

# Sustentabilidade Empresarial, Direitos Humanos e Ambiente



**Antes e para lá da diretiva anunciada  
(Dever de diligência das empresas em  
matéria de sustentabilidade)**

Coordenação:  
Jorge Coutinho de Abreu  
Ricardo Costa  
Maria Inês de Oliveira Martins

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(Dever de diligência das empresas em matéria de sustentabilidade)

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# FROM SUSTAINABILITY IN LAW TO SUSTAINABILITY LAW\*

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Beate Sjåfjell\*\*

**Abstract:** This thought piece sketches out a preliminary conceptualisation of ‘sustainability law’, as an emerging, interdisciplinary new field. The aim is to stimulate debate on how legal scholars can respond constructively to the fragmentation, silo thinking and lack of policy coherence that is hindering regulation for the fundamental transformation to sustainability. These barriers to change are evident also in the unprecedented sustainability-oriented initiatives of the European Union (EU). In this chapter, I concentrate on EU law and regulation of business as my examples throughout, while sustainability law is relevant to all jurisdictions, all areas of law and all societal issues.

**Keywords:** Sustainability; Planetary Boundaries; Social foundations; Law; European Union; business; finance; circular economy.

## 1. An emerging new field

This thought piece sketches out a preliminary conceptualisation of ‘sustainability law’, as an emerging new field<sup>1</sup>. My aim with this is to contribute to the discussion of how we as legal scholars can respond constructively to the fragmentation, silo thinking and lack of policy coherence, which I have seen in my research specifically in the context of European Union (EU) law. In this piece I will concentrate on EU law and regulation of business as my examples throughout<sup>2</sup>, while sustainability law is relevant to all jurisdictions, all areas of law and all societal issues.

The concept of sustainability, that I use it in my work with colleagues, is research-based, and not limited to dealing with any one of the crises of our time. Climate change, often referred to

\* This is a reprint of my chapter in Alessio BARTOLACELLI, ed., *The Prism of Sustainability. Multidisciplinary profiles: law, economics and ethics*, Naples: Editoriale scientifica, forthcoming 2025, and I am grateful to the editor for his kind permission. I am also grateful to my colleagues and friends with whom I have developed much of my thinking reflected in this piece, especially and most recently, Sarah Cornell, Eelke Heemskerk, Jukka Mähönen, and the participants of the Daughters of Themis workshops 2022, 2023 and 2024, and to Alessio Bartolacelli and Jukka Mähönen for comments to an earlier draft of this paper.

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<sup>1</sup> While I draw on the work in the Research Group Sustainability Law at the Faculty of Law, University of Oslo, and various collaborative research efforts, the views presented in this thought piece are my own and do not necessarily reflect those of my colleagues.

<sup>2</sup> I go deeper into my area of specialty in what may be seen as an emerging field within an emerging field, in Beate SJÅFJELL, «Conceptualising Corporate Sustainability Law», (December 10, 2024). University of Oslo Faculty of Law Research Paper 2024-13, [Accessed 11 December 2024]. Available at <https://ssrn.com/abstract=4865659>.

as the greatest challenge of our time, has been declared as ‘code red’ for humanity<sup>3</sup>. Yet, sustainability science – specifically the planetary boundaries framework – presents a whole range of ‘code reds’, of ecological limits that are being transgressed, with generally worsening trends<sup>4</sup>. Sustainability is also about social justice<sup>5</sup>, about securing the very bases for good lives and well-functioning societies now and for the future<sup>6</sup>. Sustainability is about safe *and* just<sup>7</sup>. Working towards sustainability in a European context also entails confronting Europe’s colonial history and its contribution to the unsafe and unjust conditions in many parts of the world, historically and through its current neocolonialism<sup>8</sup>. In the context of business, my concern is confronting European businesses’ neocolonialism through its globalised activities<sup>9</sup>.

In Section 2, I discuss how law has failed – and how law still can be a key piece in the jigsaw puzzle for sustainability. In Section 3, I sketch the contours of Sustainability Law as an emerging new field. Section 4 presents concluding reflections.

<sup>3</sup> UNITED NATIONS, «IPCC Report: “Code Red” for Human Driven Global Heating, Warns UN Chief», [Accessed 27 December 2021]. Available at <https://news.un.org/en/story/2021/08/1097362>.

<sup>4</sup> Johan ROCKSTRÖM, et al., «A Safe Operating Space for Humanity», *Nature* 461 (2009) 472-475, 472. [Accessed 22 November 2020]. Available at: <https://www.nature.com/articles/461472a>; Will STEFFEN, et al., «Planetary Boundaries: Guiding Human Development on a Changing Planet», *Science* 347/6223 (2015) 1259855. [Accessed 22 November 2020]. Available at: <https://science.sciencemag.org/content/347/6223/1259855>; Linn PERSSON, et al., «Outside the Safe Operating Space of the Planetary Boundary for Novel Entities» *Environmental Science & Technology* 56/3 (2022) 1510-1521. [Accessed 18 January 2022]. Available at: <https://doi.org/10.1021/acs.est.1c04158>; Lan WANG-ERLANDSSON, et al., «A Planetary Boundary for Green Water» *Nature Reviews Earth & Environment* 3 (2022) 380-392. [Accessed 27 April 2022]. Available at: <https://www.nature.com/articles/s43017-022-00287-8>; Katherine RICHARDSON, et al., «Earth beyond Six of Nine Planetary Boundaries» *Science Advances* 9/37 (2023) eadh2458, 1-16. [Accessed 14 September 2023]. Available at: <https://www.science.org/doi/10.1126/sciadv.adh2458>.

<sup>5</sup> Sarah E. CORNELL, «We Need to Talk About Gender in the “Safe Operating Space for Humanity”» in Beate SJÅFJELL / Carol LIAO / Aikaterini ARGYROU, eds, *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene*, Edward Elgar, 2022.

<sup>6</sup> Kate RAWORTH, «A Safe and Just Space for Humanity: Can We Live within the Doughnut» *Oxfam Discussion Papers*, 2012. Available at: [https://www-cdn.oxfam.org/s3fs-public/file\\_attachments/dp-a-safe-and-just-space-for-humanity-130212-en\\_5.pdf](https://www-cdn.oxfam.org/s3fs-public/file_attachments/dp-a-safe-and-just-space-for-humanity-130212-en_5.pdf). Leaving no-one behind is set out as a universal value in Agenda 2030, ‘Ultimately, leaving no one behind requires the transformation of deeply rooted systems – economic, social and political, governance structures and business models at all levels, from local to global’, UNITED UNITED NATIONS, «Leaving No One Behind», [Accessed 27 March 2024]. Available at: <https://www.un.org/en/desa/leaving-no-one-behind>.

<sup>7</sup> Melissa LEACH / Kate RAWORTH / Johan Rockström, «Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity», *World Social Science Report 2013* (OECD Publishing 2013). [Accessed 22 November 2020]. Available at: <https://steps-centre.org/blog/wssr/>.

<sup>8</sup> Malcolm FERDINAND, *Decolonial Ecology: Thinking from the Caribbean World*, Wiley, 2021. [Accessed 12 May 2023]. Available at: <https://www.wiley.com/en-dk/Decolonial+Ecology%3A+Thinking+from+the+Caribbean+World-p-9781509546220>. Neocolonialism may be defined as ‘the control of the economic and political system by foreign actors despite formal decolonization’, Aram ZIAI, «Postcolonial Critique of Economic Development», in *Handbook on Critical Political Economy and Public Policy*, Cheltenham, UK: Edward Elgar Publishing, 2023, 374-386. [Accessed 12 March 2024]. Available at: <https://www.elgaronline.com/edcollchap/book/9781800373785/book-part-9781800373785-39.xml>.

<sup>9</sup> Jason HICKEL, *The Divide: A Brief Guide to Global Inequality and Its Solutions*, London: William Heinemann, 2017.

## 2. Law has failed – and law can redeem itself

Law can, and often does, set out overarching objectives for society, as we see in many national constitutions and in the EU Treaties. Law is also amongst society's most powerful tools for achieving overarching objectives.

The aim here is not to contribute to the literature on the role of law or theoretical approaches to law<sup>10</sup>, but rather to illustrate the significance of law, and concurrently, the importance of critical and teleological analyses of law.

Law's significance includes its constitutive role, establishing legal positions and rights and duties. Law further has a conceptualising role – law's conceptualisations of 'human rights', and 'companies', as two examples, influences, to some degree or other, how these concepts are perceived. This is not to say that law regulates behaviour or perceptions alone, as I will return to below. Indeed, changes in law may only come about – or be effective – if there is a societal readiness for the change, and through support by civil society or specific actors. Yet, law can also change social norms, even moral norms<sup>11</sup>.

Law, accordingly, has its limitations, which go beyond law not being omnipotent. Law is not value-neutral; it never can be. Yet discussions of law and how to use law tend to be framed within often unacknowledged path-dependent contexts, forgetting, it seems, that law is not a neutral societal tool. The choices of what law is used for (legislative objectives), which behaviours, parties, or relationships to regulate, and how to regulate (soft, enabling approaches or hard law with severe enforcement at two ends of a spectrum), are all decisions that are influenced by overarching societal goals as perceived through the lens of the worldviews, and explicit and implicit values, of the decision-makers. Law tends to be a tool for the powerful in the specific time and place. It can be and has been used to distribute power, to create and to enforce new rights, to rectify old and current wrongs. Yet, only when those in power have been at least to some extent ready to let law do this. This has always been clear for those not being in power and not being prioritised by decision-makers<sup>12</sup>.

Indeed, in addition to law having a mechanistic and siloed approach, and tending to be rigid and backward-looking<sup>13</sup>, law used uncritically, is a tool for path-dependent perpetuation of inequalities. The regulation of business exemplifies this. As Baarts et al. set out: 'legal entitlements impact the relative power of social actors, and as a consequence, the distribution of present and

<sup>10</sup> E.g., Simon DEAKIN, et al., «Legal Institutionalism: Capitalism and the Constitutive Role of Law» *Journal of Comparative Economics* 45/1 (2017) 188-200. [Accessed 27 February 2024]. Available at: <https://www.sciencedirect.com/science/article/pii/S0147596716300087>.

<sup>11</sup> Jon ELSTER, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences*, 2<sup>nd</sup> edn, Cambridge University Press, 2015. [Accessed 23 March 2021]. Available at: <https://www.cambridge.org/core/books/explaining-social-behavior/084AF4C955B35C8FB3BBA03C4C0E0000>.

<sup>12</sup> Malcolm FERDINAND, *Decolonial Ecology: Thinking from the Caribbean World*.

<sup>13</sup> E.g., Fritjof Capra / Ugo Mattei, *The Ecology of Law: Towards a Legal System in Tune with Nature and Community*, Oakland: Berrett-Koehler Publishers, 2015.

future resources among such actors'<sup>14</sup>. The authors also highlight how 'law resides at the heart' of global value chains structuring of globalised business<sup>15</sup>, to which I return below (Section 3.2).

As Capra and Mattei highlight, the discussions of societal approaches to the grand challenges of our time are often framed as being a choice between private and public – between business and markets, on the one hand, or state on the other. But these are just two sides of the same coin; both sides are about property and power, and profits<sup>16</sup>. And indeed, the social norm of profit maximisation on the company level, and of infinite economic growth on the state level, are key barriers to the transformation to sustainability<sup>17</sup>. Alternative approaches concentrate on commons, community and collaboration<sup>18</sup>.

Currently, there is an inverted relationship between competence of law and need for regulation. A growing international body of law aims to promote corporate sustainability, but it is fraught with the weaknesses of international law: often strong on goals and vague on detailed responsibilities, addressing not the business actors directly but the nation states, and often lacking enforcement possibilities. International law depends on regional actors and nation states to fulfil these roles. Breaking down horizontal as well as vertical silos, and rethinking the power, the significance and the roles taken by or allocated to the individual actors in globalised business<sup>19</sup>, are crucial steps towards law that actively and coherently works towards sustainability.

Sustainability as an overarching global societal goal, with its inherent requirement for a fundamental transformation, can, in the best case, break through such established constraints of how to think about law – and how to regulate. It is easy to say that law has failed; with its silo-thinking, path-dependency and perpetuation of inequality. And yet, law has potential to redeem itself. The silos are beginning to crack, as the regulatory ecology analysis below in Section 3.2 illustrates.

<sup>14</sup> THE IGLP LAW AND GLOBAL PRODUCTION WORKING GROUP, «The Role of Law in Global Value Chains: A Research Manifesto» *London Review of International Law*, 4/1 (2016) 57-79, 68 with further references. [Accessed 7 November 2022]. Available at: <https://doi.org/10.1093/lrl/lrw003>.

<sup>15</sup> Ibid, p. 61.

<sup>16</sup> Fritjof Capra / Ugo Mattei, *The Ecology of Law: Towards a Legal System in Tune with Nature and Community*.

<sup>17</sup> See further in Section 3.2 below.

<sup>18</sup> Fritjof Capra / Ugo Mattei, *The Ecology of Law: Towards a Legal System in Tune with Nature and Community*. Elinor OSTROM, *Governing the Commons: The Evolution of Institutions for Collective Action*, Cambridge University Press, 1990. [Accessed 4 February 2020]. Available at: <https://www.cambridge.org/core/books/governing-the-commons/A8BB63BC4A1433A50A3FB92EDBBB97D5>; Elinor OSTROM, «Polycentric Systems for Coping with Collective Action and Global Environmental Change» *Global Environmental Change*, 20/4 (2010) 550-557. [Accessed 11 June 2020]. Available at: <http://www.sciencedirect.com/science/article/pii/S0959378010000634>.

<sup>19</sup> Milan BABIC / Jan FICHTNER / Eelke M HEEMSKERK, «States versus Corporations: Rethinking the Power of Business in International Politics» *The International Spectator*, 52/4 (2017) 20-43. [Accessed 10 June 2021]. Available at: <https://www.tandfonline.com/doi/full/10.1080/03932729.2017.1389151>.

### 3. Sustainability law

#### 3.1. Sustainability Law as an emerging new field

Over the last years, ‘sustainability law’ has increasingly become used as an umbrella term for various research activities, as well as by consultancies; the latter especially in light of EU law developments regulating finance, business and products for sustainability<sup>20</sup>. Contributions discussing sustainability law as a (potential) distinct field of law, appear often to concentrate on environmental law and usually global (international) law<sup>21</sup>. Sustainability law and related terms are used to present normative approaches to how law should be shaped and understood, usually concentrated on environmental aspects of sustainability<sup>22</sup>.

The approach that we have taken in the Research Group Sustainability Law, based at the Faculty of Law in Oslo, is to see sustainability law ‘an emerging field of law that aims to identify, analyse and propose normative solutions to the fundamental environmental, social and governance problems of our time’<sup>23</sup>. Specifically, our objective is to ‘conduct interdisciplinary analyses of law with the aim of identifying normative solutions that contribute to global sustainability’<sup>24</sup>.

Recognising the varieties of use and abuse of ‘sustainability’ (and ‘sustainable development’), we explicitly take as our entry point the research-based concept of sustainability briefly introduced above (Section 1). We therefore position our understanding of sustainability law within the conceptualisation of ‘safe and just’ as the goal; mitigating pressures on planetary boundaries and securing social foundations for humanity now



Figure 1. Sustainability Law,  
University of Oslo.

<sup>20</sup> Further below in Section 3.2.

<sup>21</sup> E.g. Marco E GRASSO, *Resilience and Sustainability in Law: Theoretical and Critical Approaches – Cambridge Scholars Publishing*, Cambridge Scholars Publishing, 2021. [Accessed 28 March 2024]. Available at: <https://www.cambridgepublishers.com/product/978-1-5275-7503-5>. Grasso also speaks about sustainable development law, and resilience law.

<sup>22</sup> Geoffrey GARVER, «The Rule of Ecological Law: The Legal Complement to Degrowth Economics» *Sustainability*, 5/1 (2013) 316-337, 316. [Accessed 28 March 2024]. Available at <https://www.mdpi.com/2071-1050/5/1/316>. Garver discusses several such approaches, including Berry’s ‘ecological law’, Boyd’s ‘sustainability law’, and Cullinan’s ‘wild law’, and presents ‘ecological law’ as a normative rule of law approach, a ‘rule of ecological law’, as a complement to degrowth, and in light of the shortcomings of environmental law, *ibid*, p. 318 with further references. See further Kirsten ANKER, et al., eds, *From Environmental to Ecological Law*, Routledge, 2021. [Accessed 28 March 2024]. Available at: <https://www.routledge.com/From-Environmental-to-Ecological-Law/Anker-Burdon-Garver-Maloneysbert/p/book/9780367689681>.

<sup>23</sup> RESEARCH GROUP SUSTAINABILITY LAW, University of Oslo, [Accessed 28 March 2024]. Available at: <https://www.jus.uio.no/sustainabilitylaw/>.

<sup>24</sup> *Ibid*.

and for the future<sup>25</sup>. As Sarah Cornell and I discuss elsewhere, this understanding of sustainability with roots going back at least to 1975<sup>26</sup>, entails finding out how to deal justly with unsafe conditions, and safely with the unjust ones<sup>27</sup>.

By setting out an explicit aim of contributing to sustainability, we are positioning sustainability law as a teleological field. This also reflects my own position as a sustainability scholar and stands in contrast to the often masculinist idea of an ‘objective’ scholar as one that is ‘neutral’; un-interested. It also, and connectedly, stands in contrast to the legal positivism that has been so dominant over the decades, including in my own home base of Scandinavia<sup>28</sup>. A specific mono-disciplinary form of legal dogmatic research still appears to be regarded as the most valid approach to legal analysis, and positioning legal analysis within an overarching objective of global sustainability is often regarded with suspicion, quick to be labelled as ‘political’, ‘value-based’ or ‘activistic’<sup>29</sup>. With often little distinction in legal academia between the role of a legal practitioner and a legal scholar<sup>30</sup>, discussing whether the law in a specific area is good or just, is something that at best (if not excluded) should be delegated to a separate section at the end of a thesis or article on ‘legal policy’ or ‘legal-political’ reflections<sup>31</sup>.

However, law can never be value neutral and legal scholarship should not pretend that it is. An aim of being ‘objective’ and un-interested may unintentionally lead to perpetuating value choices in the theoretical underpinnings and policy strategies of any area of law, without conscious reflection. Specifically in my area of business law, as I wrote in my doctoral thesis published in 2009:

company law scholars who regard companies as the shareholders’ property, with the only purpose being to maximize returns for shareholders, and who use this position as a basis for their research, have either made some unsubstantiated value choices, or – more likely – have,

<sup>25</sup> Melissa LEACH / Kate RAWORTH / Johan Rockström, «Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity».

<sup>26</sup> UNEP/UNCTAD, «The Cocoyoc Declaration: Adopted by the Participants in the UNEP/UNCTAD Symposium on “Patterns of Resource Use, Environment and Development Strategies”. Cocoyoc, Mexico, October 8-12, 1974», *International Organization* 29/3 (1975) 893-901.

<sup>27</sup> Beate SJÅFJELL / Sarah E. CORNELL, «What the Actual ....? Tensions in the Science-Business-Policy Interface for Global Sustainability», *European Law Open* (2024), 3(3): 529-560. <https://doi.org/10.1017/elo.2024.34>.

<sup>28</sup> For an introduction to modern legal positivism, see Raymond WACKS, *Understanding Jurisprudence: An Introduction to Legal Theory*, 6<sup>th</sup> ed., Oxford: Oxford University Press, 2021, Chapter 4.

<sup>29</sup> This is based on anecdotal evidence over the more than twenty years that I have worked at the Faculty of Law, University of Oslo, from my doctoral thesis onwards through major international projects, and as a scholar, supervisor and mentor.

<sup>30</sup> Hans Petter GRAVER, «Vanlig Juridisk Metode? Om Rettsdogmatikken Som Juridisk Sjanger» *Tidsskrift for Rettvitenskap*, 121/2 (2008) 149-178. [Accessed 15 July 2024]. Available at: <https://www.idunn.no/doi/abs/10.18261/ISSN1504-3096-2008-02-01>.

<sup>31</sup> This advice is so deeply internalised in students at the Faculty of Law in Oslo that it often takes a lot of encouragement and mentorship for students writing master theses to take an alternative approach to this rather old-fashioned way of distinguishing between *de lege lata* and *de lege ferenda*.

without reflection, accepted these postulates as facts, devoid of normative content. However, such postulates are neither facts nor value neutral.<sup>32</sup>

In my own research, I do not see it as sufficient to analyse the underlying value choices and legislative objectives. I go beyond that. Considering the convergence of crises in our time, with extreme exploitation of people and destruction of the environment, I take the overarching, research-based goals of a safe and just space as my research compass. This requires a reflective approach, where I position myself as a sustainability-oriented, feminist scholar, with awareness of my privileged position as a white European law professor<sup>33</sup>. It also entails continuous striving to be clear on when my conclusions of interdisciplinary legislative analysis are based on what the law is and when it (also) includes my suggestions on how law should change. This is, however, no more than any legal scholar does – or should do.

A teleological approach, with contributing to sustainability as the overarching aim, fits well with EU law analyses. Sustainability is amongst the overarching objectives for the EU, as set out in the EU Treaties, to achieve the EU's aim of promoting 'peace, its values and the well-being of its peoples'<sup>34</sup>. The EU is to 'work for the sustainable development of Europe'<sup>35</sup>, and in its 'relations with the wider world', the EU:

shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.<sup>36</sup>

<sup>32</sup> Beate SJÅFJELL, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law*, Alphen aan den Rijn: Kluwer Law International, 2009, 4 [Accessed 9 January 2019]. Available at: <https://ssrn.com/abstract=4011934>.

<sup>33</sup> See Sarah E. CORNELL / Beate SJÅFJELL, 'Feminist Theory in the Regulatory Ecology' (November 05, 2024). University of Oslo Faculty of Law Research Paper No. 2024-11, Available at SSRN: <https://ssrn.com/abstract=5010031>; Carla RICE / Elisabeth HARRISON / May Friedman, «Doing Justice to Intersectionality in Research» *Cultural Studies ↔ Critical Methodologies*, 19/6 (2019) 409-420 [Accessed 11 May 2023]. Available at: <https://doi.org/10.1177/1532708619829779>.

<sup>34</sup> Treaty on the European Union (TEU), Article 3(1), with the values set out in Article 2: 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. Peace is historically also a foundational aim of that which is now the EU. For the interconnectedness between peace and sustainability, see Beate SJÅFJELL, «No Peace Without Sustainability, No Sustainability Without Peace. The Implementation of EU Treaty Goals» in Inge GOVAERE / Sacha GARBEN / Eleanor SPAVENTA, eds, *The Impact of War (in Ukraine) on the EU* London: Hart Publishing, in print 2025, Chapter 5. To be available at <https://www.bloomsbury.com/uk/impact-of-war-in-ukraine-on-the-eu-9781509986088/>. Chapter on file with current author.

<sup>35</sup> Article 3(3) TEU.

<sup>36</sup> Article 3(5) TEU.

In my analysis, I see sustainability as the overarching objective – encompassing a range of interconnected goals of environmental, social, and economic development. EU legal method is teleological and dynamic<sup>37</sup>, and Treaty objectives have direct legal relevance<sup>38</sup>.

In a mono-disciplinary legal analysis, what sustainability entails as an overarching EU law objective would be found primarily through an analysis of legal sources. In an interdisciplinary analysis, law does not give the answers alone to what sustainability means; rather the understanding of sustainability as a legal concept must also draw on sustainability science and sustainability research<sup>39</sup>. This is also for me about taking law seriously. An analysis of overarching legislative objectives should not be constrained through inadequate policy follow-up. Rather, taking seriously overarching legislative objectives, is a basis for a critical analysis of policy follow-up. Any area of EU law and policy is intended, as a matter of EU law, to also contribute to EU's overarching Treaty objectives. This is reflected in EU Treaty law, which sets out duties for EU institutions and, to a more limited extent, for Member States, to work towards the achievement of EU Treaty aims and objectives<sup>40</sup>. As set out explicitly in case law, a Member State's duty of loyalty according to the Treaty cannot be constrained with reference to lack of action by other Member States or EU institutions<sup>41</sup>. The loyalty is owed to the EU Treaties and to the overarching objectives set out there, not to EU institutions or other Member States.

Further, law cannot exist in a vacuum – law is also about regulating actors, institutions and actions in the world, with legislative objectives. Assessing whether law is achieving its objectives, requires empirical analysis, which cannot be disconnected from what, for example, environmental science has identified as ecological limits for human prosperity on this planet<sup>42</sup>.

<sup>37</sup> The EU 'shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties', Article 3(6) TEU; Anthony ARNULL, *The European Union and Its Court of Justice*, 2<sup>nd</sup> ed, Oxford University Press, 2006, 620-621 on the European Court of Justice's teleological, contextual and dynamic method of interpretation.

<sup>38</sup> My analysis of the case law of the Court of Justice of the European Union in my doctoral thesis, further confirmed this; Beate SJÅFJELL, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law* (n 32).

<sup>39</sup> See e.g. Beate SJÅFJELL / Jukka MÄHÖNEN, «Interdisciplinising Legal Theory: Towards a Reconceptualisation of Business Law» *University of Oslo Faculty of Law Research Paper*, 2020-36, *Nordic & European Company Law Working Paper*, 22-07 (2020) 1-26. [Accessed 22 November 2020]. Available at: <https://papers.ssrn.com/abstract=3731289>., where we cite Dershowitz on there being 'no season for law shorn of other disciplines', A. M. DERSHOWITZ, «The Interdisciplinary Study of Law: A Dedicatory Note on the Founding of the NILR Introduction» *Northwestern Interdisciplinary Law Review*, 1/1 (2008) 3-6.

<sup>40</sup> Article 3(6) TEU and Article 4(3) TEU. Article 4(3) sets out that each institution of the EU and each Member State is obligated to do what they can to 'assist each other in carrying out tasks which flow from the Treaties' and refrain from doing anything that may 'jeopardise the attainment of the Union's objectives'.

<sup>41</sup> John Temple LANG, «Article 10 EC: The Most Important "General Principle" of Community Law» in Ulf BERNITZ / Joakim NERGELIUS / Cecilia CARDNER, eds, *General Principles of EC Law in a Process of Development*, The Hague: Kluwer Law International, 2008, Chapter 1.4.

<sup>42</sup> E.g., Beate SJÅFJELL / Sarah CORNELL, «What the Actual ....? Tensions in the Science-Business-Policy Interface for Global Sustainability» (n 27).

Contributing to sustainability as the goal and as the entry point to the analysis, entails taking an objective-oriented approach with strong—or rather real—sustainability as the legislative goal. This requires a policy-coherence approach that embraces complexity and uncertainty, as well as employing evidence-based law in context<sup>43</sup>.

The EU-funded project Sustainable Market Actors for Responsible Trade (SMART, 2016-2020)<sup>44</sup>, exemplifies such an approach. We mapped, analysed and identified barriers and possibilities for more sustainable market actors<sup>45</sup>, and on that basis, we drew up and submitted reform proposals to the European Union<sup>46</sup>. The reform proposals were not an add-on to our interdisciplinary research project; they were explicitly set out as ‘deliverables’ when we submitted our funding proposal, and have contributed to academic debates, to further research activities, as well as to policymaking<sup>47</sup>.

The overarching theme and academic goals of the Research Group Sustainability Law (2022-2027) are also a part of the SMART legacy, reflecting our desire to continue working towards contributing to sustainability. The field of sustainability law is, as we see it, not constrained by established fields of law and their theoretical underpinnings and assumptions, nor by perceived

<sup>43</sup> Hanna AHLSTRÖM / Beate SJÅFJELL, «Why Policy Coherence in the European Union Matters for Global Sustainability» *Environmental Policy and Governance*, 33/3 (2023) 272-287. [Accessed 2 September 2023]. Available at: <https://onlinelibrary.wiley.com/doi/abs/10.1002/eet.2029>.

<sup>44</sup> Sustainable Market Actors for Responsible Trade (SMART, 2016-2020), [Accessed 15 July 2024]. Available at: [www.smart.uio.no/](http://www.smart.uio.no/).

<sup>45</sup> Beate SJÅFJELL, et al., «Obstacles to Sustainable Global Business. Towards EU Policy Coherence for Sustainable Development» *University of Oslo Faculty of Law Research Paper*, 2019-02, *Nordic & European Company Law Working Paper*, 19-10 (2019) 1-106. [Accessed 30 September 2019]. Available at: <https://papers.ssrn.com/abstract=3354401>.

<sup>46</sup> For an overview of the reform proposals, see Beate SJÅFJELL, et al., «Supporting the Transition to Sustainability: SMART Reform Proposals» *University of Oslo Faculty of Law Research Paper*, 2019-63, *Nordic & European Company Law Working Paper*, 20-05 (2019) 1-20 [Accessed 2 February 2020]. Available at: <https://papers.ssrn.com/abstract=3503310>; for the detailed proposals see Beate SJÅFJELL, et al., «Securing the Future of European Business: SMART Reform Proposals» *University of Oslo Faculty of Law Research Paper*, 2020-11, *Nordic & European Company Law Working Paper*, 20-08 (2020) 1-88 [Accessed 23 November 2021]. Available at: <https://ssrn.com/abstract=3595048>; Eléonore MAITRE-EKERN / Mark B TAYLOR / Maja van der VELDEN, «Towards a Sustainable Circular Economy. SMART Reform Proposals» *University of Oslo Faculty of Law Research Paper*, 2020-12, *Nordic & European Company Law Working Paper*, 20-10 (2020) [Accessed 5 March 2021]. Available at: <https://ssrn.com/abstract=3596076>; Marta ANDHOV, et al., «Sustainability Through Public Procurement: The Way Forward – Reform Proposals» *University of Oslo Faculty of Law*, SMART Project Report, 2020-09 (30 April 2020) 1-58. [Accessed 11 April 2023]. Available at: <https://papers.ssrn.com/abstract=3589168>. This work also formed the basis for a range of publications during the SMART Project (see [www.smart.uio.no/publications/](http://www.smart.uio.no/publications/)) and in the years after SMART was concluded, including my own contributions, e.g. Beate SJÅFJELL, «A General Corporate Law Duty to Act Sustainably» in Hanne S BIRKMOSE / Mette NEVILLE / Karsten Engsig SØRENSEN, eds, *Instruments of EU Corporate Governance: Effecting Changes in the Management of Companies in a Changing World*, Kluwer Law International, 2023. [Accessed 20 March 2023]. Available at: <https://ssrn.com/abstract=4224255>.

<sup>47</sup> SMART legacy research activities include several new research projects and the activities of the SMART Research Network, see [www.jus.uio.no/english/research/areas/sustainabilitylaw/networks/the-smart-network/](http://www.jus.uio.no/english/research/areas/sustainabilitylaw/networks/the-smart-network/) (under History of the Network and at the time of the writing, under Call for papers).

boundaries between public law and private law, nor those between international law, regional and national law, nor between areas of law such as company law, intellectual property law and consumer law<sup>48</sup>. As outlined above, this resonates with the EU's policy coherence approach and its teleological, dynamic method.

In the Research Group Sustainability Law, we have chosen to concentrate on the three areas of sustainable business, sustainable finance, and sustainable circular economy, based on the expertise and research interests of our members. For us these are broad and interdisciplinary categories, integrating different fields as law. In the next section I briefly present the evolving 'regulatory ecology' (explained below) for sustainable business.

### 3.2. The evolving regulatory ecology for sustainable business in EU law

Taking the current integration of sustainability in EU law as a case study, we can see that the unprecedented efforts of the European Union to promote sustainable business, are world-leading – and yet clearly insufficient. The continued silo-thinking and lack of policy coherence that hinders the achievement of the EU's overarching sustainability goals, can be understood through employing a regulatory ecology approach, as can the hope for breaking down silos and achieving policy coherence. I illustrate this below with two examples: the EU's Sustainable Finance initiative and its Sustainable Corporate Governance initiative.

Regulatory ecology may be understood as an analytical lens for analysing the interactions between and influence of different modes of regulation, in a very broad sense of 'regulation'<sup>49</sup>. The approach draws on the work of Lawrence Lessig<sup>50</sup>. The term 'regulatory ecology' was apparently first coined by Ian Hosein et al.<sup>51</sup> and developed further by Maja van der Velden,<sup>52</sup> and myself together with Mark B. Taylor<sup>53</sup>. Regulatory ecology was an important boundary

<sup>48</sup> RESEARCH GROUP SUSTAINABILITY LAW, University of Oslo.

<sup>49</sup> See also Christine PARKER, «The Pluralization of Regulation» *Theoretical Inquiries in Law*, 9/2 (2008) 349-369. [Accessed 26 April 2024]. Available at: <https://www.degruyter.com/document/doi/10.2202/1565-3404.1189/html>.

<sup>50</sup> Lawrence LESSIG, *Code and Other Laws of Cyberspace*, Basic Books, Inc 1999.

<sup>51</sup> Ian HOSEIN / Prodromos TSIAVOS / Edgar A WHITLEY, «Regulating Architecture and Architectures of Regulation: Contributions from Information Systems» *International Review of Law, Computers & Technology*, 17/1, (2003) 85-97. [Accessed 27 December 2021]. Available at: <https://doi.org/10.1080/1360086032000063147>. See also van der VELDEN, «A license to know: Regulatory tactics of a global network.» in F. Sudweeks / H. Hrachovec / C. Ess, eds, *Cultural Attitudes Towards Communication and Technology*, Tartu, Estonia: Murdoch University, 2006, 555-563.

<sup>52</sup> Van Der VELDEN, «Design as Regulation: Opportunities and Limitations for Sustainable Mobile Phone Design», in J. ABDELNOUR-NOCERA, M. STRANO, C. Ess, M. Van der VELDEN / H. HRACHOVEC, eds., *Culture, Technology, Communication. Common World, Different Futures*, IFIP Advances in Information and Communication Technology, Springer, 490(2016) 32-54.

<sup>53</sup> Beate SJÅFJELL / Mark TAYLOR, «Planetary Boundaries and Company Law: Towards a Regulatory Ecology of Corporate Sustainability» *University of Oslo Faculty of Law Research Paper*, 2015-11 (2015) 1-32. [Accessed 8 January 2018]. Available at: <https://papers.ssrn.com/abstract=2610583>; Beate SJÅFJELL / Mark B TAYLOR, «Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose» *International and Comparative Corporate*

object, connecting scholars from different disciplines already from the proposal-writing stage of the SMART Project, and throughout the life of the project<sup>54</sup>. In the work I have been involved in, we have sought to position this intrinsically interdisciplinary approach within a teleological systems-theoretic understanding of the interconnectedness of the social-ecological systems of this world, based on the ontological view that the world consists of interdependent systems of ecosystems and human society, which is crucial to understanding what societal goals of sustainability should entail and what it will take to achieve them<sup>55</sup>.

Regulatory ecology can be used to analyse the regulatory effects of *law* on decision-making in business and how these are undermined or reinforced through the other regulatory modalities: *social norms*, *market* pressures and ‘*architecture*’<sup>56</sup> (the regulatory effect of the natural world (‘*ecological architecture*’) and human-made elements of the world (‘*human-made architecture*’)<sup>57</sup>. In current work-in-progress, we position the regulatory ecology within a research-based approach to sustainability. We analyse the interactions between and within the regulatory modalities, to identify opportunities for sustainable business<sup>58</sup>.

Regulatory ecology can be used to analyse regulatory developments, to identify what made a particular regulatory development

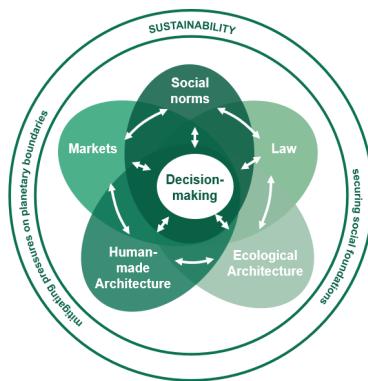


Figure 2. Credit:

Cornell/Sjåfjell, ‘Feminist Theory in the Regulatory Ecology’ (n. 33)

Law Journal 40 13 (2019) 40-66. [Accessed 26 January 2020]. Available at: <https://papers.ssrn.com/abstract=3444050>.

<sup>54</sup> Maja van der VELDEN / Beate SJÅFJELL, «Thinking with Care: Exploring Interdisciplinarity in a Global Research Project» in Beate SJÅFJELL / Roseanne RUSSELL / Maja van der VELDEN, eds, *Interdisciplinary Research for Sustainable Business: Perspectives from Women Business Scholars*, Springer, 2022.

<sup>55</sup> Hanna AHLSTRÖM, «Systems Thinking and the Law in the Age of the Anthropocene», in Beate SJÅFJELL / Carol LIAO / Aikaterini ARGYROU, *Innovating Business for Sustainability: Regulatory Approaches in the Anthropocene*, Cheltenham: Edward Elgar, 2022, 47-64, Hanna AHLSTRÖM / Sarah E CORNELL, «Governance, Polycentricity and the Global Nitrogen and Phosphorus Cycles» *Environmental Science & Policy*, 79 (2018) 54-65. [Accessed 4 November 2022]. Available at: <https://linkinghub.elsevier.com/retrieve/pii/S1462901117307670>; Carl FOLKE, et al., «Social-Ecological Resilience and Biosphere-Based Sustainability Science» *Ecology and Society*, 21/3 (2016) 41. [Accessed 14 April 2020]. Available at: <https://www.ecologyandsociety.org/vol21/iss3/art41/>; Donella MEADOWS, *Thinking in Systems: A Primer*, Chelsea Green Publishing, 2008. [Accessed 13 June 2020]. Available at: <https://www.chelseagreen.com/product/thinking-in-systems/>; Rika PREISER, et al., «Social-Ecological Systems as Complex Adaptive Systems: Organizing Principles for Advancing Research Methods and Approaches», *Ecology and Society*, 23/4 (2018) 46. [Accessed 18 November 2019]. Available at: <https://www.ecologyandsociety.org/vol23/iss4/art46/>.

<sup>56</sup> Beate SJÅFJELL / Mark TAYLOR, «Planetary Boundaries and Company Law: Towards a Regulatory Ecology of Corporate Sustainability» 1-32, (n 53).

<sup>57</sup> Work-in-progress together with Sarah Cornell and Eelke Heemskerk.

<sup>58</sup> Work-in-progress together with Sarah Cornell and Eelke Heemskerk.

possible, what is preventing the realisation of its potential, and – also conversely – what are the possibilities in the evolving regulatory ecology<sup>59</sup>.

Regulatory ecology is a lens that helps identify the interconnections between actors in and across regulatory modalities, highlighting that regulation often does not happen only through law in a linear, top-down process. Regulation is the result of interactions, inactions, tensions, clashes and power struggles between actors seeking to regulate and between them and actors sought to be regulated. Drivers in these interconnections are explicit and implicit value-choices in the theoretical underpinnings as well as in the legislative, corporate and societal actors' aims and efforts.

The EU's unprecedented efforts at channelling financial market actors' decision-making towards sustainability, and the limitations of these efforts, illustrate these interconnections. The ecological architecture of climate change with its delayed and slow regulatory effect, is increasingly materialising, with financial market actors' response in the influential Recommendations from the Task Force for Financial Risks of Climate Change of 2017<sup>60</sup>. The EU's Sustainable Finance initiative of 2018, reflects the recognition that climate change and other transgressions of planetary boundaries have financial risks. Yet its Action Plan does not engage with the planetary boundaries framework or with the ecological limits of our planet – rather it sees sustainable finance as being about financing 'sustainable growth'<sup>61</sup>. Financial risks must be mitigated, without changing finance-as-usual, business-as-usual, and indeed the economy-as-usual.<sup>62</sup> This limiting financially-driven approach has constrained the EU's range of legislative instruments under the Action Plan, including the Sustainable Finance Disclosure Regulation of 2019, the Taxonomy Regulation of 2020 and the Corporate Sustainability Reporting Directive (2022) with its European Sustainability Reporting Standards. Groundbreaking and world-leading, the EU's legislative initiatives still illustrate continued silo-thinking and the power of vested interests, with an overreliance on

<sup>59</sup> Ibid.

<sup>60</sup> TCFD, «Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures» (TCFD 2017) <https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf>.

<sup>61</sup> EUROPEAN COMMISSION, «Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. Action Plan on Financing Sustainable Growth» (2018) Commission Communication COM/2018/097 final [Accessed 3 February 2020]. Available at: [https://ec.europa.eu/info/publications/180308-action-plan-sustainable-growth\\_en](https://ec.europa.eu/info/publications/180308-action-plan-sustainable-growth_en).

<sup>62</sup> Patrick W KEYS, et al., «Anthropocene Risk» *Nature Sustainability*, 2 (2019) 667-673. [Accessed 10 April 2020]. Available at: <http://www.nature.com/articles/s41893-019-0327-x>; Beatrice CRONA / Carl FOLKE / Victor GALAZ, «The Anthropocene Reality of Financial Risk», *One Earth*, 4/5 (2021) 618-628. [Accessed 9 September 2021]. Available at: <https://www.sciencedirect.com/science/article/pii/S2590332221002359>; Beate SJÅFJELL, «Taking Finance Seriously: Understanding the Financial Risks of Unsustainability» in Kern ALEXANDER / Matteo GARGANTINI / Michele SIRI, eds, *The Cambridge Handbook of EU Sustainable Finance: Regulation, Supervision and Governance*, Cambridge: Cambridge University Press, in print 2025, Chapter 2. Preprint available at SSRN: <https://ssrn.com/abstract=4294693> [Accessed 3 December 2024].

disclosure – as opposed to mandating change – and on greening, rather than a fundamental transformation towards sustainability<sup>63</sup>.

Companies are creatures of national law, as the Court of Justice has repeatedly reiterated, and ‘law resides at the heart’ of global value chains structuring of globalised business<sup>64</sup>. Yet a specific interaction between social norms and markets constrains legislative creativity and thereby law’s possibility for regulating companies as key elements of globalised business. This law-and-economics inspired, Anglo-Saxon-based idea of ‘shareholder primacy’, dictates that companies are vehicles for shareholders’ profit maximisation, and claims, contrary to company law, that boards are agents for the shareholders as principals, and that boards – and by extension senior executive management – have a duty to maximise returns for shareholders. This is a main barrier to sustainable business, and there have been increasing strong calls for company law to clarify this and take back and use its power to set out explicitly a modern, sustainability-oriented purpose of the company, with corresponding duties for the boards<sup>65</sup>.

The EU’s Sustainable Corporate Governance, launched in 2020, was the first time that the EU included company law in its sustainability-oriented regulatory toolbox, stating explicitly that its aim was ‘to improve the EU regulatory framework on company law and corporate governance’,

<sup>63</sup> Hanna AHLSTRÖM / David MONCIARDINI, «The Regulatory Dynamics of Sustainable Finance: Paradoxical Success and Limitations of EU Reforms» *Journal of Business Ethics*, 177 (2022) 193-212, [Accessed 25 April 2024]. Available at: <https://doi.org/10.1007/s10551-021-04763-x>; Hanna AHLSTRÖM / Beate SJÅFJELL, «Complexity and Uncertainty in Sustainable Finance: An Analysis of the EU Taxonomy» in Timothy CADMAN / Tapan SARKER, eds, *De Gruyter Handbook of Sustainable Development and Finance*, Berlin, Boston: De Gruyter, 2022, 15-40. [Accessed 17 March 2023]. Available at: <https://doi.org/10.1515/9783110733488-002>; Beate SJÅFJELL, «Revisiting Agency Theory: A Radical Rethinking of Allocation of Responsibility, Accountability and Liability», in Nicolas CHEVROLIER / Aikaterini ARGYROU / Ronald JEURISSEN, eds, *Radical business perspectives for sustainability transitions*, Cheltenham: Edward Elgar, in print 2025, Chapter 9. Preprint available at SSRN: <https://ssrn.com/abstract=4835681> (accessed 24 July 2024).

<sup>64</sup> ‘–it is the vehicle through which value is generated, captured and distributed within and between organisational and jurisdictional domains, and diverse and geographically disparate business operations are coordinated and governed’, THE IGLP LAW AND GLOBAL PRODUCTION WORKING GROUP, «The Role of Law in Global Value Chains: A Research Manifesto», 61.

<sup>65</sup> Christopher M BRUNER, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power*, Cambridge: Cambridge University Press, 2013. [Accessed 18 March 2019]. Available at: [/core/books/corporate-governance-in-the-commonlaw-world/112F8A3E8EDC989060D8A051C77A663A](https://core.ac.uk/display/112F8A3E8EDC989060D8A051C77A663A); Beate SJÅFJELL, et al., «Shareholder Primacy: The Main Barrier to Sustainable Companies» in Beate SJÅFJELL / Benjamin J RICHARDSON, eds, *Company Law and Sustainability: Legal Barriers and Opportunities*, Cambridge: Cambridge University Press, 2015. [Accessed 11 July 2017]. Available at: <https://papers.ssrn.com/abstract=2664544>; Christopher M BRUNER / Beate SJÅFJELL, «Corporate Law, Corporate Governance and the Pursuit of Sustainability» in Beate SJÅFJELL / Christopher M BRUNER, eds, *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 1st ed, Cambridge: Cambridge University Press, 2019. [Accessed 6 November 2022]. Available at: <https://www.cambridge.org/core/product/identifier/9781108658386%23CN-bp-50/type/book-part>; Lynn A. STOUT, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, San Francisco: Berrett-Koehler Publishers, 2012; Andrew JOHNSTON, et al., *Corporate Governance for Sustainability*, 2019. [Accessed 29 March 2020]. Available at: <https://papers.ssrn.com/abstract=3502101>.

to ‘enable companies to focus on long-term sustainable value creation’<sup>66</sup>. The launch of the initiative resulted in extreme push-back, mainly by shareholder primacy proponents<sup>67</sup>. One of the issues that caused the most controversy was the attempt in the proposal for a Corporate Sustainability Due Diligence Directive (CSDDD) to integrate aspects of sustainability into the duties of the corporate board, with market forces mobilising to protect shareholder primacy<sup>68</sup>. The result was that the very limited inclusion of company law was taken out in the December 2023 consensus between the legislators. The tensions within social norms were illustrated by the mobilisation in favour of the CSDDD and in favour of strengthening its due diligence requirements to be more in line with internally endorsed sets of social norms, notable the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, and the UN Guiding Principles for Business and Human Rights. Reflecting the evolving regulatory ecology, the spring of 2024 saw public expressions of support by civil society, academics, and businesses themselves<sup>69</sup>, while certain Member States continued to seek to undermine the political consensus achieved between the Parliament and the Council in December 2023. The CSDDD was finally adopted in June 2024, after one of the most controversial processes in the legislative history of the EU<sup>70</sup>.

The controversy illustrates the still powerful reach of the social norm of shareholder primacy, and the underlying assumptions and prioritised values. The intent may originally be seen as a good one: the idea was that prioritising shareholders and maximising their returns is an efficient way of maximising societal welfare<sup>71</sup>. This thinking continue to dominate in spite of the lacking empirical evidence and the overwhelmingly strong empirical basis for the problematic effects of continued business-as-usual, which illustrates the power of vested interests – of actors that have

<sup>66</sup> EUROPEAN COMMISSION, *Sustainable Corporate Governance Initiative*, 2020. Available at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en).

<sup>67</sup> Beate SJÅFJELL / Jukka MÄHÖNEN, «Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy» *Bond Law Review*, 34/2 (2024) 69-113. [Accessed 15 March 2024]. Available at: <https://blr.scholasticahq.com/article/94050-corporate-purpose-and-the-misleading-shareholder-vs-stakeholder-dichotomy>.

<sup>68</sup> *Ibid.*

<sup>69</sup> BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, «Businesses Make Urgent Call for Support for EU Due Diligence Law Ahead of Council Vote», (27 February 2024). [Accessed 15 March 2024]. Available at: <https://www.business-humanrights.org/en/latest-news/eu-csddd-company-statement/>; UNICEF & THE EUROPEAN UNION, *Joint Statement by UNDP, UNEP, UNICEF and OHCHR on the EU Corporate Sustainability Due Diligence Directive* [Accessed 19 February 2024]. Available at: <https://www.unicef.org/eu/press-releases/joint-statement-undp-unep-unicef-and-ohchr-eu-corporate-sustainability-due-diligence>.

<sup>70</sup> Nicolas BUENO, et al., «The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise» *Business and Human Rights Journal*, (2024) 1-7. [Accessed 31 May 2024]. Available at: <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/eu-directive-on-corporate-sustainability-due-diligence-csddd-the-final-political-compromise/9731DFA73A2D98D2B8B71BEDF68CEDD1>.

<sup>71</sup> John ARMOUR, et al., «What Is Corporate Law?», *The Anatomy of Corporate Law*, 3rd edn, Oxford University Press, 2017, 23-24. [Accessed 27 December 2021]. Available at: <https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780198739630.001.0001/acprof-9780198739630-chapter-1>.

become rich and powerful through globalised business and do not wish to entertain the thought of fundamentally changing the system<sup>72</sup>.

Held up against the overarching aim of global sustainability, the constraining effect on the EU as legislator of path-dependent ideas concerning the necessity of prioritising maximisation for returns to investors (shareholder primacy) and continued economic growth, is clear. Environmental issues are regulated using disclosure, with the aim of greening finance and the economy more broadly. Illicit financial flows are not challenged, with business continuing to structure their enterprises in ways that undermine the economic and governance bases for well-functioning societies. People, especially people outside of the EU, do not matter enough to warrant real change. The EU's approach does not challenge the core business-as-usual approaches; it does not mandate the transformation from unsustainable, linear businesses, to more sustainable, circular ones<sup>73</sup>.

And yet, the evolving regulatory ecology shows that the horizontal and vertical silos are beginning to crack, because of a changing balance in the tensions within and between social norms, markets, and law – stimulated, amongst other things, by the ever-clearer consequences of continued extreme unsustainabilities. In the internationally and nationally endorsed sets of social norms for corporate governance, often referred to as corporate governance codes, sustainable value creation is beginning to emerge as a competing value to that of shareholder primacy<sup>74</sup>. In EU law regulating finance and business, international human rights and labour law is being directly integrated, often through references to the OECD Guidelines and the UN Guiding Principles<sup>75</sup>. The international trend of sustainability-oriented lawsuits against states and business, banks, and boards, also show how horizontal and vertical silos are cracking through new

<sup>72</sup> E.g. Jason HICKEL, *The Divide: A Brief Guide to Global Inequality and Its Solutions*, (n 9).

<sup>73</sup> See further Beate SJÅFJELL, «Revisiting Agency Theory: A Radical Rethinking of Allocation of Responsibility, Accountability and Liability» (n 63); see also Hanna AHLSTRÖM / David MONCIARDINI, «The Regulatory Dynamics of Sustainable Finance: Paradoxical Success and Limitations of EU Reforms» (n 63); AHLSTRÖM / Beate SJÅFJELL, «Complexity and Uncertainty in Sustainable Finance: An Analysis of the EU Taxonomy» (n 63); Eléonore MAITRE-EKERN, «Re-Thinking Producer Responsibility for a Sustainable Circular Economy from Extended Producer Responsibility to Pre-Market Producer Responsibility» *Journal of Cleaner Production*, 286 (2021) 125454. [Accessed 4 January 2021]. Available at: <http://www.sciencedirect.com/science/article/pii/S0959652620355001>; David MONCIARDINI et al., «Circular Economy Regulation: An Emerging Research Agenda» in Allen ALEXANDER / Stefano Pascucci / Fiona CHARNLEY, eds, *Handbook of the Circular Economy: Transitions and Transformation*, De Gruyter, 2023. [Accessed 11 March 2023]. Available at: <https://www.degruyter.com/document/doi/10.1515/9783110723373-016/html>.

<sup>74</sup> Beate SJÅFJELL / Georgina TSAGAS, «Integrating Sustainable Value Creation in Corporate Governance: Company Law, Corporate Governance Codes and the Constitution of the Company» in Beate / Georgina TSAGAS / Charlotte VILLIERS, eds, *Sustainable Value Creation in the European Union: Towards Pathways to a Sustainable Future through Crises*, Cambridge University Press, 2023. [Accessed 1 May 2022]. Available at: <https://papers.ssrn.com/abstract=4006106>.

<sup>75</sup> Briefly discussed in Beate SJÅFJELL, «Revisiting Agency Theory: A Radical Rethinking of Allocation of Responsibility, Accountability and Liability» (n 63).

interconnections and new kinds of regulatory creativity in the evolving regulatory ecology<sup>76</sup>. Currently, this is all too weak and the emphasis on greening and maintaining business as usual is still clear – but the potential for further and deeper change has been embedded into law. Certainly, yesterday's legal analysis of the duties of a board or the boundaries of company's responsibility may have little value in tomorrow's courtroom.

#### 4. Change is possible

Ensuring sustainability may as a normative matter be seen as law's objective and greatest challenge. In the context of EU law, it is the overarching objective and a legal duty. EU Treaty law, interpreted using EU law's own teleological and dynamic method, sets our requirements for the EU institutions and its Member States to work towards the overarching objectives, to promote policy coherence, and to integrate sustainability into all policies and activities.

Establishing sustainability law as a field can contribute to developing legal research and education of future lawyers and legal scholars in ways that may contribute to mitigating weaknesses of law as a discipline: Firstly, the problem with law's mechanistic world-view compared to the development of natural science, which gradually has encompassed a systems-based understanding of the ecology of our earth and its interaction with societal institutions<sup>77</sup>. Secondly, law's tendency to be siloed (horizontally as well as vertically), rigid and static in a rapidly changing society, while reflecting values and interests of those with power<sup>78</sup>. Thirdly, the limited inclusion of interdisciplinary approaches also in legal research and education<sup>79</sup>.

What the future will be depends on all of us. None of us have the full answers – and yet those of us who are in positions to do so, can work together across and beyond academia, through new and more open ways of collaborating, of reassessing underpinning values, and rethinking

<sup>76</sup> E.g. Mark B TAYLOR, «Counter Corporate Litigation: Remedy, Regulation, and Repression in the Struggle for a Just Transition», *Sustainability*, 13 (2021) 10742. [Accessed 2 October 2021]. Available at: <https://www.mdpi.com/2071-1050/13/19/10742>; Peggy HOLLINGER, «Investors Raise Pressure over “Forever Chemicals” amid Growing Litigation», *Financial Times*, (14 November 2023). [Accessed 18 November 2023]. Available at: <https://www.ft.com/content/ee955487-3e7c-4c7b-9bcb-89001507cee0>; Yusra SUEDI / Marie FALL, «Climate Change Litigation before the African Human Rights System: Prospects and Pitfalls: Practice Note: GNHRE Climate Litigation in Global South Project» *Journal of Human Rights Practice*, 16/1 (2024) 146-159. [Accessed 19 July 2023]. Available at: <https://doi.org/10.1093/jhuman/huad024>; Christina VOIGT, «The Power of the Paris Agreement in International Climate Litigation», *Review of European, Comparative & International Environmental Law*, 32 (2023) 237-249. [Accessed 25 July 2023]. Available at: <https://doi.org/10.1111/reel.12514>.

<sup>77</sup> Fritjof Capra / Ugo Mattei, *The Ecology of Law: Towards a Legal System in Tune with Nature and Community* (n 13).

<sup>78</sup> Jason HICKEL, *The Divide: A Brief Guide to Global Inequality and Its Solutions* 1 (n 9); Malcolm FERDINAND, *Decolonial Ecology: Thinking from the Caribbean World*, Wiley (n 8).

<sup>79</sup> Sarah CORNELL et al., «Opening up Knowledge Systems for Better Responses to Global Environmental Change» *Environmental Science & Policy*, 28 (2013) 60-70. [Accessed 2 February 2019]. Available at: <http://www.sciencedirect.com/science/article/pii/S1462901112002110>.

how we see the world<sup>80</sup>, and our own contributions to the world. If we concentrate only on the negative news, the seemingly self-fulfilling prophecies of humanity being selfish and unable to change, informed by economic efficiency ways of thinking, we will remain on a very certain path towards a very uncertain future<sup>81</sup>. Conversely, if many enough believe in the possibility for a fundamental transformation towards sustainability and work for that, the chances increase for that transformation to happen<sup>82</sup>.

Sustainability law's contribution to sustainability entails challenging established conceptualisations in laws and policies. What are the boundaries of a business? What is the relationship between a business and society? What are the duties of a corporate decision-maker? How can we work within the current system for change, while acknowledging its limitations and the need for a fundamental transformation? How can we challenge the neo-colonialism of globalised business? What are our roles as scholars?

The calls for change are increasing, from school children, students, civil society, policymakers, business, investors, and academics. It is my hope that this thought piece can stimulate further discussion on law's contribution to a safe and just space for humanity and other species on this one beautiful planet we call home.

<sup>80</sup> Starting by reading, for example, Robin Wall KIMMERER, *Braiding Sweetgrass*, 1st edn., Milkweed Editions, 2013. [Accessed 3 July 2024]. Available at: <<http://books.google.com/books?vid=isbn9781571313355>>.

<sup>81</sup> Rutger BREGMAN, *Humankind: A Hopeful History*, Bloomsbury Publishing, 2021. [Accessed 15 July 2024]. Available at: <https://www.bloomsbury.com/uk/humankind-9781408898956/>.

<sup>82</sup> Ibid.