. But the problem is not only about selectiveness. Instead, the failure to recognise (and shame) the unsustainable conduct will also erode the normativity of sustainability.⁶⁸

Even worse, it harms the rule of law by making artificial and arbitrary distinctions. In effect, it means the law turns a blind eye to injustice (unsustainability).

3.3. THE “ENVIRONMENTAL RULE OF LAW”?

A potential counter-argument is that the unique nature of the “environmental rule of law” requires “incremental” transitions, especially when “sustainability” is an “intrinsically evolutive” concept.⁶⁹ The incrementality is needed to cater for economic and social considerations. Therefore, the failure to prohibit some unsustainable acts at the moment should not be seen as undermining the rule of law and the authority of the norm. It takes time and education to change existing values and practices, especially deep-rooted ones like meat-eating.

In this sense, the “environmental rule of law” is very different from the traditional “rule of law”. The former tolerates injustice (unsustainability) even when there is neither guarantee nor promise that it will be resolved with the best possible effort.

⁶⁷ Andrei Marmor, *The Rule of Law and Its Limits*, 23 L. & PHIL. 1, 27-28 (2004) (Neth.) (“there is some level of coherence which the law must have in order to function properly in guiding its subjects’ conduct”); *id.* at 32 (“law cannot function if it is too fragmented and morally incoherent”).

⁶⁸ *Id.* at 34 (“Rules cannot guide conduct unless deviations from the rule are actually treated as such, namely, as deviations from the rule”).

⁶⁹ Gitanjali N. Gill & Gopichandran Ramachandran, *Sustainability Transformations, Environmental Rule of Law and the Indian Judiciary: Connecting the Dots Through Climate Change Litigation*, 23 ENV’T L. REV. 228, 236 (2021) (U.K.) (“In this context, the judiciary acts as a proactive and incremental facilitator in actioning the environmental rule of law to further transformational sustainability. Thus, the environmental rule of law is ‘incremental and progresses nonlinearly’”). *See also* Barral, *supra* note 23, at 388

([S]ustainable development itself requires various types of conduct to be adopted, because it is an objective, because it is intrinsically evolutive, and because as an obligation of means it requires a series of different types of effort towards the fulfillment of the objective it lays down. Hence, conduct aimed at achieving sustainable development, even if lacking uniformity, can still form valid precedents constituting evidence of the existence of a general practice of states);

id. at 382 “What is sustainable development will vary in time, as sustainable development is not immune to social, environmental, or scientific evolution”.

In reply to the counter-argument, it is no defense for the damage to the rule of law by raising a separate, distinct “environmental rule of law”. The application of another yardstick is exactly what undermines our rule of law. First, the traditional rule of law would not allow justice to be delayed. Even if delay is inevitable in practice, it cannot be tolerated, at least, in principle. However, the so-called “incremental” nature of the “environmental rule of law” is just a beautified way of endorsing the delay of justice (sustainability) in principle.

Furthermore, the traditional rule of law (e.g., the requirement of consistent norm applications) would require all unsustainable acts to be considered wrong, at least *in principle*, even if transitions and enforcements cannot be immediately taken. A wrong is a wrong and should be treated as such under the rule of law. Yet, the “sustainability” norm functions differently. If society favours unsustainable acts (like the use of private jets), it is then not considered a wrong on paper. In other words, the inactions against unsustainability are not necessarily caused by impracticality. This is not the rule of “law”, but rather its exact opposite: rule by arbitrary preference.⁷⁰

4. THE PATH FORWARD FOR “SUSTAINABILITY”: AS A NORM OF GOVERNANCE, OR NOT?

4.1. WEAK GOVERNANCE WITH QUESTIONABLE NORMATIVITY

The problem with equivocal normativity is that it leaves excessive room for debates and doubts on what has to be done. This deters consensus and hinders environmental transitions. For example, Elder suggested that “sustainability probably implies minimization of the need for private automobiles. Perhaps we should reintroduce

⁷⁰ See, e.g., Mary Liston, *Governments in Miniature: The Rule of Law in the Administrative State*, in ADMINISTRATIVE LAW IN CONTEXT 39, 51 (Lorne Sossin & Colleen M. Flood eds., 2013). Under Joseph Raz’s theory of the rule of law, “no rational society should entertain inconsistent [values]: for example, a society cannot endorse the indissolubility of marriage while, at the same time, permit divorce on demand. Inconsistent purposes and values are a form of conflict that is logical, not political”; John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 60 (1987), “[. . .] consistency prescribes like treatment for successive cases governed by the same”; European Commission Work Package for RECONNECT - Reconciling Europe with its Citizens through Democracy and Rule of Law, 2020, under A.V. Dicey’s rule of law, “the first two principles essentially require that people’s actions should be governed by legal norms regularly passed as opposed to arbitrary norms”; DOUGLAS E. EDLIN, COMMON LAW JUDGING: SUBJECTIVITY, IMPARTIALITY, AND THE MAKING OF LAW 5 (2016), “‘a government of laws, and not of men’ requires that we be governed by the objective rules of law rather than the subjective preferences of judges”; Vern R. Walker, *Discovering the Logic of Legal Reasoning*, 35 HOFSTRA L. REV. 1687, 1688 (2007), “the rule of law requires that similar cases should be decided similarly . . . Making the reasoning behind such decision-making transparent and open to scrutiny shifts the decisions away from mere subjective preference and toward objective rationale”.

denser, mixed-use, commercial-residential areas”.⁷¹ It is noteworthy that Elder used the words “probably implies” and “perhaps”. The wavering confirms that the norm does not have the degree of certainty to guide and compellingly call for changes.

This is not a one-off incident showing the norm’s weak governance. Prof. Bruner observed that “[m]any scholars have argued that sustainability is best pursued through extra-corporate regulation such as environmental and labor laws — leaving corporate governance itself to focus exclusively on shareholders”.⁷² At first sight, this seems like a normal debate on the best means of implementation. But the existence of this discussion is perplexing because, had the sustainability notion been truly normative, there would have been no need to debate at all. Bruner’s statement implies that corporate governance is exempted from contributing to sustainable transitions. But is sustainability not calling for green capitalism, as opposed to the traditional form of capitalism which merely emphasises developmentalism, profit maximisation and resource extraction?⁷³ The integrated balancing approach (mentioned in Section 1) requires economic deliberations to take into account environmental implications. Apparently, the debate mentioned by Bruner exists because the sustainability norm fails to penetrate into corporate law and governance.

At its current state, it is just a “framework”⁷⁴ or a “goal”.⁷⁵ It should not be boasted or treated as a substantial “norm” like “justice” because it does not yet have the necessary attributes (e.g., consistency of application to all unsustainable acts) to govern our lives normatively-speaking.⁷⁶ It is similar to “kindness” which is merely a promoted, non-obligatory virtue.

Oxford University Professor Vaughan Lowe considers sustainability a mere “interstitial norm” which does “not seek to regulate the conduct of legal persons directly”.⁷⁷ In other words, it is not a norm of governance, but it merely plays a role only

⁷¹ Elder, *supra* note 27, at 843.

⁷² Bruner, *supra* note 18, at 1224.

⁷³ Kotzé & Adelman, *supra* note 23, at 5; Bradley Loewen, *Revitalizing Varieties of Capitalism for Sustainability Transitions Research: Review, Critique and Way Forward*, 162 RENEWABLE & SUSTAINABLE ENERGY REV., July 2022, at 1.

⁷⁴ Dernbach & Cheever, *supra* note 9, at 247 (“Sustainable development (or sustainability) is a decision-making framework for maintaining and achieving human well-being, both in the present and into the future”).

⁷⁵ Dovers, *supra* note 32, at 7 (“Sustainability, the agenda that created the integration imperative, is a higher-order social goal akin to democracy, justice, or equity”).

⁷⁶ There have been claims that it is a “primary norm” which obliges states to “act sustainably” or “to balance social, economic and ecological interests”. See Oehl, *supra* note 23, at 180-81. This would be the case from a narrow standpoint, where a domestic statute, for example the New Zealand Resource Management Act 1991, explicitly provides for such an obligation applicable in defined situations. Otherwise, the selective approach indicates that it is not properly functioning as a primary norm that governs our behavior.

⁷⁷ Vaughan Lowe, *Sustainable Development and Unsustainable Arguments*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 19, 33 (Alan Boyle & David Freestone eds., 1999).

in the law or policy reasoning process by “pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other”.⁷⁸ In other words, it is “an element of legal reasoning at the discretion of the court”.⁷⁹ It is comparable to “standards” like the reasonable man test and the balancing of interests.⁸⁰

4.2. STRUCTURAL CHANGES NEEDED TO TRANSFORM INTO A NORM OF GOVERNANCE

If the world truly cares about “sustainability” just as it does “justice”, they should be accorded the same paramount status. This is necessary for it to function as a norm of governance. From this perspective, the integrated approach (which requires balancing social and economic considerations) is most detrimental to the normative authority of “sustainability”. It situates environmental sustainability as a secondary consideration, which implies that it is acceptable to act unsustainably. It is certainly true that sustainability is not always practical. However, what the integrated approach has failed to stipulate is that it does not require environmentally sustainable acts to be done whenever it is possible. Rather, it leaves open the choice to prioritise economic or social considerations even when environmental transitions could have been feasibly achieved. This approach does not do justice to the claimed importance of environmental sustainability.

Furthermore, contrary to the repeated claims of well-established normativity (as enshrined in international law and academic literature highlighted in Section 1), there are quite a number of confusing structural pointers to the opposite. First, the key U.N. Resolution on sustainable development has adopted a voluntary review mechanism.⁸¹ Under this “Voluntary National Review”, individual countries undertake their own national review of their progress towards realising sustainable outcomes, which will then be presented at the U.N. High-level Political Forum on sustainable development (H.L.P.F.).⁸² This means the predominant measure of ensuring accountability to the norm is weakly based on a non-mandatory mechanism, of which its effectiveness has been

⁷⁸ *Id.* at 31.

⁷⁹ Affolder, *supra* note 11, at 11.

⁸⁰ *Id.* at 31. *See also* Barral, *supra* note 23, at 389.

⁸¹ *See* G.A. Res. 2015, *supra* note 20, ¶¶ 72-74.

⁸² *See, e.g.,* Viktor Sebestyén et al., *Focal Points for Sustainable Development Strategies—Text Mining-based Comparative Analysis of Voluntary National Reviews*, 263 J. ENV'T MGMT. 1 (2020); Ida Lillehagen et al., *Implementing the UN Sustainable Development Goals: How Is Health Framed in the Norwegian and Swedish Voluntary National Review Reports?*, 11 INT'L J. HEALTH POL'Y MGMT. 810, 811 n. 6 (2022), noting that the mechanism is termed as “the cornerstone of the follow-up and review system”.

doubted.⁸³ This is inconsistent with the pro-normative statements in the same Resolution, such as: “We are determined to take the bold and transformative steps which are urgently needed to shift the world onto a sustainable and resilient path”.⁸⁴

Similarly, S.D.G. 2.6 has adopted loose language in relation to the role of large corporations, which provides that the governments will “encourage companies, especially large and transnational companies, to adopt sustainable practices and to integrate sustainability information into their reporting”. The mere requirement to encourage is unhelpful in both engaging stakeholders and ensuring their accountability to the norm. This is incoherent with the important role of corporations as contemplated by the U.N. Resolution, which explicitly emphasises that “the business sector . . . *must* contribute to changing unsustainable consumption and production patterns”.⁸⁵ Such a vague and fluctuating stance taken by the U.N. is counterproductive.

Until “sustainability” receives the primacy status, it should not be analogised with “justice” – in order to avoid disappointment and harm to the rule of law. It is necessary to close the expectation gap between its boasted importance and actual application. To uphold environmental justice, there is a need to adopt a truly sustainability-driven approach in both law and policy.

⁸³ See Frank Biermann et al., *Scientific Evidence on the Political Impact of the Sustainable Development Goals*, 5 NAT. SUSTAINABILITY 795, 796 (2022) (U.K.) noting that:

there is no robust evidence that such peer learning, reporting and broad participation have steered governments and other actors towards structural and transformative change for sustainable development. The [high-level review] forum has not provided political leadership and effective guidance for achieving the [S.D.G.s], and it has failed to promote system-wide coherence, largely because of its broad and unclear mandate combined with a lack of resources and divergent national interests.

⁸⁴ G.A. Res. 2015, *supra* note 20, Preamble.

⁸⁵ *Id.* ¶ 28 (emphasis added). See also UN forum highlights ‘fundamental’ role of private sector in advancing new global goals, U.N. News (Sept. 26, 2015), <https://news.un.org/en/story/2015/09/509862> (reporting the remark of former Secretary-General Ban Ki-moon that “Governments must take the lead in living up to their pledges. At the same time, I am counting on the private sector to drive success”); See Egemen Küçükgül, Pontus Cerin & Yang Liu, *Enhancing the Value of Corporate Sustainability: An Approach for Aligning Multiple SDGs Guides on Reporting*, 333 J. CLEANER PRODUCTION 1, 4 (2022) (U.K.).

CONCLUSION

This article makes two original arguments. First, the current normativity of sustainability has been overstated and is not yet comparable to other norms like justice. Second, the inconsistent applications of the norm undermine the rule of law. As mentioned in Section 4.2, the U.N. instruments that contain the norm are also structurally incoherent.

When pondering on the normativity of the notion of “sustainability”, there are two prevailing, yet dismissible, concerns that could divert the focus away from the issues raised by this article. First, there is the often-mentioned concern over its inability to provide detailed and prescriptive guidance.⁸⁶ But this is not the real issue against its normativity because abstract notions like “justice” or the “reasonable man” test can still function authoritatively.⁸⁷ In addition, the notion of sustainability is intentionally designed to be flexible enough to accommodate different developmental needs and circumstances.⁸⁸

The other misplaced concern sees sustainability as resting on the dubious assumption that “endless growth is actually possible on a finite planet where the human footprint is already far greater than Earth’s ability to sustain life”.⁸⁹ In reply, being practically difficult to accomplish should have no impact on its normativity. By analogy, the difficulty of achieving full “equality” for everyone will not undermine the

⁸⁶ See Affolder, *supra* note 11, at 1 (“Ambiguous, vague, and amorphous”); see also van Hees, *supra* note 13, at 60 (“Currently, neither [E.U.] law nor [E.U.] policy clearly explains what the concept of sustainable development means and how it must be put into practice.”); see Wood & Richardson, *supra* note 27, at 14 (“sustainable development as riddled with ambiguity and contradictions that undermine its usefulness”), 13 (“No single conception of sustainability is shared by the contributors to this book, let alone the wider environmental law community, and no attempt is made here to impose one”); see Gill & Ramachandran, *supra* note 69, at 234 (“Incremental or radical transformations: The debate”); see Dernbach & Cheever, *supra* note 9, at 249 (“the concept is ‘too vague’ or ill-defined to be useful”), 252 (“To be sure, the definitional issue is not new to sustainability; questions about its meaning and implications have surrounded the concept from its beginning”).

⁸⁷ See *supra* note 80.

⁸⁸ See Dernbach & Cheever, *supra* note 9, at 253 (“The framework itself, however, does not come with specific environmental and social objectives; those should be determined on a case-by-case basis in light of the overall objective”); see also Gill & Ramachandran, *supra* note 69, at 234-35.

⁸⁹ See Kotzé & Adelman, *supra* note 23, at 2; see also Nishan Sakalasoorya, *Conceptual Analysis of Sustainability and Sustainable Development*, 9 OPEN J. SOC. SCI. 396, 401 (2021)

No matter what object of sustainability is measured; there is a range of time across which sustainability is not achievable. Even a sustainable system eventually succumbs to entropy, asteroid collisions or other astronomical cataclysms. A universal truth in science and philosophy is that nothing is permanent in a physical sense. Accordingly, social ecological systems cannot be sustainable for indefinite periods of time.

see Dernbach & Cheever, *supra* note 9, at 249 (“there are those who believe that the prospect for a human future on planet Earth is so dire that the idea of anything being sustainable is illusory”).

normativity of equality. Similarly, “justice is expensive”, but this does not prevent our pursuit of justice.⁹⁰

Instead of these two dismissible issues, the more pertinent question is how we have unsatisfactorily understood and applied the norm. The current normativity of the notion of “sustainability” has been overstated. On the positive side, likening sustainability to the greatest norms like “justice” spreads the message that sustainability is just as important. This may help drive more sustainable changes through this “fake it till it makes it” approach.

However, it is necessary to consider the problems of inflating the standing of sustainability. First, being a norm — in a rule of law society — comes with the expectation of its fair and consistent application. Yet, there are many unsustainable acts that are allowed to exist, such as the use of private jets. The contradictions, and the expectation gap between the boasted normativity and reality, could harm the perception of not just the norm, but also the rule of law, which emphasises consistency.

Second, the comparison with justice creates the false impression that we have already accorded adequate respect for the norm. Yet, it is just one of the three factors (together with economic and social considerations) under the integrated approach. The problem is not just how this integrated approach can lead to capricious balancing exercises, or how the sustainability norm can be subdued by other considerations.⁹¹ Rather, the real issue is that its current normativity does not match its actual importance. It is certainly true that practicalities, like financial considerations, can hinder sustainable transitions. However, no matter how dire the situation, the norm of

⁹⁰ See, e.g., Emily Marx, *Justice Is Expensive*, 36 J. AM. JUD. SOC. 75 (1952).

⁹¹ See, e.g., Andrea Ross, *It's Time to Get Serious—Why Legislation Is Needed to Make Sustainable Development a Reality in the UK*, 2 SUSTAINABILITY 1101, 1106 (2010) (Switz.) (“the attempt to roll three types of sustainability (ecological, economic and social) into one overarching concept of sustainability left it pointing in multiple directions without any central meaning”); *id.* at 1116 (“All three of the Canadian administrations in their Sustainable Development Acts have chosen to define sustainable development using the Brundtland definition . . . [the] imprecision may give the executive (a public body) too much discretion while needlessly taking power away from the judiciary and the legislature”); see also Bjørn Hvinden et al., *Sustainable Development and Sustainable Welfare: A Changing International Agenda*, in TOWARDS SUSTAINABLE WELFARE STATES IN EUROPE SOCIAL POLICY AND CLIMATE CHANGE 28, 32 (Bjørn Hvinden, Mi Ah Schoyen & Merethe Dotterud Leiren eds., 2022) (U.K.) (“Governments tend to put unequal weight on economic, social and environmental concerns, often focusing on a single dimension at the time and failing to take a more holistic view”).

“justice” remains the most important, at least in principle.⁹² Sustainability should be accorded the same paramount status in principle.

Sceptics may question the impact and meaningfulness of merely uplifting its status on paper. But this is more than obvious to those who truly support sustainability – who would have replied with the question as to why sustainability is not even deemed paramount on paper. The inference drawn from the failure and opposition to elevate its standing is that there is still a fundamental divide (e.g., short-termism and self-interest versus long-termism and inter-generational equity) on the importance, necessity and urgency of sustainable development. Therefore, replacing the integrated approach with a sustainability-driven approach could help close this divide by reinforcing its normative authority.

Moreover, the suggestion does not mean sustainability must be successfully achieved at all costs. Likewise, law and justice are not always enforceable or realisable in practice. Instead, there is a need for a pledge that vitally promises sustainability – like justice – that will be upheld to the greatest possible extent, and as such society will strive for sustainable transitions. In other words, it constitutes a stronger social agreement to take it seriously.

⁹² See generally Mortimer Sellers, *Law, Reason, and Emotion*, in *LAW, REASON AND EMOTION* 11, 13 (Mortimer Sellers ed., 2017) (U.K.) (“justice is the ultimate standard of value in the law”); see also Wendell L. Griffen, *The Case For Religious Values In Judicial Decision-Making*, 81 *MARQ. L. REV.* 513, 519 (1998) (“Law is the preliminary concern; justice is the ultimate concern.”); see Jerome Hall, *Justice in the 20th Century*, 59 *CAL. L.REV.* 752, 752 (1971) (“One can say, for example, that justice is the ultimate social ideal or that it is the ideal ordering of the community”); see Sujian Guo et. al., *Conceptualizing and Measuring Global Justice: Theories, Concepts, Principles and Indicators*, 12 *FUDAN J. HUMAN SOC. SCI.* 511, 513 (2019) (Ger.) (“justice is in principle uncompromising”); see Alejandro Serrano Caldera, *The Rule of Law in the Nicaraguan Revolution*, 12 *LOY. L.A. INT’L & COMP. L. REV.* 341, 449 (1990) (from the perspective of legal philosophy, “justice is the most important value of law and it is toward justice that law is directed”).