



# The Constitutional Concepts of Sustainability and Dignity

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## Abstract

The principle of sustainability is generally taken as a good, but what does sustainability really mean? The notion of sustainability has been at the center of global governance debates for more than a decade and many countries across the world include sustainability in their constitutions. This paper argues that in order to understand the concept of sustainability in a constitutional context, we need to turn to the notion of dignity. The paper explores the concepts of sustainability and dignity and their meanings in the framework of climate justice and related questions and by discussing them in the context of Kantian and republican theory. In addition, the paper looks at intriguing court cases on the importance of nation states meeting their climate law duties. The paper concludes by exploring new uses of the sustainability concept. EU constitutional law will serve as a laboratory in testing these questions.

**Keywords** Constitutional theory · Human Rights · Environment · Non-domination · Judicial practice · EU sustainability

## 1 Introduction

Is there a constitutional duty to pursue sustainability? The answer is in the affirmative according to the EU, where the principle of sustainability is both a value and a goal. The concept of sustainability is generally taken as good, but what does sustainability really mean? Protecting the environment is one of the objectives of the EU and as such firmly embedded in its legal competencies (Articles 191 *Treaty of the Functioning of the European Union, TFEU*). Recently, the EU Commission issued

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a *New Green Deal*, which if adopted would make billions available from existing EU funds for the greening of industry, including offering tax breaks to businesses investing in net-zero technologies.<sup>1</sup> The *New Green Deal* comes as a reply to the Biden administration's recent *US Inflation Reduction Act* which invests a large amount of money in Energy Security and Climate Change programs over the next 10 years.<sup>2</sup> The US initiative has caused concerns in Europe when it comes to the EU's ambitions of being a world leader on the fight against climate change scene. The EU Commission emphasizes that the EU must be ready to lead the way when it comes to safeguarding the environment and realizing the Paris Agreement.<sup>3</sup> At the heart of the Commission's reasoning is the idea of sustainability, forming part of the wider notion of EU values.<sup>4</sup> Moreover, the aspiration of achieving sustainability across Europe seems intrinsically associated with the possibility of living in a sound environment.

Yet what are the broader implications of sustainability for our understating of constitutional law? And how, if at all, is the idea of sustainability related to the notion of dignity? The dignity dimension of sustainability is crucial to explore in an EU context, as there is clearly a co-dependence between the vocabulary of sustainability and the value and right of dignity. In EU law, both sustainability and dignity are of course central concepts as forming part of both the values of the EU and its future orientation. In this article, I wish to interpret, trace, and employ those concepts through their function in constitutional discourse. While sustainability is often associated with environmental protection, the concept can be applied much more broadly, influencing discourse in fields as diverse as socioeconomics, human rights, protection, poverty, and security.<sup>5</sup> Whereas EU policy documents often refer to the interrelation of sustainable development, security, and climate change, the EU has been accused of failing to link all three together in a coherent manner.<sup>6</sup> Moreover, while the idea of dignity today is part of the Lisbon Treaty and the EU Charter of Fundamental Rights, it has been criticized for its purported vagueness or as being "nothing but a phrase".<sup>7</sup> However it could be argued that it is precisely dignity's existence as a "living concept," that plays a pertinent role in modern constitutional law. Likewise, Colin Bird has suggested that dignity should be understood as a lived reality that all people live through an organized co-existence in which the worth of all human beings matters.<sup>8</sup> The notion of "sustainability," while also vague and conceptually contextualized, offers a crucial nexus for understanding the governance

<sup>1</sup> COM (2023) 62 final, A Green Deal Industrial Plan for the Net-Zero Age, 1 February 2023. [https://commission.europa.eu/system/files/2023-02/COM\\_2023\\_62\\_2\\_EN\\_ACT\\_A%20Green%20Deal%20Industrial%20Plan%20for%20the%20Net-Zero%20Age.pdf](https://commission.europa.eu/system/files/2023-02/COM_2023_62_2_EN_ACT_A%20Green%20Deal%20Industrial%20Plan%20for%20the%20Net-Zero%20Age.pdf) (last visited 1 February 2023).

<sup>2</sup> [https://www.democrats.senate.gov/imo/media/doc/inflation\\_reduction\\_act\\_one\\_page\\_summary.pdf](https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_one_page_summary.pdf) (last visited 5 February 2023).

<sup>3</sup> COM (2023) 62 final, A Green Deal Industrial Plan for the Net-Zero Age (note 1 *ibid*).

<sup>4</sup> *Ibid* 3–5.

<sup>5</sup> See, e.g., Justice Mensah (2019).

<sup>6</sup> Sonnsjö and Bremberg, (2016).

<sup>7</sup> Beitz, (2009).

<sup>8</sup> Bird, (2021).

of humanity's environments. Through the discussion of both sustainability and dignity, I argue that a full and enduring understanding of dignity requires sustainability, while dignity helps advance a better understanding of the meaning, uses, and requirements of sustainability. Broadly speaking, my laboratory is EU constitutional law: not just as it is institutionally and theoretically understood, but also how law and theory supply a theoretical context for a richer critical account of both concepts.

The core focus of this paper is on the constitutional manifestations of sustainability and how they are related to the notion of dignity in the context of climate change litigation on the one hand and in the framework of the EU's instrumental use of the sustainability on the other hand. The paper asks essentially three questions. The first question concerns the relationship between sustainability and the notion of dignity. Here, the paper sets out to explore how and why these concepts are related and why their interdependence matters for our understanding of constitutional questions related to the fight against climate change. The second question asks how (selected) courts deal with the growing amount of climate change litigation and how it is relevant to the debate on sustainability and dignity-oriented views of constitutional law.<sup>9</sup> The third question asks whether the constitutional landscape of sustainability and dignity is adequately reflected across different policy domains in the EU. For example, with regard to security, how are EU policies reflected in sustainability in terms of achieving peace and justice (that the EU Commission claims is one of the purposes of sanctions for example)? Does the concept of sustainability require a political community as a matter of a normative aspiration as much as, or more than, a matter of actual sociological fact?<sup>10</sup> Moreover, how is sustainability used as an instrument in EU policy agendas to pursue, for example the sustainable finance agenda? Perhaps a caveat should be made: the present paper is not a classic environmental law piece on sustainability. Instead, it aims to contribute to the debate on sustainability from the perspective of constitutional theory by drawing on insights from republication theory, Kantian theory and EU law. The paper will use diverse examples. The purpose of doing so is to illuminate the importance of sustainability in constitutional matters relating to environmental questions and how it is reflected in the idea of dignity and subsequently to ask to what extent this is visible in judicial practices as well as in EU policy documents.

The paper proceeds as follows. The first section begins by briefly discussing the notions of sustainability and dignity by way of setting a shared language. Thereafter, I will discuss the human rights dimension and touch on the crucial question regarding the relationship between human rights and environment rights and to what extent they overlap and set out how republican and Kantian theory can help us understand these questions. The aim is to untangle the wide notion of dignity before discussing it in the context of sustainability, which as I will try to argue illuminate the similarities between sustainability and dignity as wide-ranging constitutional topics. Subsequently, I will briefly discuss recent case law on climate law litigation as part of the sustainability package and connect back to the question of dignity. The idea of

<sup>9</sup> See, e.g., German Constitutional Court, Order of 24 March 2021—1 BvR 2656/18 and others.

<sup>10</sup> For similar questions in the context of criminal law, Duff, (2018).

doing so is to provide the contextual background for a discussion of sustainability in the broader framework and then move on and test, if you like, theory in the context. Specifically, I will look at policy fields in EU law that are connected through their use of sustainability as a justification for EU action. I will use examples ranging from human rights to climate ethics to whistleblower protection and security along the lines of the broader EU sustainability agenda as interesting examples of where sustainability is applied as a principle. Furthermore, as this paper will try to elucidate, there are parallels between the EU climate strategy and EU sustainable finance strategy, and the latter has interesting ties of security and peace.

## 2 Sustainability as a Contested Concept

The concepts of sustainability is constitutionally interesting, as it is conceptually “open textured,” to use the famous metaphor coined by H.L.A. Hart.<sup>11</sup> The meaning of sustainability is often described as “the ability to sustain”; to stay, to endure.<sup>12</sup> Sustainability means a capacity to maintain some entity, outcome, or process over time.<sup>13</sup> There are, in short, three dimensions of sustainability: environmental, social, and economic.<sup>14</sup> But what exactly do we mean by “sustainability”? For example, does the concept concern human life, the environments humans inhabit, or Earth’s ecological system as a whole?<sup>15</sup> The notion of “sustainable development” has been described as an oxymoronic concept, as sustainability implies a lack of change, while “development” implies change.<sup>16</sup> The concept of sustainability concerns—in broad terms—what we owe to each other at present and what we in the present owe to future generations.<sup>17</sup> The definition of sustainability is far from new. In 1987, the UN Brundtland Commission defined sustainability as “meeting the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>18</sup> However, UN policy statements on sustainable development are often criticized for their implicit anthropocentrism, which treats the Earth simply as a resource to be enjoyed by future generations of humans.<sup>19</sup> The right to a healthy environment has been described as a response to states’ limited political commitments, could be reached through the jurisprudence of regional and domestic courts.<sup>20</sup> Likewise, Simon Caney argues that a polluted environment also leads to breaches of human rights in general. In other words, a polluted environment infringes upon other rights,

<sup>11</sup> H.L.A. (1961), 120, Bix (1991) 51–72.

<sup>12</sup> Thompson 137–147 (2011).

<sup>13</sup> Mensah, (2019).

<sup>14</sup> Daly and May, (2021) 23–38.

<sup>15</sup> Stables (2013) 177–186.

<sup>16</sup> *ibid.*

<sup>17</sup> Bosselmann, (2017).

<sup>18</sup> <https://www.un.org/en/academic-impact/sustainability>.

<sup>19</sup> Fox and Alldred, 59–75 (2021).

<sup>20</sup> Boyd, (2018) 17–41, de Vido (2022), 339–349.

as they cannot be fulfilled.<sup>21</sup> Therefore, in essence, sustainability is a principle similar to justice, and much of the debate about sustainability is a discourse on ethics. The UN sustainable development goals (SDGs) are a universal call to action to end poverty, protect the planet, and ensure that all people enjoy peace and prosperity.<sup>22</sup> So “sustainability” and “sustainable development” might function as hypothetical imperatives insofar as they are regulative ideals with respect to the everyday, empirical matter of a minimally good life.<sup>23</sup> Also, the EU Charter Article 37 states that “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.” In recent years, the notion of sustainability has been invoked in various contexts: from protection of the environment to sustainable development goals to crisis-resistant financial infrastructures to security matters.

As such, sustainability is both a policy-oriented principle and a constitutional theory-grounded precept. The extent of sustainability’s use as a concept has fascinating constitutional and political dimensions.<sup>24</sup> Sustainable development has become the buzzword in constitutional law matters associated with different definitions, meanings, and interpretations.<sup>25</sup> While there are many interesting questions to be asked about the dimension of sustainability as a legal concept, I argue that sustainability is a justice-inspired principle, and that it applies justice precisely in the modes that transcend particularism and parochialism. In the context of the EU, the Lisbon Treaty stipulates that the EU shall contribute to peace, security, and to the sustainable development *of the Earth*. Like a universal view of human dignity, sustainability under the Lisbon Treaty is not confined to the signatories; the Treaty extends its own imagined social contract universally, which is morally permissible and far from any accusations of neocolonialism, since it commits itself to all persons without requiring anything in return. The UN repeatedly recognized that climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights.<sup>26</sup> The Paris Agreement is central in this regard. The Paris Agreement has been described as a landmark climate change instrument with a binding agreement that brings all nations together to combat climate change and adapt to its effects.<sup>27</sup>

One could certainly ask if sustainability is simply a reaffirmation of justice and the rule of law? This is, of course, also connected to the question as to whether we

<sup>21</sup> Caney, (2010) 69–90.

<sup>22</sup> See <https://sdgs.un.org> and see, e.g., Bosselmann, (2017).

<sup>23</sup> Stables (2013) 177–186. Likewise, the Lisbon Treaty makes it clear that the EU goals are, among others, create an internal market, and should work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, and aim at full employment and social progress and a high level of protection and improvement of the quality of the environment.

<sup>24</sup> Langhelle 295–323 (2000).

<sup>25</sup> Mensah, (2019).

<sup>26</sup> UN General Assembly, 7th session.

<sup>27</sup> <https://unfccc.int/process-and-meetings/the-paris-agreement>.

need a thick or thin conception of sustainability. Sustainability has a strong descriptive content, while it is also an ethical principle.<sup>28</sup> While there is a clear overlap in this regard and while sustainability encompasses features of justice, “justice” is not necessarily the same thing as the rule of law. There is deep disagreement about what the rule of law means in concrete terms.<sup>29</sup> For example, some would argue, if sustainability is as descriptive as possible in a context-sensitive way, one could argue that such a view of sustainability would lead to more progress and avoid contested claims of justice.<sup>30</sup> For instance, the Convention on Climate Change describes “changes in the Earth’s climate and its adverse effects as a ‘common concern’ of humanity that requires the widest possible cooperation by all countries and their participation in an effective and appropriate international response”.<sup>31</sup>

But what exactly is the nature of sustainability, as it seems to constitute both a moral and political principle? Already back in 1999, Goodin argued that: “...we need some institutional guarantees that present economic actors will not take unfair advantage of their privileged temporal position to exploit future ones. Institutionalizing a sustainability ethic would be one way, politically, of doing just that.”<sup>32</sup> According to commentators, environmental rights may concern rights to environmental resources, or to a specific standard of environmental quality, well-being, or sustainability.<sup>33</sup> The argument is often based on the idea that both specific and general substantive environmental rights are needed to capture the complexity of our relationship to the natural world and the threats that it faces. The human right to clean air, clean water, land, etc. are also human rights, necessary for an ecosystem and vital for human life. Human rights, however, are centered on individual rights while environmental protection is centered on the common global goods and rights of the collective.<sup>34</sup> There is a well-known interdependence here, as Caney points out, as human rights are dependent on a healthy environment: the human right to life, the human right to health, the human right to water and clean air, and the human right to subsistence are all issues related to environmental protection.<sup>35</sup> From this perspective, a non-anthropocentric starting point is required and this is one of the critiques of sustainability that it is too focused on humans, while any notion of ecological justice requires a non-anthropocentric vision.<sup>36</sup> The principle of sustainability is inserted in many constitutions around the globe, and more than three dozen states incorporate sustainability in their

<sup>28</sup> Langhelle 295–323 (2000).

<sup>29</sup> Kumm, (2013) 605.

<sup>30</sup> I thank Enzo Rossi for pointing this out.

<sup>31</sup> <https://unfccc.int/resource/ccsites/zimbab/conven/text/preamble.htm>.

<sup>32</sup> Goodin, 247–254 (1999).

<sup>33</sup> Dodsworth (2021), 710–724. See also Woods,(2016).

<sup>34</sup> The 1972 Stockholm Declaration of the UN Conference on the Human Environment declared that there is a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and that there is a duty to improve the environment for present and future generations.

<sup>35</sup> Of course, this also concerns what may be referred to as non-rational actors, like animals, the environment itself, and future generations. Caney, 69–90 (2010).

<sup>36</sup> Wienhues (2020).

constitutions.<sup>37</sup> For example, the Swedish Basic Law, to take just one example, states that the public sphere should aim to achieve a sustainable environment for present and future generations.<sup>38</sup> Moreover, several states have established a Commission for Future Generations; most recently the UK.<sup>39</sup>

While the notion of sustainability may seem an instrumental notion, sustainability is not simply a policy goal, but is connected to the notions of dignity and a just society. In addition, sustainability appears framed in terms of a constitutional duty. From a constitutionalist perspective, a universal view of dignity could conceptually imply a universal right to sustainability. This concern for future generations is especially present in Kantian views of sustainability and could be interpreted as a universal ethical law.<sup>40</sup> It also fits nicely with Rawlsian views of justice, as the basic structure of society, and to Dworkin's views of dignity and self-respect.<sup>41</sup> This justice dimension of sustainability is connected to the notion of dignity, and more broadly the question of a decent society.<sup>42</sup>

In the following section, I will try to explain why and how the notion of dignity is reflected in the idea sustainability and that this interdependence matters as to our constitutional understanding of the concepts as well as the idea of freedom as non-domination.

## 2.1 The Notion of Dignity and the Human Rights Dimension—the Kantian Legacy

In this section, I will seek to argue that the notion of sustainability is tied to the idea of dignity and that this matters vis-à-vis our understanding of environmental rights. While environmental rights are often discussed in the context of human rights, thus the constant debate on whether environmental rights are free standing<sup>43</sup> or needs to be connected to human rights, much less is said about dignity. The notion of dignity is intrinsic to human rights law and is central in constitutions across the world. It is also a central notion in EU constitutional law. Article 1 of the EU Charter of Fundamental Rights states: “Human dignity is inviolable. It must be respected and protected.” The idea of due process, broadly painted, is an innate right to dignity, which is institutionalized. The value of dignity is always at the heart of any discussion as to what constitutes the process of constitutional law. Any efforts to craft legislation

<sup>37</sup> Daly & May, 23–38 (2021).

<sup>38</sup> *Regeringsformen* 1 ch. 3 paragraph: “Det allmänna ska främja en hållbar utveckling som leder till en god miljö för nuvarande och kommande generationer.” Translated as (by the author): “The public should promote sustainability which results in a good environment for present and future generations”.

<sup>39</sup> <https://todayfortomorrow.org.uk/the-commission/>. Within such a commission, a commissioner is authorized to examine any parliamentary bill and secondary legislation where it judged potential harm to future generations, and to express opinions during legislative committee deliberations or as an attachment to bills.

<sup>40</sup> Thompson (2011) 137–147.

<sup>41</sup> Rawls,(1971),Dworkin (2011), ch. 9.

<sup>42</sup> Margalit (1998).

<sup>43</sup> Tan, (2017).

on dignity have been referred to by Ruti Teitel and others as “humanity’s law”.<sup>44</sup> Dignity is often described in terms of Kantian ethics, where dignity is described as a value that is “intrinsic, unconditional, and incomparable”.<sup>45</sup> For Kant, we cannot adequately respect our own humanity unless we respect humanity in others.<sup>46</sup> Specifically, Kant maintains that one ought to respect not just others’ humanity but one’s own humanity as well. Since these self-regarding duties may impose constraints on the actual content of the will, they may manifest a conflict between dignity and choice.<sup>47</sup> In his recent book on human dignity and political criticism, Colin Bird rejects the idea that human dignity is based on the inherent worth or status of individuals, and instead reinterprets it as a social relationship constituted by the effects of respect and the modes of mutual attention which they generate.<sup>48</sup> Interestingly, as Aharon Barak explains, the development of dignity as a constitutional right and constitutional value in law has a similar history as the development of dignity as a social concept and thus they often lead to overlapping results and share a common core.<sup>49</sup> Thus Barak has emphasized the multifaceted structure of dignity. This is the foundation of the requirement that we treat humanity in ourselves and others (and the environment) with respect.<sup>50</sup>

With regard to the wide contours of dignity, Michael Rosen has argued that even if it is difficult to capture exactly what dignity means, it nonetheless encompasses the right to be treated with proper respect and humanity.<sup>51</sup> Dignity requires that we avoid subjecting people to the specific (and socially oriented) harm of humiliation or degradation, and that we help protect them from such harm.<sup>52</sup> Limiting the dignity of a person leads to his or her humiliation.<sup>53</sup> For example, in determining the proportionality of a limiting right, the constitutional value of human dignity plays an important role.<sup>54</sup> It could be argued that dignity decides the ambit of proportionality. However, German constitutional law certainly denies that dignity claims may be weighed and balanced.<sup>55</sup> Still, as Rosen explains, the question of balance is still present, even in cases such as the air safety law judgment (where the German Constitutional Court objected to a law legalizing the shooting down of a hijacked airliner, as it violates both the passengers and crew’s rights to life and dignity), as the dignity

<sup>44</sup> Teitel, (2011).

<sup>45</sup> Rosen, (2018) 30. See also Beitz, 259-290 (2013), Dan-Cohen, 9–23 (2011), Weinrib (2016).

<sup>46</sup> Rosen *ibid.*, 29–30.

<sup>47</sup> Dan-Cohen, (2011).

<sup>48</sup> Bird, (2021).

<sup>49</sup> Barak, (2015, English translation) 7 and references referred to therein.

<sup>50</sup> Barak (*ibid.*). The Vienna Declaration of Human Rights 1993 states that all human rights derive from the dignity and worth inherent in the human person <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action>.

<sup>51</sup> Rosen, (2018), at 160. Rosen tells the story of Kant the last days in his life. Kant refused to sit down before his doctor had first taken the seat. When he was finally persuaded to do so, he said: “the feeling of humanity has not yet left me” (“*Das Gefühl der Humanität hat mich noch verlassen*”).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> Barak, *ibid.* 112–13.

<sup>55</sup> Rosen, (2018) 108–109.



claim of a hijacked passenger could still be thought to outweigh the claim to life of potential future victims.<sup>56</sup>

The idea of human dignity plays a role in the theory of human rights, and can explain the importance of specific protections, such as prohibitions on torture and cruel or degrading treatment, trafficking, and forced labor.<sup>57</sup> Moreover, Rainer Forst describes human rights as morally grounded, and legally and politically guaranteed rights of free and equal persons who have a basic claim not to be socially or politically dominated or mistreated by states or other agents, and to be the normative authorities of the regime of rights and duties they are subject to.<sup>58</sup> A healthy environment is a necessary component of living in dignity: all (people and animals) have an equal claim to healthy air, water, and surroundings.<sup>59</sup>

Interestingly, Andrea Sangiovanni has defended the idea that moral equality and human rights are not grounded in our equal dignity, but rather in our vulnerability to social cruelty.<sup>60</sup> For him, dignity is not the right foundation for moral equality. Instead, we should start from the wrongness of treating others as morally inferior. Specifically, Sangiovanni argues that we must begin with a consideration not of equality but of inequality and the conclusion that our commitment to moral equality is best explained by a rejection of cruelty rather than a celebration of rational capacity. In doing so, he traces the impact of this fundamental shift for our understanding of human rights and the norms of anti-discrimination that underlie it. Yet the human right to a healthy environment may be totally independent from contacts with others. You could be deprived of a healthy environment even if there is no direct discrimination at stake.<sup>61</sup> Sangiovanni's account of dignity seems unable to account for a connection to sustainability. On his reading of dignity without sustainability, the right to subsistence for example (which is held against the whole of humanity) would not entitle individuals a right to the material resources without which they could not hope to live a minimally decent life.<sup>62</sup>

Dignity is also crucial to Forst's theory on the right to justification as justice allows individuals equality and the right to justification for any decisions that concern them and form part of the very idea of human dignity.<sup>63</sup> In much of the discourse on human rights, human dignity flows from humanity.<sup>64</sup> Moreover, the rights of future generations are very interesting in the context of dignity. However, some rights can exist without serving their holders' interests.<sup>65</sup> The lack of future people's

<sup>56</sup> *ibid.*, at 110–112.

<sup>57</sup> Beitz, 259–290 (2013), Corradetti (2022).

<sup>58</sup> Forst, (2012).

<sup>59</sup> On new interpretations of Kant's view of animals, see Camenzind, (2021), On sustainability and humans-animals, Daly and May, (n 36).

<sup>60</sup> Sangiovanni, (2017), see also, e.g., Zylberman, 65 (2018).

<sup>61</sup> <https://www.un.org/ohrlls/news/frontline-climate-crisis-worlds-most-vulnerable-nations-suffer-disproportionately> (last visited 1 February 2023).

<sup>62</sup> see Olsthoorn (2021).

<sup>63</sup> Forst, (2012).

<sup>64</sup> Buchwalter, (2021).

<sup>65</sup> *Ibid.*

power to demand the fulfillments of the correlative duties does not undermine the possibility of future people having rights.<sup>66</sup> For John Rawls, a principle of “just savings” concerns members of any generation, no matter how far back (or forward) in time.<sup>67</sup> Why is dignity relevant in the context of the sustainability vocabulary and environmental protection? This is because dignity is what it means to refer to a decent society, to borrow the vocabulary of Avishai Margalit.<sup>68</sup> Also in positivistic theory of law, future generations seem to have a role to play. According to the interest theory developed by Joseph Raz, for example, the lack of future people’s power to demand the fulfillments of the correlative duties does not undermine the possibility of future people having rights.<sup>69</sup>

Moreover, the debate on sustainability, dignity, and human rights is relevant in the context in of republication theory and what it means to refer to non-domination. In the following, I will set out to explain why it is interesting, and important, to discuss not only dignity but also sustainability and climate change in the context of republican theory.

## 2.2 Republican (and Constitutional) Green Theory?

There is an interesting connection between dignity and non-domination, with the former a necessary condition for the latter. Republican theory seems particularly interesting in the context of climate change.<sup>70</sup> Increasingly, many scholars view republican theory as a useful theory for understanding environmental questions.<sup>71</sup> A republican view of environmental protection is then that failing to protect the environment is an act of domination, as no one can be free without a healthy environment. But how far reaching is this duty, and does the duty include an otherness consideration; i.e., an impetus to take into consideration externalities?<sup>72</sup> Any damage done to the environment means that there is an assault on the range of our undominated choice.<sup>73</sup> The climate crisis should be understood as structural injustice; and structural injustices, like climate change, require both a theory and ethics of political responsibility.<sup>74</sup> Steven Slaughter had made the point that liberty can only be constituted through laws and intuitions, with checks and balances of an appropriately

<sup>66</sup> *ibid.*

<sup>67</sup> Rawls, (2001). Yet arguably also a “will” theory clarifies rights for future generations, as both the will and interest share a single goal, namely producing the best account of what would be regarded as rights. The “will” theory says that rights give agents normative control. Grosseris, (2008) pp 446–474, Bowen, 427–443 (2020).

<sup>68</sup> Margalit, (1998).

<sup>69</sup> Raz, (1988.), Wenar, (2021), Cruft 347–397 (2004). If interest theory is endorsed, considerations of justice could apply to intergenerational relations.

<sup>70</sup> Slaughter, 25–31 (2008).

<sup>71</sup> Barry, (2012) ch 7.

<sup>72</sup> See the discussion in Dodsworth 710–724 (2021).

<sup>73</sup> Pettit, (1997) 137.

<sup>74</sup> Caney (2019)

empowered republican state.<sup>75</sup> Therefore, Slaughter argues that the institutional perspective by turning to republicanism offers important insights as to how global environmental issues may be addressed. In short, the notion of domination is a vertically constructed concept and denotes that some form of inequality, in terms of unfairness or the like, occurs, which is generally considered to be domination.<sup>76</sup> The ideal of non-domination is therefore structurally egalitarian, in that non-domination can only be achieved if all are equal in some fundamental sense, such as through equality before the law.<sup>77</sup>

According to Frank Lovett, the non-domination condition itself necessarily entails some concern for adequate resourcing.<sup>78</sup> The reason is the fact that a lack of resources will render people more vulnerable to domination, and hence they are not treated as free and equal.<sup>79</sup> In other words, a republican account of environmental rights would feature substantive environmental rights in order to ensure that citizens can access natural resources, thereby securing both their survival and their independence.<sup>80</sup> Furthermore, freedom as non-domination is not only a social good, which means that there are legal and social arrangements in place which ensure non-domination, it is also a common good in so far as it aims to reduce everyone's vulnerability (and the vulnerability of every social group).<sup>81</sup>

How can this be translated to transnational law more concretely? International law typically allocate joint stewardship over matters of global concern, such as the high seas, Antarctica, outer space, and resources from the deep sea floor, and these common resources are subject to joint stewardship regimes that have both negative and positive dimensions.<sup>82</sup> As Even Criddle and Even Decent Fox and point out already the Rio Declaration on the Environment and Development (from 1992) makes it clear that states bear a sweeping obligation to “cooperate in a spirit of global partnership to conserve, protect, and restore the health and integrity of the Earth’s ecosystems”.<sup>83</sup> Specifically, Criddle and Decent-Fox argue that mandatory multilateralism is implicit in principles of sovereignty equality and joint stewardship.<sup>84</sup> Similarly, Eyal Benvenisti in his work on Trustee of Humanity seeks to explore an effective voice for—and accountability to—diffuse voters, and thereby allowing them to mobilize for the sake of ensuring better respect of their rights and

<sup>75</sup> Slaughter, 25–31 (2008).

<sup>76</sup> Daly, 289–316 (2015).

<sup>77</sup> Pettit, 137 (1997).

<sup>78</sup> Lovett, 29–46 (2016).

<sup>79</sup> see also Pinto 676–692 (2021).

<sup>80</sup> Dodsworth (2021) 710–724.

<sup>81</sup> Pettit, (2014); Pettit, (ibid n 78), 122–23.

<sup>82</sup> Criddle and Decent-Fox, (2019) 272–325.

<sup>83</sup> Draft International Covenant on Environment and Development, Art. 3 & cmt. at 38–39 (4th ed. 2010). See the discussion in Criddle and Decent-Fox, pp.272–325 (n 83 ibid). Also the World Conservation Union & International Council of Environmental Law characterized the global environment as a “common concern of humanity” and stated that this status “implies acceptance of both the right and the duty of the international community to have concern for the global environment.”.

<sup>84</sup> Ibid.

welfare where outsiders are treated as agents rather than objects.<sup>85</sup> Thus, a fiduciary principle entrusts public power to the state in order to secure the state against domination. The fiduciary theory or trusteeship then is broadly republican in that it includes concerns for not only future generations but arguably also protection of the climate as such, in the idea of what it means to refer to freedom as non-domination. It is also a dignity-oriented view, which includes the concept of sustainability as this author tries to argue. What then is a necessary and sufficient condition vis-à-vis the connection between sustainability and dignity?

### 2.3 Necessary and Sufficient Condition?

An interesting question concerns to what extent any complete conception of human dignity or dignified treatment of humans imply various accounts of the sustainability test?<sup>86</sup> Surely, there can be no right of dignity without a sustainable environment, but can there be sustainability without dignity? The connection between sustainability and dignity seems to vary between domains; whether it is the spheres of the environment, socioeconomic relationships, or security questions, the exact interrelation seems context dependent. Moreover, the necessary and sufficient condition seem largely dependent on how we view the rights of future generations. As mentioned above, a key debate in climate ethics is that of the rights of future generations. In this context, Caney has suggested that the most reasonable way to think about these issues is to start with our understanding of what we owe contemporaries and why, and then consider whether there is any reason to treat future people differently from this construction.<sup>87</sup> Caney refers to “sustainable prosperity,” which is concerned with securing the ecological precondition for justice over time. Yet as he also points out, future people are powerless when it comes to democratic governance and democracy, as in contrast to the current generation, they cannot play a role in shaping politics through voting. This is of course also true for animals. They cannot vote or campaign or protest against decisions (including ones that will determine their standard of living), much like the unborn. The Rawlsian “just savings” principle mentioned above may be relevant in this context. According to this principle, members of any generation would adopt policies they would want preceding generations to have followed (and later generations to follow), no matter how far back (or forward) in time.<sup>88</sup> According to the principle of “just savings,” societies should save enough so that succeeding generations are able to live in a just society.<sup>89</sup> This would require more than sustainability but also a clear improvement of the environment for the benefit of future generations.<sup>90</sup> A necessary and sufficient condition would then be a precondition for non-domination.

<sup>85</sup> Benvenisti, 535–548 (2015).

<sup>86</sup> I am grateful to Enzo Rossi for pointing this out.

<sup>87</sup> Caney 2019 working paper available at [cusp.ac.uk/essay/m1-11](http://cusp.ac.uk/essay/m1-11).

<sup>88</sup> Rawls 160 (2001).

<sup>89</sup> *Ibid.*

<sup>90</sup> Thanks to Göran Duus-Otterström for pointing this out.

In trying to tie together the ideas of sustainability, dignity, and republican and Kantian inspired themes to law, it is arguably useful to turn to judicial practice,<sup>91</sup> which in this context would allow us to apply a more holistic view.<sup>92</sup> This is because courts have played a very important role in the area of climate law development, when the states have not fulfilled their climate law obligations.

### 3 Judicial Practice

In recent years, there has been a boom of cases on climate change and state responsibility. In this section, I will try to connect the theoretical issue of the constitutional meaning of sustainability and dignity to the question of judicial practice and the importance of courts for advancing climate justice. One core question is whether a judicially enforced right to a healthy environment leads to a more robust environmental law regime and the function of courts in this regard as judicial practice appears particularly important in this area.<sup>93</sup> Relatedly, it could be argued that any objection regarding a potential clash with democracy, legality, and foreseeability because judicial review becomes an essential instrument when states are inactive is not a convincing concern. For example, it has been suggested that states were aware that emissions and pollution could well be relevant for how a future climate Treaty would allocate costs.<sup>94</sup> Likewise, there is a current discussion on ecocide regarding the gravest crimes against the environment and on individual criminal responsibility.<sup>95</sup> Furthermore, the Constitutional Court of Columbia has referred to international environmental law as a “global ecological public order” where constitutional law recognizes that the Constitution is composed both of the formal bill of rights and the so-called organic clauses.<sup>96</sup> Specifically, the Constitutional Court of Columbia stated that it was “necessary to take a step forward in jurisprudence” to change the relationship between humankind and nature before it is too late or the damage is irreversible.<sup>97</sup>

A central question is whether the protection of the environment needs to be connected to human rights to count as a constitutional right. After all, most constitutional courts seem to pin environmental rights to the question of human rights and

<sup>91</sup> Ripstein, 330 (2009). From a Kantian perspective, empowering a court to determine whether the state or one of its officials has acted within its constitutional authority simply imposes a higher level of closure on the system “as a whole.”

<sup>92</sup> On holistic view, see Corradetti (2022).

<sup>93</sup> See, e.g., Mayer (2023), Grahn-Farley (2022).

<sup>94</sup> Duus-Otterström (2023).

<sup>95</sup> On ecocide see the Independent Expert Panel for the Legal Definition of Ecocide: Commentary and core text available at <https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d7479cf8e7e5461534dd07/1624721314430/SE+Foundation+Commentary+and+core+text+revised+%281%29.pdf> (last accessed 5th June 2023).

<sup>96</sup> See the Atrato decision, decision T-622/2016 Colombian Constitutional Court, in which the Court recognized the Atrato River as a legal subject. See also *STC 4360-2018* where the Colombian Supreme Court ruled to Protect Future Generations and Amazon Rainforest in Climate Change Case. See Alvarado and Rivas-Ramírez, (2018).

<sup>97</sup> Ibid.

to dignity. For example, the Israeli Supreme Court has ruled that the right to water deserves constitutional protection under Israel's basic law on Human Dignity and Freedom.<sup>98</sup> Likewise, in the European context, the Irish High Court has held that “[a] right to an environment that is consistent with the human dignity and well-being of citizens at large is an essential condition for the fulfilment of all human rights. It is an indispensable existential right that is enjoyed universally, yet which is vested personally as a right that presents and can be seen always to have presented, and to enjoy protection, under...the Constitution.”<sup>99</sup>

Several recent cases are also significant with regard to future generations. In the famous case of *Urgenda Foundation v. State of the Netherlands*, the plaintiffs relied in part on the Paris Agreement. The Dutch Supreme Court held that “[t]he principle of fairness means that the policy should not only start from what is most beneficial to the current generation at this moment, but also what this means for future generations, so that future generations are not exclusively and disproportionately burdened with the consequences of climate change.” Moreover, the Court held that “it is without a doubt plausible that the current generation of Dutch nationals, in particular but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime if global emissions of greenhouse gases are not adequately reduced.”<sup>100</sup>

Similarly, the German Constitutional Court recently held that the Federal Climate Change Act is partly unconstitutional and has to be amended by the end of 2022.<sup>101</sup> The Climate Change Act merely required the federal government to set, by statutory instrument in 2025, annually decreasing emission budgets for periods after 2030.<sup>102</sup> The German court stated that the Climate Change Act was unconstitutional, insofar as it did not sufficiently protect persons against future curtailments of their rights that could become necessary as climate change progresses. Therefore, the Court held that there is a risk that fundamental rights will be severely curtailed from 2030 onwards and that the Climate Change Act did not sufficiently mitigate this risk.<sup>103</sup> Also, similarly, the UK High Court of Justice has ruled that the UK government's Net Zero Strategy breached the UK Climate Change Act. Specifically, the High Court of Justice held that the parliament and the public were kept in the dark about a shortfall in meeting a key target to cut emissions.<sup>104</sup> Moreover, recent cases such as the Dutch Shell case, where the Court of Appeal held that companies are under

<sup>98</sup> Murthy et al, 25–59 (2013). See CA 9535/06 *Abadallah Abu Massad and Others v Water Commissioner and Israel Lands Administration*.

<sup>99</sup> *Merriman v Fingal County Council*. [2017] IEHC 695 [https://www.courts.ie/acc/alfresco/2156ec2e-9c44-409d-9e58-bb52e4349a25/2017\\_IEHC\\_695\\_1.pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/2156ec2e-9c44-409d-9e58-bb52e4349a25/2017_IEHC_695_1.pdf/pdf#view=fitH) (last visited 3 February 2023).

<sup>100</sup> C/09/456689/ HA ZA 13-1396. See also discussion in Abate, ch 3 (2019).

<sup>101</sup> Order of 24 March 2021—1 BvR 2656/18 and others.

<sup>102</sup> Order of 24 March 2021—1 BvR 2656/18 and others. And see policy brief Ralph Bodle & Stephan Sina *The German Federal Constitutional Court's decision on the Climate Change Act*. Ecologic Institute, Berlin <https://cclr.lexxion.eu/article/CCLR/2022/1/5> (last visited 5 February 2023).

<sup>103</sup> Martin, 449–454 (2021).

<sup>104</sup> High Court of Justice [2022] EWHC 1841 (Admin).

a duty to advance the Paris Agreement and to undertake duties to help greening the atmosphere are important.<sup>105</sup> The Dutch Court of Appeal based its reasoning on an unwritten duty of care in Dutch tort law, where Shell has an “obligation of result” to reduce CO<sub>2</sub> emissions resulting from the Shell group’s activities resulted in an obligation to take necessary steps to remove serious risks and limit any lasting consequences to the best of its abilities. This kind of intermingling public and private is also present in the EU’s recent policy agendas on sustainability, discussed below.

Not only national court have been active with regard to climate rights litigation, but the question has been brought to the European Convention on Human Rights (ECHR) regime, concerning Articles 2, 6, and 8 of the ECHR on the right to life, to a fair trial, and of private life. In a pending case, senior Swiss citizens (women) between 70 and 89 years of age complained of health problems during heatwaves, which undermine their living conditions and sued their state.<sup>106</sup> Swiss Courts had according to the claimants not properly responded to the requests and had given arbitrary decisions affecting their civil rights, by completely rejecting their specific situation of vulnerability in relation to heatwaves.<sup>107</sup> Recently, a similar case has been launched in Sweden, named the Aurora case concerning the same type of claims but the opposite; i.e., for young people. Over 600 persons born between 1996 and 2015 filed a class action lawsuit against the Swedish state, arguing that Sweden’s action on mitigating climate change is inadequate and thus in violation of their rights under the ECHR system, i.e., their rights to life, private and family life, and non-discrimination under articles 2, 8, and 14 of the ECHR.<sup>108</sup>

Yet not all national cases have been successful. For example, in the EU Court, in the “Peoples’ Climate Case,” the applicants claimed that the EU’s current emissions reductions are insufficient considering international and European environmental and human rights law.<sup>109</sup> The EU Court of Justice ruled that such a consideration would not be enough to widen the criteria for standing.<sup>110</sup> In short, their reasoning seemed to be that if everyone is affected, no one is affected. Further recent national cases where the matter of environmental concerns has been deemed too entangled to ground jurisdiction are, for example, the Friends of the Earth case in the context of the expansion of London’s Heathrow airport by way of a third runway, as well as a case concerning Norwegian arctic oil plans.<sup>111</sup> The UK Supreme Court dismissed the case but left unanswered the question as to whether the Paris Agreement was so

<sup>105</sup> Rechtbank Den Haag. C/09/571932 / HA ZA 19-379.

<sup>106</sup> The Chamber of the European Court of Human Rights, Verein Klima Seniorinnen Schweiz and others v. Switzerland (application no. 53600/20).

<sup>107</sup> *ibid.*

<sup>108</sup> Case T 8304–22, Nacka tingsrätt (distrikt court), Aurora case. <https://www.domstol.se/nyheter/2023/03/nacka-tingsratt-utfardar-stamning-i-klimatmalet/> (last accessed 2 April 2023) See also <https://www.thelocal.se/20221125/swedish-youth-launch-landmark-climate-lawsuit-against-government/> (last accessed 2 April 2023).

<sup>109</sup> Case C-565/19 P, *Carvalho and Others v European Parliament and Council of the European Union*, judgment 25 March 2021. See Bogojevic, 191–200 (2020).

<sup>110</sup> *ibid.*

<sup>111</sup> R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd [2020] UKSC 52.

“obviously material” to the exercise of the relevant discretion that a failure to have regarded it would be unreasonable and thereby constitutional.<sup>112</sup> The UK Supreme Court also rejected the claim that designating the Airports National Policy Statement would interfere with any rights contained in the ECHR. Similarly, Norway’s Supreme Court recently upheld government plans for Arctic oil exploration dismissing the claim that it violated people’s right to a healthy environment. The Norwegian Court held that the Government had taken sufficiently ambitious measures to reduce its domestic greenhouse gas emissions and that the right to a healthy environment did not protect individuals from the harms of emissions not occurring on Norwegian territory.<sup>113</sup> Another example is of course the recent ruling by the US Supreme Court.<sup>114</sup> The US Supreme Court held that the Environmental Protection Agency could not put state-level caps on carbon emissions under the 1970 Clean Air Act. The Court held that the authority to decide how power is created in the USA must come from Congress. The ruling has been severely criticized for sabotaging environmental protection and for being a setback to public health.<sup>115</sup>

These are just examples of recent cases and illustrating the relevance of the judiciary for climate law questions. It confirms the different approaches adopted by courts when it comes to the question of jurisdiction and judicial review. Perhaps, it is worth mentioning that the International Court of Justice (ICJ) has emphasized—already back in 1996—the importance of the environment. In the ruling on the legality of the threat or use of nuclear weapons, the ICJ held that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment.<sup>116</sup> The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life, and the very health of human beings, including generations unborn. The ICJ stated that the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is “*now part of the corpus of international law relating to the environment*”.<sup>117</sup> The ICJ held that states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.

What do these cases tell us, with regard to state’s obligations? First of all, it confirms an important role played by Courts, when they take the task of judicial review seriously and when the question is if a constitutional obligation is fulfilled (in this case sustainability and dignity). Respect for the environment is one of the

<sup>112</sup> Case no. 20-051052SIV-HRET Greenpeace Nordic Ass’n v. Ministry of Petroleum and Energy, December 2020.

<sup>113</sup> Ibid.

<sup>114</sup> West Virginia et al. v. Environmental Protection Agency et al., [https://www.supremecourt.gov/opinions/21pdf/20-1530\\_n758.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1530_n758.pdf) (last visited 1 November 2022).

<sup>115</sup> <https://www.hsph.harvard.edu/news/features/the-supreme-court-curbed-epas-power-to-regulate-carbon-emissions-from-power-plants-what-comes-next/> (last visited 1 November 2022).

<sup>116</sup> Advisory Opinion, July 8, 1996, ICJ Rep. 1996, p. 226, Legality of the Threat or Use of nuclear weapons.

<sup>117</sup> Ibid.



elements that goes into assessing whether an action is in conformity with the principles of necessity and proportionality.<sup>118</sup> While constitutional imagination has been criticized because of the way constitutions can harness the power of narrative and myth to project an account of political existence,<sup>119</sup> this type of constitutional action seems exactly what is needed. Yet constitutional imagination (and action like in this case of group action in many of the cases discussed above) might be the only way at present capable of achieving sustainability and dignity, and weather weaker forms of constitutionalism are not enough at present.<sup>120</sup>

In the final part of the article, I will now try to tie together the theoretical discussion of sustainability and its similarities to dignity as well as the judicial practice with the more instrumental use of the notion of sustainability as utilized in EU recent policy agendas and legal measures.

#### 4 Old and New Uses of Sustainability in EU Law—Beyond the Environment

According to the EU Global Human Rights Sanctions Regime, the EU should sanction human rights breaches in third countries. The Regime “target both state and non-state actors, regardless of where they are, and regardless of whether they commit violations and abuses in their own state, in other states or across borders”.<sup>121</sup> Does this apply also to climate law duties? The Global Human Rights Regime is based on Article 21 TEU, and one of the points mentioned in this provision is for the EU to “foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty.” While it could be questioned to grant the EU such a (universal) jurisdiction, it is telling with regard to the EU’s ambitions in this area.

As noted at the outset of the paper, the EU Commission has recently delivered a communication on the *New Green Deal*.<sup>122</sup> In the EU’s policy context, sustainable finance is understood as finance used to support economic growth while reducing pressure on the environment and taking into account social and governance aspects.<sup>123</sup> The protection and safeguarding of the environment is one of the EU’s objectives and values, and the EU has the competence and duty to legislate on environmental matters (Article 191 TFEU). According to the EU policy documents, the

<sup>118</sup> Ibid.

<sup>119</sup> Loughlin, (2015) 1–25.

<sup>120</sup> Tyner, 523–534 (2017).

<sup>121</sup> [https://www.eeas.europa.eu/eeas/eu-has-new-powerful-tool-protect-human-rights-eu-global-human-rights-sanctions-regime-0\\_en](https://www.eeas.europa.eu/eeas/eu-has-new-powerful-tool-protect-human-rights-eu-global-human-rights-sanctions-regime-0_en).

<sup>122</sup> COM (2023) 62 final, A Green Deal Industrial Plan for the Net-Zero Age, 1 February 2023. [https://commission.europa.eu/system/files/2023-02/COM\\_2023\\_62\\_2\\_EN\\_ACT\\_A%20Green%20Deal%20Industrial%20Plan%20for%20the%20Net-Zero%20Age.pdf](https://commission.europa.eu/system/files/2023-02/COM_2023_62_2_EN_ACT_A%20Green%20Deal%20Industrial%20Plan%20for%20the%20Net-Zero%20Age.pdf) (last visited 1 February 2023).

<sup>123</sup> [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/sustainable-finance/overview-sustainable-finance_en) (last visited 1 November 2022).

message is simply: money talks. Policies taken in the area of environmental matters only have simply not worked sufficiently.

Specifically, the European Commission has put forward a series of legislative proposals to make its policies fit for delivering the updated 2030 greenhouse gas emissions net reduction target of 55% below 1990 levels, as set out in the 2030 Climate Target Plan.<sup>124</sup> According to the Commission, as part of the 2030 Climate target plan, the EU Emissions Trading Scheme (ETS) works on the “cap and trade” principle.<sup>125</sup> The cap is set on the total amount of certain greenhouse gases that can be emitted by the installations covered by the system.<sup>126</sup> As mentioned, because of a lack of enforcement and the lack of political willingness in many of the Member States to a large extent, the environmental agenda and promises have not been fulfilled. Therefore, the EU combines environmental protection and financial regulation. Instruments like the Capital Markets Union Action Plan, the EU 2050 long-term climate strategy, and the Commission Action Plan on financing sustainable growth are examples of the efforts put up by European institutions.<sup>127</sup>

#### 4.1 Whistleblower Protection and Due Diligence—Instrumental Use of Sustainability

The recent Whistleblower Directive and the proposal for a Directive on corporate’s sustainability due diligence are interesting as a test cases of sustainability.<sup>128</sup> With regard to the Whistleblower Directive, it applies to reporting persons working in the private or public sector who acquired information on breaches in a work-related context including lack of environmental protection. The EU views whistleblower protection as necessary in order to enhance the enforcement of EU law. The Directive sets out to tackle insufficient enforcement of rules on public procurement by national contracting authorities and contracting entities in relation to the execution of works, the supply of products, or the provision of services thus affecting the proper functioning of the internal market.<sup>129</sup> The crimes that are listed include environmental crimes, crimes pertaining to the environment and climate, and crimes pertaining to sustainable development and waste management, including various criminalization of marine, air, and noise pollution; protection of water and soil; and animal health issues. The Directive is very broad. It appears that, arguably, the EU measure is

<sup>124</sup> [https://ec.europa.eu/clima/eu-action/european-green-deal/2030-climate-target-plan\\_en](https://ec.europa.eu/clima/eu-action/european-green-deal/2030-climate-target-plan_en) (last visited 1 November 2022).

<sup>125</sup> The ETS Directive was adopted already in 2003. Directive 2003/87/EC.

<sup>126</sup> Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 established the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (“European Climate Law”).

<sup>127</sup> Esposito et al. 214–232 (2021).

<sup>128</sup> Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

<sup>129</sup> *Ibid.*

predominately focused on restoring trust in the market, even though the vocabulary of protecting the environment and sustainability is used.<sup>130</sup>

Moreover, in 2022, the EU Commission adopted a proposal for a Directive on corporate sustainability's due diligence, largely based on sustainability concerns.<sup>131</sup> In short, what it means is that companies across the EU need to have a plan to ensure that their business strategy is compatible with limiting global warming to 1.5 °C in line with the Paris Agreement. Several EU-based companies have been associated with adverse human rights and environmental impacts, including their value chains.<sup>132</sup> Adverse impacts include human rights breaches such as forced labor, child labor, environmental impacts such as greenhouse gas emissions, pollution, or biodiversity loss and ecosystem degradation.

The proposed measure aims to foster sustainable and responsible corporate behavior throughout global value chains. Companies are required to identifying, preventing, mitigating and accounting for their adverse human rights and environmental impacts, and having adequate governance, management systems, and measurements in place to this end.<sup>133</sup> With the Whistleblower Directive and Corporate Sustainability's Due Diligence, and other EU legal measures,<sup>134</sup> such an obligation now entails a duty to positively respect sustainability and invest in green policies. The duty seems both vertical and horizontal.

## 4.2 EU Security and Peace: Dignity and Sustainability?

What does sustainability and dignity mean in the context of security? In this specific context, both concepts seem interlinked with the idea of peace. While the UN agenda 2030 (goal 16) includes peace, justice, and strong institutions, the relationship between peace and sustainability is underexamined. It has been suggested that while peace and sustainability can interact in multiple ways, such as how sustainability can promote peace, its exact relationship is not defined.<sup>135</sup> In the framework of the EU, Article 3 (5) TEU indeed stipulates that: "*in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples...*"<sup>136</sup>

<sup>130</sup> This may be problematic as the notion of sustainability should not be used as a *carte blanche* for harmonization.

<sup>131</sup> COM/2022/71 final Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability's Due Diligence and Amending Directive (EU) 2019/1937.

<sup>132</sup> Smit et al., Study on due diligence requirements through the supply chain: final report, Publications Office, 2020, <https://data.europa.eu/doi/10.2838/39830> (last accessed 1 November 2022).

<sup>133</sup> Ibid. The EU Commission points out that Union legislation on corporate due diligence would advance respect for human rights and environmental protection, create a level playing field for companies within the Union, and avoid fragmentation resulting from Member States acting on their own.

<sup>134</sup> EU Global Human Rights Sanctions Regime, [https://www.eeas.europa.eu/eeas/eu-has-new-powerful-tool-protect-human-rights-eu-global-human-rights-sanctions-regime-0\\_en](https://www.eeas.europa.eu/eeas/eu-has-new-powerful-tool-protect-human-rights-eu-global-human-rights-sanctions-regime-0_en) (last visited 5 February 2023).

<sup>135</sup> Sharif et al., 1073–1077 (2021).

<sup>136</sup> See Ganesh, (2021).

Sanctions are frequently used in conjunction with other foreign policy measures to affect a state's or group's policies or actions when such policies or actions are deemed to be a threat to world peace and security.<sup>137</sup> Take, for example, the EU current sanctions against Russia's illegal war in Ukraine. Since the Russian aggression and invasion of Ukraine on 24 February 2022, the EU has imposed eleven different packages of sanctions so far.<sup>138</sup> The EU has adopted unprecedented measures with the aim of significantly weakening Russia's economic base,<sup>139</sup> depriving it of critical technologies and markets, and significantly curtailing its ability to wage war.<sup>140</sup> The effects of the sanctions have been contested and the EU action seems to involve as much about taking values seriously and stance taken, as any actual effectiveness of the measures taken.

But could sustainability be connected to questions of security and peace? Does it meet the necessary and sufficient conditions, i.e., the need for sustainability to be consistent with the notion of dignity, as briefly discussed earlier in this paper? Sanctions are aimed at applying pressure to those engaged in aggressive war.<sup>141</sup> For example, Oona Hathaway and Scott Shapiro argue that sanctions have to be the outcome of multilateral decision making; otherwise, it is just unilateral economic and political pressure, with economic and political might replacing military might.<sup>142</sup> Moreover, Arthur Ripstein argues that indiscriminate sanctions, like indiscriminate weapons, hit people who are not part of the conflict, which is why targeted sanctions are often used.<sup>143</sup> So even if they are targeted, they impose coercion that may or may not be justified in the individual case. The only answer from a Kantian perspective, according to Ripstein, is multilateral action.<sup>144</sup> The EU seems to fulfill this if regional (multilateral) action is one way of achieving multilateral action. The EU Council decides through unanimity to adopt, renew, or lift EU restrictive measures (sanctions), on the basis of legislative proposals from the EU High Representative.<sup>145</sup> The threat of nuclear power is obviously a threat to humanity and our peace or to the ecosystem. Still, sanctions raise interesting questions about individual autonomy and collective action, and what sustainability and dignity really mean in the context of security and peace.

<sup>137</sup> <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/>.

<sup>138</sup> Since March 2014, the EU has progressively imposed restrictive measures on Russia in response to the illegal annexation of Crimea in 2014, the decision to recognize the non-government-controlled areas of the Donetsk and Luhansk oblasts as independent entities in 2022, and the unprovoked and unjustified military aggression against Ukraine in 2022.

[https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine\\_en](https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-ukraine_en) (last accessed 1 March 2023), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3429](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3429) (last accessed 28 June 2023).

<sup>139</sup> <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#sanctions> (last accessed 1 March).

<sup>140</sup> See Moiseienko, 130–136 (2022), 130–136, Kaunert, 158–164 (2022). See also the information given at the EU Commission website available at [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/sanctions-adopted-following-russia-as-military-aggression-against-ukraine\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/sanctions-adopted-following-russia-as-military-aggression-against-ukraine_en).

<sup>141</sup> Ripstein, (2021).

<sup>142</sup> Hathaway and Shapiro, (2017). Also discussed in Ripstein at 234–235 (2021).

<sup>143</sup> Ripstein, *ibid* note 125.

<sup>144</sup> Ripstein, 234–236.

<sup>145</sup> [https://ec.europa.eu/commission/presscorner/detail/en/qanda\\_22\\_1401](https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_1401).

## 5 Conclusion

In this paper, I have argued that the notion of sustainability, despite being a contested concept and with many varying definitions, receive some robustness as a concept by a reading of it in the light of dignity. What does it mean to have a sustainable policy on environmental law? This paper has argued that in order to answer this question, we need to understand the idea of sustainability in environmental matters in the context of the meaning of dignity. Both the notion of sustainability and the idea of dignity are crucial constitutional concepts and thus relevant for the protection of the environment and what it means to care about the climate. I have argued that republication theory and non-domination is a helpful tool for reconciling the climate debate with the constitutional landscape of rights and Kantian-oriented views of dignity. In this regard, environmental rights as independent and integrated in human rights are a tool for claims of justice.<sup>146</sup> I have also tried to show how dignity and sustainability are related, both as contested yet crucial concepts and are inherent in the constitutional structure of judicial review, the rule of law and justice.

Thereafter, the paper discussed judicial practice, by looking at selected cases, and pointed at the increasing aptness and awareness in many courts regarding the urgent matter of the climate when states are not doing enough to realize the obligations required by the Paris Agreement and the wider constitutional ramifications of climate duties. The final part of the article discussed EU's current instrumental use of sustainability connected to the EU's sustainable finance agenda as well as the linkage between sustainability and that of peace when it comes to the adoption of sanctions at the EU level. As I have tried to demonstrate even in the "new" ways of using sustainability in the framework established by EU law, the values of the EU and its ambitions of securing peace and sustainable living conditions, the concept of sustainability spans a wide spectrum from core questions on the environment to security matters. It also confirms a blurring of the vertical and horizontal. Sustainability and dignity in this regard mean understanding the concepts in terms of collective action for the common global good of protecting the environment, and responsibilities for present and future generations. It will only confirm a sufficient linkage to dignity and non-domination if it can also bring the rest of the global community on board. If not what we will see is a regional climate justice. In the meantime, constitutional courts across the globe may and should lead the way.

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