Book review

Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, Aldershot, Hampshire 2008) 242 pp.

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The concept of sustainability has been an influential part of the lexicon of environmental law since the late 1980s and has been subject to extensive analysis and debate among academics and regulators. In an important new addition to this scholarship, Klaus Bosselmann's *The Principle of Sustainability: Transforming Law and Governance* is an interesting interdisciplinary exposition of the historical and philosophical foundations of the concept of sustainability and ecological integrity in the context of law and governance. A law professor at the University of Auckland in New Zealand, Bosselmann has been writing on sustainability and environmental law for many years, and this book perhaps represents the apotheosis of his widely admired scholarship. He proposes a reinterpretation and application of these concepts by different actors on international, regional and national levels in order to enable sustainability to be a truly transformative guiding norm. Bosselmann organizes his discussion into six chapters: Chapter 1 'The meaning of sustainability', Chapter 2 'The principle of sustainability', Chapter 3 'Ecological justice', Chapter 4 'Ecological human rights', Chapter 5 'The state as environmental trustee' and Chapter 6 'Governance for sustainability', with a foreword by the distinguished Judge Christopher Weeramantry of the International Court of Justice.

In Chapter 2, Bosselmann argues that 'sustainability' is a legal principle, in contrast to being merely a moral principle or policy goal.¹ In explaining the differences between these categories, he refers to philosophers such as Dworkin and Hart and defines the essence of this evolving legal principle as 'the duty to protect and restore the integrity of the Earth's ecological systems'.² However, while sustainability has certainly been enshrined in the domestic legal systems of some countries, such as South Africa,³ Bosselmann acknowledges that it 'has not yet gained full international legal status'.⁴

1. K Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, Aldershot, Hampshire 2008) 45.

2. Ibid 57.

3. The concept of inter- and intra-generational equity is reflected in section 24 of the Constitution of the Republic of South Africa, 1996. Sustainable development as a principle is included in section 2 of the National Environmental Management Act 108 of 1998, and the Constitutional Court gave effect to the principle in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC).

4. Bosselmann (n 1) 50–57.

Bosselmann is aware that 'sustainability', as well as the cognate concept of 'sustainable development', is difficult to define comprehensively, and that it will continue to evolve and be re-interpreted in changing circumstances. The aim of his book is thus not pedantically or mechanically to define sustainability, but rather to investigate 'how sustainability informs universal principles used in domestic law as well as international law'.⁵ Sustainability, for Bosselmann, must be a fundamental principle of law and governance, rather than merely an aspirational or discretionary goal.⁶ In an attempt to understand the concept more comprehensively, the author distinguishes it from the notion of 'sustainable development', indicating that this concept has also developed over many years:

[a]ll good ideas take time and often they are misunderstood. In the case of sustainability, there has been a period of incubation followed by expert debate and eventual popularization through international politics. This has done more bad than good. The concept 'sustainable development' lost its core meaning between the 1980s and today.⁷

The discourse on sustainable development, which was often exploited by economic elites and other vested interests to justify merely tinkering with business-as-usual, has gradually made way for the less adulterated concept of sustainability, although it too is not without its definitional and interpretive uncertainties. Sustainable development, according to Bosselmann, is wrongly seen by many as a balancing act between the needs of today's generation and that of posterity. According to him, sustainable development in a historical context 'calls for development based on ecological sustainability in order to meet the needs of people living today and in the future'.⁸ Furthermore, 'to perceive [the] environmental, economic and social as equally important components of sustainable development is arguably the greatest misconception of sustainable development and the greatest obstacle to achieving social and economic justice'.⁹ Evidence of this economic bias in the understanding of sustainable development is widely evident. For example, in the recent South African Constitutional Court case of *Fuel Retailers*,¹⁰ the majority's decision derived from an interpretation of sustainable development imbued heavily with economic criteria.

Consequently, Bosselmann argues that 'if sustainable development would be used merely for integrating and balancing conflicting interests, nothing would be achieved. Without a benchmark, we are left at a guess *how* environmental, social and economic interests should be balanced'.¹¹ He thus proposes 'environmental ability' as an alternative benchmark: 'If environmental ability cannot be compromised (to meet present and future needs), then the economy ("the state of technology and social organizations") must ensure the environment's ability. This excludes compromises or trade-offs between economic goals and environmental goals'.¹²

5. Ibid 4.

6. Ibid 2 and 4.

7. Ibid 1.

8. Ibid 11.

9. Ibid 23.

10. See n 2.

11. Bosselmann (n 1) 25.

12. Ibid 31, 76–77.

In the minority judgment of *Fuel Retailers*, Justice Sachs applied a similar argument, indicating that economic considerations will come into play only once the environment is safeguarded.¹³

Another seminal theme of this book is culture. Bosselmann divorces culture from his definition of the environment, as the environment to him is 'global by nature and the functions of the Earth's ecological systems are felt everywhere'.¹⁴ This may be too glib a statement. The notion of the environment as a global concept in an ecological sense is more readily understood from the perspective of the developed world. It is more difficult to grasp in the developing world, where culture still plays a dominant role in the survival of the fittest. Perhaps this is the main criticism against Bosselmann's thesis. On paper, his ideas are sound, and one cannot easily dispute the moral philosophy and ethics underpinning his statements, but they are also somewhat too idealistic. In a developed world, where the natural resource base has already been heavily exploited and one must fight to preserve what little is left of the remaining ecosystems, his theory is more plausible. However, in some developing countries including my own nation of South Africa, where for many people the daily aim is mere survival and where the country has a rich and not fully exploited natural resource endowment, the notion of global ecological trusteeship might be more difficult to comprehend and apply. Sustainable development tends to be regarded as being of more importance in such a context.¹⁵ On the other hand, Bosselmann rightly acknowledges that the actions of the developed world can also impact severely on the developing world¹⁶ and that developed countries therefore 'bear a special burden of responsibility for reducing and eliminating unsustainable patterns of production and consumption'.¹⁷

Another important theme of this book is the anthropocentric-ecological debate, which Bosselmann canvasses in detail in the search for a resolution.¹⁸ A purely anthropocentric approach, according to him, may lead to exploitation rather than conservation of nature.¹⁹ Further, as one cannot anticipate the needs of future generations, anthropocentrism leads to taking only human needs into account. He believes that 'social justice and economic prosperity are valid and important [concerns] but secondary compared to the functioning of the Earth's ecological systems. Ecological sustainability is a prerequisite for development and not a mere aspect of it'.²⁰ Bosselmann acknowledges that there might not be a 'one-size-fits-all' solution to solve the world's problems, but he argues that sustainability may create such an opportunity.

13. See also D Tladi, *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (Pretoria University Law Press, Pretoria 2007) 80; W du Plessis and L Feris, 'The Dissident Sachs J: A Rebellious Step in the Right Direction?' [2009] *South African Journal of Environmental Law and Policy*, forthcoming; W du Plessis and L Britz, 'The Filling Station Saga: Environmental or Economic Concerns?' [2007] *Journal of South African Law* 263 at 275–76.

14. Bosselmann (n 1) 4.

15. See also where Bosselmann indicates that one should not 'think of sustainable development purely in terms of human needs' (30).

16. Ibid 23.

17. Ibid 41.

18. Ibid 129.

19. Ibid 3 and 13.

20. Ibid 32–33.

In Chapter 3, Bosselmann argues that ecological justice provides a better understanding of the ethical and legal dimensions of sustainable development.²¹ He distinguishes ecological justice from liberal jurisprudence and explores its validity for a new ecocentric legal discourse. Yet, with reference to philosophical and other debates, Bosselmann questions whether ecocentric reasoning has a place in legal theory so heavily inculcated with anthropocentric values and whether ecocentrism could be accepted as a basis for ecological justice in our legal systems.²² Encouragingly, he concludes that international law increasingly recognizes inter-species justice (an aspect of ecological justice) and that anthropocentrism 'is already being compromised along ecological lines'.²³

In Chapter 4 Bosselmann deals with ecological human rights in order to assess the influence of the sustainability discourse on human rights as well as on the interpretation of individual freedoms and property and the interrelations between rights and responsibilities. He identifies increasing recognition of a right to a clean and healthy environment, such as in some national constitutions and international legal documents. According to him, 56 constitutions recognize in some way a right to a clean and healthy environment, 97 constitutions place an obligation on governments to protect the environment, and 56 constitutions oblige individuals to act responsibly towards the natural environment. However, Bosselmann queries whether current formulations of such environmental rights are adequate. Certainly, in my opinion they may be effectively unenforceable in poor and impoverished countries. The importance of Bosselmann's argument is, however, that although environmental human rights can be relevant for the protection of the environment, they are limited in their application and focus as they do not always have ecological sustainability as their primary goal.²⁴

It is a pity that Bosselmann did not explore whether these constitutional duties placed on governments and individuals could provide an avenue for the implementation of ecological rights, especially in the light of his concluding remarks that:

... human rights and the environment are inextricably linked to each other. Without human rights, environmental protection could not effectively be enforced. And vice versa, without the inclusion of the environment, human rights would be in danger of losing their core function, i.e. the protection of human life, well-being and integrity. ... [t]he development of all human rights (should demonstrate that) humanity is an integral part of the biosphere, that nature has an intrinsic value and that humanity has obligations towards nature. In short, ecological limitations, together with corollary obligations, should be part of the rights discourse ...

Gradual acceptance of moral responsibilities towards nature may lead to a point where we begin to accept the idea of ecological limitations on the exercise of our rights or, more directly, agree to redefinition of the content of certain rights (e.g. property rights).²⁵

21. Ibid 81.

22. Ibid 92.

23. Ibid 109. Bosselmann refers to interspecies justice as a benchmark for ecological justice based on human–ecosystem interaction. The question could be asked if he would also be prepared to extend his argument to other species, eg, where rampaging elephants destroy the eco-systems of other living organisms. It is not clear how the sustainability and ecological justice supporters would argue when confronted with such scenarios.

24. Ibid 116.

25. Ibid 131.

Chapter 5 explores the notion of the state acting as an environmental ‘trustee’. Bosselmann argues that the concept of ‘territorial sovereignty’ needs to be redefined in the light of the common human interest in protecting the global environment. He provides an interesting interpretation of ‘environment’ from the perspective of states and relates these interpretations to the obligations of states.²⁶ The environment could be seen as one owned by a specific state (the state would have a direct interest), owned by other states (the state would have a less direct interest, but might still be affected by activities in those states), owned by all (as presently for the high seas or air space) or a global environment belonging to no one (whereby states might have only a distant interest). Bosselmann tries to reconcile the ideas of territorial sovereignty and ecological sustainability, relating them also to public trusteeship. He explains that ‘[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’.²⁷ This acceptance would lead states to accepting their obligation, *inter alia*, to protect the environment for its own sake and to adopt the Earth Charter and negotiate new environmental conventions.

The final significant chapter of *The Principle of Sustainability* is dedicated to governance for sustainability. Notably, Bosselmann distinguishes between ‘governance for sustainability’ and ‘environmental governance’.²⁸ To him, environmental governance is linked to public and economic governance, while governance for sustainability is more a holistic concept based on stronger ecological values. Bosselmann bases his understanding of governance for sustainability primarily in relation to the Earth Charter. Various actors are identified by the author that could play a role in the project of governing for sustainability, including international organizations, regional organizations such as the European Union, national states and transnational civil societal organizations.²⁹ Bosselmann concludes with a vision of ecological citizenship ‘as an extension of individual citizenship’ adopting ‘a guardianship responsibility for entities not represented in the political decision-making process’.³⁰ He also rightly points out the inherent danger of extending Westernized ethical concepts and ideas to the developing world, but urges that all states should adopt the Earth Charter in order to ‘harmonize diversity with unity, the exercise of freedom with the common good, short-term objectives and long-term goals’.³¹

Overall, this book definitely raises the level of the sustainability debate and the way in which this seminal concept relates to environmental law and governance.³² It puts into perspective more sharply that as the planet’s resources are finite, states

26. Ibid 154–55.

27. Ibid 169.

28. Ibid 175–77.

29. No reference, however, is made, for example, to the African Union or other regional bodies.

30. Bosselmann (n 1) 204.

31. Quoting the text accompanying the Earth Charter.

32. In a book of this nature, one inspires the need to differ from what is being said, without necessarily negating it. The points of criticism raised here do not reflect on the validity of the author’s argumentation, but arise from a different perspective on these matters. Thus, on page 111 the author states that ‘economic rationality assumes the Greco-Christian position that everything on Earth is for the sole use of human kind’. Although such claims may exist and may have been made by the economic rationalists, this is an interpretation of the Bible I share. Rather, the Bible states not only that one should use the earth’s resources, but also places an obligation on humankind to look after the earth, thereby creating a sort of a trusteeship.

and international organizations must move away from an insular approach to managing the environment towards a more global perspective. The climate-change debate has already started to engender that necessary transformation. The paradigm shift that Bosselmann proposes is also seen in the International Union for Conservation of Nature's (IUCN) triennial programme for 2009–2012, *Shaping a Sustainable Future*, which affirms 'the intrinsic value of nature', that 'ecosystem health underpins human well-being' and that defines sustainability as 'the maintenance of the integrity of the Earth's ecological systems'.³³ A similar perspective is also to be found in South Africa's *National Framework for Sustainable Development*, offering a developing-world perspective:

In practical terms, then, if we wish the pursuit of growth to meet human development needs to become sustainable, we must pursue growth that respects the limits of our ecosystems by making sure that growth strategies are not dependent on intensive/inefficient resource use – efficiency is the key to accelerated and shared growth, otherwise resource based constraints and degraded ecosystem services will undermine growth. We must also prioritise developing sufficient governance capacity to ensure effective implementation of policies, laws and programmes. Through these mechanisms we can achieve *sustainable shared and accelerated growth*.³⁴

In general, Klaus Bosselmann's book is deeply thought-provoking and should be read by all scholars and students of environmental law, as the debate on sustainability and its governance is definitely not over. His book makes a valuable contribution to some of the most urgent issues facing humankind, and offers a fresh perspective to the prevailing, often tired debates about sustainable development.

33. IUCN, 'Shaping a Sustainable Future: The IUCN Programme 2009-2012' [2008] 4 IUCN <http://www.iucn.org/about/work/global_programme> (last accessed 10 April 2009).

34. Department of Environmental Affairs and Tourism (South Africa), 'National Framework for Sustainable Development' [2008] <<http://www.deat.gov.za>> (last accessed 10 April 2009).