

Whither Sustainability?

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New Zealand, was the first domestic jurisdiction to legislate for sustainability by enacting the Resource Management Act (RMA) on 22 July 1991.

However, notwithstanding the imagination that underpinned the RMA the New Zealand government has embarked on a wide-ranging reform of the resource management system because the RMA has not in practice delivered on desired environmental outcomes or consistently given effect to indigenous law (tikanga Māori). The reform reimagines domestic environmental law.

This paper will critically analyse the promise inherent in these proposed reforms for the evolution of domestic environmental law and keeping pace with ecological realities by using the writings of Klaus Bosselmann to interrogate how the transformative concepts of sustainability, ecological governance, and justice can be used to re-imagine environmental law more generally. My presentation will be divided into two broad parts:

- Sustainability, ecological governance, and justice; and
- The promise inherent in the proposed RMA reforms.

1 Sustainability, ecological governance, and justice

For Bosselmann, sustainability is transformative. For example, if “fully implemented in law, sustainability would facilitate the conformity of social and economic development with ecological realities”.

However, to understand the concept Bosselmann traces the history of sustainability from the traditional cultures of Indigenous peoples, through

common agrarian practices in medieval times, to the differing extractive and stewardship views (focused primarily on forest regeneration) espoused by Descartes on the one hand and Evelyn and Carlowitz on the other hand that emerged during the eighteenth century Enlightenment.

When analysing the modern approach to sustainability articulated by the Brundtland Report 1987 – “development ... that meets the needs of the present without compromising the ability of future generations to meet their own needs”, Bosselmann provided the critical insight regarding “sustainable development” that:

If the sustainability of ecological systems is paramount it sets an overriding limit to any form of development.

This critique draws immediate distinctions between strong sustainability that prohibits economic trade-offs, and weak sustainability that merely encourages the integration of economic, social, and environmental concerns. Put simply, for Bosselmann a purely anthropocentric approach to sustainability is unlikely to be successful. This led him to focus (initially) on intergenerational equity and the work of Edith Brown Weiss who concluded that intergenerational equity comprises a mix of conserving natural and physical resources, maintaining environmental quality, and providing equitable access rights to the “legacy” of conserved resources. However, based on the inherent tension between intergenerational and intragenerational equity, Bosselmann concluded that a purely anthropocentric approach to sustainability is not sufficient and that an eco-centric perspective is also “crucial for making the concept workable”.

Central to the concept of sustainability is “ecological integrity” based on disciplinary foundations from “science, public health, philosophy, anthropology and law”. Inspired by North American approaches to managing national parks in Canada and water quality in the Great Lakes, Bosselmann considers that “ecological integrity” is the “conceptual core of sustainability”. In particular, this approach is designed to “restore and maintain” these aspects of the natural environment, applies to both living

and non-living elements, maintains biological diversity and respects assimilative carrying capacity, and acknowledges that the resilience of ecosystems to withstand certain adverse effects and that ecosystems are non-linear and change irreversibly over time. Additionally, Bosselmann also noted that ecosystem integrity provides the rationale for the Convention on the Conservation of Antarctic Marine Living Resources 1980 (which is relevant in an Aotearoa – New Zealand context regarding the Ross Dependency) and that more generally states are obliged under Principle 7 of the Rio Declaration 1992 (considered by Bosselmann to be the most authoritative international environmental law text) to “conserve, protect and restore the health and integrity of the Earth’s ecosystem”. However, domestically within Aotearoa – New Zealand, Bosselmann found that while the “core” statutory obligation in the RMA requires all persons exercising powers and functions to promote the sustainable management of natural resources, different concepts of sustainability have dominated the jurisprudence – an overall judgment approach (weak sustainability) during the period 1997-2014, and an environmental bottom line approach (strong sustainability) during the period from 2014.

Bosselmann has also been influenced by Ronald Dworkin’s conceptual approach to rules and principles (*Taking Rights Seriously*, 1977) under which rules are directly binding in relevant circumstances and give rise to automatically applicable legal consequences, whereas legal principles state “a reason that argues in one direction, but does not necessitate a particular decision”. This approach led Bosselmann to make the insightful observation that sustainability operates within the legal system in a similar way to the “foundational” concepts of democracy, equity, justice, and the rule of law. Bosselmann therefore concluded that:

Arguably, the principle of sustainability is also of such foundational importance and, like justice, it is not easily defined.

Overall, from a natural law perspective Bosselmann considered that ecological integrity could be specified as the “grundnorm” underpinning environmental sustainability. He stated:

Comparable to human rights, environmental law is deeply rooted in natural law. With regard to human rights, nobody seriously doubts that humans are born free and equal. The adequate normative protection of their rights follows as a matter of course, though there is no “scientific evidence” for the assumption of equality. By contrast, environmental law can even be justified by multiple sources that scientifically prove ecological interdependencies. Human beings are inevitably and inseparably embedded in ecosystems. Therefore, this should require governments and states to recognise and reflect ecological interdependencies in their strategies and enact laws correspondingly.

While utilitarian anthropocentric approaches pull in the opposite direction, Bosselmann returned to the work of Brown Weiss and noted that law forms part of the “cultural resource base” which should be conserved as part of the legacy for future generations and considered that sustainability as a normative legal principle (underpinned by ecological integrity) should form part of this heritage.

Generally, Bosselmann concluded that the Earth’s ecosystem “is at high risk” as a result of environmental limits or planetary boundaries being exceeded – “atmospheric greenhouse gas concentrations, rate of biodiversity loss and nitrogen cycle” and that more effective environmental laws are required. Constitutionally, this requires a shift toward “the notion of the eco-constitutional state” and a move away from territorial sovereignty toward state’s as global trustees for the environment. Beyond that, Bosselmann considered that:

Laws based on sustainability will further incorporate legal norms such as the precautionary principle, the polluter-pays principle, the principle of common but differentiated responsibility and the concept of intragenerational, intergenerational and interspecies equity.

2 The promise inherent in the proposed RMA reforms

The exposure draft of the proposed Natural and Built Environments Bill (which is intended to repeal and replace the RMA) focuses on the twin-objectives of upholding the welfare and wellbeing of the environment by protecting and enhancing the natural environment, and provides for present generations to use the environment without compromising the reasonably foreseeable needs of future generations. These objectives will be achieved by complying with environmental limits (focused on the ecological integrity of the natural environment and human health) prescribed via a national planning framework (NPF) or in plans prepared by regional planning committees; and avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The objective of upholding the welfare and wellbeing of the environment in s 5 of the Bill is firmly based on tikanga Māori (customary law) and gives primacy to the health of the environment, and recognises the interconnectedness of all parts of the environment and the essential need to safeguard the life-supporting capacity of the natural environment. While mandatory environmental limits regarding air, indigenous biodiversity, coastal waters, estuaries, freshwater, and soil are provided for under s 12B of the Bill.

In particular, the Bill responds to emerging threats by reducing the risks of natural hazards and climate change, and providing for more resilient urban areas. For example, the environmental outcomes (which must be provided for via the NPF or plans) specified in s 13A of the Bill include the protection, or if degraded the restoration, of the natural environment, namely:

- The health, mana (integrity), and mauri (life-supporting capacity) of air, freshwater, coastal waters, estuaries, soils, and indigenous biodiversity;
- Outstanding natural features and outstanding natural landscapes; and

- The natural character of the coastal environment (including the territorial sea), wetlands, and lakes and rivers, and their margins.

Additionally, the environmental outcomes specified in s 13A of the Bill also provide for the protection and restoration of the relationship of Māori and their cultural values (tikanga and traditions) with their ancestral lands, water, sacred sites, and other taonga (treasures).

Beyond that, the exposure draft of the Bill also includes a placeholder for implementation principles (which currently remain under construction). For example, s 18 of the Bill may include promoting the integrated management of the environment in a holistic way, providing for appropriate public participation (including participation by Māori), a requirement for “relevant persons” to have particular regard to any cumulative effects of the use and development of the environment, and an obligation to take a precautionary approach. In particular, the precautionary approach is defined by s 2 of the Bill as:

... an approach that, in order to protect the natural environment if there are threats of serious irreversible harm to the environment, favours taking action to prevent those adverse effects rather than postponing action on the ground that there is a lack of full scientific certainty.

Overall, the obligation to comply with environmental limits should have a profound effect on current patterns of production and consumption.

Conclusion

Whither sustainability? The exposure draft of the proposed Natural and Built Environments Bill provides for a mixed eco-centric and anthropocentric approach to protecting and enhancing the natural environment consistent with the writings of Bosselmann and the work of Brown Weiss. In particular, it builds on the essential approaches to sustainability identified by Bosselmann via the requirement for legally

binding environmental limits focused on ecological integrity to be specified via the NPF and plans prepared under the statute. The Bill also provides for the protection and restoration of the natural environment similar to the North American legal instruments and Principle 7 of the Rio Declaration critically identified by Bosselmann as vital aspects of sustainability, including indigenous biodiversity. Additionally, the core concept of ecological integrity is expressly articulated in the Bill in relation to prescribing environmental limits. Overall, the combined effect of s 5 of the Bill should maintain the environmental bottom line approach embedded in the resource management system since 2014.

Beyond that, the principle of sustainability captured by the statutory provisions in s 5 of the Bill should have a strong directional effect (as envisaged by Bosselmann and Dworkin) on decision-making and the design of the NPF and the plans prepared under the statute. However, whether the proposed Bill will together with other environmental laws extant in Aotearoa – New Zealand effectively address the high risks identified by Bosselmann (atmospheric greenhouse gas emissions, biodiversity loss, and nitrogen leaching) will ultimately depend on the effectivity of the subsidiary instruments prepared under the framework statute. But the proposed Bill is currently light on environmental principles compared with similar legal instruments enacted in the European Union and the United Kingdom.

Overall, how the Bill is applied and interpreted will be vitally important for the future outlook of sustainability in Aotearoa – New Zealand. For example, Bosselmann concluded:

Ultimately, it is not the legal text that matters, but what we read into it. The idea of sustainability law, therefore, is an invitation for environmental lawyers to educate ourselves about ecological realities and to advance “ecological approaches to environmental law”. These approaches affect ethical awareness, law teaching, legal practice and judicial determination, but most of all, the role that law has for developing sustainable societies.