

Governing the Global Commons

the ‘planetary boundaries’ approach

Introduction

This article offers some ideas about a system of governance which reflects the reality of planetary boundaries (Rockström et al., 2009; Steffen et al., 2015). The goal of living safely within the boundaries of our planet cannot be achieved by relying on traditional forms of governance based on the concept of sovereign nation states. States, driven by national interest, have been resistant to accepting responsibility for areas beyond national jurisdiction known as the global commons (Ostrom, 1990). The focus for governing the global commons – the polar regions, oceans, atmosphere, outer space – needs to shift from states to Earth as a whole, evoking what might be called ‘Earth governance’ (Bosselmann, 2015).

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Hence, consensus-building ultimately resides with citizens, not with governments. It is appropriate, therefore, to perceive of governments as trustees acting for, and on behalf of, citizens as beneficiaries (ibid., pp.155-97). In the Anthropocene, citizenship has ecological and global dimensions (ibid., pp.42-45). This calls for transnational processes of forming the collective will. In this way we can perceive Earth, not states, as the common reference point, enabling us to develop a strong sense of stewardship, or guardianship, for the global commons. This reasoning makes the case that states can, and must, accept fiduciary duties for the global commons.

Reclaiming Earth: the global commons

Currently, the atmosphere is being treated as an open-access resource without any legal status: it is widely regarded as *ius nullius*, a legal nullity. This works for property owners, who fill the vacuum by exercising their property rights. Such rights may not include a right to pollute, but the absence of someone who could

claim violation of their own rights means that actual pollution goes without any sanction. In fact, it is free. This will be qualified only when the law sets rights-limiting emissions standards. To date this has been an uphill battle, which has not been made easier merely by having the Paris Agreement. By asserting that we all own the atmosphere, we begin to use the institutions of law working in our favour. As legal owners we can charge for damage to our common property, provide rewards to those who protect it (e.g. producers and users of renewable energy) and in this way eliminate greenhouse gases.

This could be supported by the public trust doctrine – that natural commons should be held in trust, since assets serve

commons' movement has certainly found a new momentum in recent times.

International law and the United Nations are not only needed, but practically ready to develop institutions of trusteeship governance. There is, for example, a tradition of UN institutions with a trusteeship mandate, including the (now retired) UN Trusteeship Council, the World Health Organization with respect to public health, and, ironically, also the World Trade Organization with respect to free trade (Bosselmann, 2015, pp.198-232). A number of other UN or UN-related institutions with weaker trusteeship functions exist as well (ibid., p.206). Quite obviously, states have been capable of, expressively or implicitly,

'[n]ot even seated at democracy's table – not organised, not propertied, and not enfranchised – are future generations, ecosystems, and nonhuman species' (Barnes, 2006, p38).

The practice of state governance in recent decades has affected how environmental policies and laws are being conceived. Mary Wood calls this a 'discretionary frame', which means that governments see themselves as perfectly entitled to give priority to short-term resource exploitation over long-term resource conservation (Wood, 2013, p.592). Environmental commons are perceived as 'government-owned', but not with any concern for future generations, nonhuman species, or even the contemporary citizen (Barnes, 2006, p.43). It is clear that governance today is about a quid pro quo, symbiotic relationship between political institutions and corporations (ibid., p.37). The rewards for the latter include property rights, friendly regulators, subsidies, tax breaks, and free or inexpensive use of the commons. This means little is left for the 'common' good.

Fundamentally, the legitimacy of the state rests on its function to act for, and on behalf of, its citizens. This requires consent of the governed.² Governmental duties can therefore be understood as fiduciary obligations towards citizens (Fox-Decent, 2012; Frankel, 1983). Such fiduciary obligations are recognised typically in public law.³ They exist in common law and civil law (although in varying forms and degrees),⁴ and are also known in international law (Blumm and Guthrie, 2012; Perritt, 2004; Brown Weiss, 1984). The fiduciary function of the state can also be described as a trusteeship function (Finn, 1995).

Let us, therefore, examine how 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, which is to serve the citizens on whom it depends and to whom it is accountable.

The environmental crisis and the state of the global commons gives rise to the need for revisiting the relationship between sovereignty and trusteeship (Stec, 2010, pp.361, 378-80, 384-85).

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the public good. 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. Nationally, the government would act as an environmental trustee, while internationally states would jointly act as trustees for the global commons, such as the 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 change (Costanza, 2015).

The idea of global nature trusts has been promoted by environmental lawyers Mary Wood and Peter Sand, as well as economist Peter Barnes (Wood, 2007, 2013; Sand, 2004, 2013, 2014; Barnes, 2001, 2006). Recently, the global petition Claim the Sky was launched by Robert Costanza with support from the Club of Rome.¹ Trusteeship governance is also advocated by the rich literature on the commons (e.g. Bollier, 2014; Bollier and Weston, 2013; Helfrich and Haas, 2009; Ostrom, 1990). The 'reclaiming the

creating international trusteeship institutions. These developments – and in particular the existence of supranational organisations such as the European Union – demonstrate that sovereignty of states can be transferred to international levels.

The underpinning motives are not so much of a particular legal nature, but rather driven more by politics. And politics is driven by morality that presently favours exploitation. But morality can be subject to change. By insisting on the common good, civil society can reclaim lost ground and rebuild democracy. Trusteeship governance should be seen as a joint effort of the UN, states and civil society organisations with an equal say in decision making.

Sovereignty and trusteeship

There is, at present, an alliance between politics ('sovereignty') and private interests ('property') which can undermine the democratic process and public concern for safeguarding the global commons. As Barnes points out,

Trusteeship must be pursued at both the international level and the domestic, internal level. As Benvenisti notes, the private, self-contained concept of sovereignty is less compelling than it was in the past because of the 'glaring misfit between the scope of the sovereign's authority and the sphere of the affected stakeholders'. This engenders inefficient, undemocratic and unjust outcomes for under- or unrepresented affected stakeholders (Benvenisti, 2013, pp.295, 301). Non-citizens, future generations and the natural environment all fall into this category.

There are two challenges to advancing the idea of trusteeship, and both boil down to sovereignty. On the one hand, to propose a system of international trusteeship is to directly challenge the principle of non-interference in the domestic affairs of states. To propose that states become trustees themselves, in addition to an international system of trusteeship, is, again, an intrusion into their sovereign right to determine their approach to the environment. However, without the latter we will not achieve the former. Regardless of what one thinks about the legitimacy of sovereignty and the entire make-up of international relations, the reality is that states call the shots. Unless there is a radical reorganisation of global politics, we need to work within the state-centric context.

Trusteeship is an idea which softens the blow of what would otherwise be seen as an unprecedented intrusion into sovereign state affairs. This is a type of intervention that was not envisaged in the UN Charter, but is nonetheless desirable and legitimate (Bantekas, 2009, p.19). As Redgwell explains, 'trust arrangements do not challenge sovereignty directly, for one of the advantages of trusteeship arrangements is the absence of sovereignty in the exercise of trusteeship functions – there is no transfer of sovereignty to the trust authority' (Redgwell, 2005, p.179).

But what if trust arrangements were perceived as a significant intrusion into sovereignty? The many proposals of trusteeship arrangements at the level of the UN have been, more often than not, greeted with hostility. States seem too attached to the principle of non-

interference to appreciate cooperation of this kind. Yet the very origins of the concept of state sovereignty are closely linked with humanitarian concerns. The Peace of Westphalia, as the foundation of state sovereignty, was a key instrument for upholding humanitarian precepts relating to freedom of conscience and religion (Stec, 2010, pp.378-80). To the extent that it resolved a crisis of freedom of conscience and equality before the law and many pre-existing institutions had lost their legitimacy and ultimately collapsed, sovereignty has been and can be justified. But it should also be remembered that humanitarian concerns were at the root of the crisis that the new order resolved. Where new crises emerge,

exclusive. The argument in favour of states as trustees proceeds along the following lines.

The state gains its legitimacy exclusively from the people who created it. While the legality of a state depends on recognition by other states, 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 citizen and state and is arguably the only legitimate basis for political authority (Reisman, 1990). It is echoed in constitutional documents such as the 1776 Pennsylvania

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can the principle of non-interference really be justified?

Similarly, with regard to the state itself as environmental trustee for those over whom it governs, it could hardly be refuted that a democratically elected government does not owe its citizens a duty to govern their natural wealth and resources in a sustainable way.⁵ The first step, then, is reminding ourselves, as citizens and society, that these rights and responsibilities rest with us, despite the state acting as our representative. The second step is convincing the consumer society of what these rights and responsibilities entail. This is no small feat.

Fiduciary duties of the state

The only way to turn things around and move international law from the Westphalian conflict model to a 21st-century cooperation model is to redefine states as trusteeship organisations. Sovereignty and trusteeship must be seen as complementary, not mutually

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' (Criddle and Fox-Decent, 2009; Pennsylvania Constitution of 1776, article 1). Locke 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 legislature when they find the legislative act to be contrary to the trust reposed in them'.

Kant drew the moral basis of fiduciary obligations from the duty-bound relationship between parents and children (Criddle and Fox-Decent, 2009, p.352). Children have an innate and legal right to their parents' care. State legitimacy is the result of a contract necessarily created between people to form Rousseau's 'general will'. Through this process, Kant claimed, we jointly authorise the state to announce and enforce law.

That state sovereignty is fundamentally a trust relationship cannot be dismissed as a Western ideal. Trusts and the implicit fiduciary relationship are traced back to Middle Eastern origins and Roman and Germanic law, as well as being inherent in religious teachings. The idea is perhaps even more prevalent in non-Western societies because they emphasise collective identity (family, clan, nation, religion) over individual freedom and dignity, imbuing implied fiduciary obligations into the structure of public and private legal institutions (ibid., pp.378-79). The Universal Declaration of Human Rights states that 'the will of the people shall be the basis of the authority of government'.⁶

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So, although we may have democracy (and many places do not) in a technical sense, we have lost sight of what duty the state owes to those it governs. At its most simplistic, the state's legitimacy to govern is based on its ability to serve the common interest. Aristotle saw the purpose of the state as for the 'common good'. Locke hinted at such a purpose. But who defines common good and what does it include? According to Locke's definition, the common good was what arose from there being surplus produce that could be sold in the marketplace. The common good is 'a quantifiable one, not a moral one. From this concept of quantity would flow the modern measure of the common good – the Gross Domestic Product – a poor measure of any society's real quality of life' (Collins, 2008, p.455). But because 'common interests' are socially conceived, they are not static and can be contested; we can argue that new functions and responsibilities ought to become a part of the state's mandate to govern.

We have seen that government perceives its role largely as a facilitator

of economic growth, seen as analogous to 'prosperity', and thus the protector of private property (ibid.); that is, the belief that allowing individuals to pursue their own interests will result in the best possible social organisation. Few governments could argue that they do not owe a fiduciary duty to their constituents. Indeed, now more than ever governments are scrambling to reduce deficits in order to fulfil their obligation to the public not to overspend. The problem is that states have neglected the ecological aspects of their fiduciary duty. And we, as the voting public, have let them.

Benvenisti conceives of three other normative bases according to which we should ascribe a trusteeship function to

states' mandate to govern. The first two grounds lend themselves most easily to the development of rights and obligations under a conception of state trusteeship limited to intra-generational concerns. A normative approach which grounds itself in global resource distribution may be more conducive to the realisation of state trusteeship according to principles of inter-generational equity.⁷

First, sovereignty should be viewed as a vehicle for the exercise of personal and collective self-determination (Benvenisti, 2013, p.301). Collective self-determination embodies the freedom of a group to pursue its interests to further its political status, and 'freely dispose of [its] natural wealth and resources'.⁸ Second, Benvenisti refers to a conception of sovereign states as agents of humanity as a whole (ibid., p.305). He bases this conception largely on the equal moral worth of all human beings⁹ and the corresponding foundation of international law in human rights. He argues that it is humanity at large that assigns to certain groups of citizens the

power to form national governments. Accordingly, states can and should be viewed as agents of a global system that allocates competences and responsibilities for the promotion of the rights of all human beings and their interest in the sustainable utilisation of global resources (ibid., pp.306, 308).¹⁰ As such, the corollary of state authority to manage public affairs within domestic jurisdictions is an obligation to take account of external interests and balance internal against external interests.¹¹

The privilege of territorial sovereignty can, then, be legitimised only in so far as the universal interests of humanity as a whole are not severely affected. This argument is based not only on ecological realities defying national state boundaries, but also on the observation that boundaries of states do not necessarily coincide with boundaries of nationalities, or of those groups whose members share a distinct interest in, and conception of, the common good (Gans, 2003).

For Benvenisti, sovereignty is the power to exclude portions of global resources. Both ownership and sovereignty are claims for the intervention in the state of nature by carving out valuable space for exclusive use (Benvenisti, 2013, p.308). Such a perception of states as power-wielding property owners provides a solid normative foundation for the imposition of a positive obligation on states to take other-regarding considerations into account when managing the resources assigned to them (ibid., pp.309, 310).¹² Property law theory can thus provide us with a framework within which we can translate these moral grounds into legal obligations (Bosselmann, 2011). Thus, we should conceptualise ownership of global resources as originating from a collective regulatory decision at the global level, rather than as an entitlement of sovereign states (Benvenisti, 2013, p.309).

Conclusion

Global commons governance reverses the traditional rule that international law and governance ends where national borders begin. The dichotomy between national law and international law defies ecological reality. States need to exempt transnational ecological aspects from the concept of

exclusive territorial sovereignty, making way for global commons governance. Through environmental trusteeship at the state level, territorial sovereignty is conceptually restricted at the global level, leading to a paradigm shift in international environmental law. Instead of state sovereignty setting limits to environmental protection, environmental protection would set the limits to state sovereignty. Indeed, 'limiting the self-interest of states by taking into account global concerns of humanity has become a fundamental aspect of international law' (Stec, 2010, p.364).

States are as yet unable to resist the global market. Its forces have heavily eroded state sovereignty – the same state sovereignty required to resist its complete dominance. The paradox of surrendering sovereignty to free trade and market forces on the one hand, and on the other hand insisting on sovereignty when expected to protect the commons has been described as the 'sovereignty paradox' (Zaum,

2007, pp.226-31; Kaul, 2013). The way out of the paradox is differentiation: more sovereignty where possible; less sovereignty where necessary. In a globalised world this means protecting citizens and the environment from global economic forces ('more sovereignty') and protecting the global commons through international rules controlling financial and economic markets ('less sovereignty'). The perspective of differentiated sovereignty, also referred to as 'responsible sovereignty', calls for reforming and strengthening global institutions (Kaul, 2013). Nothing is more urgent than matching political institutions to the global challenges we face.

Concern for the global commons is a unifying feature of humanity. If we see ourselves as stewards of Earth, with states acting as trustees of the common good, a crucial step will be taken towards Earth governance – perhaps then, more

appropriately, called Earth democracy (Bosselmann, 2010).


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- 1 https://secure.avaaz.org/en/petition/Claim_the_Sky/?pv=58.
- 2 '(Government is not legitimate unless it is carried on with the consent of the governed': quoted in Ashcraft (1991), p.524.
- 3 Including constitutional law, administrative law, tax law, criminal law and environmental law.
- 4 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.
- 5 See, for example, the Declaration on Permanent Sovereignty over Natural Resources (1962), UN General Assembly resolution 1803 (XVII) [1].
- 6 Universal Declaration of Human Rights, UN General Assembly resolution 217 A(III) (adopted 10 December 1948), article 21(3).
- 7 As initially expounded by Brown Weiss (1984).
- 8 International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976), article 1.
- 9 Referring to John Stewart Mill, *Considerations on Representative Government*, 1861.
- 10 Paraphrasing Huber (1928) in *Island of Palmas (Netherlands v United States)*, RIAA 829, 869.
- 11 Paraphrasing Huber in *British Claims in the Spanish Zone of Morocco (Spain v United Kingdom)* (1925), 2 RIAA 615, 641.
- 12 Also when making rival claims on transboundary and public resources.

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Forthcoming Events

	Title	Speaker/Author	Date and Venue
Institute for Governance & Policy Studies	<i>Human rights and prison practice in Europe today</i>	Professor Frieder Dunkel, <i>Past President of European Society of Criminology</i>	Thursday 16th February 12:00 – 1:30pm Government Building Lecture Theatre 1 RSVP: igps@vuw.ac.nz
Institute for Governance & Policy Studies	with Transparency International: <i>Hero or Traitor? The ethics of blowing the whistle.</i>	Expert panel to be confirmed	Tuesday 21st February 5:30 – 7:00pm Rutherford House Lecture Theatre 2 RSVP: igps@vuw.ac.nz
Institute for Governance & Policy Studies	Exclusive Book Launch: <i>Petroleum Development and Environmental Conflict in Aotearoa New Zealand</i>	Dr Terrence Loomis, <i>Visiting Research Fellow, IGPS</i>	Friday 24th February 5:00 – 7:00pm Rutherford House Mezzanine Room 6 RSVP: igps@vuw.ac.nz
Institute for Governance & Policy Studies	Book Launch: <i>Governing for the Future (Emerald) and Safeguarding the Future (Bridget Williams Books)</i>	Professor Jonathan Boston, <i>Professor of Public Policy, Victoria University of Wellington</i>	Thursday 23th March 5:40 – 7:00pm Banquet Hall, Parliament Buildings RSVP: igps@vuw.ac.nz

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