

Annual EELF Conference 2017 “Sustainable Management of Natural Resources: Legal Approaches and Instruments”, Copenhagen, 30 August - 1 September 2017:

Ecological Sustainability as a Fundamental Principle of Law

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Structure

1. Meaning of sustainability
2. Importance in international environmental law
3. Importance in domestic environmental law
4. Outlook: sustainability as a fundamental principle

What is
Sustainability?
?

A hand is shown on the right side of the image, holding a white chalk and writing the word 'Sustainability?' on a green chalkboard. The text is written in a white, slightly irregular, hand-drawn font. The question mark is positioned below the word 'Sustainability'. The chalkboard has a textured, slightly grainy appearance.



"I'm right there in the room, and no one even acknowledges me."



Examples of “Sustain-ability”

Health

Love

Material security

Meaningful relationships

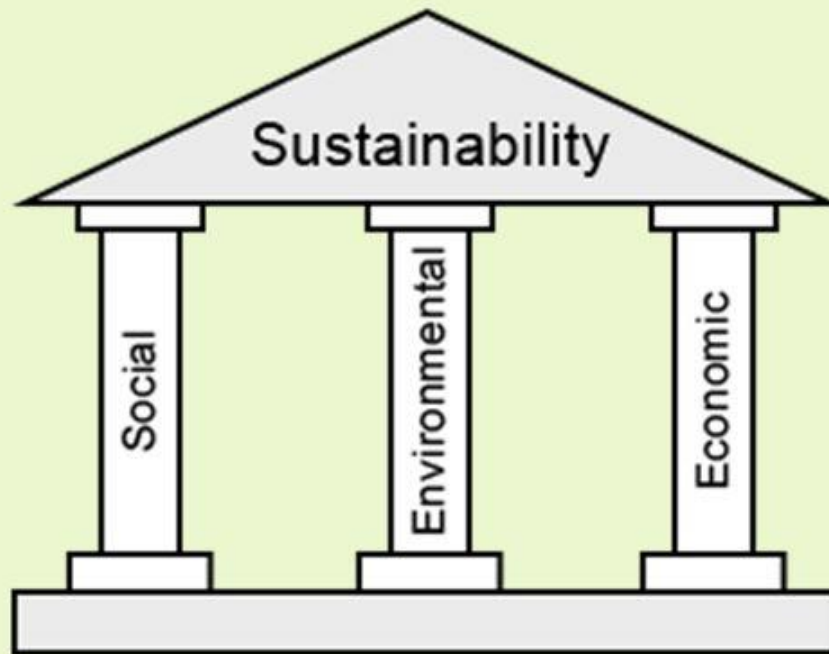
Healthy ecosystems

Ecosystem resilience

Climate stability

Biological diversity

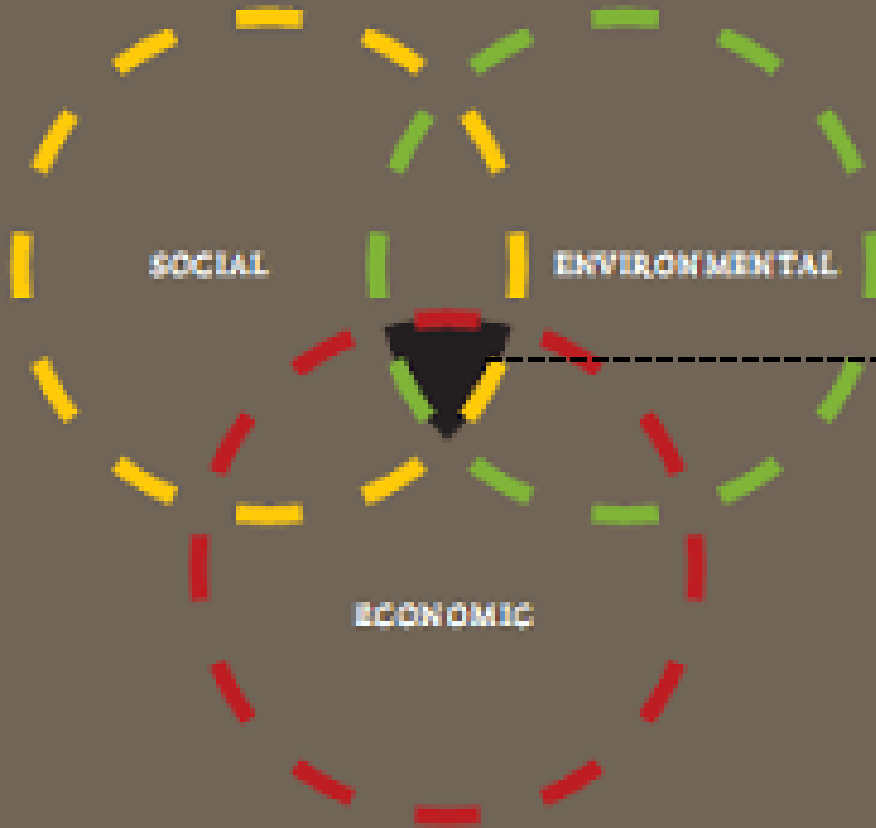
Three Pillars of Sustainability



Relationship between the three (environmental, social, economic) pillars

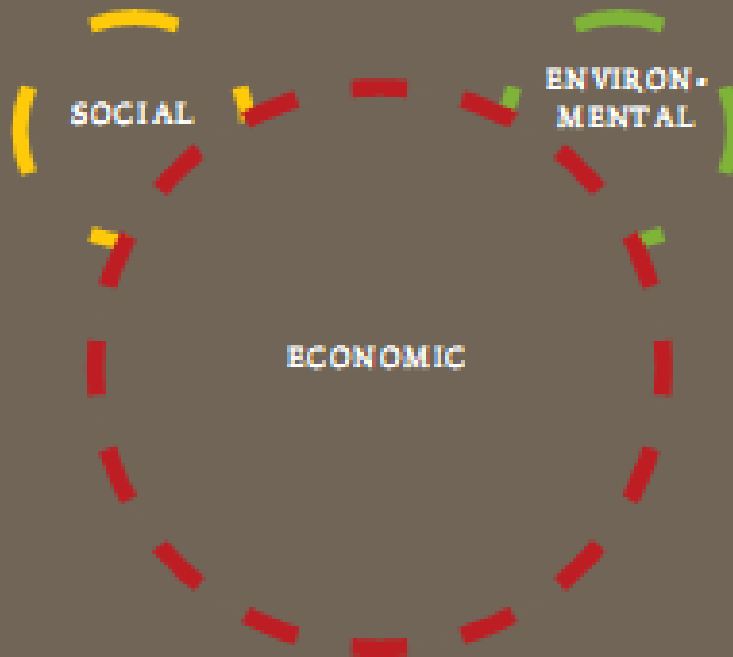
- Equally important?
- Some more important than others?

TRIPLE BOTTOM LINE MODEL



“sustainable solutions”
(leaving society & economy
largely untouched)

MICKEY MOUSE VERSION
OF THE TRIPLE BOTTOM LINE MODEL



unsustainable development

STRONG SUSTAINABILITY MODEL



(true) sustainable development

The long history of “sustainability”

- Nachhaltigkeit (“sustainability”) was the guiding economic principle prior to the Industrial Revolution ensuring the indefinite availability of natural resources.

See e.g. Hans Carl von Carlowitz, *Sylvicultura Oeconomica*, 1713; Ulrich Grober, *Sustainability: A cultural history*, 2012

- Sustainability is the antithesis of collapse/breakdown.

See e.g. *Limits of Growth*, Club of Rome Report, 1972

- Brundtland Commission set up in 1983 to find solutions based on the findings of the Club of Rome Report

What did the Brundtland Report actually say?

It defined sustainable development as *“development that meets the needs of the present without compromising the ability of future generations to meet their own needs”*.

... but further explained:

“It contains within it two key concepts: the concept of ‘needs’, in particular the essential needs of the world’s poor... and the idea of limitations imposed by the state of technology and social organisation on the environment’s ability to meet present and future needs”

1987 Brundtland Report:

“The Earth is one but the world is not. We all depend on one biosphere for sustaining our lives.” (p.26)

“There are thresholds that cannot be crossed without endangering the basic integrity of the system. Today we are close to many of these thresholds.” (p.29)

“Sustainable development requires that the adverse impacts on the quality of air, water, and other natural elements are minimized so as to sustain the ecosystem's overall integrity.” (p.31)

“At a minimum, sustainable development must not endanger the natural systems that support life on Earth: the atmosphere, the waters, the soils, and the living beings.” (p.38)

Champions of (true) sustainable development



Jim MacNeill (1928-2016)

Initiator and Secretary General of Brundtland Commission; lead author of the Brundtland Report; Pioneer of the Earth Charter



Maurice Strong (1929-2015)

Member, Brundtland Commission; Secretary General of the 1992 Earth Summit Pioneer of the Earth Charter

Jim MacNeill:

“Governments and the corporate world cherry-picked elements of the sustainable development concept and rejected the idea to organize socio-economic development within the limits of nature.”

“Ecological sustainability is paramount.”

(Lecture 8 January 2015, University of Ottawa; cited in K. Bosselmann, “Mind the Gap: State Governance and Ecological Integrity”, in: L. Westra et al., *Systems Integrity: Governance, Law and Integrity*, Routledge 2015, p.272-283, at 277)

Role of environmental law

“The central reference point of environmental law is not ‘the environment’ or ‘sustainable development’, but ecological sustainability.”

(Staffan Westerlund, “Theory for Sustainable Development Towards or Against?” in: H.C. Bugge and C. Voigt (eds.), *Sustainable Development in International and National Law*, Europa Law Publ., 2008, 48-65, 53)

Role of environmental law

“A reimagined environmental law should seek, so far as possible, to imbue all lawyers with a full appreciation that the sustainability of ecosystems of every scale and description should become one of the foundational principles of the law everywhere.”

(Sanford Gaines, “Reimagining Environmental Law for the 21st Century”, *Environmental Law Reporter*, Vol. 44 (2014), 10188-10215, 10213/14)

Role of environmental law

“Processes of legal reasoning [need to] reflect the fundamental *grundnorms* of the system – the rule of law in general and sustainability in the context of environmental governance.”

(Douglas Fisher, *Legal Reasoning in Environmental Law: A Study of Structure, Form and Language*, Edward Elgar 2013, p.433)

Conclusion so far...

Sustainability has its roots in maintaining the integrity of ecological systems (that all life incl human life depends on), is the core idea behind the concept of sustainable development (“ecologically sustainable development”) and has been described as central to the purpose and overall objective of environmental law.

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Sustainability as an overall objective of international environmental law

The objective of achieving sustainability - described as preserving and restoring the integrity of ecological systems – is contained in, at least, 25 international soft and hard law agreements.

For example:

1978 US-Canadian Great Lakes Water Quality Agreement

Article II:

“The purpose of the Parties is to restore and maintain the chemical, physical and biological integrity of the waters of the Great Lake Basin Ecosystem...where the latter is defined as ... the interacting components of air, land, water and living organisms including humans...”

1982 World Charter for Nature

I. General Principles –

“(…) Ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the **integrity of those other ecosystems** or species with which they coexist.”

1992 Rio Declaration on Environment and Development

Preamble -

“Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental systems.”

Principle 7 –

“States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.”

Agenda 21

Chapter 10 – Integrated Approach to the Planning and Management of Land Resources

“...maintenance of the integrity of life-support systems...”

Chapter 16 – Environmentally sound Management of Biotechnology

“...maintenance of environmental integrity...” “...protect environmental integrity with a view to long-term ecological security...”

Chapter 18 – Protection of the Quality and Supply of Freshwater Resources

“... maintenance of ecosystem integrity...”

1995/2015 IUCN Draft International Covenant on Environment and Development

Article 2 –

“(…) The integrity of the Earth’s ecological systems shall be maintained and where necessary restored.”

2000 Earth Charter

Principle 5 –

“Protect and restore the **integrity of Earth's ecological systems**, with special concern for biological diversity and the natural processes to sustain life.”

2012 (Rio+20)

The Future We Want

Article 40 –

“We call for holistic and integrated approaches to sustainable development which will guide humanity to live in harmony with nature and lead to efforts to restore the health and **integrity of the Earth's ecosystem.**”

2015 Paris Agreement

Preamble -

(...) “*Noting* the **importance of ensuring the integrity of all ecosystems**, including oceans, and the protection of biodiversity, recognized by some cultures as Mother Earth,”

Article 4.13 -

(...) Parties shall **promote environmental integrity** (...).

Article 6.2 -

Parties shall (...) **ensure environmental integrity**.

2016 World Declaration on the Environmental Rule of Law

Preamble:

(...)” Humanity exists within nature and **all life depends on the integrity of the biosphere and the interdependence of ecological systems.**”

(...) “The environmental rule of law should serve as the legal foundation for achieving environmental justice, **global ecological integrity** and a sustainable future for all.”

Principle 4: Ecological Sustainability and Resilience

“Legal and other measures shall be taken to **protect and restore ecosystem integrity** and to sustain and enhance the resilience of social-ecological systems.”

2017 Draft Global Pact on the Environment

Preamble:

(...) “Determined to promote a sustainable development that allows each generation to satisfy its needs without compromising the capability of future generation to meet theirs, while respecting the balance and integrity of the Earth's ecosystem.”

Article 2: Duty to take care of the environment

“Every State or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own levels to the conservation, protection and restoration of the integrity of the Earth's ecosystem.”

National & transnational Law

Typically, ecological integrity is an overall objective in conservation legislation and policy, e.g. US, Canada, Australia, New Zealand, Brazil and defined as the ability of an ecosystem to maintain or recover its ecological processes, structure, composition, diversity, and resilience.

Ecological integrity is also a central part of ecosystem approaches to environmental law and management (e.g. water; oceans; climate)

Example of environmental legislation: New Zealand

NZ Resource Management Act 1991

Sec. 5(2) In this Act, **sustainable management** means managing ...natural ... resources in a way ... which enables people and communities to provide for their social, economic, and cultural wellbeing ...

while

- (a) Sustaining the potential of natural ... resources to meet the ... needs of future generations; and
- (b) Safeguarding the life-supporting capacity of... ecosystems; and
- (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

NZ Resource Management Act 1991

The NZ Environment Court initially adopted the “environmental bottom-lines” approach

... but since the mid 1990’s increasingly followed an “overall judgment approach” (giving equal consideration to economic, social and environmental factors).

NZ Resource Management Act 1991

... rejected in 2014 by the Supreme Court (*King Salmon*) in favour of the “environmental bottom-line approach” as being more truthful to the Act’s purpose description in Sec. 5(2).

Consequence: ecological sustainability is paramount

Outlook:

The case for sustainability as a fundamental principle

If “fundamental human rights are superior to the law of the sovereign State” (H. Lauterpacht) and can be seen as *grundnorms* or basic norms underpinning any law (R. Alexy, E. Benvenisti), then ecological sustainability can claim similar fundamentality .

Human dignity and ecological sustainability are essential requirements for human survival and well-being, hence are fundamental principles of law.

Importance of constitutionalism

Populist democracy (USA, Hungary, Poland...)
vs liberal democracy based on rule of law/*Rechtsstaat*
("constitutional state")

Liberal democracy is predicated by constitutional guarantees
such as human rights and – at least, potentially – sustainability
("eco-constitutional state")

Never more topical than now!

What environmental lawyers can do now

Oslo Manifesto “From Environmental Law to Ecological Law

www.elga.world/oslo-manifesto/

Adopted by ca. 100 environmental law scholars at the 2016
IUCN Academy of Environmental Law Colloquium in Oslo

Ecological Law and Governance Association (ELGA)

www.elga.world

To be launched in Siena/Italy, 11-13 October 2017

THANK YOU

