

In Search for Global Law: The Significance of the Earth Charter

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Abstract: Western legal traditions are anthropocentric in character and largely hostile to ecological principles. However, domestic and international environmental law show signs of an ecocentric orientation. In search for a legal framework for ecologically sustainable development the Earth Charter marks an important step forward. Among its ground-breaking principles are ecologically defined concepts of sustainability, justice and rights.

Key terms: Respect for life, sustainability as a legal principle, eco-constitutional state, ecological justice, ecological human rights.

1. Modernity at crisis point

The 21st century will be marked by the global ecological crisis and our response to it. So far, the experience has been sobering. 'Nine Eleven' has accelerated the global crisis, not so much through terrorism, but through its militant response. The 'war on terrorism' is a barely disguised crusade for world domination of the 'free'. The long-term consequences of this new variant of Western *Weltbeglückung* (blessing the world) can only be imagined. However, its anti-ecological nature is painstakingly obvious. The most wasteful nations lead the charge of economic expansionism. Denying their ideological character (McMurty 1998), they make the world believe that there is no other option.

Promoting the other option is left to civil society. Unfortunately, civil society is divided on what this other option may be. Should industrial society be reformed towards sustainable development ('weak sustainability')? Or is industrial society inherently unsustainable' (Rees 2000) in need to be transformed (,strong 'sustainability')? This article assumes that the notion of 'civil' is diametrically opposed to the ideals of industrial society. If civil society is the matrix of social relationships through which shared or public goods are pursued (Dower 2003, xii), we need to first identify these goods. The economic means to achieve them are secondary and must not be allowed to dictate the conditions under which society could develop sustainably.

The ideals of industrial society are those of Modernity. Any search for the guiding principles of a sustainable society has to begin here. The ecological ignorance of Modernity has been described in numerous books, articles and documents, and it is remarkable that all aspects of social self-expression are affected. In science, nature is mere object of human discovery and unrelated to human experience. In social sciences, nature is 'externalized' and not accounted for in social modelling. Economics and jurisprudence, for example, have no comprehension for nature other than referring to 'natural resources'. Instrumentalised in this manner, economic and legal decision-making reinforce exploitative behaviour (Bosselmann1995).

As a defining feature of Modernity, the law mirrors its ecological ignorance. However, a closer look at the two pillars of the law of Modernity – individual freedom and human dignity - gives us insights into both, their ecological ignorance and the way out of it.

The traditional liberal idea of freedom has no inbuilt mechanism preventing us from completely destroying the natural environment around us. The environment sets no limitations to human freedom and remains passive recipient of the anthropocentric value system. In the light of the fact that no species can survive without respecting its ecological conditions, an anthropocentric perception of human freedom appears as an absurdity. It is the saw to cut the branch we are sitting on. No matter how small and insignificant individual contributions may be, their total impact means that the branch will break.

In structural terms, ecological ignorance is comparable to social ignorance that the traditional liberal idea of freedom is afflicted with. The ethics of individual autonomy stood at the beginning of Modernity. John Locke's ideal of a free society did not know responsibility of the individual except for itself. Such autonomy guaranteed the freedom of 'a free fox in a free hen-house' (Garaudy 1955). We can see today that the fox not only devoured the hens, but large parts of the whole hen-house. Social injustice has always been accompanied by ecological injustice (Bosselmann 1995, 20).

Considering the long, troublesome road towards more social responsibility, one can imagine how much it will take to reach more ecological responsibility. It is hard to see how the individualistic core of guarantees for freedom could ever embrace social and ecological responsibility. The core is, after all, anthropocentric (Bosselmann 1995, 226). And yet, without an ecocentric redefinition of individual freedom no ecological perspective can emerge. If we keep a blind eye on the ideological character of the inherited idea of freedom we will not be able to notice our own ignorance.

Like the ideal of freedom, the dominant perception of human dignity lacks a sense of realism. Against the ecological experience, the image of an autonomous individual only accountable only to fellow human beings seems questionable. Would the image of a semi-autonomous individual as a social and natural being (*Sozial- und Naturwesen*) not be more appropriate? And is it not perceivable to see the recognition of our ecological conditions as making us truly humane?

At the heart of protecting human dignity is respect for the uniqueness of the individual. This uniqueness is, however, not without certain human attributes. To a degree, all constitutions assume an ideal or image of a human being (*Menschenbild*). This is not unproblematic considering the secularism and pluralism of the modern constitutional state. So, while there cannot be a prescribed ideal, this does mean that the individual, protected by human dignity and human rights, is a 'blanc sheet'. The central values of human rights concepts undoubtedly show the contours of a socially engaged person: *liberté – égalité – fraternité*. The underlying assumption seems to be that individual liberty, social equity and compassionate fraternity make us true human beings.

Another ideal could have been the crude character of Thomas Hobbes' *homo homini lupus* or the God fearing person in Islamic Law or the more holistic perception in indigenous cultures. Quite obviously, Western constitutions favour certain

characteristics of a human being over certain others. But what are these characteristics at a closer look?

It is revealing how judicial interpretations of individual freedom and human dignity favour material aspects over non-material aspects. Like economic theory, most legal theories perceive the individual as rational and guided by material interests. The image of *homo economicus* may be challenged by modern psychologists and sociologists, however, lawyers still take it for granted.

Homo economicus has shaped the idea of individual property as interpreted by the courts (Bosselmann 1998, 67-70, 100-109). The German Constitutional Court, for example, perceives property as a 'personal achievement' of the individual. Walter Leisner (1972, 51) goes even further: "Private property is nothing else than the result of exercised freedom. Essentially, property is elevated freedom." On the other hand, there has always been warning not to perceive freedom and property deprived of any historical context. Peter Häberle, for example, suggested that 'recent events' call for a more ecological reflection of human existence: "humans consider the previously merely used world as their environment and 'with'-world (*Um- und Mitwelt*) ... struggling for 'peace with nature' ... and asking for rights of nature." (Häberle 1988, 20).

If we assume that modern legal traditions tend to favour the freedom of *homo oeconomicus occidentalis*, we can also imagine the freedom of an enlightened *homo ecologicus universalis*. This type differs from the reductionist Ego of Western provenience as it asserts a connection with its global and natural environment. The real prospect of *homo ecologicus universalis* may be less important than the very thought of it. Such an image may be helpful to explain the growing number of people who see themselves not in competition, but solidarity with each other. More and more people think of themselves not just as citizens of particular countries, but citizens of the planet (Dower 2003, 12). In the words of the Earth Charter: "We are at once citizens of different nations and of one world in which the local and global are linked." (Earth Charter 2002, Preamble).

This still very young century has already proven how much we are all affected by events seemingly far away. But terrorism and the hysterical reactions to them have also sharpened the divide between the crusaders for world domination (*homo economicus occidentalis*) and global civil society (*homo ecologicus universalis*). The search for a new world order should now be on.

2. Key ethical aspects of sustainable development

In the Preface to the German translation of the Earth Charter, Klaus Töpfer, Executive Director of the United Nations Environment Programme, writes: "The highly developed 'rich' countries of this world shift a great deal of their living costs to developing countries. This 'ecological aggression' is the starting-point and lasting reason for conflicts. Global preventive environmental precaution policy is, therefore, a key component for regional peace policy." (Ökumenische Initiative 2002, 1). The militarisation of peace and security following 'Nine Eleven' highlights what brutal forms this 'ecological aggression' can take. However, Klaus Töpfer also indicates how

the aggression could be stopped: “It is my hope that the principles formulated in the Earth Charter may serve as guidelines for governments, non-governmental organizations, industry and science world-wide.” (Ökumenische Initiative 2002, 2).

The Earth Charter aims for more than global environmental precaution, it “attempts to revolutionise humanity’s relationship with nature” (Taylor, 1999, 326). The Charter takes a systemic view on peace, security, social and ecological justice, human rights and democracy. None of these can be achieved without the other, and they all need to be developed to reflect the Charter’s idea of sustainable development. Its principles are, therefore, guidelines for the entire way how nations and people ought to conduct their affairs. This makes the Earth Charter a suitable constitution for a new world order.

The Charter provides the ‘values and principles for a sustainable future’ (Earth Charter 2002). Interestingly, it does not define sustainable development, but rather assumes the validity of the famous Brundtland definition (WCSD 1987, 43): “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. The Earth Charter aims, however, for applying this definition in enforceable law and policy. It does so by spelling out the far-reaching ethical implications of the Brundtland definition.

The key to understanding these implications is Principle I:1 (‘Respect Earth and life in all its diversity’) with its definition for respect for life: “Recognize that all beings are interdependent and every form of life has value regardless of its worth to human beings.” (Earth Charta 2002, Principle I:1a).

The Brundtland definition contains two ethical elements that are widely accepted as being essential to the idea of sustainable development:

- concern for the poor (intragenerational justice or equity); and
- concern for the future (intergenerational justice or equity).

However, these two elements leave us with a ‘missing link’. What do they mean with respect to the planetary ecosystem? If we are to share environmental goods and burdens fairly among us living today and also leave something for the future, what do we have to leave? The full integrity of the planetary ecosystem or just parts or aspects of it? If, so what are those parts or aspects?

As we are unable to determine the needs of future generations, the reasonable choice is for a duty to pass on the integrity of the planetary ecosystem as we have inherited it. Uncertainty requires precaution, and there seems no better choice than assuming that future generations would like the planetary ecosystem as bountiful as we have found it.

And yet, such an obvious duty is neither suggested by the Brundtland definition nor favoured by governments or big business. As their morality is confined to traditional social ethics, they do not consider the importance of an environmental ethic to incorporate nature or the planetary ecosystem. Instead, the standard view is that society, economy and environment are somehow of equal importance. As a result, sustainable development is perceived as balancing act between economic, social and environmental goals with trade-offs as a necessary outcome. There is no guidance that

could ensure, for example, a preference for ecological sustainability or the needs of future generations. Without such guidance, policies may become more integrated, but they will not make a difference to existing unsustainable patterns of production and consumption.

This business-as-usual approach is commonly known as ‘weak sustainability’ (Bosselmann 2002b, 90). If associated with moral obligations to the future, weak sustainability policies consider it our sovereign decision what kind of assets, ‘stock’ or legacy we wish to leave for future generations. It could be the ‘natural stock’, but it also could be its substitute, for example, the knowledge to alter the natural stock, for example through genetic engineering. Such ‘capital stock’-gift to the future implies the very possibility of destroying the planet’s conditions of life. We simply don’t know and possibly never will.

To preserve the integrity of the planetary ecosystem is the only reliable alternative and may, in fact, be a desirable goal for most people. However, only if we give this goal moral significance, we have the guidance needed for a policy of sustainable development. Only then the ‘weak’ will become the ‘strong’; and the missing link in the Brundtland definition is found. A third element, therefore, needs to be added to the two mentioned above (Bosselmann 2002c, 147; Hayward 1997; Almond 1995, 15):

- concern for the planetary ecosystem (interspecies justice or equity).

The Earth Charter reflects this element with the first set of principles I:1 to 4 on (‘respect and care for the community of life’) and principles II:5 to 8 (‘ecological integrity’). They describe the environmental ethic that has been missing in the states’ discourse on sustainable development. Only thereafter, principles III:9 to 12 (‘social and economic justice’) and IV:13 to 16 (‘democracy, non-violence, and peace’) describe the social ethics more familiar to the general sustainable development discourse.

In short, in the centre of concerns for sustainable development are not ‘human beings’ as Principle 1 of the Rio Declaration proclaimed, but the ‘community of life’ as Principle I of the Earth Charter states.

The shift from the welfare of human beings to the welfare of human *and* other living beings may not be dramatic in practical terms, but does indicate a significant shift of paradigms. The Earth looks different if we are solely concerned with ourselves (anthropocentrism), on the one hand, or if we are seeing ourselves as part of a wider community of life (biocentrism), nature (ecocentrism) or the universe (holism). Only in a non-anthropocentric perspective we accept moral responsibility towards Earth and its future; only then we can truly speak of an “Earth” Charter.

3. The legal significance of the Earth Charter

From a legal perspective the Earth Charter’s three elements of sustainable development appear as aspects of distributive justice, i.e. intragenerational, intergenerational and interspecies justice. While the former two aspects are fairly established in international and national jurisdictions (Bosselmann 2002b, 95/96), the notion of ‘interspecies

justice' is less familiar. The ethical debate surrounding "justice for the nonhuman world" (Almond 1995, 18) and "interspecies justice" (Almond 1995, 15; Cooper and Palmer 1995) has not yet entered the legal debate. Can the nonhuman world be part of the *justitia communis* as the ecocentric perspective suggests or is it bound to stay excluded from the *justitia communis*?

John Rawls has been quite clear about this exclusion: "(the) status of the natural world and our proper relation to it is not a constitutional essential or a basic question of justice" (Rawls, 1993, 246). While Rawls acknowledges 'duties' in this regard, he describes them as 'duties of compassion and humanity' rather than duties of justice. Any 'considered beliefs' to morally include the nonhuman world "are outside the scope of the theory of justice." (Rawls 1999, 448). His 'original position' cannot assume such a morality. There have been efforts to reconcile Rawls' political liberalism with ecological justice (Wissenburg 1998; Bell 2002; Ott 2003), however, they tend to underestimate the persistence of paradigms. Why should Rawls or any liberal, concerned with inter-human justice, throw the baby out with the bath water? Their anthropocentric bias prevents them from rethinking the *justitia communis*.

Legal theories of justice all suffer from avoiding the moral debate. That is why no legal theory has ever addressed ecological justice. It takes new ethical building blocks (Bosselmann 1999) to change the legal mind. And only then justice and law will be capable to incorporate the ethics of sustainable development.

Morality is also the subject of the human rights discourse. It is impossible to define extent and limits of individual human rights without resorting to ethical considerations. For example, whether or not property rights should be defined to include obligations is not a matter of the 'law', but of ethical reasoning underpinning it. Most constitutions define private property as a combination of guaranteed individual freedom and limiting social responsibility. Property cannot be protected in abstract, but only in a social context.

It can, therefore, be reasoned that human rights are limited not solely by their social context, but also by their ecological context. Individual freedom is determined not just by laws of society, but also by laws of nature. The ecological approach to human rights has influenced constitutional law in Germany (Bosselmann 2001) and international law (Taylor 1998a; Bosselmann 1998).

It is of profound importance, therefore, that the Earth Charter considers human rights not only as the basis of, but also, a limitation to, human welfare and existence. Stressing the interrelations between human and non-human welfare, the Charter contains important procedural and substantial human rights (Principles I:3 a), II:7, 8a), III:9a), III:11, III:12 and IV:13) and also limitations to human rights (Principles I:1a), I:2a) and II:6a)). This dual approach is a novelty in international human rights law and, at the same time, crucial for a constitution for sustainable development.

From the perspective of international law, the Earth Charter is a new, fascinating instrument (Bosselmann 2003, 63; Taylor 1999,193). This is partly due to its origins. The world-wide dialogue of thousands of civil society groups and individuals over a period of several years is impressive in itself. Unlike Agenda 21, a states-negotiated soft law document of the 1992 Rio Earth Summit, the Earth Charter represents a

broader consensus. It is probably for the first time that global civil society has produced a document with such a wide consensus on global principles. Further, many of these principles have not been created during this process, but only been further defined and put into context. Concepts like ecological integrity, precautionary principle, democratic decision-making, human rights or non-violence are well established in international law, yet not always so clearly defined as in the Earth Charter. More importantly, the interaction between all these concepts has not been spelled out in any other single document, not even in Agenda 21.

The reputation and credibility of the Earth Charter rests largely on its transnational, cross-cultural approach. In a situation of a widely perceived crisis of global governance, such approach counts for a lot more than, say, ten years ago when the impacts of global corporate governance were less strongly felt. Any states-negotiated document on global governance produced today and in the future would have to be benchmarked against its impact on controlling corporate governance. Consensus merely among states is no longer sufficient if not, at least, “tolerated” by transnational corporate power. While the Earth Charter cannot be expected to be representative of global civil society in its entirety (including, for example, corporate interests), it does represent a very significant sector of it. States would not be able to overlook its leading role, in particular, in the light of partnerships on sustainable development that they have committed themselves to in Agenda 21 or the 2002 Johannesburg Plan of Implementation. States will certainly need partnerships with civil society if they want to gain control over anarchistic global corporate power.

Meanwhile, the Earth Charter continues to foster its moral-political leadership within global civil society. The promotion of its principles in more than 50 national Earth Charter campaigns and the ever-increasing number of endorsing institutions are evidence of its success.

In terms of international law principles, the Earth Charter represents *prima facie* a draft legal document. The international legal community - states, the UN with its organizations and certain other international organizations - can choose to ignore it. However, they are unlikely to do so. A number of states and international organizations endorsed the Earth Charter. It also enjoys considerable recognition in legal education and scholarship. Leading texts of international law and numerous legal research papers have discussed the significance of both, the Earth Charter itself and its guiding principles (Kiss and Shelton 2000, 70; Taylor 1999; Taylor 1998, 326). Recognition among international law scholars counts for a subsidiary source of international law (Art.59 of the Statute of the International Court of Justice). While the legal status of a number the Earth Charter’s principles continues to be in dispute, most of them are frequently referred to in treaties, conventions and other binding documents. Some key concepts such as the precautionary principle or sustainable development are not (yet) recognized as custom or general principles of international law. However, the common view is that they have become an integral part of international law (Birnie and Boyle 2002, 84, 115; Kiss and Shelton 2000, 248, 264).

In recent times, ‘soft law’ has become an important ‘new’ source of international law (Kiss and Shelton 2000, 46). In contrast to ‘hard law’ (treaties, custom, general principles), ‘soft law’ is not legally binding. It cannot be ratified and does not have direct legal effect. However, the political strength of ‘soft law’ can hardly be

underestimated. An example is Agenda 21. As a non-binding soft law document it cannot be ratified by states, but has proven to be among the most powerful documents in international environmental law. Since 1992, Agenda 21 has been recognized and implemented by wide sectors of civil society all around the world. Local governments, small and mid-sized business, educational institutions and professional organizations have enacted statutes or guidelines of sustainable development citing Agenda 21 as their main source. This new kind of 'bottom-up ratification' has put enormous political pressure on governments to implement, at least, some form of governance for sustainable development. Among all the treaties and international documents promoting sustainable development none has had such an impact on practice as the 'soft law' Agenda 21.

The Earth Charter can benefit from this experience. Although not yet recognized as a 'soft law' document, it has all the ingredients of becoming very close to it. An example in case is the 2002 World Summit for Sustainable Development (WSSD) in Johannesburg (Bosselmann 2002a). In the year preceding the WSSD efforts have been made by Earth Charter Commissioners and the International Secretariat to achieve recognition at the Summit. In his address at the opening session of the Summit, President Mbeki of South Africa cited the Earth Charter as a significant expression of "human solidarity" and as part of "the solid base from which the Johannesburg World Summit must proceed." In the closing days of the Summit, the first draft of the Johannesburg Declaration on Sustainable Development included in paragraph 13 recognition of "the relevance of the challenges posed in the Earth Charter." On the last day of the Summit in closed-door negotiations the reference to the Earth Charter was deleted from the Political Declaration. (Rockefeller 2002, 2), however, the final version of the Political Declaration included, in paragraph 6, wording almost identical to the concluding words of the first paragraph of the Earth Charter Preamble, which states that "it is imperative that we, the peoples of Earth, declare our responsibility to one another, to the greater community of life, and to future generations." Furthermore, Article 5 bis of the Plan of Implementation contains indirect reference to the Earth Charter: "We acknowledge the importance of ethics for sustainable development, and therefore we emphasize the need to consider ethics in the implementation of Agenda 21."

Such developments at the WSSD reveal growing international support for the Earth Charter or, at least, the ethics it is promoting. When states are not prepared to agree on a text with specific commitments, but are supportive of more general language surrounding them, they may choose the 'soft law' path. This path could lead to an official recognition of the Earth Charter, for example, by the UN General Assembly or a future UN Summit. But even if such recognition will not emerge, the rejection would not undermine the Earth Charter's legal significance. There are many other paths towards further recognition in international law.

One of them would be the conversion to a UN Draft Earth Charter. Either together with the IUCN Draft Covenant on Environment and Development or as a stand-alone document, the Earth Charter could become an official UN Draft document, eventually rendering it into negotiation among states (with all advantages and disadvantages involved). Another path is the promotion of the Earth Charter within countries and among international organizations. The target here is to increase endorsements (in their various forms) up to a point that the Earth Charter reaches a certain omnipresence.

Governments would then be more likely to adopt it as a 'soft law' document or enter treaty negotiations along the lines of the Earth Charter. A further path could be to focus on the Earth Charter's content and seek dialogues with governments on desirable principles and how they could be implemented in law and policy; here the Charter would merely serve as a starting-point for discussion.

Many paths lead to Rome. However, the most promising of all is to insist on the Earth Charter's validity as a novel instrument in international law. Never before have so many people in so many different countries, cultures and religions reached a consensus on a central theme of humanity. To some extent, the Earth Charter can be celebrated as global civil society's first and foremost founding document. Such achievement both in terms of quantity and quality puts the world's states on their back foot. States, having failed for so long to not even attempting a legally binding agreement on sustainable development, are rapidly losing their political and intellectual leadership.

Are states really representing the interests of civil society? Or would it be more appropriate to perceive states as only involved in representing civil society? After all, a democratic country's sovereign is its *demos* (people), not its government. In the history of international law, states have represented short- and mid-term national interest, but much less so long-term national interests, and virtually no global interests or interests of future generations. Considering the fact, that most of the world's problems can only be addressed by taking a global, not a national perspective, the law-creating monopoly of states is highly questionable, thus justifiably challenged by the Earth Charter.

4. Conclusion

As we have seen, the Earth Charter's ethics of sustainable development can make a difference in law. But they have to be communicated at the level of jurisprudence and law-making. This communication has only just begun. It holds the exciting prospect for a global law as a 'convergence of international and municipal law' (Taylor 2002, 123) and 'the convergence of values and beliefs at the root of all civilizational identities' (Falk 1998, 195).

Of course, claims for a global law need to be treated with caution. Any attempt of unifying diverse ethical and legal cultures is faced with a fundamental problem. It cannot be imposed. To this end, Hegel's *Weltgeist*, Kelsen's *Grundnorm* and even Kant's *Vernunftrecht* have failed. A normative system for the world needs to grow in a global dialogue. Having initiated this dialogue, is the historical merit of the Earth Charter.

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