The German Approach to Sustainability and its New Zealand Equivalent

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Sustainability has become an important principle of international public law. It is recognised in almost all fields of law and shows a significant impact on many national legal systems. This article examines the historical development of sustainability and its implementation into European and German constitutional law. It also analyses the normative inclusion of sustainability in German administrative provisions, in particular in environmental and planning law, and exposes the shortcomings of the German approach. With reference to the New Zealand Resource Management Act 1991, this article, finally, aims to detail sustainability in terms of content as in the German legal system sustainability has to be named and sharpened via directional political decisions in order to make it (more) tangible for legal practitioners.

1. THE RICH FACETS OF SUSTAINABILITY

1.1 Perceptory Contradictions: Vision, Criticism and Misuse

Sustainability is probably one of the most enigmatic terms in use in legal circles today — not only in New Zealand, but in Germany too. It can be found in a wide range of fields within the law, and ranges from international law down into the "lowlands" of "simple" administrative law. Euphoric voices go so far as hoping that its widespread implementation is to be "a profound process of rethinking, including examining and partially readjusting the traditional political preference models" ("einen tiefgreifenden Umdenkensprozess

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einschließlich einer Überprüfung und partiellen Neujustierung der tradierten politischen Präferenzmodelle"), which is even to take us into a new era.[1]

At the same time, the term "sustainability" is so flexible and context dependent[2] that the lack of substance from which it was previously said to suffer has already been the subject of unambiguous criticism in German-speaking legal circles: put bluntly, people have called it a fashionable term,[3] a semantic chameleon,[4] a rubber word,[5] junk law,[6] or even an all-purpose term for politically correct do-gooders.[7] The strong rhetoric essentially lends a voice to the allegation that the principle of sustainability is characterised by arbitrariness of content, so that sustainability appears to be useable for everything, and yet for nothing.[8]

This critical view is underpinned by the fact that sustainability has for quite some time been inundating the widest variety of fields within the political arena, as well as in everyday life and in the life of society. Sustainability was therefore already qualified before the turn of the millennium as "a term, used frequently — whether deliberately or unknowingly — but at the same time virtually never taken seriously, and at times even ridiculed" ("ein vielfach — bewußt oder unbewußt — eingesetzter, gleichwohl überwiegend kaum ernst genommener, mithin durchaus auch belächelter Begriff").[9] And in fact, we encounter sustainability in Germany on a daily basis, as do people in New Zealand — for instance as "sustainable budget and security policy", "sustainable fashion", "sustainable basket of goods", "sustainable

1 W Kahl "Einleitung" in W Kahl (ed) *Nachhaltigkeit als Verbundbegriff* (Mohr Siebeck, Tübingen, 2008) 1 at 32ff.
2 K Lange in K Lange (ed) *Nachhaltigkeit im Recht* (Nomos Verlag, Baden-Baden, 2003) 109 at 126ff.
3 Compare R Streinz (1998) Europäische Zeitschrift für Wirtschaftsrecht [EuZW] 137 at 144.
4 F Nuscheler *Entwicklungspolitik* (Bundeszentrale für politische Bildung, Bonn, 2006) at 382.
5 K Wullenweber "Wortfang: Was die Sprache über Nachhaltigkeit verrät" (2000) 63/64 Politische Ökologie 23.
6 M Reinhardt (1998) Umwelt- und Technikrecht [UTR] 73 at 102.
7 M Ronellenfitsch (2006) Neue Zeitschrift für Verwaltungsrecht [NVwZ] 385.
8 See, for details, Kahl, above n 1, at 1ff; E Frenzel *Nachhaltigkeit als Prinzip der Rechtsentwicklung?* (2005) at 44ff; rather clearly, C Hagist, S Moog and B Raffelhüschen (2014) Zeitschrift für Soziologie der Erziehung und Sozialisation [ZSE] 529 at 546: "typical weasel word: The packaging may be beautiful, but the term is devoid of content in most cases"; in the same vein, C Felber in I Pufé *Nachhaltigkeit* (UVK Verlag, München, 2014) at 5: "model of the Post Modern era, as enigmatic as it is intangible".
9 W Erbguth (1999) German Administrative Gazette [DVBl] 1082.

corporate governance", "sustainable coffee", "sustainable interior design", "sustainable school meals", "a sustainable idea for a present", ranging through to "sustainable consumption".

1.2 An Assignment for Legal Science

This misuse of sustainability should however not be rashly confused with the term "sustainability" and the instrument that is sustainability. My view is that it is actually at the core of the endeavours within legal circles to reveal the manner in which more open legal structures are handled, as are ultimately also the everyday legal tools of weighing up or proportionality.[10] What is more, any criticism, however pointed it may be, of the principle of sustainability can do nothing to remedy the fact that the legislature has inserted sustainability into the laws in an elongated manner.[11] One only has to take an analytic look at German environmental and planning law to find a diversity of proof in the Federal Building Code (Baugesetzbuch), in the Soil Conservation Act (Bodenschutzgesetz), in the Federal Emission Control Act (Bundesimmissionsschutzgesetz), and in many other places besides.[12] When it is included in the wording of the law, sustainability aspires to exert control in

10 The term "sustainability" is already being structurally equated with proportionality; compare on this K Gehne *Nachhaltige Entwicklung als Rechtsprinzip* (2011) at 184ff, 252ff; M Eifert "Nachhaltigkeit durch Innovation und Wissensgenerierung" in W Kahl (ed) *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck, Tübingen, 2016) 371 at 371ff.

11 More than 500 cases can be evidenced at federal level alone in 2017.

12 In concrete terms, evidence can be found, for instance, in s 1(5), sentence 1, s 171a(2), sentence 1, subs (3), Nos 6 and 7, s 177(5), s 193(5), sentence 2, No 4, as well as Annexes 1 and 2 to the Federal Building Code [BauGB]; s 1, sentence 1, and s 17(2), sentence 1, of the Federal Soil Conservation Act [BBodSchG]; s 37a(4) of the Federal Emission Control Act [BImSchG] in conjunction with s 14 of the Biofuels Sustainability Ordinance [Biokraftstoff-Nachhaltigkeitsverordnung]; s 37d(2), Nos 1 and 3, and s 37g of the Federal Emission Control Act; s 1(1), No 2, subs (3), No 4, s 5(2), Nos 1 and 2, subs (3), sentence 1, subs (4), sentence 3, s 23(2), sentence 1, s 25(2), s 26(1), No 1, and s 62 of the Nature Conservation Act [BNatSchG]; s 1, No 1, s 11(1), sentence 1, s 38(1), No 2, and s 41(2), sentence 1, of the Federal Forests Act [BWaldG]; s 1(1), s 3, No 47, and s 90, No 1, of the Renewable Energy Act [EEG]; s 3, No 33 of the Energy Industry Act [EnWG]; s 1(2), s 2(1) and (2), Nos 1, 3 and 6, and Annex 2 of the Regional Planning Act [ROG]; Annex 4 and Annex 6 of the Environmental Impact Assessment Act [UVPG]; and s 1, s 6(1), s 28, No 1, s 31(2), sentence 1, No 2, sentence 2, s 45a(2), No 3, s 45b(2), s 45h(1), sentence 1, and s 96(1), sentence 3, of the Federal Water Act [WHG].

a manner which needs to be identified in legal terms;[13] this is already required by respect for democratically elected legislators.[14]

2. THE GENESIS OF SUSTAINABILITY

2.1 First Attempts at Sustainability

If one takes a look back into the past in order to describe the attempt of sustainability to exert an influence, one already sees that its historic roots are rather difficult to pinpoint. It is at least proven that the fundamental concept underlying sustainability reaches back into ancient times.[15] The legal institution of usufruct in Roman law already incorporated the principle that a thing which belongs to a third party is to be used and deployed in such a way that its substance is conserved.[16] And in the Middle Ages too, people living in Central Europe recognised that almost completely clearing the forests between 1300 and 1350 would have severe negative consequences. They therefore decided to fundamentally change the way in which they managed the forest as a resource in order to enable replacement trees to grow; they thus decided to act in a sustainable manner.[17]

2.2 The Linguistic Setting

If we add to these first historical approaches by taking a journey through time into our linguistic past, we first reach back to the economist Hans-Carl von Carlowitz in the Electorate of Saxony, who in his *Sylvicultura Oeconomica* called in 1713 for the "continuous stable and sustainable use" ("continuierliche beständige und nachhaltige Nutzung") of trees in forest management.[18] Von

13 Erbguth, above n 9, at 1083.

14 A Glaser *Nachhaltige Entwicklung und Demokratie* (2006) at 53; E Rehbinder in K-P Dolde (ed) *Umweltrecht im Wandel* (Erich Schmidt Verlag, Berlin, 2001) 721 at 738.

15 J Soentgen (2016) 25(2) Gaia 117.

16 "Usus fractus est ius alienis rebus utendi fruendi salva rerum substantia" ("usufruct is the right to use a thing belonging to another, whilst conserving the substance of the thing"); compare on this P Krüger and T Mommsen *Corpus iuris civilis* (1889) at 13.

17 W Abel *Die Wüstungen des ausgehenden Mittelalters* (1976); K Bosselmann *The Principle of Sustainability: Transforming Law and Governance* (2nd ed, Routledge, New York, 2017) at 12.

18 H von Carlowitz *Sylvicultura Oeconomica, oder haußwirthliche Nachricht und naturmäßige Anweisung zur wilden Baum-Zucht* (1713) (quoted from the 2nd ed, 1732, at 105ff).

Carlowitz probably derived the German adjective "nachhaltig" ("sustainable") from the much older verb "nachhalten", which was first documented as long ago as 1300.[19] Even if, in linguistic terms, sustainability had found its way into other sciences by the 20th century, such as educational theory[20] or the law on bankruptcy,[21] it remained a specialist term that was used in forest management in the German-speaking area.[22] This is also where the bridge was built to Anglo-Saxon law, in the area of influence of which the term "sustained yield" was used from the beginning of the 20th century.[23] At that time, the definition of sustainability was still broad in nature, but also strikingly simple:[24] an (ecological) resource is only to be subject to such strain that it is not placed at risk itself.[25]

2.3 The Breakthrough in International Law and Enrichment of Content

The term "sustainability" did not shed its forest management chains until 1972. For the first time, the report penned by Donella and Dennis Meadows, Jorgen Randers and William W Behrens III entitled *The Limits to Growth*,[26] which had been commissioned by the Club of Rome, places sustainability in a broader global context in terms of the world economy. The authors reach the following conclusion: "It is possible to alter these growth trends and establish a condition of ecological and economical stability that is *sustainable* far into the future",[27] and thus seek to establish a world order "that is *sustainable* without sudden and uncontrollable collapse".[28] Sustainability is now integrated into a structure of relationships with economics and other factors that are relevant in terms of global politics. This means that the states shoulder an ecological

19 D Klippel and M Otto "Nachhaltigkeit und Rechtsgeschichte" in W Kahl (ed) *Nachhaltigkeit als Verbundbegriff* (Mohr Siebeck, Tübingen, 2008) 39 at 45.
20 J Dolch *Nachhaltigkeit und Lebenswirksamkeit des Unterrichtserfolgs, Vierteljahresschrift für wissenschaftliche Pädagogik* (1953) at 187ff.
21 H Krohn *Die Nachhaltigkeit der konkursmäßigen Feststellung* (1933).
22 Klippel and Otto, above n 19, at 45.
23 U Grober "Modewort mit tiefen Wurzeln — kleine Begriffsgeschichte von 'sustainability' und 'Nachhaltigkeit'" (2003) Jahrbuch Ökologie 167.
24 A Grunwald and J Kopfmüller *Nachhaltigkeit* (2012) at 18ff; Sachverständigenrat für Umweltfragen *Umweltgutachten 2008*; E Hofmann "Nachhaltigkeit und prozedurale Entscheidungsebene" in W Kahl (ed) *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck, Tübingen, 2016) 299 at 300; Kahl, above n 1, at 3ff.
25 Glaser, above n 14, at 43.
26 D Mellows, D Mellows, J Randers and WW Behrens III *The Limits to Growth* (Universe Books, New York, 1972).
27 Mellows and others, above n 26, at 23 (emphasis added).
28 At 158 (emphasis added).

responsibility for the future,[29] and this also found its way into the report of the World Commission on Environment and Development, chaired by the then Norwegian Prime Minister Gro Harlem Brundtland, under the umbrella term "sustainability".[30]

Sustainability was able to make its major breakthrough in global political terms in 1992. The Rio Declaration that was adopted following on from the United Nations Conference on Environment and Development elevated sustainability to become the leading principle of the development of international law.[31] With its mandate that "States and people shall cooperate … in the further development of international law in the field of sustainable development", it had yet to take on the character of a binding international law,[32] being only a policy recommendation which in thematic terms was primarily incorporated into the development policy context of the Rio Declaration.[33] In terms of international law, sustainability is ever increasingly coming to be understood as a cross-sectoral principle. The ecocentric approach is holistically supplemented by social and economic components, thus casting the concept of sustainability in a more multidimensional light.[34] Whilst, first of all, solely ecological interests within the resource-conserving (one-dimensional) concept of sustainability set themselves up as a restriction on economic profit maximisation, the three-dimensional approach, which was added later, requires consideration and a process of comprehensive balancing of economic and social interests.[35] This development process — the metamorphosis of sustainability — continues

29 International Development Strategy for the Third United Nations Development Decade of 5 December 1980, para 41 (UN Doc A/RES/35/56); Preamble, art I, para 4 of the World Charter for Nature (UN Doc A/RES/37/7).

30 World Commission on Environment and Development *Our Common Future* (Oxford University Press, Oxford, 1987).

31 Rio Declaration on Environment and Development of 12 August 1992 (UN Doc A/CONF/151/26/Rev 1).

32 D Murswiek "Nachhaltigkeit" (2002) NuR 641 at 644; M Ruffert "Das Umweltvölkerrecht im Spiegel der Erklärung von Rio und der Agenda 21" (1993) Zeitschrift für Umweltrecht [ZUR] 208 at 214.

33 KF Gärditz "Nachhaltigkeit und Völkerrecht" in W Kahl (ed) *Nachhaltigkeit als Verbundbegriff* (Mohr Siebeck, Tübingen, 2008) 137 at 138.

34 R Sparwasser, R Engel and A Voßkuhle *Umweltrecht* (5th ed, CF Müller, Heidelberg, 2003), section 2, para 23; Erbguth, above n 9, at 1083ff; P Sieben (2003) NVwZ 1173 at 1174ff; KF Gärditz "Nachhaltigkeit durch Partizipation der Öffentlichkeit" in W Kahl (ed) *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck, Tübingen, 2016) 351 at 351.

35 W Kahl and A Glaser in K Lange (ed) *Nachhaltigkeit im Recht* (2003) 9 at 9; J Kersten *Das Anthropozän-Konzept* (Nomos Verlag, Baden-Baden, 2014) at 45. Gärditz, above n 33, at 140ff, votes for the consideration of a fourth pillar of cultural interests.

unabated: in the course of the subsequent environmental conferences,[36] the time horizon of the resource-conserving approach is expanded to include an intergenerational, dynamic perspective (intertemporary justice), and the global scope of the principle is made clearer.[37] The concept of sustainability thus mutated at international law level to become a fundamental rational orientation and guide to explore the ubiquitous conflicts of interest that rage within modern societies in a tradition with compensatory principles, such as the principle of proportionality, and in doing so to lose sight of neither the bundle of interests of current and future generations (intergenerational justice), nor of the different natures in the interests of industrial and developing countries.[38]

Today, the concept of sustainability and the guide[39] of sustainable development are found in many international agreements, and exert an influence on international environmental law in particular. This concept has for instance become part of the Convention on Biological Diversity,[40] the Framework Convention on Climate Change,[41] the Convention to Combat Desertification,[42] as well as finally the Paris Convention on Climate Change.[43] This may be rightly described as a general concept of international law in its early days.[44]

36 Compare on this A Ingold "Strategien und Leitbilder nachhaltiger Entwicklung" in W Kahl (ed) *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck, Tübingen, 2016) 117 at 125ff.

37 Ingold, above n 36, at 125; G Michelsen and M Adomßent "Nachhaltige Entwicklung: Hintergründe und Zusammenhänge" in H Heinrichs and G Michelsen (eds) *Nachhaltigkeitswissenschaften* (2014) 3 at 13; U Beyerlin and T Marauhn *International Environmental Law* (Hart Publishing, Oxford, 2011) at 83.

38 V Eichener, R Heinze and H Voelzkow in R Voigt (ed) *Abschied vom Staat — Rückkehr zum Staat?* (Nomos Verlag, Baden-Baden, 1993) 393; I Appel "Staatsziel Nachhaltigkeit in das Grundgesetz?" in W Kahl (ed) *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck, Tübingen, 2016) 83 at 83; Bosselmann, above n 17, at 54ff; T Schomerus "Nachhaltigkeit aus rechtlicher Perspektive" in H Heinrichs and G Michelsen (eds) *Nachhaltigkeitswissenschaften* (2014) 290 at 293ff.

39 On working with models, A Voßkuhle in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle *Grundlagen des Verwaltungsrechts* (2012), vol I, section 1, para 42.

40 (1993) Federal Law Gazette [BGBl], Part II, No 32, 1742ff.

41 The text of the Convention can be downloaded at <unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf>.

42 The text of the Convention can be downloaded at <http://www2.unccd.int/sites/default/files/relevant-links/2017-01/UNCCD_Convention_ENG_0.pdf>.

43 The text of the Convention can be downloaded at <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>; compare on this C Kreuter-Kirchhof (2017) DVBl 97.

44 Compare on this J Monien *Prinzipien als Wegbereiter eines globalen Umweltrechts?* (2014) at 155ff, 189ff; Beyerlin and Marauhn, above n 37, at 73ff; W Kahl "Einleitung" in W Kahl (ed) *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck, Tübingen, 2016) 1 at 4; going further, M Schurmans "Sustainable Development is Emerging as a Core Tenet of WTO Case Law. To What Extent has

3. SUSTAINABILITY IN GERMAN ADMINISTRATIVE LAW

3.1 Inclusion within the Framework of European and Constitutional Law

Starting at the level of international law, the contents of the concept of sustainability have found their way into German administrative law. But we should not overlook the fact that German administrative law and international law are not the only partners here. The German legal area is also characterised by the considerable influence exerted by European law (the Europeanisation of the law).[45] Apart from that, national administrative law is part of a constitutional framework which it needs to respect, and the interpretations of which impact on "simple" non-constitutional law.[46] In the same way as constitutional law, European law may hence help to set the standard for an understanding of sustainability under administrative law.

The Member States of the European Union have taken up the idea of sustainability, and have undertaken towards third parties in art 3(5) of the Treaty on European Union (TEU) to engage in global, sustainable development. Moreover, they have agreed in accordance with art 11 of the Treaty on the Functioning of the European Union (TFEU), in their internal relations, to integrate environmental protection requirements into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.[47] Finally, sustainability has taken its place in art 37 of the Charter of Fundamental Rights of the European Union,[48] thus also being repeatedly reflected in the secondary legal acts of the European Union.[49]

it Helped Enshrine this as a Legal Concept?" (2015) 24(2) European Energy and Environmental Law Review 28.

45 Compare on this M Kment *Grenzüberschreitendes Verwaltungshandeln* (2010) at 16ff; R Wahl in I Appel and G Hermes (eds) *Mensch — Staat — Umwelt* (Duncker & Humblot, Berlin, 2008) 135 at 139; W Schroeder *Das Gemeinschaftsrechtssystem* (2002) at 104ff.

46 Federal Constitutional Court, judgment of 15 November 1958 — 1 BvR 400/51 —, 7 BVerfGE 198; Federal Constitutional Court, judgment of 25 February 1975 — 1 BvF 1/74 —, 39 BVerfGE 1 at 41ff.

47 E Wagner (2016) Zeitschrift für Europäisches Umwelt- und Planungsrecht [EurUP] 121; A Epiney "Nachhaltigkeitsprinzip und Integrationsprinzip" in W Kahl (ed) *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck, Tübingen, 2016) 103 at 104ff; T Attendorn (2012) NVwZ 1569 at 1569.

48 Compare on this HD Jarass (2011) ZUR 563 at 564ff; H-W Rengeling *Festschrift Kloepfer* (2013) 161.

49 S Schlacke "Nachhaltigkeit durch Umweltprüfungen" in W Kahl (ed) *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck, Tübingen, 2016) 335 at 338.

Unlike some foreign constitutions,[50] the Federal Republic of Germany has not explicitly incorporated the term "sustainability" into its constitutional law (Grundgesetz — Basic Law). Having said that, art 20a of the Basic Law contains a sub-function of the model of sustainability, namely intergenerational protection of the natural foundations of life as a form of expression of responsibility towards the future and for the long term.[51] Moreover, the "limits of borrowing" that are enshrined in arts 109(3) and 115(2) of the Basic Law anchor a sub-element of sustainability, namely financial sustainability, in the Basic Law.[52] The concept of sustainability, which is constitutionally guaranteed in segments, hence focuses on targeting the legislature, which in turn is to implement the sustainability obligations, in the shape of optimisation mandates, and hence to counter a major worsening of the objects under its protection.[53] The legislature is thus entrusted with the organisation and coordination of the various real development threads in the light of the concept of sustainability. It is tasked with guaranteeing methods and instruments, but is to provide at least a structuring framework, in order to facilitate a positive development of real life, despite uncertainties and incalculabilities, in a setting that is full of complexities, a development that is tenable in the long term and which can be determined with regard to its consequences.[54] In addition to the (moderate) issuance of norms, the legislature has reacted to this, in particular by drawing up sustainability strategies[55] which bring across the goals which it envisions, and increasingly provided as soft-law control services for legal practitioners;[56]

50 See, for instance, art 6 of the French Constitution and art 2, para 2 of the Swiss Constitution; compare on this Glaser, above n 14, at 74ff, 364ff. See also, for more detail, P Häberle "Nachhaltigkeit und Gemeineuropäisches Verfassungsrecht — eine Textstufenanalyse" in W Kahl (ed) *Nachhaltigkeit als Verbundbegriff* (Mohr Siebeck, Tübingen, 2008) 180.

51 W Frenz (1999) UTR 37 at 40ff; J Brehme *Privatisierung und Regulierung der öffentlichen Wasserversorgung* (2010) at 332; CF Gethmann, M Kloepfer and HG Nutzinger *Langzeitverantwortung im Umweltstaat* (1993); M Kloepfer (1996) DVBl 73 at 78; D von Bubnoff *Der Schutz der künftigen Generationen im deutschen Umweltrecht* (2001) at 62ff.

52 P Kirchhof *Deutschland im Schuldensog* (2012) at 93ff; H Kube "Nachhaltigkeit und parlamentarische Demokratie" in W Kahl (ed) *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck, Tübingen, 2016) 137 at 146ff; Kahl, above n 44, at 13ff.

53 E Rehbinder (2002) NVwZ 657 at 660; Schlacke, above n 49, at 338.

54 Appel, above n 38, at 83ff.

55 Federal Government *Perspektiven für Deutschland. Unsere Strategie für eine nachhaltige Entwicklung* (Bundestag printed paper [BT-Drs] 14/8453); Federal Government *Nationale Nachhaltigkeitsstrategie. Fortschrittsbericht 2012* (BT-Drs 17/8721); Federal Government *Eine Agenda für den Wandel zu nachhaltiger Entwicklung weltweit* (BT-Drs 18/3604).

56 Compare U Volkmann (2009) 134 Archiv des öffentlichen Rechts [AöR] 157 at 175.

in some instances, the case law also takes into account the models which have been offered in order to take up the legislative objectives in a compressed manner.[57]

3.2 The Normative Inclusion of Sustainability in German Administrative Provisions, in Particular in Environmental and Planning Law

The legal construction of the normative control levels, as well as the interaction between the control instruments, is characterised in German administrative law by a strikingly similar process of stratification and combination. Similar to an umbrella construction, one finds there first of all a general Administrative Procedure Act (Verwaltungsverfahrensgesetz — VwVfG), applying to all areas, which holds the fundamental elements of administrative law at the ready, and is then supplemented by nuanced specialist legislation. What is more, the respective approvals under the specialist legislation (also referred to as planning approval in some instances) do not work without involvement in pre-emptive plans that build a framework.

This makes it all the more astonishing that German administrative law does not embrace the concept of sustainability in the above-mentioned general Administrative Procedure Act applying to all areas, but instead leaves this to the special fields of administrative law. One thus finds mostly abstractly worded contents — for instance in the law on the energy industry, in the law on the forest and on hunting, in the law on nature conservation and soil protection, as well as in the planning law fields of regional planning and construction law, and in many other fields besides.[58] Generally positioned at the start of the law, as objectives or models they are to orientate the respective sub-areas of special administrative law towards the goal of sustainability.[59] An overview of the norms enables us to see that the planning law norms typically have inherent to them a *three-dimensional* orientation of the principle of sustainability, and hence seek to strike a balance between ecological interests and other relevant interests that oppose them,[60] whilst the environmental and energy regulations which are not orientated towards planning are devoted first and foremost towards a primarily resource-conserving, *one-dimensional* understanding of sustainability.[61] In the latter case, it is possible to make out a relativisation

57 Ingold, above n 36, at 122; similarly, C Franzius in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle *Grundlagen des Verwaltungsrechts* (2012), vol I, section 4, para 24.

58 See the detailed description at part 1.2 above.

59 G Beaucamp *Das Konzept der zukunftsfähigen Entwicklung im Recht* (2002) at 241ff.

60 Erbguth, above n 9, at 1084.

61 Schlacke, above n 49, at 339.

of the exclusively ecologically interpreted concept of sustainability (towards a three-dimensional approach) at best in terms of the fact that, in some legal Acts, objectives other than sustainable development are designated which do not always run homogeneously with sustainability.[62]

3.3 Shortcomings in Impact in German Environmental and Planning Law

In practice, it is rather difficult to ascertain the returns offered by this legislative construction.[63] The question remains above all as to whether the abstractly declared sustainability interests actually exert a major influence on the enforcement of the above norms of administrative law[64] — that is their practical implementation.[65] Unlike other legal principles that one encounters in German environmental law, such as the precautionary principle, the cooperation principle or the polluter-pays principle,[66] the concept of sustainability has no instrumental confirmation — for instance in the shape of commandments and prohibitions; at best it is taken up by these instruments in particular cases.[67] What is more, recent research on sustainability in German administrative law unanimously makes it clear how heavily dependent the principle of sustainability is on the legislative structure in administrative law.[68] It is stated very clearly: "Without any subsequent normative detailing in concrete contexts, sustainability … remains too abstract to legally programme decisions. Turned in the positive sense, sustainability is effective where it does not exaggerate abstract forms of intertemporary common good responsibility, but is made real through concrete legislation. Sustainability is made operable by attributing the act and its legal consequence in a comprehensible regulatory context." ("Ohne normative Nachverdichtung in konkreten Kontexten bleibt Nachhaltigkeit … zu abstrakt, Entscheidungen rechtlich zu programmieren. Positiv gewendet

62 Compare on this, for instance, s 1(1) of the Renewable Energy Act and s 1 of the Federal Forests Act.

63 W Söfker in Ernst, Zinkahn, Bielenberg and Krautzberger (eds) *BauGB* (2017), section 1, para 103.

64 See part 2 above.

65 W Durner "Nachhaltigkeit durch Konzentration und Integration von Verfahren" in W Kahl (ed) *Nachhaltigkeit durch Organisation und Verfahren* (Mohr Siebeck, Tübingen, 2016) 317 at 318.

66 See on this C Calliess *Rechtsstaat und Umweltstaat* (2001) at 153ff; B Stüer *Handbuch des Bau- und Fachplanungsrechts* (2015), para 4607ff; E Rehbinder *Festschrift Sendler* (1991) 269.

67 E Rehbinder (2002) NVwZ 657 at 660ff; Schlacke, above n 49, at 339. Erbguth, above n 9, at 1085 speaks of a "supplementary relationship". Compare, for instance, U Ramsauer in H-J Koch (ed) *Umweltrecht* (4th ed, Vahlen, München, 2014), section 3, para 87ff on direct and indirect control of conduct.

68 See Durner, above n 65, at 319; Schlacke, above n 49, at 339ff; Gärditz, above n 33, at 352. Similarly, P Sieben (2003) NVwZ 1173 at 1176.

ist Nachhaltigkeit gerade dort wirksam, wo sie nicht abstrakte Formen intertemporärer Gemeinwohlverantwortung überhöht, sondern durch konkrete Gesetzgebung vertatbestandlicht wird. Nachhaltigkeit wird durch Zuordnung von Tatbestand und Rechtsfolge in einem überschaubaren Regelungskontext operabel gemacht.")[69] This implementation of sustainability is however lacking in German environmental and planning law at present. We also speak of the "lack of contours of the concept of sustainability … in German environmental and planning law" ("Konturenlosigkeit des Nachhaltigkeitsgebots … im deutschen Umwelt- und Planungsrecht").[70]

If we take a closer look at German administrative law, we (unfortunately) find that the detailed dogma regarding the concept of sustainability, as it can be found at international, European and in some cases constitutional level,[71] is not taken on into German administrative law. The dogma declines given that sustainability — particularly in the law on planning — is indifferently taken up as a noble goal into the canon of the models and legal Acts, only to lose its way there in the tumult of abstract planning principles, guidelines and general planning goals without number.[72] In the concrete, bitterly waged battle for the best equalisation of interests, it is unfortunately "weighed away" with an easy hand.[73] The former President of the Federal Administrative Court Eckart Hien coined the term "sustainable grieving" ("nachhaltige Trauerarbeit") for this. It is intended to make it clear that not much is gained with the allocation of an unspecifically structured goal for the common good (such as sustainability) into the ranks of norms related to planning goals and of fundamental norms, but only an *argumentative* debate is initiated which in practice as a matter of principle leads to a justification as to why the (sustainability) interests in question must in particular give way to other specialist preferences.[74]

Unlike planning law, the principle of sustainability in classical environmental law (emission control or nature conservation) is largely reduced to its resource-conserving components, and its potential is hence reduced. In

69 Gärditz, above n 33, at 352.

70 Schlacke, above n 49, at 339ff; similarly, with a fundamental tendency, Eifert, above n 10, at 371.

71 See parts 2.3 and 3.1 above.

72 See only the comprehensive stipulations contained in s 1(5) and (6) as well as s 1a of the Federal Building Code and ss 1(1)–(3) and 2(2) of the Regional Planning Act; compare on this HD Jarass and M Kment *BauGB* (2017), section 1, para 22ff, para 39ff; section 1a, para 1ff; Spannowsky in Spannowsky, Runkel and Goppel *ROG* (2010), section 2, para 27ff.

73 H Johlen (2000) Wirtschaft und Verwaltung [WiVerw] 35 at 43, 49; G Beaucamp *Das Konzept der zukünftigen Entwicklung im Recht* (Mohr Siebeck, Tübingen, 2002) at 265ff; E Schmidt-Aßmann *NuR* (1979) at 1; Durner, above n 65, at 331.

74 Compare on this B Stüer and M Krautzberger (2004) DVBl 914 at 923ff; Durner, above n 65, at 331.

most cases, there is no sensitivity towards the future with regard to social and economic interests, which are understood more as political topics and left to the legislature, but not lifted to become a standard of project-related administrative decisions.[75] This is certainly a trigger for the scepticism that is frequently found among project funders and individuals responsible for projects with regard to sustainability, which is understood more as a disruptive element.

This conclusion regarding the German legal area may come up against the objection that German administrative law helps the idea of sustainability to be implemented in practice with a large number of different impact assessments (environmental impact assessment, strategic environmental assessment, FFH (flora fauna habitat) impact assessment, assessment of encroachment under the law on nature conservation, and so on), multiphase participation arrangements, integration and concentration requirements, as well as expanded legal protection opportunities for environmental associations and the general public. Such an argumentation however conceals the fact that many of the instruments that have been mentioned as such *can* certainly promote the sustainability approach, but nonetheless are only attributed to the principle of sustainability (after the fact in some cases), without having been specifically designed to do so. This point of view thus gives away the potential of the sustainability concept, and conceals the shortcomings in its implementation, which are also particularly revealed when it comes to the actual administrative decision-making process, which is intended to lead to the approval of the project, plan licensing or planning. In this instance, the instruments that have been provided by administrative law continue to find it difficult to take up the future and world perspective that is inherent in the idea of sustainability. Even weighing-up planning decisions, which in Germany are certainly accustomed to working with prognoses,[76] have so far not yet offered a well-thought-out decision-making platform in order to effectively take up the time perspective and global sustainability impulses. These necessary sustainability standards are however still missing at present.[77] This is an all the more precarious situation, given that particularly larger

75 Ramsauer, above n 67, section 3, para 49; Gärditz, above n 33, at 357; G Hermes *Festschrift Koch* (2014) 283 at 288ff with regard to financial aspects in the plan licensing of major projects.

76 Federal Administrative Court, judgment of 7 July 1978 — IV C 79/76 —, 56 BVerwGE 110 at 121; Federal Administrative Court, judgment of 26 March 1981 — 3 C 134/79 —, 62 BVerwGE 86 at 107ff; Federal Administrative Court, judgment of 30 May 1984 — 4 C 58/81 —, 69 BVerwGE 256 at 272; Federal Administrative Court, judgment of 16 September 2014 — 4 BN 11/14 —, Juris, para 6; compare also W Hoppe in Hoppe, Bönker and Grotefels *Öffentliches Baurecht* (2010), section 7, para 107ff; K Finkelnburg, K-M Ortloff and M Kment *Öffentliches Baurecht* (2017), section 5, para 53; GN Jochum *Amtshaftung für Abwägungs- und Prognosefehler in der Bauleitplanung* (1994) at 121ff.

77 Gärditz, above n 33, at 360.

infrastructure projects with an environmental relevance and other major projects could be controlled in interdisciplinary terms by means of planning-related legal Acts, in particular regional policy plans or federal sectoral planning.[78]

3.4 The Path to Detailing Sustainability in Terms of Content

3.4.1 The requirement to structure established priorities in legal terms

The legal debate on the implementation of sustainability should, in this author's view, aim to ensure that it comes into the spotlight to an even greater degree in German environmental and planning law. But how to approach the shortcomings that have been revealed? What efforts may one demand of the German legislature in order to tangibly strengthen the principle of sustainability, particularly in the above conflict of interests? A conceivable solution might consist in lending clearer contours to sustainability in order to position the definition of the term sustainability, which otherwise is extremely malleable, more exactly with regard to the situation. Depending on the specific contexts in which sustainability is to operate (water law, emission control, overall planning, and so on), the "margins" of sustainability would have to be named and sharpened via directional political decisions in order to make them (more) tangible for legal practitioners. Within the conflict of interests,[79] it appears above all to require legal and hence political priorities to be set in order to define the rank of sustainability (more) clearly. "The abstract guiding idea then takes a back seat vis-à-vis concrete standards, but in turn attains real chances of becoming implemented in the democratic legislative process." ("Die abstrakte Leitidee tritt dann hinter konkreten Maßstäben zurück, erlangt dafür aber reelle Durchsetzungschancen im demokratischen Rechtssetzungsprozess)."[80]

3.4.2 The New Zealand Resource Management Act 1991 as a reference

No practical experience has yet been gathered in Germany with regard to this approach. Other nation-states have taken this step,[81] including New Zealand. The New Zealand legislature opted at an early stage in the Resource Management Act 1991 (RMA) to make the principle of sustainability one of the central structural principles of environmental and planning law as a whole,

78 Durner, above n 65, at 323; M Kment *Rechtsschutz im Hinblick auf Raumordnungspläne* (2002) at 71ff.
79 See part 3.3 above.
80 Gärditz, above n 33, at 352.
81 Compare Häberle, above n 50, on the implementation of sustainability in other legal systems at constitutional level.

and to largely orientate administrative activity in line with this principle.[82] The RMA is part of a fundamental project of state reform, and is furthermore understood as a counter-model of the country's centrally managed infrastructure and allocation planning, which previously met with little interest with regard to environmental protection objectives, these being orientated exclusively towards the economic development and exploitation of the natural environment.[83] Since 1991, the RMA has aimed to effect integrated resource management (land, minerals, water, energy, and so on) which is orientated in line with ecological frameworks[84] and takes up the sustainability concept;[85] this also led to the selection of the term "sustainable management", which is central to the RMA.[86] In accordance with s 5(2) of the RMA, the New Zealand legislature understands this duo of "sustainable management" as "managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment". The fundamental premise of s 5(2) of the RMA is supplemented in s 6 of the Act by eight matters of national importance, such as the preservation of the natural character of the coastal environment, the wetlands, and lakes and rivers (a) or the protection of outstanding natural features and landscapes (b). Finally, in accordance with s 7 of the RMA, other matters which persons exercising functions and powers under the Act "shall have particular regard to" range from the maintenance and enhancement of amenity values (c) and the quality of the environment (f), the effects of climate change (i) through the protection of the habitat of trout and salmon (h), to the Māori ethic of guardianship and stewardship ("kaitiakitanga").

82 But critically, U Klein "Integrated Resource Management in New Zealand — A Juridical Analysis of Policy, Plan and Rule Making under the RMA" (2001) 5 NZJEL 1 at 19, who understands New Zealand environmental planning as being only ecologically comprehensive to a limited degree.

83 D Fisher (1984) Journal for European Environmental & Planning Law 387 at 388ff; U Klein *Integrierte Umweltplanung: Das Neuseeländische Modell* (2004) at 86ff.

84 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 at [24].

85 I Carlman "The Resource Management Act 1991 Through External Eyes" (2007) 11 NZJEL 181 at 182.

86 DP Grinlinton in K Bosselmann and DP Grinlinton (eds) *Environmental Law for a Sustainable Society* (NZCEL, Auckland, 2002) 19 at 26.

If one factors into this the fact that the RMA subjects the entire environmental and resource-relevant sector of New Zealand to a threefold integrated planning system which directly controls the use of resources (such as use of land, soil, or water) and/or directly leads it to any approval that may be needed,[87] ss 6 and 7 of the RMA are highly reminiscent of the weighing up of abstractly designated matters which are to guide decision-makers when carrying out their tasks, which are inherent in German environmental and planning law, but can frequently achieve but little solely because of the great amount and situation-dependent dichotomy.[88] This first impression is correct in the sense that the matters which are listed in ss 6 and 7 of the RMA do not bindingly determine the decision-making process in New Zealand, but — in the same way as German planning principles and planning guidelines — are also intended to guide, and are hence to be weighed.[89] This assumption is however to be corrected in the sense that — unlike in Germany — the matters listed in ss 6 and 7 of the RMA are largely environmental concerns and/or show a strong link to the ecological system.[90]

Regardless of this, the focus of the further analysis of New Zealand law is to be placed on s 5(2) of the RMA, which is the central provision on which the New Zealand sustainability approach is based. The unambiguous profession of the New Zealand legislature to the use, development and protection of natural and physical resources, which are to serve the social, economic and cultural well-being of the population (management aspect), is supplemented to include a succinct ecological function of the RMA: to sustain the potential of natural and physical resources to meet the needs of future generations (a), to safeguard the life-supporting capacity of air, water, soil, and ecosystems (b), as well as avoiding, remedying, or mitigating any adverse effects of activities on the environment (c). This legislative implementation of the concept of sustainability at a medium level of abstraction has not prevented New Zealand legal specialists from disagreeing amongst themselves as to the relationship between the individual mosaics within the principle of sustainability in New Zealand. Does s 5(2) of the RMA lean more towards a narrower, ecologically orientated understanding that subjects economic, social

87 Compare on this G Palmer [2016] NZLJ 46; DP Grinlinton in V Mauerdorfer (ed) *Legal Aspects of Sustainable Development* (2016) 423 at 426ff.

88 See s 1(5) and (6) and s 1a of the Federal Building Code and ss 1(1)–(3) and 2(2) of the Regional Planning Act; compare on this Jarass and Kment, above n 72, section 1, para 22ff, para 39ff; section 1a, para 1ff; Spannowsky, above n 72, section 2, para 27ff.

89 *Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220 at 228.

90 Grinlinton, above n 87, at 433.

and cultural matters to an ecological objection ("bottom line" approach), or are the ecological matters that are taken up in s 5(2)(a)–(c) of the RMA not only related to intergenerational justice, but also to be placed within a broader balancing process of all involved interests (including economic, social and cultural matters), and do they thus naturally undergo a tangible relativisation ("overall broad judgement approach")?[91] Taking a look at the genesis of the Act reveals that the legislature shied away from answering this decisive question and made it possible to adopt either interpretation through an open choice of words ("while").[92] This triggered swivelling movements. First of all, the ecological reservations expressed in s 5(2)(a)–(c) of the RMA were subjected to a stricter understanding,[93] only to be tangibly weakened later on.[94] It was not until 2014 that the Supreme Court of New Zealand was able to counter this legal uncertainty which had gone on for years, but it selected an intermediary approach in the *King Salmon* case.[95] This approach was probably also taken for constitutional reasons related to the separation of powers, in order not to release the legislature from the responsibility to give clearer instructions, to leave the executive in its decision-making responsibility, and finally to not unnecessarily burden the structure of powers with pillars that had been knocked in by the Court.[96] In the view of the Supreme Court, s 5(2) of the RMA does not contain an "environmental bottom line" as such.[97] Nonetheless, binding environmental standards (bottom lines) which are not subject to any subsequent overall broad judgement approach can be developed in ministerial and executive plans on the basis of this statutory order.[98]

91 S Elias "Righting Environmental Justice" (RMLA, Salmon Lecture, 2013) at 11ff; G Palmer [2016] NZLJ 2; Grinlinton, above n 86, at 27.

92 I Williams "The Resource Management Act 1991: Well Meant But Hardly Done" (2000) 9 Otago Law Review 673 at 678; J McLean "New Zealand's Resource Management Act 1991: Process With Purpose?" (1992) 7 Otago Law Review 538 at 545.

93 *New Zealand Rail Ltd v Marlborough District Council* [1993] 2 NZRMA 449 at 470; *Foxley Engineering Ltd v Wellington City Council* Planning Tribunal W 12/94 (16 March 1994) 40.

94 *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 at 93ff; *RFBPS of NZ Inc v Manawatu-Wanganui Regional Council* [1996] NZRMA 241 at 269.

95 Different assessment by G Palmer [2016] NZLJ 2: "matters were made as clear as it is possible to be" (in favour of a bottom line).

96 Elias, above n 91, at 12ff.

97 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 at [24c].

98 At [106]ff; compare on this also Grinlinton, above n 87, at 432.

4. CONCLUSIONS

If one attempts to draw conclusions from a comparison of the two legal systems, one first finds that it is possible to lend greater detail in legislative terms to the national understanding of sustainability and to progress beyond simply naming it and supplementing it in terms of soft law. Having said this, taking a look at New Zealand also makes it clear that such contouring at medium abstraction level must be carried out with great care, and that there is a need to avoid opening up one's flanks to allow undesirable relativisations to be carried out.

Finally — and this is also documented by the experience in New Zealand[99] — the key to enforcing the concept of sustainability however probably lies not solely in its statutory detailing, but in an evaluation of its significance by the legal practitioner. If the decision-maker is defensive with regard to the principle of sustainability, the concept of sustainability, particularly where there is considerable latitude for decision-making, will encounter only a slight echo in the executive control instruments (in particular when it comes to state plans); if the fundamental stance is open to sustainability, legal practitioners will be more willing to avail themselves of their latitude for decision-making in favour of the concept of sustainability.

This throws our gaze back to the beginning of this article. Sustainability should call not only for a profound process of rethinking, including a review and partial readjustment of the traditional political preference models, but should also require a willingness to carry it out in order for it to take full effect.

99 In detail, G Palmer [2016] NZLJ 46.