

Rethinking Sustainable Development in Terms of Justice

Rethinking Sustainable Development in Terms of Justice:

*Issues of Theory, Law
and Governance*

Edited by

Beatriz Felipe Pérez,
Daniel Iglesias Márquez
and Lorena Martínez Hernández

Cambridge
Scholars
Publishing



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This book first published 2018

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

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ISBN (10): 1-5275-1137-5

ISBN (13): 978-1-5275-1137-8

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PREFACE

Speaking of sustainable development is an exercise in ambiguity. This is not meant as criticism of the term (I shall abstain from calling it a “principle”, a “concept”, a “norm”, a “programme”, etc.); it is – and historically was – the very purpose of the term to be ambiguous, to allow for the justifiable aspirations of developing nations to continue their efforts towards socio-economic development unhindered while at the same time acknowledging the importance of environmental protection. It is often said, and this is to some extent warranted if one looks at the stances taken by different delegations at some key negotiations, that developed countries advocated for environmental protection only to find reluctance from developing countries. But it is unlikely that any country delegation had in its negotiation instructions, at Stockholm, Rio, Johannesburg, Rio, New York and at many other meetings, a clear mandate to put environmental protection over socio-economic prosperity, whether one calls it development or growth.

Sustainable development was brought into the picture to draw a veil over this intractable problem. The very tensions that, at Founex, in preparation for the Stockholm Conference, had led to a sequence (development as the main strategy for developing nations to combat environmental degradation) or, at Rio, to distributional considerations (developed nations to take the lead in fighting environmental degradation) or, a few years later at Rio again, to competitiveness considerations (with environmental protection following green industrial policy as a strategy to become more competitive in the economy of tomorrow), still remain barely articulated in policy and industry statements or in the reports of international organisations. Sustainable development still projects its synergistic shadow. But, in the shadows, tensions continue to exist between the “pillars” of sustainable development: economic development, social development, and environmental protection.

Recognising the existence of tensions is not only a matter of realism or even maturity; it is a necessary condition for moving from agreement of principle to actual implementation or, in other words, to effectiveness. This is not to say that sustainable development has lost its value or its place; only that it must lose some of its clout. We must see beyond synergies and understand conflicts between different goals and strategies

in specific contexts. There will be no overarching solution to such tensions, no new tricks to turn tension into synergy or to make one term prevail over another. There can only be case-by-case solutions to such tensions when they arise. Some will be brought by technological developments; others by industrial policies or political preferences; others by alignment of interests through market mechanisms; others, still, by principled stances as to the relative importance of different values. Sustainable development will provide some background to them, either to ease the edges or to organise broad integrative agendas of cross-cutting questions. That is its proper role.

The merit of the editors and contributors of this edited volume is, in this context, two-fold. They must first be praised for having organised the first Tarragona International Environmental Law Colloquium in 2016, which is set to become an annual global meeting of academics working on these issues, with pride of place for young researchers and doctoral students. And, secondly, they deserve praise for having called the attention of this community to think beyond the veil of sustainable development and look into its craft and operation. The contributions to this book, including the most theoretical ones, make it clear that it is no longer pragmatic to leave the synergistic narrative of sustainable development unquestioned. Theoretical criticism has indeed become a practical duty.

J. E. Viñuales
Cambridge, 14 August 2017

ACKNOWLEDGMENTS

The edited book “Rethinking Sustainable Development in Terms of Justice: Issues of Theory, Law and Governance” could not have been possible without the commitment of the contributing authors. The editors would like to thank you for your trust in this collective project, your patience, hard work and for your outstanding contributions.

We also want to express our sincere thanks to Antonio Cardesa-Salzmänn for the preparation of the book proposal and for encouraging us to edit this book.

We are also deeply grateful to members of the Tarragona International Environmental Law Colloquium Organizing Committee, the “*Asociación de Alumnos y Exalumnos de Derecho Ambiental de Tarragona*” (AAEDAT), the Tarragona Centre for Environmental Law Studies (CEDAT) and the Universitat Rovira i Virgili (URV).

We express our gratitude to Cambridge Scholars Publishing team for their patience and for the production of this edited book.

We extend our warmest thanks and gratitude for our families as well as our relatives and friends, for their support and encouragement over the years.

INTRODUCTION

Today we are immersed in an ecological crisis which is the result of the historical structural shortcomings of the cultural, economic, social, political and legal model created by Western modernity. Due to the progressive misalignment of institutional governance frameworks, these shortcomings have increased during the last decades as well as their present structures and the technological advances related to production, which have increased pressure on natural resources.¹

As former Vice-President of the International Court of Justice Weeramantry stated in his Separate Opinion in the judgment on the Gabčíkovo-Nagymaros Dam Case rendered back in 1997,² the very idea of sustainability belongs to the cultural heritage shared by some of the most ancient peoples from all around the world for as long as collective memory goes back. However, modernity, colonialism and globalization have established a precarious balance between human societies and their natural environment, putting them under strain with unprecedented intensity. As Prof. Carmen Gonzalez claims:

Global economic activity exerts relentless pressure on the planet's ecological systems and threatens the health and well-being of present and future generations. Despite the proliferation of legal instruments to combat environmental degradation, the global economy continues to exploit natural resources at unsustainable rates while intensifying inequality within and among nations.³

¹ See Antoni Pigrau, "España, la Unión Europea, el Derecho internacional y el desarrollo insostenible," in *España y la Unión Europea en el orden internacional*, ed. Joaquín Alcaide Fernández and Eulalia W. Petit de Gabriel (Valencia: Tirant lo Blanch, 2017), 1254-1259.

² Separate Opinion of Vice-President Weeramantry, The Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgement of 25 September 1997, ICJ Reports 1997 88 – 119.

³ Carmen G. Gonzalez, "Human rights, environmental justice, and the North-South divide," in *Research Handbook on Human Rights and the Environment*, ed. Anna Grear and Louis J. Kotzé (Cheltenham and Northampton: Edward Elgar Publishing, 2015), 449.

The progressive awareness of the planetary boundaries⁴ against the voracious demand of capitalist accumulation led to stop-gap measures which did not compromise the functioning of the system. Thus, in 1987 the World Commission on Environment and Development provided the famous modern concept of “Sustainable Development” as a normative paradigm that sought reconciling competing and conflicting interests in economic development, social welfare and environmental protection, not only between present generations, but also between present and future generations.

The 1992 United Nations (UN) Conference on Environment and Development translated this normative paradigm into international law and transnational legal processes. All this on the basis of the 22 principles contained in the Rio Declaration, the political process set in motion by Agenda 21, and the specific reception of some aspects and regulatory components of sustainable development in multilateral treaties of a universal or almost universal scope, such as the United Nations Framework Convention on Climate Change, or the Convention on Biological Diversity.

In 2000, the United Nations General Assembly adopted the Millennium Declaration. Eight main goals were developed from its content: the Millennium Development Goals (MDGs), all to be achieved by the target date of 2015. Despite the fact that some progress was reported, it was uneven among the different goals and it can be generally stated that most of the goals lacked meaningful progress.⁵

The document entitled “The Future We Want” was one of the few results of the 2012 UN Conference on Sustainable Development (Rio+20). This document reaffirmed the commitments of the 1992 Rio Declaration but, at the political level, none of the challenges of the conference (the limited nature of natural resources, the need to modify the production and consumption patterns and others) received a significant response. This document also included an agreement to embrace the process of adopting a new set of Sustainable Development Goals (SDGs) in order to overcome the pending challenges of the MDGs.

⁴ Dennis Meadows, Donella Meadows, Jørgen Randers, and William W. Behrens III *The Limits to Growth* (New York: Universe, 1972); Donella Meadows, Dennis Meadows, and Jørgen Randers, *Beyond the Limits* (New York: Chelsea Green Publishing, 1992); Donella Meadows, Jørgen Randers and Dennis Meadows, *Limit to Growth: the 30-Year Update* (New York: Chelsea Green Publishing, 2004).

⁵ Antonio Cardesa-Salzmänn and Antoni Pigrau Solé, “La Agenda 2030 y los objetivos para el desarrollo sostenible. Una mirada crítica sobre su aportación a la gobernanza global en términos de justicia distributiva y sostenibilidad ambiental,” *Revista Española de Derecho Internacional* 69, no. 1 (2017): 280.

On September 2015 the 17 SDGs were adopted by the international community with the noble objective of ending poverty, protecting the planet, and ensuring prosperity for all as a part of a new development agenda. Each goal has specific targets to be achieved over the next 15 years. However, the SDGs and their targets “did not emerge from, and were not inserted into, a normative vacuum. They are grounded in international law and made consistent with existing commitments expressed in various international legal instruments”⁶ as Prof. Kim has pointed out.

In this sense, the dissemination of the regulatory elements of sustainable development across functionally differentiated transnational regimes has been remarkably selective, depending on the constituent reasoning behind each regime. By way of example, we can think of the precautionary approach under environmental regimes, such as the Cartagena Protocol on Biosafety, as opposed to the World Trade Organization Agreement on Sanitary and Phytosanitary Measures. Of course, sustainable development makes perfectly in underscoring the discourse on mutual supportiveness between environmental protection measures and an open, non-discriminatory trade regime. But does it articulate a real balance between economic development, social welfare and environmental protection in the form of meaningful legal restrictions to socio-environmental impacts of economic development?

Moreover, from a global perspective, these processes of normative development and dissemination have been uneven, to the extent that they have been more intense in some regions of the world than in others. Even in the European context, one may reasonably argue that the formal reception of sustainable development as a principle of law has not been successful in making a sustainable balance between intra- and intergenerational concerns for economic development, social welfare and environmental protection.

Instead, renewed claims for making up for historical wrongs and the promotion of procedural fairness and distributive justice in international environmental law, are increasingly gaining prominence. Is sustainable development still a suitable concept to address these claims? What normative, institutional and/or regulatory changes are required in the different areas of international environmental law and governance to tackle these demands and promote social fairness and environmental sustainability?

⁶ Rakhyun E. Kim, “The Nexus between International Law and the Sustainable Development Goals,” *Review of European Comparative and International Environmental Law* 25, no. 1 (2016): 15.

This edited book addresses these two fundamental questions within three distinctive thematic areas: “Sustainable Development and Justice”, “Sustainable Development in Context” and “Sustainable Development and Judiciaries”, which deal respectively, with issues of theory, law, and governance.

This book draws from the substantive results of the 1st Tarragona International Environmental Law Colloquium (TIEC), held on 5 and 6 May 2016 at Universitat Rovira i Virgili (University of Tarragona), as part of the research project “From Sustainable Development to Environmental Justice: towards a Conceptual Framework for Global Governance”, led by Prof. Antoni Pigrau and funded by the Spanish Ministry of Economy and Competitiveness (DER2013-44009-P).

Since 2016, the TIEC aims to provide a forum for researchers with different backgrounds in which to present and discuss their research and works-in-progress every year. This event is jointly organized by the Tarragona Centre for Environmental Law Studies (CEDAT-URV) and the Tarragona Environmental Law Students Association (AAEDAT).⁷

⁷ See www.tieccolloquium.com

PART I

SUSTAINABLE DEVELOPMENT AND JUSTICE

CHAPTER ONE

SUSTAINABILITY AND JUSTICE: A CONSTITUTION OF FRAGILITY*

JORDI JARIA-MANZANO

Introduction: a Constitutional Culture for the Anthropocene

“Anthropocene” is the word proposed by Nobel Prize Paul J. Crutzen in 2002 to describe a new geological era where the geological dynamics are mostly governed by human activity.¹ This idea has been generalized in the last fifteen years and has been incorporated in the literature regarding

* This paper has been prepared in the framework of the research developed in the project ‘Global Climate Constitution: Governance and law in a complex context’, financed by the Spanish Ministry of Economy and Competitiveness (2017-2019), reference DER2016-80011-P; led by Jordi Jaria-Manzano and Susana Borràs Pentinat.

¹ See Paul J. Crutzen, “Geology of mankind,” *Nature* 415 (2002): 23. This idea is not new, as Crutzen itself recognizes, but the word proposed by him captures with accuracy the historical moment the humanity as a whole is living by now, deeply involved in a global environmental crisis since the end of the past century. Crutzen mentions as a precedent Antonio Stopani, who had talked about the Anthropozoic Era as early as in 1873. The term ‘Anthropocene’ has not been officially accepted by the geologist community, but the Anthropocene Work Group (AWG) has presented the evidence at disposal by now in the last International Geological Congress, held in Cape Town between 27th August and 4th September 2016. The AWG recommended provisionally the acceptance of the term. See “Media note: Anthropocene Working Group (AWG),” University of Leicester, accessed May 5, 2017, www2.le.ac.uk/offices/press/press-releases/2016/august/media-note-anthropocene-working-group-awg. According with the evidence gathered by the group, 1950 would be the date of beginning of this new geological era. About the AWG, “Working Group on the Anthropocene,” accessed May 5, 2017, <https://quaternary.stratigraphy.org/workinggroups/anthropocene/>.

environmental law and governance, despite the existence of reasonable criticism about some misunderstandings implied.² If we approach environmental crisis in terms of sustainability, the narrative of Anthropocene is very inspiring, because it focuses in the self-sufficiency of social reproduction, which projects itself upon the possibility of destroying the biophysical base of social processes, i.e. sustainability depending of human action.³ The idea of global catastrophe linked to human action is essential to the environmental crisis as a crisis of sustainability.⁴

The comprehensive effects of human activity in the biosphere, as climate change shows, raises the necessity of channelling human activity through political and legal institutions to avoid catastrophe, to guarantee sustainability.⁵ The Anthropocene narrative suggests the necessity to think in a global polity where social reproduction deploys itself.⁶ It points out to some constitutional idea for a global community where the traditional difference —at least in Western thought— between “physis” and “polis”, between nature and society is effaced.⁷

Social self-sufficiency, sustainability, global perspective and a constitutional texture, even in vague form, seem to be implications of the Anthropocene narrative in the social discourse. Three fundamental ideas affecting sustainability seem to be related with the current construction of biosphere in natural sciences: its limits, the irreversibility of changes and the uncertainty of our knowledge. Regarding the irreversibility, it should be taken into account the second law of thermodynamics.⁸ Moreover, we

² See, particularly, Louis J. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Oxford: Hart, 2016).

³ There would have been a colonization of the nature. See Marina Fischer-Kowalski, Helmut Haberl, “Sustainable development: socio-economic metabolism and colonization of nature,” *International Social Science Journal* 158, no. 4 (1998): 573-87.

⁴ See Charles Alexandre Kiss and Dinah Shelton, *Manual of European Environmental Law* (Cambridge: Cambridge University Press, 1993), 10.

⁵ The idea of sustainability as a core of any reasonable response to the current human crisis is developed in a panoramic way by Klaus Bosselmann, *The Principle of Sustainability. Transforming Law and Governance* (Farnham, Burlington: Ashgate, 2008).

⁶ On the concept of global polity, see Olaf Corry, “What is a (global) polity?,” *Review of International Studies* 36, no. 1 (2010): 157-80.

⁷ The constitutionalization of international order is a current topic in legal and political research. See Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

⁸ “Any process either increases the entropy of the universe — or leaves it

are not only living in a fragile and limited physical basis where changes are irreversible, but nor we do know how our behaviour affects it.⁹ These three ideas are easily fitted to the Anthropocene paradigm.

However, it seems that justice is lost in this story. Some critics have pointed out that the Anthropocene hides the structural differences in terms of use of fossil fuels and, consequently, in terms of responsibility on the transition to the Anthropocene and its consequences.¹⁰ This leads us to consider that any constitutional framework reacting to Anthropocene should start from environmental justice, defined in terms of fair distribution of burdens and benefits of global social metabolism (distributive justice), and respect to the plurality of forms of social reproduction (justice of recognition).¹¹

Here some theoretical notions have to be introduced to complement the Anthropocene narrative. First of all, there is the idea of interpreting the interaction between society and biosphere as a social metabolism, which seems wise in order to adjust social discourse to the Anthropocene.¹² This social metabolism acquires a global dimension in the context of the

unchanged. Entropy is constant only in reversible processes which occur in equilibrium. All natural processes are irreversible". See Ronald Brown, "Entropy and the second law of thermodynamics: how the universe works," accessed July 26, 2017, www.calpoly.edu/~rbrown/entropy.html.

⁹ This is the *Leitmotiv* of Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (Chicago: University of Chicago, 1985).

¹⁰ See Andreas Malm and Alf Hornborg, "The geology of mankind? A critique of the Anthropocene narrative," *The Anthropocene Review* 1, no. 1 (2014): 62-9.

¹¹ See Jordi Jaria i Manzano, "Environmental Justice, Social Change and Pluralism," *IUCN Academy of Environmental Law e-Journal* 1 (2012): 18-29, about the environmental justice as a distributive justice. Then, I begun to add the recognition aspect, regarding respect to pluralism in "El constitucionalismo de la escasez (derechos, justicia y sostenibilidad)," *Revista Aranzadi de Derecho Ambiental* 30 (2015): 295-349.

¹² The idea of social metabolism was introduced by Karl Marx, following the reading of the work of Jacob Moleschott. In contemporary ecologic economics this notion has acquired a central role. See Marina Fischer-Kowalski, "Society's Metabolism: The Intellectual History of Materials Flow Analysis, Part I, 1860-1970," *Journal of Industrial Ecology* 2, no. 1 (1998): 61-78; Marina Fischer-Kowalski, Walter Hüttler, "Society's Metabolism: The Intellectual History of Materials Flow Analysis, Part II, 1980-1998," *Journal of Industrial Ecology* 2, no. 2 (1998): 107-136; Helga Weisz, "Combining Social Metabolism and Input-Output Analysis to Account for Ecologically Unequal Trade," in *Rethinking Environmental History: World-System History and Global Environmental Change*, ed. Alf Hornborg, John Robert McNeill and Joan Martínez-Alier (Lanham: AltaMira Press, 2007), 289-306.

capitalist world-economy.¹³ The world-economy is structurally organized as centre and periphery.¹⁴ This duality, eventually complemented by a semi-periphery, is built upon relations of unequal exchange.¹⁵

There are many forms of ecologically unequal exchange, as the transfer of toxic waste to the peripheral countries,¹⁶ land grabbing,¹⁷ disproportionate use and occupation of oceans and atmosphere by central countries,¹⁸ or

¹³ This idea has been developed by Immanuel Wallerstein since its book *The Modern World-System, vol. I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century* (New York, London: Academic Press, 1974).

¹⁴ The differentiation between centre and periphery in the global economy was proposed by the Argentine economist Raúl Prebisch, working for the Economic Commission for Latin America and the Caribbean (ECLAC), in 1949. Then, it has been used for many theorists to explain the structure of the world-economy, particularly for Wallerstein itself. An overview about this distinction in Peter J. Taylor and Colin Flint, *Political Geography: World-Economy, Nation-State and Locality* (London: Routledge, 2011), 20.

¹⁵ Ecological economists refer to ecological unequal exchange. See Alf Hornborg, “Zero-Sum World. Challenges in Conceptualizing Environmental Load Displacement and Ecologically Unequal Exchange in the World-System,” *International Journal of Comparative Sociology* 50, no. 3-4 (2009): 237-262; J. Timmons Roberts and Bradley C. Parks, “Ecologically Unequal Exchange, Ecological Debt, and Climate Justice. The History and Implications of Three Related Ideas for a New Social Movement,” *International Journal of Comparative Sociology* 50, no. 3-4 (2009): 385-409.

¹⁶ See among others Ruchi Anand, *International Environmental Justice* (Aldershot, Burlington: Ashgate, 2004), 61ff; Antoni Pigrau et al., *Legal Avenues for EJOs to Claim Environmental Liability* (EJOLT Report no. 4, 2012); and Astrid Epiney, “Abfallrecht im internationalen Kontext. Europa- und völkerrechtliche Aspekte der grenzüberschreitenden Abfallverbringung,” *Umweltrecht in der Praxis / Le Droit de l’environnement dans la pratique* (1999): 65ff. The Trafigura case is a concrete expression of this phenomenon. It consisted in a massive disposal of toxic waste into the port of Abidjan (Ivory Coast) by a Dutch cargo vessel, after being refused in the port of Amsterdam. See for details “Trafigura lawsuits (re Côte d’Ivoire),” Business & Human Rights Resource Centre, accessed July 31, 2017, <http://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire#c9344>.

¹⁷ See GRAIN et al., *The many faces of land grabbing. Cases from Africa and Latin America* (EJOLT Report no. 10, 2014).

¹⁸ This topic has been particularly important in defining ecological debt, a central idea in global environmental justice. See Christian Azar and John Holmberg, “Defining the Generational Debt,” *Ecological Economics* 14, no. 1 (1995): 7-19; Joan Martinez-Alier, “Ecological debt and property rights on carbon sinks and reservoirs,” *Capitalism Nature Socialism* 13, no. 1 (2002): 115-19.

biopiracy,¹⁹ among others. The technologic and economic evolution causes the increase of social use of matter and energy, and the anthropic transformation of environment, against the backdrop of capitalist accumulation. All this would have boost inequality between different social groups.²⁰ As unequal exchange defines centre and periphery in a context of a world-economy that creates a global social metabolism, justice issues have sense.

A constitutional approach seems an appropriate conceptual basis to build strategies of global governance, considering that social reproduction has escalated to global level and defines even its own physical environment, as it is stated in the Anthropocene narrative.²¹ This constitutionalization of global interaction between society and biosphere is aiming to consider governance problems not only upon the basis of guaranteeing sustainability, but also of searching justice. These twin fundamental ideas should guide a constitutional discourse for the Anthropocene, the constitution of fragility.

Possessive Individualism and Sustainable Development

Previously to develop my proposal, it is necessary to make some criticism about the hegemonic social responses regarding the transition to the Anthropocene. I have pointed out the pertinence of a constitutional solution for governing the global social metabolism in the Anthropocene, but constitutional tradition does not starts from a holistic point of view, rather from an individualistic one; it is not based upon a pragmatic conception, but rather upon a utopian one. Modern constitutionalism, since the American and the French revolutions, envisages as a fundamental value an abstract idea of the individual, based in a utopian vision dependent on an unlimited and tamed nature, able to satisfy indefinitely any necessity conceived within this paradigm.²²

¹⁹ See Daniel F. Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates* (London, Washington: Earthscan, 2010).

²⁰ See Ramón Margalef, “Lo que se llama ecología y posibles condicionantes de nuestro futuro,” in *Hacia una ideología para el siglo XXI. Ante la crisis civilizatoria de nuestro tiempo*, ed. José Alcina Franch and Marisa Calés Bourdet (Tres Cantos: Akal, 2000), 330.

²¹ This would be aligned with the discourse of global constitutionalism, but with important divergences regarding contents. On this issue, see Anne Peters, “Global Constitutionalism,” in *The Encyclopedia of Political Thought*, ed. Michael Gibbons (London: Wiley-Blackwell, 2015): 1484-87.

²² See John Locke, *Second Treatise of Government*, ed. C.B McPherson (Indianapolis, Cambridge: Hackett, 1980).

Confronted with the vulnerability and limitation of resources, this idea of an abstract individual entitled with rights, not subject to any other condition than his or her own dignity, must be revised. Nevertheless, regarding sustainability, the hegemonic reaction before the transition to Anthropocene seems to go forward without breaking with this utopian and individualistic perspective. The paradigm of rights is not abandoned, but only rectified through incorporations of new rights, as the right to a healthy environment.²³ Regarding justice, development is the key issue to provide this panoply of rights to all the people in the world. If we take together sustainability and justice in this hegemonic paradigm, we have sustainable development.²⁴

Clearly, this notion does not challenge the core values and practices of capitalist world-economy, but only seems to try to adapt them to the limitation of resources. In my opinion, sustainable development implies a merely managerial reaction to Anthropocene, with a business-as-usual approach.²⁵ With this notion, the paradigm of rights is adapted to the new situation, with the goal of maintaining current power relations in the global society, and disregarding devastating effects on environment, unfair social exchange and the interests of future generations.²⁶ In fact, hegemonic practices at global scale maintain domination and exploitation on the basis

²³ It has been described as a human right *statu nascendi* by Bosselmann, *The Principle of Sustainability*, 126.

²⁴ Sustainable development was a concept coined in the “Report of the World Commission on Environment and Development: Our Common Future,” where was defined as the ability “to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs”. See “Report of the World Commission on Environment and Development: Our Common Future,” UN, accessed July 27, 2017, www.un-documents.net/our-common-future.pdf. There is an immense literature on this notion, which has become central in international politics and law. For an overview and basic criticism, see John Alder and David Wilkinson, *Environmental Law & Ethics* (London: Macmillan, 1999), 127ff; and Stephen Clarkson and Stepan Wood, *A Perilous Imbalance. The Globalization of Canadian Law and Governance* (Vancouver, Toronto: UBC Press, 2009): 124ff.

²⁵ A clear evidence of this is the Rio+20 Conference (2010) final document. See “The Future we Want,” UN, accessed July 27, 2017, www.un.org/disabilities/documents/rio20_outcome_document_complete.pdf. Green economy is the core idea of this document, advocating for increasing the pressure on natural resources in a scenario of deep crisis in global economy, which affects specially countries in its centre.

²⁶ See Antoni Pigrau, Susana Borràs, Antonio Cardesa-Salzmänn, Jordi Jaria i Manzano, *International law and ecological debt. International claims, debates and struggles for environmental justice* (EJOLT Report no. 11: 2014), 59ff.

of the utopian belief of redemption through consumption, based on a growing social metabolism which inevitably aggravates the situation.²⁷ At the end, sustainable development does not intend to have any impact in the institutional structure of global capitalism and to reverse the growing deregulation in trade and investments.²⁸

Sustainable development is supposed to integrate three different goals —e.g., environmental protection, social solidarity and economic efficiency—, but it does not intend to introduce substantive modifications in the institutional framework and fundamental regulations of global social metabolism.²⁹ Needing to improve life standards in the periphery of global economy and not to challenge the fundamental organization of the international society, neither substantially nor institutionally, technological innovation is preferred to other possible strategies to react to environmental crisis, as population decreasing or modification of consumption habits —degrowth—.³⁰ In this context, issues on sustainability and justice (of distribution and recognition) remain unresolved.

Sustainable development begins to define the core of the approach of international community to environmental crisis since the Rio Declaration on Environment and Development (1992) was adopted. This document has a clear anthropocentric orientation, based on traditional conceptions within

²⁷ See Marina Fischer-Kowalski and Helmut Haberl, “El metabolismo socioeconómico,” *Ecología política* 19 (2000): 27.

²⁸ Andrew Dobson, in *Justice and the Environment. Conceptions of Environmental Sustainability and Dimensions of Social Justice* (Oxford: Oxford University Press, 1998), 60, underlines the eclecticism and ambiguity characterizing sustainable development, which did not break up with traditional power relations and distribution rules at global level. However, there are very optimistic analysis about its potential in transforming international relations, as shows Peter Malanczuk, “Die Konferenz der Vereinten Nationen über Umwelt und Entwicklung (UNCED) und das internationale Umweltrecht,” in *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt*, ed. Ulrich Beyerlin, Michael Bohte, Rainer Hofmann and Ernst-Ulrich Petersmann (Berlin, Heidelberg, New York: Springer, 1995), 986ff. See also John Dernbach and Federico Cheever, “Sustainable Development and Its Discontents,” *Transnational Environmental Law* 4, no. 2 (2015): 247-287.

²⁹ See Luzius Mader, “Die Umwelt in neuer Verfassung? Anmerkungen zu umweltschutzrelevanten Bestimmungen der neuen Bundesverfassung,” *Umweltrecht in der Praxis / Le Droit de l'environnement dans la pratique* (2000): 110.

³⁰ On these three possible strategic paths, see Daniel Jositsch, “Das Konzept der nachhaltigen Entwicklung (Sustainable Development) im Völkerrecht und seine innerstaatliche Umweltsetzung,” *Umweltrecht in der Praxis / Le Droit de l'environnement dans la pratique* (1997): 97.

the paradigm of rights, oriented to justify global capitalism and western cultural predominance. It states that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”³¹ According to that a *right* to development is recognized (Principle 3).³² The link between the notion of sustainable development and the paradigm of rights is therefore easily established. Consequently, this idea connects directly with the framework defined by the Universal Declaration of Human Rights (1948) and both international pacts of 1966 —on Civil and Political Rights, and on Economic, Social and Cultural Rights—.³³

Though the Stockholm Summit (1972) pointed to a deep reflection on the ethical bases of international community regarding the necessity to

³¹ UN General Assembly, Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (June 3-14, 1992), www.un.org/documents/ga/conf151/aconf15126-1annex1.htm, Principle 1.

³² Rio Declaration, Principle 3.

³³ In fact, development was consecrated as a goal of the United Nations in Section 55 of its Charter. So the couple of rights and development is firmly embedded in the core of the international law system. Later, the creation of the United Nations Development Program showed how development was a key issue in the international law post Second World War. See the UN General Assembly, Resolution 2029(XX), Consolidation of the Special Fund and the Expanded Programme of Technical Assistance in a United Nations Development Programme (Nov. 22, 1965),

www.mx.undp.org/content/dam/mexico/docs/MarcolegalPNUDMx/UNDP-MX-SpecialFundandTechnicalAssistanceMX.pdf. Finally, development and rights have been merged into the notion of right to development, with the UN General Assembly, Resolution 41/128, Declaration on the right to development A/RES/41/128 (Dec. 4, 1986), www.un.org/documents/ga/res/41/a41r128.htm. It is interesting to compare all these documents with the Earth Charter. The Preamble is very clear about how to escape the utopian and eurocentric paradigm of rights: “We stand at a critical moment in Earth’s history, a time when humanity must choose its future. As the world becomes increasingly interdependent and fragile, the future at once holds great peril and great promise. To move forward we must recognize that in the midst of a magnificent diversity of cultures and life forms we are one human family and one Earth community with a common destiny. We must join together to bring forth a sustainable global society founded on respect for nature, universal human rights, economic justice, and a culture of peace. Towards this end, 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.” It is very significant to note the emphasis in concepts as responsibility or diversity, as well as the reference to the fragility and interdependence of the world. See Earth Charter, accessed July 27, 2017, <http://earthcharter.org/discover/the-earth-charter/>.

find a global commitment to tackle environmental crisis, a reformist discourse based on sustainable development has prevailed.³⁴ In fact, even this first document was not isolated from the discourse combining development and rights which has become hegemonic.³⁵ Accordingly, the liberal idea of possessive individualism has still colonized international law until now. In any case, it is clear that sustainable development has acquired a constitutional dimension, incorporating it to the rights-centred substance of constitutions around the world.³⁶

Fragility and Sustainability

The first question posed by the global environmental crisis is the end of the utopia of abundance. Development and rights, as twin concepts, have endorsed the idea that the biophysical basis for social reproduction can afford any project of life, allowing to define individual self-determination in very wide terms, only depending of a more efficient exploitation of resources. The vulnerability and scarcity of resources which is imposed by the conception of a closed system, inherent to living in a limited planet, and the irreversibility of our actions challenge this utopian framework, urging for a more pragmatic approach. Fragility of the biosphere is central here.

The Anthropocene narrative implies the conscience that the planet is not a cornucopia. According to that it should to be governed with care, not

³⁴ Declaration of the United Nations on the Human Environment, UN Doc. A/CONF.48/14/Rev.1 (1972), www.un-documents.net/unchedec.htm began by stating: “Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself”. The conscience about the capacity of humanity of transforming its environment, which is the core of the Anthropocene narrative is here clear. This path to profound changes, starting from the acceptance of the self-referential state that humanity has reached is lacking in further developments in international law and politics, marked by the two Rio Declarations (1992 and 2012).

³⁵ Declaration of the United Nations on the Human Environment. Principle 8.

³⁶ Sergio Salomón Zarkin Cortés, *Derecho de protección al ambiente* (Mexico City: Porrúa, 2000), 4. Probably the Swiss Constitution of 1999 and the French Charter for the Environment of 2004 are some of the most illustrative cases.

through dominance.³⁷ Putting the emphasis on care and responsibility rather than on rights is the first step in order to build a constitutional framework for the Anthropocene. The Earth Charter is a notorious example of this approach. Presented on 29th June 2000 it was the result of a long process inspired by the United Nations, where a large number of NGO's took the task of designing a new ethical horizon for the new century.³⁸

This document approaches to the environmental crisis through a holistic framework and ethics based on respect and responsibility.³⁹ Confronted with the Declarations of Rio and Rio+20, the Earth Charter has to be considered the most significant international document regarding the environmental crisis out of the hegemonic framework, based on sustainable development and rights. Avoiding utopian dogmatism of hegemonic politics and constitutional culture, the Earth Charter takes seriously into account the systemic limits of social metabolism, advocating for a global, socially inclusive and culturally integrative strategies, which can be the inspiration for a more fair, realistic and respectful model, pointing out to a constitutionalism of fragility, where utopia is changed into pragmatism; predation into respect; and rights into responsibilities. To advancing on it, we need to consider also issues regarding justice.

Unequal Exchange and Environmental Justice

Environmental justice was born in the civil rights movement in the United States around the end of the seventies. With this idea, activists intended to underline the differentiate exposition to environmental degradation among non-white communities in the US and to denounce the existence of environmental racism.⁴⁰ Originally, environmental justice pointed out to

³⁷ About the ethics of care, see Virginia Held, *The Ethics of Care: Personal, Political, Global* (Oxford: Oxford University Press, 2006).

³⁸ See "What is the Earth Charter," accessed July 31, 2017, <http://earthcharter.org/discover/what-is-the-earth-charter/>.

³⁹ The Preamble states: "Everyone shares responsibility for the present and future well-being of the human family and the larger living world. The spirit of human solidarity and kinship with all life is strengthened when we live with reverence for the mystery of being, gratitude for the gift of life, and humility regarding the human place in nature". Then, in Principle 1 it refers to "[r]espect Earth and life in all its diversity" and to "[c]are for the community of life with understanding, compassion, and love".

⁴⁰ See Adam S. Weinberg, "The Environmental Justice Debate: A Commentary on Methodological Issues and Practical Concerns," *Sociological Forum* 13, no. 1

the unequal share of damages derived from social use of natural resources, and to the inefficiency of public policies in order to repair massive shortcomings regarding the assignation of costs of environmental degradation among communities of different income.⁴¹ This idea moved to the international arena, where the same phenomena were (and are) occurring.⁴² The original idea was centred in the distribution of burdens, ignoring the share of benefits.⁴³ Even now the US Environmental Protection Agency (EPA) refers to “protection from environmental and health hazards”.⁴⁴ However environmental justice has evolved into a paramount regulative idea, aiming to achieve a fair distribution of the whole social exchange with nature, governing the global social metabolism.⁴⁵

Consequently, environmental justice presents itself as an alternative pattern to sustainable development, taking into account the scarcity and vulnerability of natural resources, as well as the fair allocation of assets and passives of social metabolism.⁴⁶ Environmental justice is aiming to overcome the utopian model of social reproduction derived from the abstract individualism of liberal constitutionalism, starting from the idea of the fragility of Earth system.⁴⁷ In the view of the global system of governance, this implies an integrative and equitable constitutional framework for international relations, blending scarcity of resources with fair distribution, instead of advocating for a right to development based on

(1998): 25-32.

⁴¹ The US Environmental Protection Agency has defined environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies”. This implies “the same degree of protection from environmental and health hazards” and “equal access to the decision-making process to have a healthy environment in which to live, learn, and work”. See “Environmental Justice,” United States Environmental Protection Agency, accessed July 31, 2017, www.epa.gov/environmentaljustice.

⁴² See Anand, *International Environmental Justice*, 15.

⁴³ See Luke W. Cole and Sheila L. Foster, *From the Ground Up. Environmental Racism and the Rise of Environmental Justice Movement* (New York, London: New York University Press, 2001), 66; Susan L. Cutter, “Race, class and environmental justice,” *Progress in Human Geography* 19, no. 1 (1995): 112.

⁴⁴ See “Environmental Justice”.

⁴⁵ See Jaria i Manzano, “Environmental Justice,” 18-29.

⁴⁶ See Jaria i Manzano, “Environmental Justice,” 20ff.

⁴⁷ The goal here is to build “*un spazio sociale diverso da quello istaurato dall'individualismo possessivo*”, as pointed out by Patrizia Macchia, *Normativa a tutela dell'ambiente e disciplina del sistema produttivo nell'ordinamento giuridico elvetico* (Naples: Jovene, 1994), 4.

continuous increase of consumption of resources, in order to maintain a faint promise of improvement of the situation of most disfavoured people.⁴⁸

Homogeneity and Pluralism

The paradigm of rights cannot be the core of a constitutional framework for the Anthropocene, not only because individualism and utopia make it unfitted for the new problems that humanity as a whole has to confront, but also because it is conceived in terms of Western-centred traditions, which has been imposed to other peoples and cultures in the world through the enhancing of capitalist world-economy.⁴⁹ Accordingly, in the periphery of global economy cultures different from the hegemonic western culture of capitalism and liberalism are subjected to increasing homogenization. In fact, the building of a citizenship based upon the recognition of (individual and individualistic) rights has been a strategy of assimilation, implemented by hegemonic structures of social reproduction.⁵⁰

The implantation of nation-states as dominant institutional structure have marginalized traditional forms of political organization. This was performed through a process of political and cultural homogenizations, implying the nation-building of an artificial community. Western constitutionalism played a key role in legitimating new forms of political socialization, endorsing capitalist accumulation and appropriation of

⁴⁸ See Jordi Jaria i Manzano, “Governing a global community. The necessary transformation of international law into a constitutional order to address unequal exchange,” in *International law and ecological debt. International claims, debates and struggles for environmental justice*, ed. Antoni Pigrau, Susana Borràs, Antonio Cardesa-Salzmán and Jordi Jaria i Manzano (EJOLT Report no. 11: 2014), 98ff.

⁴⁹ Although not being completely critical with the paradigm of rights, B.S. Chimni illustrates in “Capitalism, Imperialism, and International Law in the Twenty-First Century,” *Oregon Review of International Law* 14, no. 1 (2012): 28ff., how strategies of neoimperialism are acting and its relationship with the imposition of the rights paradigm linked with the expansion of the capitalist world-economy in its financial phase.

⁵⁰ This is very clear in the case of the new states emerged after the independence from Iberian colonial powers in Latin America. See Consuelo Sánchez, “Autonomía y pluralismo. Estados plurinacionales y pluriétnicos,” in *La autonomía a debate. Autogobierno indígena y Estado plurinacional en América Latina*, ed. Miguel González et al. (Quito: FLACSO (Sede Ecuador), Cooperación Técnica Alemana (GTZ), Grupo Internacional de Trabajo sobre Asuntos Indígenas (IWGIA), Centro de Investigaciones y Estudios Superiores en Antropología Social (CIESAS), Universidad Intercultural de Chiapas (UNICH), 2010), 274-275.

natural resources.⁵¹ The constitution of fragility, as an alternative to the sustainable development and rights-centred paradigm in international law, should be sensitive to cultural pluralism, particularly, when the threats on survival of concrete cultural forms are intense, as it is the case of indigenous peoples.⁵² As an inclusive strategy of distribution and recognition, a deep model of environmental justice should include individuals and communities, taking seriously the groups being minorities within the global community and protecting alternative ways of social reproduction.⁵³

A pluralist approach to governance tends to limit capitalist accumulation and diminish the pressure on the natural resources. In fact hegemonic social reproduction is built upon abuse and misuse of natural resources to the same extent than marginalizing or assimilating different patterns about social priorities and common good.⁵⁴ For this reason, a

⁵¹ This is the approach in international law before the International Labour Organization (ILO), Convention 169 Indigenous and Tribal Peoples Convention (June 27, 1989),

www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 and UN General Assembly, Resolution 61/295, United Nations Declaration on Rights of the Indigenous Peoples, A/61/L.67 and Add.1 (Sep. 13, 2007), www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. For example, Indigenous and Tribal Populations Convention, 1957 (No. 107) gave way to assimilation into the state, strongly influenced by the idea of the superiority of Western modern culture and by considering indigenous peoples as marginal. The treatment of questions such as the application of general legislation to indigenous peoples (Article 3), propriety (Article 11), removal (Article 12), or national agrarian programmes (Article 14) are examples of this perspective. The text of the Convention has a different perspective, more sensitive to pluralism. This more sensitive point of view is also that of the United Nations Declaration on the Rights of Indigenous Peoples.

⁵² Recognition of cultural pluralism at international level is growing, giving more room to indigenous peoples demands. See Christoph Beat Graber, “The new UNESCO Convention on Cultural Diversity: a Counterbalance to the WTO?,” *Journal of International Economic Law* 9, no. 3 (2006): 558ff.

⁵³ See Lourdes Montero Justiniano, “Una Economía para la Inclusión”, in *Miradas. Nuevo Texto Constitucional* (La Paz: Instituto para la Democracia y la Asistencia Electoral, Vicepresidencia del Estado Plurinacional de Bolivia, Universidad Mayor de San Andrés, 2010), 593. This alternative social and economic practices are not necessarily incompatible with market economy, which is not to be developed forcibly through capitalist accumulation. See Amartya Sen, *Identity and Violence. The Illusion of Destiny* (New York, London: Norton, 2006), 136-137.

⁵⁴ Environmental crisis, as global crisis of civilization in the context of Anthropocene narrative, boosts the value assigned to (cultural) pluralism. See Isidoro Moreno Navarro, “Quiebra de los modelos de modernidad, globalización e

pluralist constitutional framework is most appropriated to govern a sustainable global community, as far as this is intended to overcome social exclusion and pressure on resources, as well that to put value on traditional knowledge and practices.⁵⁵ As a consequence, the culture of rights must be considered critically, as a tool for intercultural respect and exchange, rather than a form of legitimation for assimilation. The constitutionalism of fragility is intended to follow this path.

Conclusion: Principles Embedded in the Constitution of Fragility

Confronting the sustainability, justice and recognition issues in the framework of the transition to the Anthropocene requires to overcome some embedded conceptions and practices developed with the process of capitalist accumulation. In terms of governance, it seems to require a pragmatic and sensitive approach to take care appropriately of the Earth system, which now is in the hands of humanity. The substantial core of governance is the constitutional ideology, consisting of its fundamental values and procedures. In this context, the constitution should be conceived as “an anchoring point and reference perspective for the collision of existing and emerging legal semantics of society’s self-governance [that] must facilitate the intersection of law and politics in a radically heterarchic, modern society.”⁵⁶

The constitution of the Anthropocene should be a constitution of fragility, gravitating around the fundamental principles of responsibility, precaution and cooperation. Responsibility is a central feature here. It

identidades colectivas,” in *Hacia una ideología para el siglo XXI. Ante la crisis civilizatoria de nuestro tiempo*, ed. José Alcina Franch and Marisa Calés Bourdet (Tres Cantos: Akal, 2000), 129.

⁵⁵ With this the memory of the species is preserved and can be used to confront the enormous challenge of governing the Earth-system. See Victor M. Toledo, “¿Por qué los pueblos indígenas son la memoria de la especie?,” *Papeles de relaciones ecosociales y cambio global* 107 (2009), 27-38. This is the approach of the General Conference of the United Nations Educational, Scientific and Cultural Organization, Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Oct. 20, 2005), http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html.

⁵⁶ See Peer Zumbasen, “Carving our typologies and Accounting for differences across Systems: towards a methodology of transnational constitutionalism,” in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andrés Sajó (Oxford: Oxford University Press, 2012), 96.

implies a holistic perspective, rather than an individualistic and fragmented one, where sustainability and equity are only to be achieved through responsibility regarding present generations, future generations, different species and finally the life as a whole.⁵⁷ Therefore, as Rolston has pointed out, “[t]he rights paradigm must be left behind in favor of a concept based on what is right: this is the planet that is right for life and it is right that life continue here.”⁵⁸

This suggests to advance in a cautious humanism, where the deployment of human life is made with respect to humans and non-humans, satisfying our needs with measure and proportionately, being an “alternative worldview that is not so much rights-based as responsibility-based, one that is ecocentric and not simply anthropocentric.”⁵⁹ According to that the individuals and communities are subject to limits and obligations in order to preserve equity and sustainability in the use of natural resources.⁶⁰ As a consequence, this brings us beyond traditional anthropocentrism, embedded in the hegemonic paradigm of sustainable development.⁶¹

Secondly, the precautionary principle gains prominence as regulatory idea, taking into account not only the limitation and vulnerability of the biophysical basis of social reproduction, but also the uncertainty and irreversibility of human action in a context where it defines the Earth system.⁶² Finally, global governance within the Anthropocene narrative demands an integral management of the resources through participation of all social actors, reinforcing the dimension of the commons and overcoming fragmentation and appropriation, characteristic of the capitalist legal

⁵⁷ This is the fundamental idea of deep ecology, as described in the “Eight Points”, drafted by Arne Naess and George Sessions, accessed August 2, 2017, www.deepecology.org/platform.htm. It is meaningful that the only reference to rights in this document is negative: “Humans have no right to reduce this richness and diversity except to satisfy vital needs” (Third Point).

⁵⁸ See Holmes Rolston III, “Rights and Responsibilities on the Home Planet,” *Yale Journal of International Law* 18 (1993): 263.

⁵⁹ Rolston III, “Rights and Responsibilities,” 252.

⁶⁰ See Gregorio Mesa Cuadros, “Elementos para una teoría de la justicia ambiental,” in *Elementos para una teoría de la Justicia Ambiental y el Estado Ambiental de Derecho*, ed. Gregorio Mesa Cuadros (Bogotá: Universidad Nacional de Colombia, 2011), 31.

⁶¹ See Alder and Wilkinson, *Environmental Law & Ethics*, 127ff.

⁶² See Jamie Benidickson, *Environmental Law* (Ottawa: Irwin Law, 1997), 18ff; Dominik Koechlin, *Das Vorsorgeprinzip im Umweltschutzgesetz unter besonderer Berücksichtigung der Emissions- und Immissionsgrenzwerte* (Basel, Frankfurt am Main: Helbing & Lichtenhahn, 1989), 10ff.