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## Rethinking Global Environmental Governance

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Climate change and environmental devastation are arguably the biggest threats facing humanity in the Anthropocene. This is the result of unsustainable production and consumption. Unfortunately, global environmental governance appears unable to control or ameliorate these problems – primarily due to the dominance of neoliberal orthodoxies and the predominance of “soft” international environmental law. History suggests that the deepening ecological and climate crises cannot be resolved through business as usual or law as usual. As Naomi Klein cogently argues, the epistemologies of mastery that have brought us to this critical juncture cannot provide solutions to the problems they have caused.<sup>1</sup> Since it is beyond question that endless economic growth is not possible on a finite planet, business as usual merely deepens the climate and ecological problems that confront us. And since credit, debt, interest and growth are hardwired into legal systems, environmental problems cannot be adequately addressed through law as usual.<sup>2</sup> It follows that sustainable development, which is predicated upon the illusion that it is possible to simultaneously achieve economic growth, social justice and environmental protection is equally problematic because it is an oxymoron; sustainable development should not be confused with genuine sustainability.

Sustainable development emerged at the 1988 World Conference on Environment and Development in the famous Brundtland definition: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. This called for development to be aimed at meeting the human needs of current and future generations.<sup>3</sup> It accepted the existence of limits to growth, both insuperable limits such as the finitude of resources and the capacity of ecosystems, and flexible limits dependent upon economic, political and social choices. But it ultimately comes down in favour of development as economic growth, for which the conservation of natural resources is a precondition. At a stroke, the report promises to reconcile the irreconcilable: the simultaneous achievement of endless growth, social justice and environmental protection – as if capitalism were non-existent. Gudynas notes that environmental warnings emerged as early as 1972 in *Limits to Growth*, which questioned the possibility of perpetual growth, the central element in hegemonic development discourse.<sup>4</sup> Bosselmann notes the unresolved tensions between growth and sustainability but appears to view this as a misfortune that can be corrected rather than a problem intrinsic to economic activity. He argues that sustainability should be the underpinning or *Grundnorm* of global environmental constitutionalism and in favour of a right to sustainability because there is currently “no global consensus on the importance of sustainability similarly to constitutionalized values such as human rights,

<sup>1</sup> Naomi Klein, *This Changes Everything: Capitalism vs the Climate* (Allen Lane 2014). Sam Adelman, ‘Epistemologies of mastery’ in Anna Grear and Louis Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015).

<sup>2</sup> Stephen Turner argues that architecture of international facilitates environmental degradation. Stephen Turner, *A Global Environmental Right* (Routledge 2013).

<sup>3</sup> World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) 34.

<sup>4</sup> Donatella H Meadows, Dennis L. Meadows, Jorgen Randers, and William W. Behrens, *The Limits to Growth: A Report for the Club of Rome’s Project on the Predicament of Mankind* (Universal Books 1972). Eduardo Gudynas, ‘Debates on development and its alternatives in Latin America: a brief heterodox guide’ (2013) in Miriam Lang *et al.* (eds) *Beyond Development: Alternative Visions from Latin America* (Transnational Institute 2013).

democracy, or peace ... Promoting an overarching sustainability objective should be at the heart of global environmental constitutionalism.”<sup>5</sup>

Stephen Gill argues that global constitutionalism is a form of disciplinary neoliberalism. “New constitutionalism is the political-juridical counterpart to ‘disciplinary neoliberalism’”<sup>6</sup> which promotes the power of capital by seeking to naturalise and spread market values and disciplines into every aspect of social life and environmental governance. Everything can be priced because nothing has value. New global constitutionalism “is the *political/juridical form* specific to neoliberal processes of accumulation and to market civilization.”<sup>7</sup> In the twenty-first century global constitutionalism is underpinned by trade pacts such as the Trans-Pacific Trade Pact, which harmonise standards at the lowest possible level and exclude dispute settlement from national, public courts. In a process of *de facto* constitutionalism under the aegis of the international economic institutions, which are undemocratic and unaccountable, global constitutionalism promotes neoliberal orthodoxies at the expense of environmental protection.<sup>8</sup> The contrast between the hard law of the WTO and the soft law in the Paris Agreement is stark. The problem is that all legislation and constitutions, no matter how progressive, can be subverted by the rule of markets. Against law’s self-presentation as neutral, impartial and objective, law should instead be understood as constitutive of market civilisation in which corporations have what Upendra Baxi has termed trade-related, market-friendly human rights.<sup>9</sup> As Bosselmann acknowledges, “the omnipresence of free market ideology has certainly undermined efficiency and enforceability of environmental rights.”<sup>10</sup>

Global environmental governance is dysfunctional because it does not prevent climate change and environmental degradation due to ceaseless extractivism and the breaching of planetary boundaries.<sup>11</sup> Gill argues that contemporary global governance reflects “an *impasse* shaped by the degenerative structures and processes associated with disciplinary neoliberalism, with no clear or generalized progressive solution yet in sight, and, indeed, with the potential for authoritarianism to prevail in the context of intensifying global competition for resources and food and the emerging politics of austerity.” In his view, solutions are obstructed by the underlying assumption that “material progress can continue regardless of ecological and environmental constraints.”<sup>12</sup>

If, as Kotzé argues, global governance is designed to attend to the ecological crisis confronting us, “evidence suggests that it is failing to solve pervasive global environmental problems such as climate change, biodiversity loss, and the destruction of the biosphere.”<sup>13</sup>

<sup>5</sup> Klaus Bosselman, ‘Global Environmental Constitutionalism: Mapping the Terrain’ (2015) *Widener Law Review* 21179.

<sup>6</sup> Stephen Gill, ‘Constitutionalizing Inequality and the Clash of Globalizations’ (2002) *International Studies Review* 4(2) 47.

<sup>7</sup> *Ibid*, 48 (emphasis in original).

<sup>8</sup> Gill, 2002 48.

<sup>9</sup> Upendra Baxi, *The Future of Human Rights* (Oxford University Press 2013).

<sup>10</sup> 177.

<sup>11</sup> Will Steffen *et al*, ‘Planetary Boundaries: Guiding human development on a changing planet’ (2015) *Science* 347.

<sup>12</sup> Stephen Gill, ‘Organic crisis, global leadership and progressive alternatives’ in Stephen Gill (ed), *Global Crises and the Crisis of Global Leadership* (Cambridge University Press 2012) 237.

<sup>13</sup> Louis Kotzé, ‘Arguing Global Environmental Constitutionalism’ (2012) 1 *Transnational Environmental Law* 199, 200.

Amongst the problems he identifies are the lack of corporate liability, core ecological and ethical values, and the absence of fundamental, enforceable and universal environmental rights.<sup>14</sup> Kotzé is one of several writers who highlight the difficulty of addressing environmental problems in a period in which neoliberalism is dominant and market solutions are promoted despite conclusive evidence that the commodification and monetisation of the environment rarely enhance the protection of ecosystems.<sup>15</sup> For example, green capitalism, heavily promoted by the United Nations Environment Programme and the Reducing Emissions from Deforestation and Forest Degradation Plus (REDD+) framework is suffused with terms such as natural capital and payment for environmental services in language that implicitly assumes that nature is an endless set of resources existing only to satisfy insatiable consumption. As Death writes, “The ‘green economy’ is the latest repackaging of long-running debates, programmes and discourses ostensibly seeking to reconcile economic growth and capitalist development with ecological sustainability.” Whereas proponents of the green economy present it as an unquestionable good, critics view the discourse as “contradictory, distracting or politically dangerous, legitimating new forms of expropriation and accumulation.”<sup>16</sup>

Environmental justice cannot be achieved without addressing current levels of inequality, which is not possible without distributive, climate, gender and global justice. From one perspective, the intertwined climate, ecological and economic crises present daunting ethical, political and governance problems difficult to address simultaneously, but from another viewpoint they constitute an unprecedented opportunity because they cannot be solved separately.<sup>17</sup> Murcott describes how neoliberalism has undermined transformative constitutionalism in South Africa because environmental justice has been subordinated to the spurious discourse of sustainable development.<sup>18</sup> She highlights the difficulties that arise from bolting together different concepts in ways that militate against a coherent, holistic approach to the ecological crisis.

A large part of the problem lies in resolutely anthropocentric law. Anthropocentrism “has fundamentally informed not only the way modern law constructs, categorizes and orders nature, but also the manner in which law protects nature” primarily for the benefit of people and not for the sake of the environment itself.<sup>19</sup> Anthropocentric law, based upon instrumentalist rationality and possessive individualism, turns nature into property and subjects it to exploitation as of right.<sup>20</sup> The “image of nature that emerges ... is that of a

<sup>14</sup> Ibid 203.

<sup>15</sup> See Sam Adelman, ‘Rio+20: sustainable injustice in a time of crises’ (2013) *Journal of Human Rights and the Environment* 4(1).

<sup>16</sup> Carl Death, ‘Four discourses of the green economy in the global South’ (2015) *Third World Quarterly* 36(12) 2207.

<sup>17</sup> “As part of the project of getting our emissions down to the levels many scientists recommend, we once again have the chance to advance policies that dramatically improve lives, close the gap between rich and poor, create huge numbers of good jobs, and reinvigorate democracy from the ground up.” Klein n 1 10.

<sup>18</sup> Melanie Murcott, ‘The role of environmental justice in socio-economic rights litigation’ (2015) *South African Law Journal* 132(4).

<sup>19</sup> Vito de Lucia, ‘Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law’ 2015 *Journal of Environmental Law* (27) 95.

<sup>20</sup> Mariachiara Tallacchini ‘Human Right to the Environment or Rights of Nature?’ in Rex Martin and Gerhard Sprenger (eds) *Rights: Proceedings of the 17th World Congress of the International Association for Philosophy of Law and Social Philosophy* Volume I (Franz Steiner Verlag 1997) 126.

lifeless, inert machine that exists to satisfy the needs, desires (and greed) of human beings.”<sup>21</sup> New forms of law are gradually emerging that seek to address this problem, primarily by giving rights to nature - albeit in a contradictory manner that creates a tension between human rights and the rights of nature.

Innovative and imaginative juridical and political responses are required to ensure that global environmental governance protect human rights as well as those of other species and Mother Earth (*Pachamama*) itself. However, as Friends of the Earth argue, there are numerous barriers to effective governance, including “development politics, lack of trust, widespread discounting of the future, excessive or incoherent fragmentation, challenges of scale, the dominance of economic interests in multilateral relations, and the ambition for a grand plan together with ‘bandwagoning’.”<sup>22</sup> Friends of the Earth identify two basic approaches. The first is the reform of governance institutions by addressing their relative weakness in relation to economic forces. The second involves alternative approaches that view environmental problems as “wicked” and address broader contextual and structural issues.

May and Erin discern four rapidly developing concepts in global environmental governance: the rights of nature, sustainability, public trust, and climate change. They maintain that constitutionalising the rights of nature is “part of a growing global movement highlighting the importance of the natural environment for its own sake and as a whole, rather than as an aggregation of resources to be harnessed by humans for various purposes.”<sup>23</sup> They view it as one of the most promising forms of governance because it addresses the inadequacies in Western conceptions of development based upon the dominance of nature by human beings, the exploitation of private property rights, and a false notion of sustainability.

### *The Need for Alternative Conceptions of Global Economic Governance*

Kotzé argues that the current global environmental governance regime requires urgent reform.<sup>24</sup> In *The Conceptual Contours of Environmental Constitutionalism* he analyses the ways in which constitutional features may be “thin,” operating as a framework for governance, or “thick” and value-laden, and provide the components necessary for rights-based constitutionalism.<sup>25</sup> Environmental constitutionalism exhibits both thin and thick features, but is most effective when it provides a “thick” right to a healthy environment. He argues that global environmental constitutionalism is a means of incorporating its normative aspects “into existing domestic and global regulatory arrangements that seek to mediate the human-environment interface.” It embodies a “transformative approach that relies on

<sup>21</sup> Peter Burdon ‘The Earth Community and Ecological Jurisprudence’ 2013 *Oñati Socio-Legal Series* 3(5) 818.

<sup>22</sup> Friends of the Earth, ‘A synthesis of literature regarding the governance of the commons together with the identification of interventions to increase the likelihood of sustainable management of the global commons’ 4 <[www.foe.co.uk/sites/default/files/downloads/protecting\\_the\\_global\\_commons.pdf](http://www.foe.co.uk/sites/default/files/downloads/protecting_the_global_commons.pdf)> accessed 1 August 2016.

<sup>23</sup> James May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2014) 255. See Christopher Stone’s seminal work *Should Trees Have Standing: Law, Morality, and the Environment* (Oxford University Press 2010). On the possibility of a global environmental right, see Stephen Turner, n 2 and his chapter in this volume.

<sup>24</sup> Louis Kotzé, ‘Arguing Global Environmental Constitutionalism’ (2012) *Transnational Environmental Law* (1)1 200. See also Louis Kotzé, *Global Environmental Governance: Law and Regulation for the 21st Century* (Edward Elgar 2012).

<sup>25</sup> Louis Kotzé, ‘The Conceptual Contours of Environmental Constitutionalism’ (2015) *Widener Law Review* 21 187.

constitutions to provide for the architecture of environmental governance, whereupon it then acts to improve environmental protection through various constitutional features such as fundamental rights and duties, principles of environmental governance, the rule of law and endearing aspirational values.” Edenhofer *et al.* view the problem of global climate policy as the transformation of the governance of the atmosphere from an open-access into a global commons regime.<sup>26</sup>

Earth jurisprudence and wild law are emergent legal theories that seek to redefine the legal relationship between human and non-human entities and to develop biocentric law capable of protecting the integrity and health of ecosystems. The goal of Earth jurisprudence is a “non-anthropocentric” earth justice in which the rights of nature are given equal if not more weight than human rights. It is predicated upon the view that human beings have an ethical responsibility as stewards to prevent activities which harm the planet and the idea that there is an intimate connection in nature between all animate and inanimate entities that determines physical laws and therefore underpins positive laws as well. Earth jurisprudence seeks to realign human governance systems by developing coherent new theories or philosophies. In Cullinan’s view, this follows from the fact that people are an integral part of the Earth system, and this existential unity means that we are embedded in and influenced by the larger Earth community. The way we govern ourselves must therefore of necessity have as its “purpose to ensure that the pursuit of human well-being does not undermine the integrity of the Earth, which is the source of our well-being” Only by creating a jurisprudence that reflects this reality, he argues, “will we be able to begin a comprehensive transformation of our societies and legal systems.” To this end, it is necessary to establish “wild” laws that foster rather than stifle creativity and the human connection to nature.<sup>27</sup>

The most well-known alternative to Western forms of global environmental governance has emerged from Latin America. “*Buen Vivir*” - living well - is based upon Andean cosmovisions that provide an alternative conception of development. It eschews anthropocentrism, the society/nature dualism, and ideas of linear progress central to Western epistemologies, and focuses instead on the well-being of people and nature through co-dependency. It privileges traditional forms of knowledge without being limited to them, and draws on progressive thought that is critical of modernity such as biocentric environmentalism and ecofeminism. “*Buen Vivir* is a set of attempts to build other social and economic orders that break free of the bounds imposed by Modernity.”<sup>28</sup> The aim of *buen vivir* is to move beyond the antagonistic relationship between human beings and nature in which the former seek to subordinate the latter without any regard for its intrinsic value for the purposes of capitalist consumption and extractive development.

An ecocentric conception of global environmental governance is outlined in the *People’s Agreement of Cochabamba*, which calls for a paradigm shift leading to Mother Earth (*Pachamama*) being recognised as the source of life for a new system of global environmental governance based *inter alia* on the principles of harmony and balance among

<sup>26</sup> Ottmar Edenhofer, Christian Flachsland, Michael Jakob, and Kai Lessmann, ‘The Atmosphere as a Global Commons – Challenges for International Cooperation and Governance’ Discussion Paper 2013-58 (Harvard Project on Climate Agreements, August 2013).

<sup>27</sup> Cormac Cullinan, ‘A History of Wild Law’ in Peter Burdon (ed) *Exploring Wild Law: The Philosophy of Earth Jurisprudence* (Wakefield Press 2011) 170-171. On the essential wildness of nature and the environment, see Steven Vogel, *Thinking Like a Mall: Environmental Philosophy After the End of Nature* (MIT Press 2015).

<sup>28</sup> Gudynas n 4 35.

all and with all things; complementarity, solidarity, and equality; people in harmony with nature; and the recognition of human beings for what they are, not what they own.<sup>29</sup> The Preamble reads:

We confront the terminal crisis of a civilizing model that is patriarchal and based on the submission and destruction of human beings and nature that accelerated since the industrial revolution.

The capitalist system has imposed on us a logic of competition, progress and limitless growth. This regime of production and consumption seeks profit without limits, separating human beings from nature and imposing a logic of domination upon nature, transforming everything into commodities: water, earth, the human genome, ancestral cultures, biodiversity, justice, ethics, the rights of peoples, and life itself.

Under capitalism, Mother Earth is converted into a source of raw materials, and human beings into consumers and a means of production, into people that are seen as valuable only for what they own, and not for what they are.<sup>30</sup>

Several constitutions, including those of Germany and Lithuania, contain provisions protecting nature but do not confer rights on it. In contrast, biocentric environmental constitutionalism that recognises the rights of nature has emerged in Latin America. Bolivia has a framework law recognizing the rights of nature and Ecuador's constitution states: "Nature, or Pachamama, where life is reproduced and created, has the right to integral respect for her existence, her maintenance, and for the regeneration of her vital cycles, structure, functions, and evolutionary processes."<sup>31</sup> In a chapter devoted exclusively to the rights of nature, the constitution grants public authority to each "person, community, people, or nationality" to exercise public authority to enforce the right.<sup>32</sup> *Wheeler c. Director de la Procuraduria General Del Estado de Loja* was the first case anywhere to vindicate the Rights of Nature. The suit was filed in 2011 for permitting a road expansion project that narrowed the width of the Rio Vilcabamba and doubled its speed due to the dumping of debris. The project went ahead without an environmental impact assessment or the consent of the local community. Two local residents claimed that the rights of the river had been violated rather than conventional property rights. In setting an important precedent, the court confirmed that the burden of proof lay on the defendant to prove that no damage had been caused to nature and held that "the rights of nature trump other constitutional rights because in its view a 'healthy' environment is more important, and more pervasive, than any other constitutional right" (para. 5).

Unlike in Bolivia, where it functions more as an ethical principle, *Buen Vivir* was incorporated into the new Constitution of Ecuador in 2008 as a set of rights to health, shelter,

<sup>29</sup> *People's Agreement of Cochabamba*, World People's Conference on Climate Change and the Rights of Mother Earth, 22 April, Cochabamba, Bolivia.

<sup>30</sup> Bodansky points out that multilateral environmental agreements do not possess a global constitutional nature and that the distinctive features of international environmental law "do not amount to a constitution in any meaningful sense of the term." Daniel Bodansky, 'Is there an International Environmental Constitution?' (2009) *Indiana Journal of Global Legal Studies* 16 579.

<sup>31</sup> Constitución Política de la República del Ecuador, title II, ch. 7, arts. 71-74.

<sup>32</sup> Article 71. On Ecuadorian case law arising from chapter 7 of the constitution, see May and Daly n 22 257-260.

education, and food as well as the innovative inclusion of the rights of Nature “that should be fulfilled in an intercultural framework, respecting their diversity, and in a harmonious coexistence with Nature.”<sup>33</sup>

The Bolivian formulation offers more options for cultural diversity than the Ecuadorian, but does not include *Buen Vivir* as a right. The Ecuadorian text clearly stated that development in line with *Buen Vivir* is required to fulfil the rights of Nature or *Pachamama* (with a biocentric posture that recognizes intrinsic values in the environment). The Bolivian text does not recognize intrinsic values in Nature, and the environment is presented within the classical third generation human rights (quality of life and protection of the environment).<sup>34</sup>

The Preamble of the Constitution refers to a “new form of social coexistence that respects diversity and is in harmony with nature in order to attain good living, the *sumak kawsay*.” Nature becomes a legal subject rather than an object of exploitation. Article 71 states that nature or “*Pachamama*, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes”. Article 72 asserts that “nature has the right to restoration” and article 83 states that Ecuadorians have a constitutional obligation to respect the rights of nature.

Attempting to use the rights of nature has inevitably proved to be contradictory due to the tension between economic growth and environmental protection at the centre of all conceptions of development. Manzano argues that, far from a paradigm shift away from Western-style developmentalism, environmental governance has not been strengthened, and equating the “rights of nature” with the “rights of man” invariably results in the subordination of the former to economic rights. He illustrates this claim by analysing numerous cases through which, he argues, the judiciary has provided a veneer of environmental protection while protecting people rather than ecosystems.<sup>35</sup> As Manzano observes:

Ecuador cannot escape from taking part in the process of capitalist accumulation, because it requires foreign investment and foreign consumption of its raw materials to provide economic opportunity for Ecuadorans. In this way the Constitution reinforces extractive development and economic dependence.<sup>36</sup>

Manzano argues that enshrining the rights of nature in the constitution is misguided because it threatens to disconnect human beings from their responsibility of stewardship towards the nation. Instead, he argues, we should limit human rights according to the availability and vulnerability of natural resources. He concludes that the rights-based approach in the Ecuadorian Constitution has failed, and that:

<sup>33</sup> Gudynas, E. ‘Buen Vivir: Today’s Tomorrow’ (2011) *Development* 54(4) 443.

<sup>34</sup> *Ibid.*

<sup>35</sup> Jordi Jaria I Manzano, ‘The rights of nature in Ecuador: an opportunity to reflect on society, law and environment’ in Robert V. Percival, Jolene Lin and William Piermattei (eds) *Global Environmental Law at a Crossroads* (Edward Elgar, Cheltenham 2014).

<sup>36</sup> Manzano n 35 54.

the paradigm of care, responsibility and stewardship demands something more than placing nature's rights on a par with the multitude of human rights. In fact, if respect for nature is to limit human behaviour, then a holistic transformation of the perspective on the place of human beings within nature must take place so that the goals of humanity cease to be absolute and all other things are no longer regarded as existing solely to meet human needs.<sup>37</sup>

Iorns Magallanes believes that protecting indigenous rights, both constitutionally and in other ways, is a precondition for protecting the environment, and that upholding indigenous rights is a way of protecting the human rights of everyone as well as the environment.<sup>38</sup> She shows that it is possible for Western legal systems to confer and protect the rights of nature through innovative and imaginative approaches that incorporate the onto-epistemologies of indigenous peoples. She highlights the differences between anthropocentric Western thinking, which emphasises the separation of human beings and nature, endless growth, consumption, possessive individualism and progress, and indigenous Maori cosmology, which views people as an interdependent part of nature. She describes how a kind of constitutional cosmology has informed New Zealand legislation about natural resources affecting Maori in special arrangements that have "recognized in law the Maori view that the natural environment should be treated more as a person - indeed, as a relative - rather than simply as a resource." She argues that these "illustrate ways in which the law can be used to implement and incorporate indigenous cosmologies with a Western society and legal system and better protect the natural environment in the process," resulting in a healthier environment for everyone. She believes that courts in New Zealand have shown just how constitutionalism can promote environmental norms and protection by advancing indigenous rights.<sup>39</sup> These legal changes have occurred to protect human rights rather than the environment (but for the Maori these are inextricably linked) and "do not fit squarely within the standard environmental protection paradigm, whereby nature is protected apart from people." Instead, they reflect "the indigenous cosmological view of people as part of nature, not separate nor above it. Indeed, the legal recognition of personality in these examples also recognizes the Maori cosmology of ancestral nature and the indivisibility of the physical and metaphysical elements of the natural world."

Weston and Bollier also propose an alternative conception of global environmental governance. They argue that effective and just environmental protection can be achieved through commons- and rights-based ecological governance, which they call green governance.<sup>40</sup> Human rights and the rights of nature are, they argue, implicit in ecological commons governance. The centrepiece of their green governance is the rigorous application of a reconceptualised human right to a clean and healthy environment (or a right to environment) designed to promote environmental well-being while meeting the basic needs of all people. Like Bosselmann, they call for a shift from anthropocentrism to biocentrism,

<sup>37</sup> Manzano n 35 61-62.

<sup>38</sup> Catherin Iorns Magallanes, 'Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment' (2015) *Widener Law Review* 21.

<sup>39</sup> Iorns Magallanes uses the examples of the judicial recognition of agreements that recognise the legal personalities of the Whanganui River and Te Urewera forest: "A fundamental — though perhaps less obvious — aspect underlying these examples is the importance placed on the intrinsic value of nature itself."

<sup>40</sup> Burns H. Weston and David Bollier, *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press 2013). They cite the work of Elinor Ostrom, who identified principles of effective commons governance at 147ff.

for an end to self-defeating and counterproductive growth fetishism, and a move away from the neoliberal alliance between State and Market ('State/Market') primarily responsible for the current, failed paradigm of ecological governance. This will occur through the emergence of Vernacular Law in the form of organic rule, norms and sanctions. This is an approach that could productively be extended to all ecosystems. One example is Weston and Bollier's argument that commons offer an alternative form of environmental governance favourable to both human rights and the rights of nature if both State and Vernacular law and practice are remodelled to mutually reinforce each other.<sup>41</sup> They propose a *Universal Covenant Affirming a Human Right to Commons- and Rights-based Governance of Earth's Natural Wealth and Resources*.

Another possibility is a dedicated treaty on sustainability and the rights of nature, although the UN Special Rapporteur on Human Rights and Climate Change, John Knox, opposes it at this stage because although "a declaration could certainly have the benefits its proponents describe, it would also become a central point of attention for the period of its negotiation, which might distract from the continuing development of the norms at the national, regional and international levels ... [a]t this point in their evolution, some issues might better be resolved through their continued consideration by a variety of human rights bodies, rather than be addressed in an intergovernmental negotiation."<sup>42</sup> Knox argues that it is preferable that states should continue constitutionalising the right to a healthy environment or at least "strong environmental laws ensuring, among other things, rights to information, participation and remedy" and establishing dedicated environmental courts.<sup>43</sup> The implementation of the Sustainable Development Goals is "highly important to the promotion of human rights and environmental protection."<sup>44</sup> The problem with this approach is twofold. First, despite the fact that environmental rights are protected in more than 165 of the 193 states in the UN through articles promoting environmental stewardship, the right to a safe or clean and healthy environment or by ensuring some level of public participation in environmental decision making, environmental degradation and ecosystem destruction continues unabated.<sup>45</sup> Environmental rights and values are more widespread than the protections they envisage. Second, such a right is not the best way of dealing with environmental pollution from greenhouse gases and is therefore inappropriate as a means of dealing with climate change.

These alternative conceptions of global environmental governance, which are gaining strength in Latin America, New Zealand and elsewhere, demonstrate that it is possible to use environmental law to protect ecosystems, but only if the law is matched by sufficient political will to subordinate economic imperatives to the needs of nature in pursuit of genuine sustainability rather than sustainable development, which merely fosters the illusion of endless growth on a finite planet.

Bosselman correctly argues that global environmental constitutionalism has a coherence lacking in international environmental law but accepts that it is not yet clear

<sup>41</sup> Weston and Bollier n 40 179.

<sup>42</sup> UN Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, (A/HRC/31/53, 28 December 2015) 4.

<sup>43</sup> Ibid. 12.

<sup>44</sup> Ibid. 13.

<sup>45</sup> James R May, 'Introduction: Symposium on Global Environmental Constitutionalism: An Introduction and Overview Widener Law Review Symposium Issue 2015' (2015) *Widener Law Review* 21 139.

whether it is capable of protecting the environment and human rights. International comparison shows that:

the process of “greening” of national constitutions and international law is slow, incomplete, sketchy, and not following an overarching objective. There is, as of now, no global consensus on the importance of sustainability similarly to constitutionalized values such as human rights, democracy, or peace. Likewise, policy objectives tend to focus on economic prosperity and largely ignore its dependence on sustainability.<sup>46</sup>

Facing planetary environmental and climate crises, effective global environmental governance is urgent but some way off and time is fast running out. It is far from hyperbolic to argue that humanity’s future depends on our ability to govern the environment effectively in the interests of all species and the planet itself.

<sup>46</sup> Bosselman n 5 179.