

THE ROLE OF ENVIRONMENTAL LAW WITHIN THE FRAMEWORK OF SUSTAINABLE DEVELOPMENT

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WHAT IS SUSTAINABLE DEVELOPMENT?

“The greatest issue of our age is to achieve sustainable development” this is the bold statement made by Michael Decker in his treatise on The Law of Sustainable Development, General Principles. A statement I wish to endorse. Prior to the concept of “sustainable development”, the terms “economic development” and “development” were the mantra of nations, developing ones in particular. Economic development is defined as an increase in the gross income of the state and the term “development” as used by developing countries, is primarily meant as improvement of living standards or put another way is an increase of a country’s material wealth. To attain these goals the utilization/exploitation of the state’s natural resources was necessary. The goals of attaining economic development and developed country status are still the main objectives of our island states and other developing countries as we continue to exploit our natural resources.

The question is what is sustainable development? The modern concept of sustainable development was most clearly articulated in 1987 through the publication of a United Nations report entitled *Our Common Future*, also known as the Brundtland Report. It provides the most widely cited definition of sustainable development that is “development which meets the needs of the present without compromising the ability of future generations to meet their own needs”.

Although the Brundtland Report has identified critical objectives for the environment and development, the concept of sustainable development needed strengthening by an international legal framework. This was accomplished in June 1992 in Rio de Janeiro, Brazil under the aegis of the United Nations Conference on Environment and Development also known as the Earth Summit. At this Summit it was agreed and accepted that development, as striven for until then, as the unrestricted increase in material wealth, has placed mankind’s survival at risk because it exceeded the earth’s capacity as an ecosystem.

Out of this Summit five agreements emerged, two of which are the Declaration on Environment and Development (the Rio Declaration) and an action programme called Agenda 21. The preamble to the Rio Declaration underscores that “*a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people*” by “*.... Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and*

developmental system". Principle 3 of the Rio Declaration states that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. It is this linking of the environment and development which is expressed by the term "sustainable development". Sustainable development, therefore, is an increase of a country's wealth production, that is, its gross income, which does not entail parallel reduction or degradation of its natural capital. Natural capital is the sum of all kinds of ecosystems into which living and physical systems organize themselves. This definition also ensures that the ideal of justice between generations will be realized, because it demands that a country's natural capital should be preserved and passed on to future generations unscathed.

The conservation of natural capital is the nucleus of the notion of sustainable development, this is reinforced by Principle 4 of the Rio Declaration, which states, *inter alia* "in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it". Sustainable development can be legally defined as developmental policy, which does not harm the environment. This means that the striving for sustainable development as a legal obligation, has now been removed from the sphere of political will and the latter is bound by the above fundamental rule, whose custodians are the judiciary.

THE ROLE OF ENVIRONMENTAL LAW

Having looked at what constitutes sustainable development, let us now examine what role environmental law plays within the framework of sustainable development. Environmental law is an essential tool of governance and management of sustainable development. It provides the foundation for governmental policies and actions for the conservation of the environment and for ensuring that the use of natural resources is both equitable and sustainable.

There has been a remarkable worldwide development in the field of environmental law in recent years. In the last twenty years over one hundred (100) multilateral treaties on environmental subjects as diverse as Biological Diversity, Transboundary Long-Range Air Pollution, The Law of the Sea, Climate Change, Desertification and Protection of the World's Cultural and Natural Heritage have been concluded. In addition, numerous "soft" law instruments on the environment have been promulgated such as the 1982 World Charter for Nature and the 1992 Rio Declaration on Environment and Development. Regionally, there are the 1997 Bridgetown Declaration of Principles and the St. George's Declaration of Principles of Environmental Sustainability in the Organisation of Eastern Caribbean States (OECS).

Countries throughout the world are rapidly amending or adding internal legislative, regulatory and administrative measures for the purpose of enhancing environmental management. Trinidad and Tobago, Guyana, Jamaica, St. Lucia and Belize have put administrative measures in place. Trinidad and Tobago has gone a step further with the enactment of the Environmental Management Act, 2000, which established the

Environmental Commission, as a superior court of record, with jurisdiction to hear and determine environmental disputes as provided for under the Act or any other written law.

The Rio Declaration advances this cause under Principles 11 and 13. Principle 11 provides that all states shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Principle 13 provides, *inter alia* that states shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage.

Since law is an instrument for translating societal goals and aspirations into practice. Environmental law has a two-fold role to play in the creation of and sustenance of a society, which follows just socio-economic norms, as well as to interweave environmental interests in the scheme of developmental policies and programmes. One concerns the regulation and control over the use of natural resources, which is achieved through appropriate measures concerning permits or sanctions, waste disposal regulations, setting standards of emissions and effluents, resource management laws and penal provisions attendant upon violation of regulatory measures. The other concerns the fact that environmental law must also contain anticipatory mechanisms to avoid harmful impact of developmental policies and programmes. From the perspective of developing countries, the regulatory and control mechanism in environmental law suffers from inadequate enforcement because of over-riding concerns for achieving economic growth. Compliance with environmental law and enforcement of the regulatory mechanism has become matters of major concern in the developing countries, and in particular here in the Caribbean.

Environmental Law in the Caribbean

Agenda 21 was affirmed in Barbados in May 1994 by the English-speaking Caribbean at the United Nations Global Conference on the Sustainable Development of Small Island Developing States. In 1997 a Programme of Action was adopted by Caribbean Ministers who declared that a number of measures at the national level would be undertaken for the adoption of sustainable development throughout the region.

The St. George's Declaration of Principles for Environmental Sustainability in the Organisation of Eastern Caribbean States was published in 2001. That Declaration in its preamble recalled the principles of, and commitments to sustainable development as enunciated in the Rio Declaration and the Programme of Action (i.e. Agenda 21), and affirmed the shared commitments to the principle of sustainable development in order to minimize inherent environmental vulnerability and proclaimed that the principle of sustainable development was the standard by which human conduct affecting the environment was to be guided and judged.

The foregoing agreements bear testimony to the commitment, at least in principle, by Caribbean states to the concept of sustainable development. Many of our countries have become signatories to international environmental treaties, which have at their core the

concept of sustainable development. However, it is note-worthy that the provisions of these international agreements have not been incorporated in many of our local laws and therefore have no legal applicability in Caribbean jurisdictions.

This need for incorporating the provisions of environmental agreements into national legislation was illustrated in two cases; the first is the unreported Jamaican case of *Natural Resources Conservation Authority v. Seafood and Ting International Ltd.*, (Suit No. C.L. 1999/S-134; dated July 1 1999) in the judgment of the Court of Appeal of Jamaica and in the unreported Trinidad and Tobago case *EA 3 of 2002 Talisman (Trinidad) Petroleum Ltd. v. The Environmental Management Authority* in the judgment of the Environmental Commission.

In the Jamaican case the Court of Appeal had to consider whether the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (CITES) to which Jamaica had acceded was applicable to local exporters of Queen Conch. This Convention sought to debar exporters of the Queen Conch from doing so without prior grant of an export permit. The Court found that the lack of implementing legislation meant that there was no law requiring the respondents to obtain a CITES permit from the appellants.

In Trinidad and Tobago the Environmental Commission in the *Talisman Case* had to consider *inter alia* whether a particular wetland was a designated protected area under the Ramsar Convention to which Trinidad and Tobago was a signatory. The appellant Talisman wished to carry out seismic research in an area, which included part of the Nariva Swamp, a designated wetland site under that Ramsar Convention. The respondent in refusing to grant a Certificate of Environmental Clearance relied, among other things, on the fact that the area in question consisted of part of a protected wetland under the Ramsar Convention. The Commission found that though so designated a Ramsar site no local legislation was ever enacted to give legal protection to the designation.

Generally, the laws, which exist in most Caribbean states, which relate either directly, or indirectly to the environment, are concerned with the regulation of the exploitation rather than the protection of the environment. Consequently judicial intervention in environmental cases was confined to private and public nuisance. The Constitutions in jurisdictions outside of the region, for example Greece and India, make specific provision for the preservation and protection of the environment. Article 24(1) of the Constitution of Greece states, “The protection of the natural and cultural environment constitutes a duty of the State. The State is bound to adopt special preventive or repressive measures for the preservation of the environment”; and Article 48A of the Constitution of India states that “The State shall endeavour to protect and improve the environment”.

Caribbean constitutions do not expressly recognize a right to environmental protection. The Constitutions in fact protect property interest, the very interests that may require curtailment in order to properly balance developmental and environmental concerns.

The 1970 Constitution of Guyana at Article 36 is the exception in the Caribbean; in that it recognizes a right to environmental protection. At Article 36 it states, “In the interests of the present and future generations, the State will protect and make rational use of its land, mineral and water resources, as well as its fauna and flora, and will take all appropriate measures to conserve and improve the environment.”

Since the Rio Declaration of 1992, Caribbean states have enacted primary and secondary legislation and amended existing legislation in the more traditional areas associated with the environment, such as:

- Beach protection;
- Coastal zone protection;
- Oil pollution of marine areas;
- Fisheries;
- Town and country planning;
- Public health; and
- Conservation of wild life.

Apart from enacting legislation in the areas mentioned Trinidad and Tobago has gone one step further. The preamble to the Environmental Management Act 2000 states, *inter alia*, that “the Government of the Republic of Trinidad and Tobago is committed to developing a national strategy for sustainable development, being the balance of economic growth with environmentally sound practices, in order to enhance the quality of life and meet the needs of present and future generations”. The Act establishes the Environmental Management Authority to *inter alia* co-ordinate, facilitate and oversee execution of the national environmental strategy and programmes. The Act also established the Environmental Commission.

Guyana enacted the Environmental Protection Act, 1996 which bears a close resemblance to the Trinidad and Tobago 1995 Environmental Management Act which was repealed and replaced by the Environmental Management Act, 2000. The 1996 Act created an Environmental Protection Agency along the same lines of the Environmental Management Authority in Trinidad and Tobago. Jamaica has a similar agency established under the Natural Resources and Conservation Authority Act, 1991. This Act provided for the legal establishment of the Natural Resources Conservation Authority which is responsible for management and protection of the natural resources of Jamaica.

Belize enacted the Environmental Protection Act, 1992 which provides for the rational use of natural resources, the control of pollution and related incidental matters. It should be noted that the only territory to date which has put in place an institution to deal specifically with environmental matters is Trinidad and Tobago with the establishment of the Environmental Commission, as a superior court of record with all the powers inherent in such a court along with the power to enforce its own orders and judgments and the same power to punish contempts as the High Court of Justice.

Trinidad and Tobago has enacted, to date, some subsidiary legislation which would assist in advancing the concept of sustainable development: Noise Pollution Rules, Certificate of Environmental Clearance Rules, Environmental Sensitive Species Rules, Environmental Sensitive Areas Rules. The Water Pollution Rules and Air Pollution Rules have all been drafted but not yet promulgated. The Bureau of Standards has established emission and effluent standards. The Hazardous Waste Rules are yet to be drafted. The Environmental Commission stands ready to meet its mandate; however, without the promulgation of the aforementioned subsidiary legislation it is unable to fully provide the protections for which it was established.

Generally speaking in the Caribbean there is insufficient legislative enactments in environmental law which assist in advancing the concept of sustainable development. Our constitutions do not take the bold and progressive step as India did by making the right to the environment a fundamental protected right for the benefit of its citizenry. However, the courts in the Caribbean can follow the lead of those in Bangladesh, which so creatively construed their constitutional provisions so as to ensure that the environment is protected and that there is sustainable development. In the case of *Dr. Mohiuddin Faroque v. Bangladesh* 48 DLR 1996 the question on appeal before the Appellate Division of the Supreme Court of Bangladesh was whether the fundamental right to life included the protection and preservation of the environment and ecological balance. The Honourable Justice A.T.M. Afzal, Chief Justice of Bangladesh ruled:

“Although we do not have any provision like Article 48A of the Indian Constitution for protection of the environment, Articles 31 and 32 of our Constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which, life can hardly be enjoyed.”

In the same case the Honourable Justice Choudhary ruled that:

“Any act or omission contrary thereto will be violative of the said right to life.”

In our Commonwealth Caribbean jurisdictions in the absence of constitutional provisions and legislative enactments to promote the concept of sustainable development, the burden rests on the courts through judicial activism to rise to the challenge of ensuring that development is pursued in such a way that it meets the needs of the present generation without jeopardizing the needs of future generations.

The Rio Declaration affirmed the importance of law, which reflects and shapes a society's norms as a critical tool of sustainable development. It recognises that sustainable development is a matter of social justice, giving what is due to society now and in the future. This is the principle of intra and intergenerational equity. In this context a rights-based approach to environmental issues is desirable. I believe that it has been universally agreed that people have a right to a healthy environment and concomitant with that right governments have a duty to ensure that it is not violated. This inevitably shifts the role of law to a pivotal position as a tool of sustainable development.

This role of law provides at least three basic challenges to the legal system:

- (1) coping with uncertainty, including operation with a long-term perspective;
- (2) effectively preventing man-made environmental harm, as opposed to simply attempting to repair it; and
- (3) taking account of transboundary – often global – causes and implications of environmental degradation.

Coping with uncertainty

No one can deny that there are wide gaps in our knowledge, understanding and charting of basic environmental phenomena and their significance for mankind and of the impact of human activity on them. For this we must rely on science, and science has not yet provided us with definitive answers, a case in point is global warming. Similarly we are uncertain as to what degree the effect of long-term cumulative nuclear and other hazardous waste, fertilizers and pesticides, or genetically altered organisms would have on mankind.

It is frequently difficult at best, and somewhat impossible to trace damage to a specific source of environmental pollution or to actually prove damage, especially future damage, in terms no more conclusive than statistical probabilities. It would be difficult to predict the impact of future technologies, consumption patterns, new materials, pollution control and other factors of critical importance for the environment.

This uncertainty has profound implications for legal systems such as ours, which rely, to a large extent on demonstrable causal links, measurability and predictability. One consequence of this knowledge gap is the exercise of the precautionary principle, which calls upon legislators and regulatory systems to take account of the probability of environmental harm even when it is not demonstrated by conclusive scientific data.

Prevention

Beyond these uncertainties, a second challenge to the legal system derives from the fact that environmental degradation is often irreversible. If islands disappear as a result of the rise in ocean levels caused by global warming, who can be sued for reparations, how and to what effect? This means that reparatory or punitive legal measures taken after the event, by tort remedies or by penal sanctions, are not, by themselves effective instruments of control. Priority must be given to preventive policies and measures, for example, the need for environmental impact assessments, licensing or prohibition, monitoring and supervision and ultimately, enforcement.

Transboundary Dimensions

Legal systems must be able to respond to the challenge that environmental phenomena and environmental degradation tend to have transboundary implications. As in the case of water and air pollution. Pollution damage is more often than not attributable to the

cumulative effect of many activities, it frequently occurs across national borders and affects victims in more than one country. DDT and PCBS have been found throughout the food chain of the Eskimos in the Arctic.

All of this adds up to the fact that the management and control of environmentally sustainable development transcends the scope of domestic legal systems and calls for concerted action at the supranational level, whether bilateral, multilateral, regional or global. As stated earlier in this presentation, in the last twenty years there have been at least one hundred international instruments dealing with the environment. Though most of these instruments represent “soft” law, they play a vital role not only in supranational governance, but also in the development of domestic environmental policy and law. However, there is much to be desired at the level of awareness, implementation, compliance and enforcement.

The challenge for the judiciary and is very clear, that is, to make law an effective instrument of environmental and social justice, thereby creating a proper balance of meeting present needs without jeopardizing the needs of future generations.

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