Published in: *Transnational Legal Theory*, Special Issue: Environmental Law in the Anthropocene: Transnational Dimensions, 11(1), 2020

Environmental trusteeship and state sovereignty: can they be reconciled?

Klaus Bosselmann

Abstract:
The call for Earth trusteeship cannot easily be reconciled with state sovereignty. The concept of state sovereignty emerged at a time of great distances and absolute national autonomy. In a globalized, interconnected world that utterly depends on the integrity of Earth's ecological systems, absolute territorial sovereignty is counterproductive and potentially life threatening. Arguably, the time is right for reconceptualizin state sovereignty. Sovereignty includes not just fiduciary and trusteeship obligations towards the state's own citizens, but also towards humanity at large and Earth as a whole. The current UN reform process including Agenda 2030 offers a window opportunity for institutionalizing Earth trusteeship at international and national levels.

Keywords:
Earth governance, trusteeship, sovereignty, ecological integrity

1. Introduction

The central question of Earth governance is how the protection of Earth and her ecological systems can be expressed in politics, law and governance.[1] If it is true that long–term survival depends on humanity's ability to maintain and restore the integrity of Earth's ecological systems,[2] then how we control and govern ourselves is – literally – vital. So far, our governments have not governed to cause measurable change. Rather they seem to be caught up in crisis management with little vision and commitment to tackling climate breakdown, the plight of the oceans and the massive loss of biological diversity.[3]

True to Albert Einstein's famous definition of insanity ('insanity is doing the same thing over and over again and expecting different results'), states have over and over again

[1] Klaus Bosselmann, *Earth Governance: Trusteeship of the Global Commons* (Edward Elgar, 2015)
[2] Will Steffen and others, 'The Anthropocene: From Global Change to Planetary Stewardship' (2011) 40&7) *AMBIO A Journal of the Human Environment* 739.
[3] Bosselmann, '*Earth Governance: Trusteeship of the Global Commons'* (n 1) 155.

relied on negotiating compromises between environmental needs and economic demands. This is routine insanity. Humanity cannot negotiate the physical conditions that life on Earth, including human beings and their economies, depends on.

It is 'known' that climate change could lead to a world of declining ecological and biological integrity, which threatens the future of all life on the planet.[4] Yet states have been dealing with climate change as just one issue amongst many others, and often competing, concerns, most notably the concern for ongoing economic growth.[5]

What is missing here is a sense of urgency. If you live in the poorer parts of the world the urgency is only too obvious. If you are young, the urgency is equally felt, but the same may be true for the rest of us as we all experience draughts, floods and erratic weather patterns on a regular basis and wherever we happen to live.

Urgency is less felt, however, in institutions of governance. Political leaders may express their concern about climate change at every possible occasion, however real action is a rarity. There are many reasons why governments – despite or, some might say, *because* of the *Paris Agreement*, do not really act.[6] The predominance of economic rationality (of cost efficiency and growth) is certainly a major reason. But there is also a remarkable myopia that economic and political institutions the world over suffer from. Corporations, governments and parliaments are neither willing nor sufficiently equipped to solve global environmental problems.

Why is this so? Again, there may be many reasons, but a main reason is that these institutions have been designed in an age of much narrower space and time horizons.[7] This is particularly true for the institution of the modern sovereign state. The Westphalian idea of

---

[4] Anders Wijkman and Johan Rockström, *Bankrupting Nature: Denying Our Planetary Boundaries* (Routledge, Revised edn 2012) 44–47.
[5] Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Routledge, 2nd edn 2017), 179–180
[6] See generally Simon Copland, 'Anti–politics and Global Climate Inaction: The Case of the Australian Carbon Tax' (2019*) Critical Sociology* 1; Margaretha Wewerinke–Singh and Curtis Doebbler 'The Paris Agreement: Some Critical Reflections on Process and Substance' (2016) 39(4) *University of New South Wales Law Journal* 1486.
[7] Daniel C Est and Maria H Ivanova, 'Making International Environmental Efforts Work: the Case for a Global Environmental Organization' (2001) *Yale Center for Environmental Law and Policy* 1, 7–8.

nation–states was designed at a time when Europe recovered from the trauma of 30–year long civil war.[8] Creating a peace order of nation states that can be identified as such and held accountable was seen paramount. At the same time, the world outside Europe had been discovered offering highly attractive opportunities for trade and overseas possessions. The best tool for achieving both objectives was the idea of a sovereign state. Once control of a given territory and its people has been physically established, international law recognises this as the establishment (or extension, respectively) of a sovereign state.[9] State sovereignty allowed both mutual control and accountability of nations within Europe, to create the peace order, as well as European exploration and exploitation of the rest of the world: America, Africa, parts of Asia, Australia/New Zealand and Antarctica.

The core of state sovereignty was designed as property over their own territory at the exclusion of any foreigners ('territorial sovereignty').[10] This core has largely stayed unchanged until today and has been the legacy under which modern international environmental law was established.[11]

Principle 2 of the 1992 Rio *Declaration on Environment and Development* says: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies'.[12] Like a private owner of land, the state has the undisturbed right to exploit its territory. Crucially, the state has no obligation to protect it or protect any areas outside national boundaries such as oceans and the atmosphere.

On the other hand, the second half of Principle 2 says that states have 'the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'

---

[8] Jason Farr, 'Point: The Westphalia Legacy and the Modern Nation–State' (2005) 80(3/4) *International Social Science Review* 156–159.
[9] Margaret Moore*, A Political Theory of Territory* (Oxford University Press, 2015) 15.
[10] Joseph Beale, 'The Jurisdiction of a Sovereign State' (1923*)* 36(3) *Harvard Law Review* 245.
[11] Patricia Mische, 'National Sovereignty and Environmental Law', in Simone Bilderbeck (ed), *Biodiversity and International Law* (IUCN NL, Amsterdam 1992)
[12] Rio Declaration on Environment and Development, (14 June 1992) UN DocA/CONF.151/26/1(1), Principle 2.

Furthermore, Principle 7 of the *Rio Declaration* reads: 'States shall co–operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.'[13] So, is there a legal obligation of states to protect the global environment and integrity of the Earth's ecosystem after all?

The short answer is no. The current system of international law does not require the sovereign state to protect the natural environment within or beyond national boundaries.[14] It only expects states to consider – but not necessarily avoid – disastrous environmental consequences of their actions. There is huge discretion involved here, a degree of moral responsibility, but no legal obligations whatsoever. Only negotiated treaties and fundamental principles of international law could change that, but so far, all treaties have been too weak and fragile – not to mention lacking enforcement[15] – to urge states into the logic of common responsibility for the Earth. For this to happen, we need a deliberate, bold move towards trusteeship for the Earth.

As a first step we can ask ourselves who owns the Earth? Answering this question can lead us to some insights of who actually is in charge at present, to appreciate the critical role of legal concepts such as property and sovereignty in the context of global environmental protection and why a transnational approach based on Earth trusteeship is needed.

2. Who owns the Earth?

Who owns the Earth? For lawyers such a question is quite intriguing. We are used to capturing reality in legal terms, especially in legal property terms.

In a broad sentimental way we can say all of us living today and who ever will come after us own the earth. And not just humans. All inhabitants of the planet 'own' the Earth in a

---

[13] *Ibid,* Principle 7.

[14] Klaus Bosselmann, 'Democracy, sovereignty and the challenge of the global commons' in Laura Westra, Janice Gray and Franz-Theo Gottwald (eds), *The Role of Integrity in the Governance of the Commons: Governance, Ecology, Law, Ethics* (Springer, 2017), 58.

[15] UN Environment Programme, 'Dramatic growth in laws to protect environment, but widespread failure to enforce, finds report' (24 Jan 2019), online: <https://www.unenvironment.org/news–and–stories/press–release/dramatic–growth–laws–protect–environment–widespread–failure–enforce> accessed 07 April 2020.

sense that they need spaces to live in. But such an idea of ownership refers to a biological condition and does not tell us anything about power and control. Once we talk about power and control, the question arises what it means to legally own Earth.

For a start, only land can be owned in the legal sense, not water (including the oceans) or air (including the atmosphere). The Earth overall is 123 billion acres in size, of which 37 billion acres are land.[16] These 37 billion acres are currently shared by 7.3 billion people, so each of us theoretically owns five acres.[17] This is plenty of space per capita and should theoretically allow humanity to utilise available resources without overshooting the Earth's life–supporting capacity. In reality, there is a single person who legally owns about 6.6 billion acres, or one–sixth of the Earth's land surface. This person is Queen Elizabeth II, the Queen of thirty–two countries and head of a Commonwealth of fifty–four countries.[18] She owns, for example, the second–largest country on Earth, Australia, and also the third–largest country, Canada.

Legal ownership means control and power, but a lot depends on whether land is owned individually or collectively and whether ownership involves obligations of care and stewardship. In the case of Queen Elizabeth, she does not control the land herself, of course, but her countries do. Thanks to state sovereignty, Australia and Canada, for example, can do with their land whatever they like. They sure have done that extensively, and in recent times in the most exploitative way: Australia's coal mines[19] and Canada's oil sands[20] are responsible for a considerable chunk of carbons emitted into the global atmosphere, which incidentally, is not owned by anyone. The atmosphere, like the oceans, is *res nullius* (nobody's thing) and does not have any legal status that could be used to protect against

---

[16] Mathis Wackernagel, 'What we use and what we have: ecological footprint and ecological capacity' (2002) online: < https://edisciplinas.usp.br/pluginfile.php/49503/mod_resource/content/1/texto17.pdf>
[17] *Ibid.*
[18] See Kevin Cahill, *Who Owns the World? The Hidden Facts Behind Land Ownership* (Mainstream Publisher, 2006).
[19] J Moss, 'When it comes to climate change, Australia's mining giants are an accessory to the crime' *The Conversation* (25 September 2009) online: <https://theconversation.com/when–it–comes–to–climate–change–australias–mining–giants–are–an–accessory–to–the–crime–124077>.
[20] Leslie Shiell and Suzanne Loney, 'Global Warming Damages and Canada's Oil Sands' (2007) 33(4) *Canadian Public Policy / Analyse de Politique* 419.

interferences such as greenhouse gas emissions or, in the case of oceans, acidification, pollution, overfishing and biodiversity loss.[21]

Remember, legal ownership means power and control. As each of the world's 196 countries are 'owners' of their territories, they not only can do within their own territories whatever they like, they can also externalise any waste and pollution originating from their respective territories. This is either been done through commercial deals (eg Europe's export of waste to poor countries in Africa or Asia).[22] Or it is done through discharges into areas outside national jurisdictions, ie into the oceans (eg plastic) and the atmosphere (eg greenhouse gases). Both forms of discharge are, at present, perfectly legal. Apart from a few global treaties[23] and the legal doctrine of state responsibility[24] – both rather weak instruments – there is nothing that could legally prevent states from collectively destroying the Earth.

Countries do not intentionally destroy the Earth, of course, but they behave as if this is inevitable or, at least, just a distant risk. The reason for this ignorance is that governments continue to produce laws – domestically and internationally – that are essentially geared to secure 'their' property at the exclusion of all others. 'The other' comes in many forms: other states, other people (non–citizens, foreigners), other beings (animals and plants), other areas (global commons) and other times (future generations). Fundamentally, state sovereignty is about excluding 'the other' and cooperation between states is hampered by a counterproductive me–over–you attitude called national interest.

In this way, not just national laws, but the world's entire legal system was developed on the basis of protecting the individual ownership of states, corporations and people. In other

---

[21] Friedrich Soltau, 'Common Concern of Mankind' in Kevin Gray, Richard Tarasofsky and Cinnamon Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016) 203.

[22] Mauro Anastasio, 'The EU countries using the rest of the world as a dumping ground', (13 February 2019) META from the European Environmental Bureau, online: <https://meta.eeb.org/2019/02/13/revealed–the–eu–countries–using–the–rest–of–the–world–as–a–dumping–ground/>.

[23] Examples of international treaties include the *Convention on Biological Diversity* 1992 (adopted 5 June 1992, entered into force 29 December 1993) (1992) 31 ILM 818; *Convention on Long–Range Transboundary Air Pollution* (adopted 13 November 1979, entered into force 16 March 1983) (1979) 18 ILM 1449; and *United Nations Framework Convention on Climate Change* (adopted 9 May 1992, entered into force 21 March 1994) (1992) UN Doc A/AC237/18, 31 ILM 848.

[24] See Bosselmann *The Principle of Sustainability: Transforming Law and Governance* (n 5) 187–191.

words, national and international laws are largely about competing property rights. In today's culture of competition and rights, success is determined by ownership. You either own something in which case you are somebody or you own nothing in which case you are nobody.

What at a personal level may hardly be noticeable – most of us own, at least, 'something' – at a collective and global level appears as a massive problem: the richest 26 people own half of the world's assets[25] and the three richest people in the US – Jeff Bezos, Bill Gates and Warren Buffet – own as much wealth as the bottom half of the US population of 160 million.[26] The net worth of these three people alone is USD 286 billion which is higher than the combined annual Gross Domestic Product (GDP) of 47 countries.[27]

At global level, the combined GDP of the world's 11 richest countries – in descending order: United States, China, Japan, Germany, India, United Kingdom, France, Brazil, Italy, Canada and Korea[28] – is the same as the combined GDP of the remaining 185 countries. Small wonder that these 11, and only a further 15 or so other countries, are firmly in charge of everything that affects the lives of the world's entire population: what is being done about climate change, nuclear weapons, poverty, food security or the internet, including our personal data. Rich countries shape the international agenda and would never accept anything that could jeopardise their specific economic and strategic interests.

Yet, even such imbalances between the world's few rich and the many poor people cannot deny the reality of the situation that we are in. Ultimately, the lives and living standards of all people – rich or poor – depends on our ability to preserve the Earth's

---

[25] Max Lawson *et al*, *Public Good or Private Wealth?* (January 2019) Oxfam Briefing Paper, 28 online: https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620599/bp-public-good-or-private-wealth-210119-en.pdf?utm_source=indepth accessed 7 April 2020.

[26] Chuck Collins, 'The wealth of America's three richest families grew by 6,000% since 1982' *The Guardian* (31 October 2018) online: <https://www.theguardian.com/commentisfree/2018/oct/31/us–wealthiest–families–dynasties–governed–by–rich> accessed 7 April 2020.

[27] Wikipedia, *International Inequality* (2020) online: <http://en.wikipedia.org/wiki/International_inequality> accessed 7 April 2020.

[28] Measured in USD: Knoema, *World GDP Ranking 2019|GDP by Country|Data and Charts* (29 January 2020) online: <https://knoema.com/nwnfkne/world–gdp–ranking–2019–gdp–by–country–data–and–charts> accessed 7 April 2020.

ecological systems. We are all in this together and only a common effort to take responsibility for Earth can save us. I believe that the law has a very important role to play here.

3. Reclaiming Earth: trusteeship of the global commons

There is an ever–growing movement of environmental lawyers that has found its expression in the advocacy of Earth jurisprudence, Earth law and ecological law.[29] Some recent developments give us a sense just how significant this legal movement has been.

In 2016, some 100 professors of environmental law adopted a manifesto called 'From Environmental Law to Ecological Law' at the International Union for Conservation of Nature (IUCN) Academy of Environmental Law Colloquium in Oslo, Norway. The *Oslo Manifesto*[30] has since been endorsed by hundreds of environmental lawyers and law organisations from around the world and has led to the establishment of the Ecological Law and Governance Association (ELGA) in 2017.[31] ELGA is a global network of lawyers and environmental activists that coordinates initiatives for transforming law and governance.

One of these initiatives is the Earth Trusteeship Initiatives (ETI), established on 10 December 2018 in the Peace Palace in The Hague, Netherlands. This day marked the 70th anniversary of the adoption of the *Universal Declaration of Human Rights*.[32] With the support and endorsement of many human rights, environmental and professional organisations, the ETI launched the *Hague Principles for a Universal Declaration on Responsibilities for Human Rights and Earth Trusteeship.*[33]

The three 'Hague Principles' set out the framework for Earth trusteeship. All rights that human beings enjoy depend on responsibilities that we have for each other and, crucially, for the Earth. We cannot live in dignity and well–being without accepting fundamental duties

---

[29] See Klaus Bosselmann and Prue Taylor (eds), *Ecological Approaches to Environmental Law* (Edward Elgar, 2017).

[30] 'Oslo Manifesto' (*ELGA,* June 2016), online: <www.elga.world/oslo–manifesto/> accessed 7 April 2020.

[31] 'Our Misson, Our Vision' (*ELGA*, 2020), online: <www.elga.world/> accessed 7 April 2020.

[32] 'Earth Trusteeship' (*Earth Trusteeship*, 2020*)* online: <www.earthtrusteeship.world/> accessed 7 April 2020.

[33] 'The Hague Principles' (*Earth Trusteeship*, 2020) online: <www.earthtrusteeship.world/the-hague-principles-for-a-universal-declaration-on-human-responsibilities-and-earth-trusteeship/> accessed 7 April 2020.

for each other and for Earth. These are trusteeship duties. We must understand ourselves as 'People for Earth' or trustees of Earth.[34] As citizens of our respective countries, we must demand our governments to accept Earth trusteeship. State sovereignty implies obligations as trustees of human rights and the Earth.

In our current legal system, Earth has no meaning or status. Earth is taken for granted as if it does not need to be protected. On the other hand, we all know that critical planetary systems are at risk (the atmosphere, oceans, global biodiversity). We also know that protection efforts based on negotiations between states have not worked very well. A logical step forward is, therefore, to establish trusteeship obligations of states themselves, rather than relying on political compromises between states. The sovereign state is not so sovereign as to ruin its own territory, transboundary ecological systems, and Earth as a whole.

In the light of what we know about our age of human planetary dominance (the Anthropocene), we need to revisit the concept of state sovereignty inherited from an age when a global environmental crisis did not exist.[35] Now is the time to advance the concept of sovereignty as a concept of rights and responsibilities.[36] The rights of self–determination and non–intervention must be complemented by responsibilities for human rights and the Earth.[37] In my address to the UN General Assembly in April 2017, I said the following:

> The ethics of stewardship or guardianship for the community of life is one of the most foundational concepts in the history of humanity. It is inherent in the teachings of the world's religions and the traditions of indigenous peoples and is, an integral part of humanity's cultural heritage. Yet, our political and legal institutions have not taken Earth ethics to heart. The Earth as an integrated whole may be featuring in images, in science and in ethics, but does not feature in law. Earth and the areas

[34] 'About Us' (*People for Earth*, 2016) online: <www.peopleforearth.kr/eng/default.asp> accessed 7 April 2020.
[35] Nico Schrijver, 'The Dynamics of Sovereignty in a Changing World' in Konrad Ginther, Erik Denters and PJIM De Waart (eds) *Sustainable Development and Good Governance* (Kluwer Law International, 1995), 80– 89.
[36] Bosselmann, *The Principle of Sustainability: Transforming Law and Governance,* (n 5) 169.
[37] Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107(2) *American Journal of International Law* 295.

> outside national jurisdictions (the global commons) are considered as *res nullius*, a legal nullity without inherent rights. Not that Earth cares about such rights. It is we humans who must choose to care about them. If we keep ignoring them, then basically we are saying that the Earth system doesn't really matter. We take it for granted – like sunshine and rain – and of no relevance to the system of law that governs society and states. Given that the ethics of Earth stewardship are widely accepted today we should be ready for taking the next step: Earth trusteeship.
>
> Earth trusteeship is the essence of what Earth jurisprudence is advocating, but, more importantly, it has also been advocated in key international environmental documents. Earth trusteeship is the institutionalization of the duty to protect the integrity of ecological systems.
>
> This duty is expressed in no less than 25 international agreements – from the 1982 *World Charter for Nature* right through to the 2015 *Paris Climate Agreement*![38] To act on this duty 'states need to cooperate in the spirit of global partnership' as, for example, Principle 7 of the 1992 *Rio Declaration* says.[39]

The legal argument for Earth trusteeship can be firmly based on ethics common to all cultures and fundamental obligations of states expressed in many international agreements. The challenge ahead is to convince governments that the step to Earth trusteeship is not only necessary, but actually possible and not too difficult to take.

An important part of meeting this challenge is the public debate around the global commons. As climate change has become the most pressing issue of our time – largely thanks to powerful protests of young people all over the world – a shift of thinking seems to be occurring.

---

[38] Rakhyun E Kim and Klaus Bosselmann, 'Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm in International Law' (2015) 24(2) *Review of European, Comparative and International Environmental Law* 194, 194–208.

[39] Klaus Bosselmann, 'The Next Step: Earth Trusteeship', (April 2017) Address to the United Nations General Assembly, 2–3 online: <http://files.harmonywithnatureun.org/uploads/upload96.pdf>.

Rather than having to justify calls for action, people put governments on the back foot: lack of action can no longer be justified. More radical measures than negotiating climate deals are needed.

To think that global warming can be negotiated is like thinking rainfall and sunshine could be negotiated. The biogeochemical cycles of the atmosphere follow laws of nature, not laws of humans. It is therefore more realistic and promising to take the atmosphere into focus and recognise it in law! At present, the law treats the atmosphere as an open access resource without any safeguards, ie a *res nullius*. This legal vacuum has worked to the advantage of property owners who have filled the vacuum by exercising their property rights. Any holder of property rights – you and me or the entire fossil fuel industry – can freely emit carbon dioxide into the atmosphere. Only negotiated deals and compromises would limit these emissions. It would be far more effective if property rights are limited by the atmosphere as a global commons. This would constitute a legal duty to protect the integrity of the atmosphere as a whole and reverse the logic of emissions: they are only protected by property rights in so far they do not compromise the integrity of the atmosphere.

Emissions would no longer be free, but subject to hefty fees and taxes. As trustees of the atmosphere, states and the international community of states would have a legal obligation to charge users of the atmosphere such as corporations, banks, and consumers, and to progressively ban any greenhouse gas emissions. Just as the owner of a house controls who lives there and under what conditions.

From the perspective of citizens, this logic is compelling and could, for example, be supported by the well–established public trust doctrine. The public trust doctrine says that natural commons should be held in trust as assets to serve the public good.[40] It is the responsibility of the government, as trustee, to protect these assets from harm and ensure their use for the public and future generations. So nationally, the government would act as an environmental trustee, internationally, states would jointly act as trustees for the global commons such as the

[40] Burns H Weston and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press, 2013) 245–248.

atmosphere.

Considering that only about 90 companies are responsible for two–thirds of carbons emitted into the atmosphere, a global trusteeship institution could quickly fix the problem of climate breakdown.[41] All it takes is the political will to do so!

The idea of trusts of the global commons has been promoted by environmental lawyers such as Mary Wood[42] and Peter Sand,[43] and economists such as Peter Barnes[44] and Robert Costanza.[45] Trusteeship governance is also advocated by the general literature on the commons.[46]

Essentially, international law and the United Nations (UN) are ready to develop institutions of trusteeship governance. There is, for example, a tradition of UN institutions with a trusteeship mandate including the (now defunct) UN Trusteeship Council, the World Health Organization (WHO) with respect to public health and – somewhat ironically – the World Trade Organization (WTO) with respect to free trade.[47] A number of other UN or UN-related institutions with weaker trusteeship functions exist also.[48] Quite obviously, states have been capable of, expressively or implicitly, creating international trusteeship institutions. These developments – and in particular the existence of supranational organisations such as

---

[41] Robert Costanza, 'Claim the Sky!' (2015 6(1)) *Solutions* 21.
[42] Mary C Wood, 'Nature's Trust: A Legal, Political and Moral Frame for Global Warming,' (2007) 34(3) *Environmental Affairs* 577; Mary C Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Carolina University Press, 2013).
[43]Peter H Sand, 'Sovereignty Bounded: Public Trusteeship for Common Pool Resources,' (2004) 4(1) *Global Environmental Politics* 47; Peter H Sand, 'The Rise of Public Trusteeship in International Law' (2013) *Global Trust Working Paper Series* 04/2013, 21; Peter H Sand, 'The Concept of Public Trusteeship in the Transboundary Governance of Biodiversity' in Louis Kotzé and Thilo Marauhn, *Transboundary Governance of Biodiversity* (Brill, 2014).
[44] Peter Barnes, *Capitalism 2.0: Who Owns the Sky? Our Common Assets and the Future of Capitalism* (Island Press, 2001); Peter Barnes, *Capitalism 3.0: A Guide to Reclaiming the Commons* (Berret–Koehler Publishers, 2006).
[45] 'Claim the Sky' (*AVAASZ.org*, 12 May 2015) online: <https://secure.avaaz.org/en/petition/Claim_the_Sky/?pv=58>
[46] See, for example, David Bollier, *Think Like a Commoner: A Short Introduction to the Life of the Commons* (New Society Publishers, 2014); David Bollier and Burns H Weston, *Green Governance: Ecological Survival, Human Rights and the Law of the Commons* (Cambridge University Press, 2013); Silke Helfrich and Jörg Haas (eds), *The Commons: A New Narrative for Our Time* (Heinrich Böll Stiftung, 2009); Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990).
[47] Bosselmann, *Earth Governance: Trusteeship of the Global Commons* (n 1) 198–232.
[48] *Ibid*, 206.

the European Union – demonstrate that sovereignty of states can be transferred to international levels.

The UN Trusteeship Council could quite easily be revived as an Environmental Trusteeship Council following proposals by the Global Governance Commission in 1995 which were supported by a number of states and particularly championed by the former UN Secretary General, the late Kofi Annan. A combination of environmental activism (the 'Greta effect') and new political alliances between motivated progressive states can make a crucial difference. Chances are that such combined effort will be very powerful as our global ecological, financial, political and democratic systems continue to disintegrate.

Trusteeship governance will not be initiated by the 'top', ie the UN and its member states themselves, but rather by global civil society forces outside the system. To this end, we can build on many years of activism and proposals for institutional change. Nor can states be allowed to exclusively run and control global trusteeship institutions such as a World Environment Organization or a Global Atmospheric Trust. Rather, their governance ought to be jointly formed by representatives from global civil society, UN and states, each with an equal say in decision–making.

So far, governments have been very slow learners and, most alarmingly, they have been too close to corporate powers. The challenge for civil society is, therefore, to bring them back into a position that allows them to actually govern and help solving the crisis rather than just managing or even exacerbating it.

4. Sovereignty and Trusteeship

It has been observed by many political analysts and activisits that our democratic institutions have been hijacked by neoliberal economics. The unholy alliance between politics ('sovereignty') and private interests ('property') raises serious questions about the ability for the public to influence policy. Furthermore, as Barnes points out, '[n]ot even seated at

democracy's table – not organized, not propertied, and not enfranchised – are future generations, ecosystems, and nonhuman species.'[49]

Neoliberalism has undoubtedly affected how environmental policy and law is conceived *within* states also. Primarily, they are characterised by what Mary Wood calls a 'discretionary frame'.[50] This means that governments have positioned themselves as holding discretionary powers to permit resource exploitation.[51] Domestic environmental commons may be 'government–owned' but this is not to say that they are managed on behalf of future generations, nonhuman species, or ordinary citizens.[52] To the contrary, domestic commons such as forests, water, and energy have been privatised and commercialised in most countries.

We can clearly see that 'governance' today is about a *quid pro quo* relationship between politicians and corporations.[53] The rewards include an unshaken guarantee of property rights, friendly regulators, subsidies, tax breaks, and free use of the commons. What this ultimately means is that when issues such as environmental degradation arise, governments do not govern, rather create as little interruption to market forces as possible. In the words of Peter Barnes, 'we face a disheartening quandary here. Profit–maximizing corporations dominate our economy. Their programming makes them enclose and diminish commonwealth. The only obvious counterweight is government, yet government is dominated by these same corporations.'[54] The assumption that the state promotes 'the common good' is sadly false.[55]

On the other hand, the legitimacy of the state rests on its function to act for, and on behalf of, its citizens. This requires consent with the governed.[56] Governmental duties can

---

[49] Barnes (2006) (n 44), 38. See further, Naomi Klein, *On Fire: The (Burning) Case for a Green New Deal* (Simone Schuster, 2019); Naomi Klein, *The Shock Dcotrine: The Rise of Disaster Capitalism* (Henry Holt and Company, 2008); Tim Kuhner, *Capitalism v. Democracy: Money in Politics and the Free Market Constitution* (Stanford University Press, 2014).
[50] Wood (2007) (n 46).
[51] *Ibid*, 592.
[52] Barnes (2006) (n 44), 43.
[53] *Ibid*, 37.
[54] *Ibid*, 45.
[55] *Ibid.*
[56] Richard Ashcraft (ed), *John Locke: Critical Assessments* (Routledge, 1991) 524. According to Locke, '(G)overnment is not legitimate unless it is carried on with the consent of the governed.'

therefore be understood as fiduciary obligations towards citizens.[57] Such fiduciary obligations are typically recognised in public law,[58] exist in common law and civil law although in varying forms and degrees,[59] and are also known in international law.[60] The fiduciary function of the state can also be described as a trusteeship function.[61]

How then can state sovereignty can be reconciled with trusteeship? *Prima facie* both seem to have different purposes, yet they are part of the same basic function of the state: to serve the citizens it depends on and is accountable to.

Furthermore, global commons governance brings sovereignty and trusteeship close together.[62] As has been noted, the traditional concept of sovereignty is less compelling today than it was in the past because of a 'glaring misfit between the scope of the sovereign's authority and the sphere of the affected stakeholders'[63] This 'glaring misfit' engenders inefficient, undemocratic and unjust outcomes for under or un–represented affected stakeholders.[64] Non–citizens, future generations and the natural environment all fall into such a category of 'affected stakeholders'. To overcome this misfit, states need to increasingly perform trusteeship functions.

5. Fiduciary Duties of the State

[57] Evan Fox–Decent, *Sovereignty's Promise: The State as a Fiduciary* (Oxford University Press, 2012); Tamar Frankel, 'Fiduciary Law' (1983) 71(3) *California Law Review* 795.
[58] Including constitutional law, administrative law, tax law, criminal law and environmental law.
[59] For example, the United States, Canada, Australia and New Zealand recognise them with respect to indigenous peoples, ratepayers and (with the exception of New Zealand) in the form of public trusts, whereas continental European countries more fundamentally rely on public law to assume fiduciary relationships between individuals and governments.
[60] Michael Blumm and Rachel Guthrie, 'Internationalizing the Public Trust Doctrine' (2012) 45 *University of California, Davis Law Review* 741; Henry H Perritt Jr, 'Structures and Standards for Political Trusteeships' (2004) 8(2) *UCLA Journal of International Law and Foreign Affairs* 385; Edith Brown Weiss, 'The Planetary Trust: Conservation and Intergenerational Equity' (1984) 11(4) *Ecology Law Quarterly* 495.
[61] Paul Finn, 'The Forgotten "Trust": The People and the State' in Malcolm Cope (ed), *Equity: Issues and Trends* (The Federation Press, 1995) 131–151.
[62] Stephen Stec, 'Humanitarian Limits to Sovereignty: Common Concern and Common Heritage Approaches to Natural Resources and Environment' (2010) 12(3) *International Community Law Review* 361, 384–385, 378–380.
[63] Benvenisti (n 41), 301.
[64] *Ibid.*

The state gains its legitimacy exclusively from the people who created it. While the legality of a state depends on recognition by other state, once in existence a state can only ever legitimise its continued existence through ongoing trust by its people. The core idea of the modern democratic state is that it acts through its people, by its people and for its people. This implies a fiduciary relationship between people and state and is arguably the only legitimate basis for political authority in the English civil war, American Revolution, and then again confirmed in the French Revolution.[65] It is echoed in constitutional documents such as the 1776 Pennsylvania *Declaration of Rights*: '[A]ll power being… derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.'[66] John Locke had famously asserted that legislative power is 'only a fiduciary power to act for certain ends' and that 'there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them.'

Likewise, Immanuel Kant drew the moral basis of fiduciary obligations from the duty–bound relationship between parents and children.[67] Kant claimed that children have an innate and legal right to their parents' care. In a similar sense, he believed that state legitimacy was grounded in the existence of commonly shared values and interests, which we can refer to as a 'basic norm' (akin to Kelsen's *grundnorm*).[68] Apart from creating legal certainty, Kant's basic norm is exclusively concerned with achieving lasting peace. A strong argument can be made that, today, this basic norm includes sustainability and the protection of ecological integrity.[69] Further, it holds clear jurisprudential potential to protect the ecological integrity of Earth on the basis that no rational human, or nation state, could imagine a world where sustaining and protecting the planet is not a prior duty to any further

---

[65] W Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84(4) *American Journal of International* Law 867.
[66] Evan Criddle and Evan Fox–Decent, 'A Fiduciary Theory of Jus Cogens' (2009) 34(2) *Yale Journal of International Law* 331; *Pennsylvania Constitution* 1776, Article IV.
[67] *Ibid*, 352.
[68] Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (n 5) 94.
[69] *Ibid.*

activity, duty or right that those persons or states may hold.[70] This puts the state into the position as guardian or trustee of the natural environment.

That state sovereignty is fundamentally a trust relationship cannot be dismissed as a mere ideal. Trusts and the implicit fiduciary relationships can be traced back to Middle Eastern origins, Roman and Germanic law. They are also inherent in the teachings of the world's religions and are prevalent in non–Western cultures.[71] In fundamental terms, the trust relationship is also anchored in the *Universal Declaration of Human Rights*. Article 21(3) states that 'the will of the people shall be the basis of the authority of government.'[72]

Following Eyal Benvenisti, we can conceive of three normative arguments for state trusteeship. Firstly, sovereignty should be viewed as a vehicle for the exercise of personal and collective self–determination.[73] Collective self–determination embodies the freedom of a group to pursue its interests, further its political status, and 'freely dispose of [its] natural wealth and resources'[74] or, of course, protect and preserve them. Secondly, sovereign states are agents of humanity as a whole as all human beings are holders of rights not because states granted them, but because they are entitlements of free born, equal human beings.[75] The legitimacy of a state ultimately depends on its ability to honour and respect human rights, hence the trusteeship function of the state with respect to humanity. Thirdly, the right to own natural resources ('territorial sovereignty') is intrinsically linked with the responsibility to protect them. Any disjuncture would jeopardise the sustained use by citizens, hence the need for state trusteeship of the (borderless) natural environment.

In essence, the legitimacy of the state of the twenty-first century utterly rests on its ability to function as a trustee of human rights and the natural environment.

---

[70] Mehmet Ruhi Demiray 'Natural Law Theory, Legal Positivism and the Normativity of Law' (2015) 20(8) *The European Legacy* 822.
[71] Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (n5) 378–379.
[72] *Universal Declaration of Human Rights*, (adopted 10 December 1948 UNGA Res 217 A(III) .
[73] Benvenisti (n 34) 301.
[74] *International Covenant on Civil and Political Rights,* (adopted 16 December 1966, entered into force 23 March 1976) (1966) 999 UNTS 171, Article 1.
[75] Benvenisti (n 34) 305.

6. Conclusion

Earth governance is the expression of protecting the Earth and its ecological systems through politics and law. While the importance of protecting the natural environment has been well recognised, there are currently no legal obligations on states to protect the environment within or beyond national boundaries. The question of legal ownership of the Earth is crucial to understanding the power and control which states, companies and individuals exercise over natural resources. The paramountcy of property rights in legal systems mean that owners can exploit these resources as they wish and exclude the interests of other affected stakeholders: other people, beings, areas and generations. Furthermore, the power accompanying ownership means that only a few very rich countries, companies and people set the entire international environmental agenda. The concept of Earth trusteeship has arisen in the environmental legal movement, which argues that states should adopt trusteeship obligations for the Earth's ecological systems. This would ensure stronger environmental protection compared to current diluted compromises balancing the environment against economic growth and efficiency.

Earth trusteeship also requires a redefinition of the idea of state sovereignty where states not only have traditional rights of self–determination and non–intervention but also have responsibilities for human rights and the Earth. While initially appearing irreconcilable, Earth trusteeship is compatible with sovereignty as it forms part of the fiduciary duties owed by states to their citizens. The worldwide neoliberal economic system encouraging privatisation and mass exploitation undermines the legitimacy of a state through its failure to serve the best interests of its citizens. The global scale of climate change challenges the narrow Westphalian conception of sovereignty and demands a departure from the traditional rule that care for the environment ends at national boundaries. Protection of the Earth's ecological systems must be a domestic concern as much as an international concern. Ultimately, it is not states, but the well–being of Earth, which must determine the degree and quality of environmental protection. Such an Earth–centred viewpoint forces our political institutions into the logic of Earth trusteeship.