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## Book Review

### THE PRINCIPLE OF SUSTAINABILITY: TRANSFORMING LAW AND GOVERNANCE, by Klaus Bosselmann<sup>1</sup>

LEE GODDEN<sup>2</sup>

"THE CONCEPT OF 'SUSTAINABLE DEVELOPMENT' lost its core meaning somewhere between the 1980s and today."<sup>3</sup> In response, Klaus Bosselmann in *The Principle of Sustainability: Transforming Law and Governance* seeks to define a new vision for sustainability in order to transcend the limitations of its earlier conceptions. He envisages a reinvigorated principle of sustainability as fundamental to reformulating environmental law and governance that relates to sustainability in the spheres of both domestic and international law, as well as in policy settings. While Bosselmann's book focuses on elucidating sustainability as a legal principle, it is also remarkable as an articulation of the role of law as an ethical pursuit in modern society.

*The Principle of Sustainability* thus has relevance for an audience beyond that of academics, students, and professionals engaged with environmental law, although these would be the primary target groups. The work speaks to many general questions about the nature of law. Therefore, it will have appeal in legal theory fields, as well as multidisciplinary areas centred on environmental philosophy and ethics. It also offers an important contribution to opening debates about the nature of environmental sustainability in both policy and institutional settings.

Underpinning the conceptual architecture for sustainability is a jurisprudential analysis that critiques the procedural account of law while adopting a natural law perspective. However, this perspective is informed by an awareness of

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1. (Aldershot: Ashgate, 2008) 242 pages.

2. Professor and Director, Centre for Resources, Energy and Environmental Law, Melbourne Law School, The University of Melbourne.

3. Bosselmann, *supra* note 1 at 1.

the practical limits of any appeal to the higher values. Sustainability emerges as an overarching norm or principle that “calls for development based on ecological sustainability in order to meet the needs of people living today and in the future. Understood in this way, the concept provides content and direction. It can be used in society and enforced through law.”<sup>4</sup>

The key argument across the book is that the sustainability principle, through its prioritization of ecological integrity, has definitive content and direction. Yet, at times, there is a sense that too much is being claimed for the sustainability principle as the universal guide to revitalizing environmental law. Sustainability is asked to bear considerable interpretative weight when it is linking it with liberal humanism, justice, human rights, state trusteeship, and citizen participation in a resurgent civic space. While the transcendental function of law should not be ignored, it is a large contention to construe sustainability as the foundation for reconstituting the liberal legal paradigms that currently govern a growth-oriented political economy and nation-state autonomy. In effect, sustainability is asked to perform the function of a *Grundnorm*<sup>5</sup> that sets out the idealized parameters of the social and biophysical world to be instituted as a legal order. Despite some concerns as to whether ecological sustainability is up to the task, the book offers one of the most comprehensive and compelling accounts of sustainability in contemporary law in its capacity to inform a transition to a more ecologically-oriented form of law and governance.

In sketching how sustainability might underpin the foundation for the transformation of environmental law, *The Principle of Sustainability* commences with a discussion on the meaning of sustainability, drawing on historical and contemporary thoughts. These concepts are then juxtaposed by an examination of how sustainability functions as an overarching principle that prioritizes ecological concerns. The philosophical analyses in the opening two chapters are followed by an examination of the parameters of ecological justice. This exploration contrasts with a more traditional, liberal account of justice, discussed in chapter three, which has been long associated with John Rawls.<sup>6</sup> Shifting his focus from ecological justice to rights, Bosselmann addresses the long-standing debate

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4. *Ibid.* at 11.

5. *Grundnorm* is a concept attributed to Hans Kelsen, a jurist and legal philosopher, and thus has a specialized legal origin. More widely, it denotes an overarching or basic norm.

6. Bosselmann, *supra* note 1 at 81-85.

about the utility of associating human rights with environmental protection in chapter four, concluding “that human rights ... need to respect ecological boundaries.”<sup>7</sup> Chapter five acknowledges the pivotal role of the nation-state and the influence of international law in reframing concepts of sovereignty to develop a model of sustainability and state trusteeship. The sixth (and final) chapter examines how sustainability can inform a system of environmental governance that comprises “the various institutions and structures of authority engaged in the protection of the natural environment.”<sup>8</sup>

## I. THE MEANING OF SUSTAINABILITY

Sustainability is characterized as “both simple and complex”<sup>9</sup> in the first chapter. Sustainability is simple in that it forms the ultimate limit to human existence. The idea of limits, while simple in theory, draws on a complex philosophical and legal understanding of human interaction with nature.<sup>10</sup> Accordingly, Bosselmann recognizes the diversity of influences upon the definition of sustainability while seeking to discern an essential meaning that can be differentiated from the term “compromise.”<sup>11</sup> The classic definition of sustainable development that is contained in the Brundtland Report is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>12</sup> Yet, explains Bosselmann, it is only “meaningful if related to the core idea of ecological sustainability.”<sup>13</sup> The commonly-held view that we need to balance the needs of people living today (intragenerational equity) with the needs of people in the future (inter-

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7. *Ibid.* at 143.

8. *Ibid.* at 175.

9. *Ibid.* at 9.

10. Donald Kelley, “Second Nature: The Idea of Custom in European Law, Society and Culture” in Donald Kelley, ed., *The Writing of History and the Study of Law* (London: Variorum, 1997) at 31.

11. *Supra* note 1 at 29-30.

12. World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 43. This book is often also known as the “Brundtland Report,” named after the chair of the Commission and former Prime Minister of Norway, Gro Harlem Brundtland.

13. *Supra* note 1 at 11.

generational equity) is rejected in preference to the effective realization of the ecological core of sustainability.<sup>14</sup>

The genesis for ecological sustainability is to be found in many societies. Such concepts have an ancient lineage, with elements found in areas as diverse as forestry practices and law, and common property concepts in agricultural villages. The reference to non-Western legal systems is at times cursory, with the main emphasis on the development of European law and practice, principally in Germany.<sup>15</sup> Given the embedded character of sustainability in many indigenous and local communities,<sup>16</sup> the author's Eurocentric focus is a little problematic. However, Bosselmann does acknowledge that Western legal systems no longer exhibit sufficient levels of sustainability. He separates sustainability from environmental law, declaring the latter to be ecologically ignorant<sup>17</sup> and largely procedural in character. Such a separation may be questioned, as some scholars see sustainability as suffering from a dilution similar to that of the term "environment," especially in the deployment of weak sustainability agendas by governments.

The first chapter concludes by stepping through the international legal framework for sustainable development, including the distributive justice outcomes emanating from the 2002 World Summit on Sustainable Development.<sup>18</sup> Bosselmann reiterates his central theme by arguing that all existing treaties, laws, and legal principles must be interpreted in the light of the sustainability principle as "guidance for the interpretation of legal norms and sets the benchmark for the understanding of justice, human rights and state sovereignty."<sup>19</sup>

## II. PRINCIPLE OF SUSTAINABILITY

In chapter two, *The Principle of Sustainability* seeks to define a more precise formulation for the principle of sustainability in order to set the "parameters for the

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14. *Ibid.* at 23.

15. *Ibid.* at 13-20.

16. See generally Peter Ørebeck *et al.*, eds., *The Role of Customary Law in Sustainable Development* (Cambridge: Cambridge University Press, 2005).

17. Bosselmann, *supra* note 1 at 13.

18. *Ibid.* at 37-41.

19. *Ibid.* at 41.

direction and extent of social change.”<sup>20</sup> In discussing how principles forged in the interdisciplinary environmental field become legal principles, the analysis implicitly adopts a specific jurisprudential perspective. Bosselmann sets out a vision where the primary function of law is to promote fundamental principles that are given legal effect.<sup>21</sup> This tautology of defining legal essence through its connection with Law has its derivation in jurisprudence, but is associated with John Austin in the common law.<sup>22</sup> Bosselmann also draws a classic distinction between principles of moral force and those principles exhibiting legal effect, relying primarily on Ronald Dworkin to support his thesis of the existence of fundamental legal principles.<sup>23</sup> In this way, legal principles function as *Grundnorms*, or overarching values, to which all other subsidiary principles and legal rules should adhere. Sufficient “recognition” is the catalyst for sustainability to take on this fundamental character.<sup>24</sup> Sustainability is to be a “meta-principle” having “interstitial normativity.”<sup>25</sup> Bosselmann develops a typology to classify those environmental principles of legal normative force as distinct from mere policy.

Bosselmann adopts a position reminiscent of European natural law conceptions, noting that “[t]he prime responsibility of law is to promote fundamental principles, often expressed in constitutions ... and ensure the legal process is reflective of them. If sustainability is perceived as one of such fundamental principles, the legal process will have to be reflective of it.”<sup>26</sup> It is at this point in *The Principle of Sustainability* that some difficulties arise. The author insists that fundamental legal principles are given their form by their reference to essential constructs, such as justice and equality, to provide certainty to the normative content. Sustainability, therefore, can only be clearly defined by reference to its essence in the external values of ecological priority. Of course, that begs the

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20. *Ibid.* at 43.

21. *Ibid.* at 44.

22. See John Austin, *The Province of Jurisdiction Determined* (London: John Murray, 1832); John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law*, 4th ed. (London: John Murray, 1873).

23. *Supra* note 1 at 47-50.

24. *Ibid.* at 46.

25. *Ibid.* at 51.

26. *Ibid.* at 63.

question as to what is ecological priority in any given context, although Bosselmann does seek to ethically ground its essence.<sup>27</sup>

The core problem of distinguishing law from morals by reference to overarching values, which in turn rely on an accepted moral and ethical content, is not confined to Bosselmann's analysis; this process pervades many "liberal constitutional" analyses of law. Bosselmann does acknowledge some difficulties by suggesting that ecological sustainability initiatives should be realistic and have broad community acceptance. The author also cites specific case studies to give normative content to ecological sustainability.<sup>28</sup> However, some reference to the literature that offers a critique of liberal jurisprudence may have provided a more rounded discussion of how sustainability might function as a *Grundnorm*. Other possible accounts of law, social, and ecological change are referenced briefly. This reference is largely to dismiss instrumentalist views that would associate law with power, and the lack of sustainability with the dominance of particular interests within the legal system. Bosselmann's further articulation of the principle of sustainability and its interactions with justice, human rights, state obligation, and civic participation thus proceeds firmly within the liberal model of law as the prevailing paradigm in contemporary legal systems.

### III. ECOLOGICAL JUSTICE

The third chapter commences with the proposition that "[t]he principle of sustainability aims to protect ecological systems and their integrity. Its subject matter is ecological processes. However, social processes determine to what extent and how ecological systems should be sustained. This way sustainability becomes a social issue."<sup>29</sup> In considering these social issues, Bosselmann identifies two components of distributive justice: firstly, the fair distribution of the environment among peoples; and secondly, the "justice" between humans and the environment.<sup>30</sup> With respect to the latter, the book explores an ethical approach, noting that "[t]he goal of extending justice to respond to environmental needs has long

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27. *Ibid.* at 52-53.

28. *Ibid.* at 63-76.

29. *Ibid.* at 79. See also Robyn Eckersley, *The Green State: Rethinking Democracy and Sovereignty* (Cambridge, MA: MIT Press, 2004).

30. *Supra* note 1 at 79.

occupied theorists.”<sup>31</sup> Identifying a line of theory based around John Rawls’s identification of human needs, which are built around life sustaining properties and human health, Bosselmann examines the tensions involved in reconciling “liberalism’s preoccupation with the individual, self-interest and state neutrality with a commitment to good environmental practice.”<sup>32</sup> It becomes clear that reconciling the above interests by extending justice outward from the self-interested individual has its limitations. Accordingly, ecological approaches are preferred that ground justice in a concept of “generalizable” (*i.e.*, public) interests, rather than individual self-interest. The third chapter also considers how ecological or interspecies justice<sup>33</sup> can be practically implemented in law by reference to biotechnology regulation and New Zealand resource management legislation. In articulating an approach to ecological justice, the author draws on theorists such as Robyn Eckersley, whose arguments, in turn, have resonances from Jürgen Habermas.<sup>34</sup> Indeed, in various guises, Habermas and his theories of collaborative democracy appear often in the succeeding chapters, especially in the final chapter, in its concern with “ecological citizenship.”<sup>35</sup>

#### IV. ECOLOGICAL HUMAN RIGHTS

In the 1970s, the limitations that arose out of a focus on the rights of human individuals, whether or not these individuals may need to respect ecological imperatives, were some of the central drivers for moving away from a liberal property- and sovereignty-oriented model to environmental protection. Bosselmann acknowledges the intersection between human rights and environmental protection in both international and national law, but suggests that each is distinguished by a different value system. In tracing out their different trajectories, he canvasses whether a human right to the environment is extensive enough to support a non-human centred articulation of rights.<sup>36</sup> He argues that the human right to the environment might support an initial transition, but that any sustainability principle must be accompanied by a respect for the intrinsic

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31. *Ibid.* at 81.

32. *Ibid.*

33. *Ibid.* at 99.

34. *Ibid.* at 87-88.

35. *Ibid.* at 196-98.

36. *Ibid.* at 127.



value of the non-human world. Concepts of respect and obligation can help bridge the current gap between human dignity and the intrinsic rights of the non-human world,<sup>37</sup> as exemplified in *The Earth Charter*.<sup>38</sup> Yet it is not apparent from the author's analysis that a full resolution of the respective priorities between human and non-human rights can be achieved within the liberal paradigm.

## V. THE STATE AS ENVIRONMENTAL TRUSTEE

The growing recognition that the state has responsibilities for sustainable development has been crucial to the continued expansion of international environmental law since the late 1960s. Chapter five, explores the internal and external role of the state as the central authority in environmental law. The state should make and enforce rules based on fundamental principles—specifically and most pertinently, it is argued, the principle of sustainability. Bosselmann's analysis links sustainability, as a fundamental guiding principle, with constitutionalism. He provides an example of Germany as an emerging ecological state based around this idea. The chapter also outlines the redefinition of territorial sovereignty that has been implemented through international environmental law.<sup>39</sup> Ultimately, the chapter arrives at a redefined legal construct whereby “[t]he incorporation of ecological sustainability into the concept of territorial sovereignty creates a fundamental duty to protect the integrity of the Earth's ecosystems.”<sup>40</sup> This duty is foreshadowed in the emergence of the concepts of public trusteeship, common heritage, and guardianship in public international law. Yet, for a truly effective common concern for the environment across the international community, the concept of sustainability must be extended to other international regimes, such as trade rules.

## VI. GOVERNANCE FOR SUSTAINABILITY

The final chapter focuses on the transformation of institutions to achieve governance for sustainability, rather than environmental governance. While this dis-

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37. *Ibid.* at 140-41.

38. Earth Charter Associates, *The Earth Charter*, online: The Earth Charter Initiative: Values and Principles for a Sustainable Future <<http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html>>.

39. Bosselman, *supra* note 1 at 165-68.

40. *Ibid.* at 169.

inction is subtle, the main purpose in focusing on governance for sustainability is that it is to be regarded as a central defining feature rather than merely an “add-on.”<sup>41</sup> The guidelines for reform take inspiration from *The Earth Charter*,<sup>42</sup> which allows Bosselmann to set out how the transformation of key institutions, such as the United Nations, might occur.<sup>43</sup> The European Union is chosen as an example to illustrate how states can effectively reorganize their sovereignty to take into account supranational concerns.<sup>44</sup>

To conclude the chapter, the author examines the actors that would be able to institute change. The proliferation of non-state environmental actors, such as environmental non-governmental organizations, is evidence of a growing momentum toward ecological citizenship. Such citizenship is to serve as the catalyst for a global sense of responsibility to achieve sustainability that will transcend local concerns.<sup>45</sup> The European experience is seen as a template for global citizenship, with the final sections of the book tracing out viable theories by key thinkers on how global ecological citizenship could be implemented. The fundamental basis for global ecological citizenship “is the recognition of non-human beings as ‘fellow citizens,’”<sup>46</sup> as articulated by *The Earth Charter* principles.

## VII. CONCLUSION

Bosselmann’s final comments sound a warning whereby, if states do not commit to ecological leadership, humanity will be destroyed by militant states or the powers of nature. While the impending limits might be overstated, the arguments that espouse the need for a fundamental transformation of governance to include direct and clear sustainability goals are well made. The book makes a significant contribution by exposing key deficiencies in existing laws and institutions. It charts a course for sustainability that generally is practical and attainable, and therefore of particular relevance for public policy analyses at both the domestic and international levels. Some further discussion of the powerful interests and barriers that are arranged against the *Grundnorm* of sustainability, which might

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41. *Ibid.* at 175.

42. *Supra* note 38.

43. *Supra* note 1 at 179-86.

44. *Ibid.* at 187-93.

45. *Ibid.* at 196-97.

46. *Ibid.* at 204.

impede its effective realization in law, may have been beneficial. However, these minor points need to be set alongside the depth and quality of the analysis in the book, and its commitment to the fundamental priority that should be accorded to ecological sustainability.