1. Introduction

In December 2012, representatives of virtually all states heard what kind of law and governance may be required to live within our planetary boundaries. This was when the UN General Assembly discussed the Report "Harmony for Nature" prepared by the Secretary-General.

Here are some excerpts of the Report:

"45. Numerous scientists, economists, and legal experts have decried the escalating destruction of the Earth's natural systems (...) They are insisting that, rather than people and planet serving the infinite growth of the economy, economy must recognize its place as servant to the larger well-being of humans and the Earth itself.

46. In this new system, the rule of law, science, and economics will be grounded in the Earth. (...) 47. A key challenge in developing a global governance system built on the rule of ecological law is reinvigorating a transformed sense of democracy, in which individuals and communities embrace their ecological citizenship in the world and act on their responsibility to respect the complex workings of the Earth's life systems."

Such comments hint to new fundamentals of law and governance: the rule of ecological law, a transformed sense of democracy, the concept of ecological citizenship and responsibility for the Earth's life systems. They are the typical categories of law grounded in the Earth, limited by planetary boundaries and shaped around ecological integrity.

2. Existing failures and required changes

From a legal perspective, much of the failure of the current system of unsustainability comes down to property rights. Property rights dominate and channel our discourses around sustainability. For example, the huge gap between rich and poor undermines all prospects for social justice, but governments seem incapable of controlling the rich and corporate power. Here we need to discuss the social dimension of property rights. Or think of climate change. The air is free for everyone and corporates use their power to determine the price that they are prepared to pay. Governments, in turn, fear for the competitiveness of their national economies and don’t act. Here we need to discuss the environmental dimension of property rights. So at the core of the law’s failure to achieve sustainability is the social and ecological blindness of property rights. Fundamentally, the legal system needs to be organized around sustainability not property.
The good news is that these concerns are beginning to sink in among the more enlightened sectors of the legal system. This makes it more and more absurd to separate the world of economics from the world of ecology. The paradigm of separation is, of course, still dominating legal curricula and research agendas, but environmental law has always been about integration, for 25 years now known as “sustainable development”. That is why environmental law is at the vanguard of law in general.

Sustainable development law is the antithesis of current fragmented law as it integrates environmental, economic and social concerns. It cannot succeed, however, as long as it remains a vague idea and rather detached from the ecological reality of planetary boundaries and disconnected from the basics of the legal system including property rights, state sovereignty and the rule of law.

So here is my suggestion for a two-step strategy towards sustainability.

The first step is to recognize the reality of planetary boundaries. Of the nine boundaries identified thus far\(^2\), three have already been exceeded (atmospheric greenhouse gas concentrations, rate of biodiversity loss and nitrogen cycle). The recognition of planetary boundaries sets a non-negotiable bottom-line for all human activities. More particularly, and in the context of the concept of sustainable development, it suggests a hierarchical order of its three constituent elements: the natural environment is universal and comes first, human social organization exists within it and comes second and economic modeling only exists within both, neither in parallel nor above them. Such an hierarchical understanding of sustainable development (‘strong sustainability’) reflects the reality of planetary boundaries and marks the first step towards a refined rule of law.

The second step is to take the strong sustainability approach to the design and interpretation of laws governing human behavior. One of the most basic tools in this regard is the rule of law. It is the tool that ensures control and accountability of governments. It demands that governmental decisions are bound by law and implies that all citizens are subject to the law. But not any law can count for the true meaning of the rule of law. A purely ‘formal’ or ‘thin’\(^3\) recognition of the rule of law, deprived of any values and content, permits any man and his dog claiming compliance. Such formalism is not what I have in mind here and is surely not good enough for nations that describe themselves as civilized and supportive of the virtues of citizenry.

3. The rule of law in an ecological context

The rule of law as a concept lacks a decisive definition, only the basics are clear. Its modern origins are in the Glorious Revolution of 1688 when Rex Lex (‘The King is Law’) was converted to Lex Rex (‘The Law is King’). This historical event had of course ramifications far beyond the English monarchy. It marked the beginning of modern parliamentary democracy. Preventing the exercise of arbitrary power by government and safeguarding individual rights is the core of the rule of law and represents a consensus that is perhaps shared all around the world today. Beyond that, however, there is no terminological consensus.


A recent report for the European Commission\(^4\) acknowledges a variety of meanings of the rule of law, but specifically identifies some core elements across legal cultures and expressed in numerous international documents: (1) independence and impartiality of the judiciary, (2) legal certainty, (3) non-discrimination and equality before the law, (4) respect for human rights, (5) separation of powers, (6) the principle that the State is bound by law, and (7) the substantive coherence of the legal framework.\(^5\) The report concludes by stating that it can be deduced there exists a rule in customary international law that demands the rule of law operates in the States as a precondition for membership in international organisations.\(^6\)

The international recognition is perhaps the most significant feature of the rule of law principle. If the rule of law can be seen as a defining characteristic of the modern State, then any linking with universally accepted principles – in whatever shape or form – would have ramifications for the contents of domestic and international law. This is already the case with respect universally accepted principles such as respect for human rights, the principle of legality or the idea of a constitutional State based on fundamental rights. However, what could be more fundamental as the protection of human life and the physical conditions that human life depends on? Surely, the protection of ecological conditions as prerequisite for human life and well-being can, today, be recognized as an universally accepted principle, at least, morally.

So what would it take to legally recognize such a principle in the context of the rule of law?

For several years now, the World Justice Project of the American Bar Association measures the strength of the rule of law principle around the world and ranks countries according to their governments’ accountability, the absence of corruption, clarity and stability of laws, fundamental rights, open government, regulatory enforcement and access to justice. The latest Rule of Law Index 2012-13\(^7\) has the five Scandinavian countries (incl Finland and Iceland) topping the list of the world’s most respected countries. They are followed by the Netherlands, then Germany, Austria and New Zealand (with the USA way down the list).

The interesting thing here is that, with the exception of New Zealand, the top ten countries do not even refer to the ‘rule of law’ in their respective jurisdictions. Instead they speak of rätt staat (Danish/Swedish/Norwegian) and Rechtsstaat (German/Dutch) or Rechtsstaatsprinzip and Rechtsstaatlichkeit (German). The literal translation of ‘rule of law’ (e.g. Herrschaft des Rechts) would be far too limiting to capture the system of principles and values associated with the concept of the rule of law. One obvious difference is that virtually all continental European countries relate the idea of law (Recht, Rätt, droit, derecho, diritto) to the idea of the state (staat, etat, estado, stato). Both ideas are intertwined and describe the expectation that a government gains legitimacy and legality only through adherence to predefined standards and principles.


It is typical for the Romano-Germanic legal tradition to derive the content of the rule of law from an entire system of mutually reinforcing and limiting principles. Depending on what principles are invoked and how they are defined, it is possible to give the Rechtsstaat certain content. In Germany we speak of sozialer Rechtsstaat ('social constitutional state), Umweltstaat⁸ ('environment state') or ökologischer Rechtsstaat⁹ ('eco-constitutional state'). Such contextualized understanding allows for a fruitful discourse on the importance of ecological responsibilities and the rule of law. In Germany, this discourse started in the mid 1980's and prompted a very promising investigation of the Joint Constitutional Commission of Bundestag and Bundesrat. The 1989 final report of the Joint Commission concluded that the question of an ecological rule of law is of such importance that only a wider public debate among the relevant sectors of society could advance this matter. German unification and full-blown neoclassic economics has silenced this debate, but it never really stopped. Michael Kloepfer, a pioneer of German environmental law, but not known as an eco-lawyer, recently observed the ongoing “ecologicalization of the legal system” and an increasing “ecologicalization of society”.¹⁰ As the ecological crisis continues to evolve, it is likely that we see more of this fundamental debate in the years to come.

Like in Germany, the past two decades saw moves towards an ecological rule of law in many other civil law jurisdictions such as Switzerland, Austria, France, Spain, Portugal, South Africa, and Latin American countries including Brazil, Venezuela and particularly Bolivia and Ecuador. What we could learn here is that, conceptually, the rule of law can be expanded to include ecological responsibilities.

Arguably, the same is true for the rule of law outside civil law jurisdictions including international law and the Anglo-Saxon common law system. To illustrate this I want to particularly acknowledge Scandinavian legal scholarship and briefly discuss two important achievements.

One is Environmental Law Methodology (ELM) as developed by one of the pioneers of environmental law Staffan Westerlund, Uppsala University, who sadly passed away last year. Taking a system-theoretical approach, ELM looks at law and the environment from an external point of view. Rather than conventional legal theory with its focus on internal structure and content, ELM is interested in the reality of natural systems and their representation in legal systems. This opens the view for the mismatch between ecological realities and legal construct. From an ELM perspective it is obvious that environmental law has largely failed. In the words of Staffan Westerlund: “Environmental Law as an academic discipline has not really achieved anything of significance for ecological sustainability”.¹¹ He adds: "Not even in New Zealand with its 1991 Resource Management Act". After a promising start with the so-called environmental bottom-line approach to interpret the purpose of the RMA, the so-called overall judgment approach took over and reduced ecological sustainability to just one concern.

---


among others. The latest chapter in the NZ experience is that the current Government wants to rip the heart out of the RMA altogether by favouring economic development over environmental concerns. So NZ is perfectly in line with the rest of the world and sustainable development remains a distant illusion.

If Westerlund is right, and I think he is, then environmental law needs to focus on ecological sustainability as its central point of reference.

The other achievement of Scandinavian scholarship are the insights it provided in the effectiveness (or lack of it) of international environmental law. Apart from Westerlund, the work by Jonas Ebbesson, Inga Carlman, Martti Koskeniemi, Tina Korvela, Hans-Christian Bugge, Christina Voigt and many others has shown that international environmental law lacks coherence, direction and fundament. There is no clear guidance, essentially no specific law. In her book “The Significance of the Default” Adelheidur Johannsdottir from the University of Iceland has asked what happens when there is no specific law: What is the law if there is no law? If a treaty contains no specific duties around ecological sustainability, then the default position is state sovereignty with its traditional right to exploit and use natural resources. And that is the problem. There is little incentive for states to be serious about global responsibilities if they can rely on their default position. So any lack of global commitment goes in their favour of national sovereignty which is the equivalent to exclusive private property. To reverse this bizarre logic, the default position needs to be ecological sustainability. That is the result of Johannsdottir’s remarkable research.

International law as well as domestic law need to include the principle of sustainability as a fundamental norm, a grundnorm.

A grundnorm can be defined as a basic norm to bind governmental power in the same sense as the rule of law is generally perceived as a basic norm to bind governmental power. This understanding differs from Kelsen’s definition and is closer to Immanuel Kant’s argument that any positive law must be grounded in a “natural” norm of general acceptance and reasonableness. The existence of an environmental grundnorm, therefore, rests on the assumption that respecting the planet’s ecological boundaries is a dictate of reason (Gebot der Vernunft) and general acceptance (allgemeine Gültigkeit). According to Kelsen’s Pure Theory of Law any basic norm can be a grundnorm so long as its bindingness can somehow be established. By contrast, Kant puts any candidate to the test of reasonableness. It certainly seems reasonable to assume the physical reality of a finite planet as generally acceptable and require all social and legal norms to be informed by it. In this vein we can postulate that keeping within planetary boundaries and protecting the integrity of ecological systems are a fundamental requirement for all human actions. Surely, ecological sustainability has grundnorm qualities that any legal norm, including the rule of law, ought to respect.

4. Ecological integrity as the core idea of sustainability

The case for sustainability is not only scientifically and ethically strong, it can also be traced back to history. Virtually all cultures have historically followed the wisdom of sustainability, some more successfully than others, but all with a deeply embedded understanding that humans are part of nature and that the laws of nature must not be violated. European culture is no exception.

European history is no exception. In fact, the origins of the modern sustainability discourse can be found in medieval monasteries (first appearing in the Canticle of the Sun by Saint Francis of Assisi), in
the writings of the philosophers of the enlightenment (Spinoza, Leibniz, Humboldt, Goethe), and in energy sciences and macro-economics, particularly in the books of forest economists John Evelyn (‘Sylva’ 1670) and Hans Carl von Carlowitz (‘Sylvicultura Oeconomica’ 1713).

John Evelyn was a founding-member of the Royal Society in London and today there is a public lecture on John Evelyn and Carl von Carlowitz at the Royal Society held by German journalist and historian Ulrich Grober who recently wrote the book ‘Sustainability – A Cultural History’, 2013) which shows that Nachhaltigkeit (Sustainability) has been the foundational principle of successful economic strategies until the industrial revolution of the early 19th century when it was replaced by the growth paradigm. As Ulrich Grober says: “The idea of sustainability ... is our prime world cultural heritage.”

We should acknowledge, therefore, that the modern sustainability discourse following the 1987 Brundtland Report, did not start from scratch. Rather it was informed by the idea that infinite growth in a finite world is not possible. Again, this was not a new idea itself as it was first raised by theorists such as Thomas Malthus and Friedrich Engels. However, the Club of Rome Report “Limits of Growth” (1972) made the connection between economic growth and prospects for sustainability. It predicted that we will eventually see global economic collapse and, remarkably, defined sustainability as the counter model to collapse.

Today we can see much more clearly, just how destructive the growth paradigm really is. Everything is sacrificed at its altar. Until quite recently, Governments could perhaps be excused for giving priority to growth over sustainability. The thinking was that only a growing economy allows for policies that make environmental protection possible in the first place. Sustainability-thinking aims for the opposite: only functioning ecological systems allow for policies that make economic prosperity possible in the first place. This is clear to see for everyone who observes what is going on. Governments are tragically trapped as they force their own citizens into austerity for the sake of upholding the growth paradigm. They rather accept social and environmental decline including climate collapse than reorganizing financial and economic markets. What we see is crisis management around market failures, not governance for the commons.

Our only hope is Governments don’t forget sustainability altogether, but start thinking about what it really means. To again quote Staffan Westerlund: “The core problem lies in achieving and maintaining ecological sustainability as the necessary foundation for sustainable development”. So, protecting the integrity of ecological systems is at the core of sustainability as a grundnorm.

The notion of ecological integrity is by no means new and has been used in numerous legal documents including domestic law and international treaties. The concept first appeared in the international arena in 1978 with the Great Lakes Water Quality Agreement signed bilaterally between Canada and the United States, whose purpose was ‘to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem’. The first multilateral environmental treaty to include the notion of integrity was the Convention on the

12 See e.g. the extensive work of over twenty years by the Global Ecological Integrity Group http://www.globalecointegrity.net


14 Art. II GLWQA, ibid.
Conservation of Antarctic Marine Living Resources adopted in 1980.\(^{15}\) The parties to the Convention recognized ‘the importance of safeguarding the environment and protecting the integrity of the ecosystem of the seas surrounding Antarctica’.\(^{16}\) Since then, more than a dozen international environmental treaties have been adopted with some reference to ecological integrity in their preambular or operative parts.\(^{17}\) Among soft law agreements designed around ecological integrity as a core concept are the 1982 World Charter for Nature\(^{18}\), the 1992 Rio Declaration on Environment and Development\(^{19}\), Agenda 21,\(^{20}\) the Draft International Covenant on Environment and Development,\(^{21}\) the Earth Charter,\(^{22}\) the Plan of Implementation of the World Summit on Sustainable Development,\(^{23}\) and The Future We Want.\(^{24}\)

Today, it seems almost forgotten that the 1992 Rio Declaration commits, in its preamble, the UN member states to ‘international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system’.\(^{25}\) Furthermore, principle 7 obligates states to ‘cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem’.\(^{26}\) This was in the spirit of the World Charter for


\(^{16}\) Ibid., at preamble.

\(^{17}\) See Rakhyun Kim and Klaus Bosselmann, \textit{supra note} 36, 305


\(^{22}\) The Earth Charter Initiative, \textit{The Earth Charter} (The Earth Charter Initiative, 2000), available at: \url{http://www.earthcharterinaction.org}


\(^{25}\) Rio Declaration, \textit{supra note} 19

\(^{26}\) Principle 7 Rio Declaration
Nature of 1982, which firmly established the integrity of ecosystems or species as a non-negotiable bottom line when achieving ‘optimum sustainable productivity’ of natural resources.\textsuperscript{27}

The Earth Charter, which was adopted in 2000 as global civil society’s response to the Rio Declaration, is in its entirety designed around the concept of ecological integrity. Here, ‘all individuals, organizations, businesses, governments, and transnational institutions’ are urged to ‘[p]rotect and restore the integrity of Earth’s ecological systems, with special concern for biological diversity and the natural processes that sustain life’.\textsuperscript{28} Similarly, the 2010 IUCN Draft International Covenant on Environment and Development states as a first fundamental principle: ‘Nature as a whole and all life forms warrant respect and are to be safeguarded. The integrity of the Earth’s ecological systems shall be maintained and where necessary restored.’\textsuperscript{29} Although still a draft, the inclusion here is significant because the Covenant is a codification of existing environmental law, and was intended as a blueprint for an international framework convention.

Such repeated references in legal and semi-legal documents per se would not suffice to suggest that the notion of protecting Earth’s ecological integrity has become the ultimate goal of international environmental law. However, the concept of ecological integrity is emerging as one of the common denominators among the plethora of international environmental legal instruments. In this sense, the concept has the potential to be recognised and accepted as an environmental \textit{grundnorm}.

\section*{5. Conclusion}

Sometimes, the rule of law appears as a monstrance carried in front of a solemn procession. There was something eerily disturbing when President Bush said: “America will always stand firm for the non-negotiable demands of human dignity, i.e. the rule of law” or when President Putin declared “the principles of the rule of law amongst the country’s highest priorities.” or when President Robert Mugabe explained: “Only a government that subjects itself to the rule of law has any moral right to demand from its citizens obedience to the rule of law.” With such rhetoric the rule of law becomes elusive and a weapon in the hand of the powerful.

It may be true that appeals to the rule of law have too often escaped serious analysis.\textsuperscript{30} It perhaps shares this fate with other foundational concepts such as fairness, justice or sustainability. Yet, none of these are in any way dispensable or negotiable if humanity is to flourish. This is even more true in the Anthropocene with its new global dimensions of responsibility.

Understood as a value-based, complex and dynamic concept, the rule of law needs ongoing and never-ending attention. It may be time now to remind ourselves that the law has no intrinsic value, but is a mere human construct intended to govern ourselves in a civilized manner. However, what could be more civilized than caring for the conditions that make human life possible in the first

\begin{itemize}
\item \textsuperscript{27} Principle 4 World Charter for Nature, \textit{supra note} 18
\item \textsuperscript{28} Principle 5 World Charter for Nature
\item \textsuperscript{29} Art. 2 Draft International Covenant, \textit{supra note} 21
\end{itemize}
place. It is here where the concern for the integrity of life as a whole has its place. And it is here where a renewed sense of the rule of law must have its beginning.