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Legal Certainty and Fundamental Rights

A Cross-Disciplinary Approach to Constitutional Principles in German and South African Law

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Comment: Sustainable Legislation

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I. Preliminary remarks

Jenny Hall describes in her article[1] the development of the principle of sustainability at the international level, its introduction into South African law and then addresses the question of how the principle of sustainability is "operationalized" in the application of the law. For this purpose, she examined a series of court rulings, which, in turn, were decided on the basis of the National Environmental Management Act (NEMA) in various cases concerning environmental protection. The analysis of this case law

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1 The oral presentation was delivered by *Jenny Hall* and *Sikhulile Ngcobo* together. This comment refers to the written contribution of *Jenny Hall* as submitted and published in this book, 257 et seqq.

shows that there is no clear line. Sometimes the ecological component is emphasized, in others the economic component of the sustainability principle is put into the foreground. The principle of sustainability is therefore, as a result, an indeterminate legal concept that does not provide sufficient legal certainty. While the author does not say it explicitly, she gives the reader the impression that the sustainability principle is used by South African courts to justify – ultimately even arbitrarily – political decisions in law.

Whether or not this impression is correct, I cannot assess – for I am neither familiar with South African environmental law nor do I know the specific court decisions. Viewed from a distance, however, I consider it necessary to relativize these findings for three reasons: First, it is in principle difficult to try to understand the "actual legal situation" by means of a casuistic approach studying some court decisions and to expect coherence in this respect. Courts decide on concrete issues of dispute. With regard to the factual circumstances, they are largely dependent on the submissions of the individual parties. Therefore, one should not expect to derive abstract-general legal principles from court rulings that might, beyond the concrete dispute, even clarify or avoid all other future issues of dispute. Secondly, the principle of sustainability must not be equated with the aim to fundamentally enhance environmental protection. As the contribution has correctly pointed out, the principle has, in addition to the ecological element, also a social and an economic element. If in the case law at hand sometimes the one and at times the other element prevails, it is therefore not objectionable in general. Thirdly, the steering effects of general principles simply must not be overestimated. This applies all the more if such principles – as is the case with the principle of sustainability – contain several sub-objectives of government action, which in turn are in a relationship of mutual tension. Neither the embodiment of the sustainability principle in the constitution nor its repetition in a legal statute may lead to the expectation that this will completely and exclusively determine a concrete approval decision in favour of environmental protection. Precisely because the principle has different elements, the only thing that can be derived from it is, at most, the requirement to give proper consideration to the various interests in the decision-making procedure, however not the anticipation of a specific result of the decision. Therefore, the sustainability principle is neither the only nor the decisive legal standard for decisions of the executive and the judiciary.

II. Sustainability in German and European environmental law

Against this background, I will not comment on the individual cases that have been described in the contribution of *Hall*, but rather provide a very brief overview of the situation in Germany and the EU, which is comparable in principle.

1. Sustainability in German environmental law

The principle of sustainability was enshrined in the Basic Law (*Grundgesetz* – GG) in 1994. At that time, Article 20a of the Basic Law introduced the state objective of environmental protection, which obliges the state to "protect the natural basis of life for future generations as well". The term "responsibility for future generations" is also described as an environmental law principle of sustainability. Some laws and ordinances have taken up this principle of sustainability. Surprisingly, however, not all laws on environmental protection make mention of it. For example, while Section 1 of the Federal Water Resources Act elevates the aim of sustainable water management to the central purpose of the entire water law and the Federal Nature Conservation Act refers to the "sustainable usability of natural resources", "sustainable soil fertility" or in general to "sustainable development" in various parts (but aside from that also makes reference to the aim of "sustainable energy supply" and "sustainable tourism" for instance), the Federal Immission Control Act makes no reference to it at all or only in the context of an authorization of the executive to issue a "biofuel sustainability ordinance". The principle of sustainability has instead been concretized further in urban development law and in spatial planning law in particular. In its pure form, the principle of sustainability is still reflected in the Federal Forest Act. This is because the principle of sustainability has been known in German (and Swiss) forestry since the second half of the 18th century. In this field, it is primarily a management principle. Put simply, it requires that only as many trees may be felled in a given period as will grow again in the same period. The English term "sustainable development" in the *Brundlandt*-report of 1987, which *Jenny Hall's* contribution correctly mentions, was therefore a translation of the German term sustainability.

2. Sustainability in EU law

At the level of the European Union, the principle of sustainability has been developed as a legal principle as well. Article 3 para. 3 of the Treaty on European Union (TEU) obliges the EU to work for the "sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment." Furthermore, Article 3 para. 5 of the TEU sets the goal of the "sustainable development of the Earth".

Closer focusing on environmental protection, the so-called cross-section clause of Article 11 of the Treaty on the Functioning of the European Union (TFEU) requires that environmental protection requirements must be taken into account when defining and implementing the Union's policies and activities, in particular with a view to promoting sustainable development. This provision is accompanied by Article 37 of the Charter of Fundamental Rights (the Charter): "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." Despite being enshrined in the Charter, this provision is not understood as a subjective right. Rather, it only legitimizes legal acts which promote environmental protection, even if they restrict fundamental rights. Given its function, Article 37 of the Charter is therefore not a fundamental right but a justification to restrict fundamental rights.

3. From three pillars of sustainability to 38 reference topics

Most importantly, however, I would like to point out that the issue of sustainability has also emancipated itself from environmental protection in Germany (and in the EU). Here, too, the three-pillar concept – aiming at striking a balance between the economic system, the social structure and the environment – has established itself in the political and academic debate.

A closer examination of the legal structure, however, reveals that each of these three objectives first of all stands for itself – there are environmental, economic and social sustainability requirements, each with different normative binding force. The principle of sustainability as such is not legally binding, it may rather be characterized as a political or ethical principle.

Instead, legally binding force is only achieved by concretizing the principle in corresponding laws.

In Germany, in addition to the aforementioned Article 20a of the Basic Law referring to environmental protection, the financial constitution must also be taken into account, which contains a "debt brake" capping public debt in Article 109 para. 3 and Article 115 of the Basic Law since 2009. Sustainability in this context means that future generations will have sufficient financial resources to shape the future in accordance with their respective political requirements. The principle of sustainability, understood as the scope of action of future generations, is thus rooted in the principle of democracy. In order to ensure that each generation has sufficient financial leeway, constitutional limits on national debt have been enshrined both in German law as well as at the level of the European Union. However, in politics as well as in the economic sciences not only the exact limits on public debt, but even their very basic purpose are being debated. In this respect, the fundamental message of the article by *Jenny Hall* is also confirmed by German and European law: The principle of sustainability – at least from a legal perspective – is in danger of degenerating into an empty formula that is filled with content depending on the political objective.

This applies all the more to the third pillar, social sustainability, which is from the very outset only indirectly anchored in the constitution. On the one hand, it is understood as a guarantee for a dignified human material sustenance and in this respect only seems to choose a different label for familiar content. However, it also contains a second component in which the basic idea of sustainability is expressed more strongly: the state social security systems must be designed in a way such as not to benefit the current beneficiaries at the expense of the current or future contributors. Here the principle of sustainability is complemented by the idea of intergenerational justice.

In Germany, these three subgoals are summarized and condensed into a common concept of the sustainability strategy, which was first adopted in 2002, revised in 2016 and again updated in 2018. It aims at making sustainable development the guiding principle of the Federal Government's policy and is therefore primarily a voluntary commitment. The three subgoals are measured by the sustainability strategy against a total of 38 key indicators, including poverty, land management, food security, health, air pollution, education, gender equality, water quality, resource conservation, innovation and distributive justice. This partial enumeration is deliberately not structured in terms of content, as the 38 areas cover almost all policy areas and read more like a promising program of a political party before

an election than a concept of a government setting priorities. In addition, the quantification of the objectives in the individual areas is not comprehensible – it is unclear why the contribution to climate financing should be doubled by 2020 compared to the sum of 2014 and not changed by another factor, particularly since it is just as unclear which measures are considered to contribute to climate financing. The same applies to the goal of "affordable housing" – here the goal of reducing the proportion of "overburdened persons" in the population to 13 percent by 2030 is proclaimed.

Overall, therefore, the sustainability strategy must not be overestimated. It can be considered as a management tool that aims at contributing to a holistic, integrative sustainability policy through management rules, the definition of objectives and the allocation and measurement of indicators. From a legal perspective, however, it should be noted that the binding effect of the strategy must be put into perspective in several respects: Firstly, the strategy has not been legally adopted. Secondly, insofar as it is at least a voluntary self-commitment, it misses its actual goal, namely to enable a long-term or at least longer-term planning, because it can at best bind new federal governments politically. Thirdly, its content and, in part, its objectives are to a large extent open to interpretation. What is meant by a "significant reduction" (in carbon dioxide emissions from public-sector vehicles) or what is meant by "innovation", for example, is ultimately left open by the sustainability strategy.

III. Sustainability as a procedural concept

Due to a lack of detailed substantive requirements, sustainability is primarily a procedural concept. Sustainability is a task, not a solution.[2] Sustainability is a permanent balancing process.[3] Such a proceduralisation of the concept of sustainability does justice to the complexity of its task. However, even if understood as a procedural instrument, the capability of the sustainability principle must not be overestimated. Its effectiveness largely depends on how the procedure is designed.

In this respect, the contribution of *Jenny Hall* shall first be taken into consideration again. Referring to the legal rulings on various cases from South Africa, she describes only the very last step in the implementation

2 *Meßerschmidt*, in: Kahl (ed.), Nachhaltigkeit durch Organisation und Verfahren (2016), 195, 198.

3 *Lepsius*, in: Kahl (ed.), Nachhaltigkeit als Verbundbegriff (2008), 326, 349.

and enforcement of the constitutional sustainability postulation. The principle of sustainability as a constitutional principle is primarily binding on the legislator. The legislator itself is required to take sustainability into account and to develop it further when drafting laws, especially in the field of environmental protection. However, the constitutional principle of sustainability hardly plays an independent role in the application and interpretation of the laws by the authorities and the courts. This is because they primarily apply the law as enshrined in the statutes. Only where the legislator leaves the authorities and courts room for discretion does the constitutional principle of sustainability gain importance, as an interpretative guideline under certain circumstances, but it is then as open in content as described and – rightly – criticized by *Jenny Hall* in her article. Whether and in how much detail the legislator provides guidelines, namely to the authorities, which after all still have adequate professional competence, or also to the courts, which alone have the competence to judge, is perhaps a question of constitutional law, but above all a question of constitutional culture. However, the lack of coherence in the jurisprudence of South African courts, which the author has criticized, will certainly be achieved sooner and better by further concretizing the legal requirements more precisely.

More important than the question to which extent the three state powers are bound by the constitutional principle of sustainability or can and may concretize it, is the question of the procedure in which the concept of sustainability is operationalized irrespective of its binding nature. A variety of models are conceivable here. The participation of associations and other interest groups[4] or even the entire public[5] is one possibility, the creation of sustainability councils another.[6] Both procedures emphasize above all the democratic component and aim primarily at maintaining public support. If, on the other hand, a scientifically defined objective is the primary objective, expert advice is a good option.[7] And, of course, all

4 On this cf. *Leschke*, in: Kahl (ed.), Nachhaltigkeit durch Organisation und Verfahren (2016), 235 et seqq.

5 *Gärditz*, in: Kahl (ed.), Nachhaltigkeit durch Organisation und Verfahren (2016), 351 et seqq.

6 See *Calliess*, in: Kahl (ed.), Nachhaltigkeit durch Organisation und Verfahren (2016), 275 et seqq.

7 See *Wischmeyer*, in: Kahl (ed.), Nachhaltigkeit durch Organisation und Verfahren (2016), 253 et seqq.

these components can be combined and ideally further developed into a "sustainable governance".[8]

IV. *Sustainability as a general guideline for legislation*

Germany took such a combined approach and in 2000 convened a Council for Sustainability, which in 2002 presented its first sustainability strategy "Perspectives for Germany" that – as already mentioned – was revised in 2016 and updated in 2018.

1. Internal guidelines of the Federal Government

In addition, the Common Rules of Procedure of the Federal Government (*Gemeinsame Geschäftsordnung der Bundesregierung* – GGO) were amended in 2009. In the drafting process of legislative proposals, the Federal Government is since then obliged under Section 44 para. 1 sentence 3 of the GGO to "explain whether the impacts of the project correspond to sustainable development, in particular what long-term effects the project has".

As can already be seen from the systematic placement of this provision within the GGO, the sustainability impact assessment is thus designed in form of an impact assessment of the law.[9] In contrast to the "normal" impact assessment of laws, however, it is longer-term oriented and focuses more strongly than the "normal" impact assessment on the undesirable side effects of a proposed law. Although the "normal" impact assessment of laws must also forecast and evaluate the unintended side effects in addition to the intended effects, the sustainability assessment attaches much greater importance to the – conceivable – side effects.

Moreover, the actual significance of the sustainability principle is well expressed in the wording of Section 44 para. 1 sentence 3 of the GGO. It is less concerned with concrete or even abstract specifications. It is insofar noteworthy that Section 44 para. 1 sentence 3 of the GGO does not provide any further specification of such effects, i.e. it does not refer to the

8 See *Reimer*, in: Kahl (ed.), Nachhaltigkeit durch Organisation und Verfahren (2016), 43 et seqq.

9 More detailed on this *Kahl*, in: Kluth and Krings (eds.), Gesetzgebung (2014), § 13, paras. 35 et seqq.

triad of environment, economy and social affairs, but takes into account all (possible) effects. Its specific feature however, lies much more in the time perspective: the "long-term" effects of projects. It certainly is a reasonable demand that explicitly expands the political time horizon, which is usually limited to one legislative period. The aim of Section 44 of the GGO is thus to add fact-oriented rationality to political rationality by means of the Rules of Procedure. The legislator – or more precisely: the government as the initiator of laws – should bear in mind the long-term consequences of the laws it creates and, if possible, should only choose measures that do not unduly narrow the scope of action for future generations.

Nevertheless, it must again be born in mind that the Common Rules of Procedure only bind the Federal Government when drafting bills. Neither the other constitutional bodies nor individual citizens, associations or companies can invoke the GGO. Thus, if the sustainability imperative has not been observed at all or only insufficiently met and if legislative proposals do not sufficiently take into account the long-term effects or if such effects have not been evaluated, this does not prevent the practical effectiveness of the law. As the Federal Government proposes about three-quarters of all enacted laws, the practical significance of the Common Rules of Procedure must certainly not be underestimated. However, even considering this, disregarding the Rules of Procedure does not lead to the unconstitutionality of a law. In addition, the provisions of the Rules of Procedure can be circumvented if legislative proposals are introduced disguised as parliamentary proposals in the German Bundestag or if they are initiated in parallel not by the Government, but by a parliamentary group in the Bundestag.

2. Institutional complementation in the German Bundestag

One special feature of the sustainability assessment according to Section 44 para. 1 sentence 3 of the GGO was the introduction of a Parliamentary Advisory Council for Sustainable Development at the German Bundestag in 2004. This is no regular committee and therefore does not decide on concrete draft laws. However, it is a special body with the task of accompanying strategies for sustainable development and monitoring the Federal Government with regard to sustainable development. In this respect, it is in close, inter-institutional contact with the Federal Government.

V. Conclusion: Disillusion

Despite the embodiment in positive law and the institutional embedding of the sustainability principle, it cannot be said even in Germany that the laws at federal and state level have become more sustainable than before. It is still true that what the respective majority considers to be right, is shaped into law and if the majority changes, what was previously enacted in the name of sustainability is changed or repealed in the very same name again later. The expectations in terms of sustainability seem to foremost increase the efforts made to justify a measure, but less to shape the content of the laws. The legislation follows its own, sometimes very different rationalities.[10] Does the sustainability principle above all create "much ado about nothing"?

The question cannot be answered. It cannot be answered for the reasons that were also the result of *Jenny Hall's* contribution: it is simply unclear what sustainability is meant to imply. The general idea behind sustainability is still clear: every generation must solve its own problems and must not burden them onto future generations. In this sense, the *Brundtland* Commission has already stated: "Sustainable development is development that meets the needs of present generations without compromising the ability of future generations to meet their own needs". But even this basic rule faces the problem of recognizing that it is impossible to define what the needs of future generations will be. While it is important to become aware of the – also long-term – consequences of government action, it would be wrong to label politically desirable action with the seal of sustainability and to exclude politically undesirable action as a violation of the principle of sustainability. Sustainability must not become a meta-argument that prevents the discussion of the concrete factual arguments. If it does, there is a real danger that it is used as a means to enforce goals that would, if pursued as such, not be capable of gaining majority support and enforceability.

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