SUSTAINABILITY AND THE COURTS: A JOURNEY YET TO BEGIN?

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Abstract

The international judiciary system has not yet developed a coherent approach to cases involving sustainability concerns. Furthermore, sustainability has rarely influenced the *ratio decidendi* of decisions. There are institutional and normative reasons for the lack of legal recognition of sustainability. In addressing these deficiencies, the historical and cross-cultural roots together with the fundamentality of sustainability need to be acknowledged to extrapolate its normative quality and rule-generating potential. Essentially, sustainability is a fundamental legal principle akin to justice and equality.

Introduction

In his analysis of international case law, John Gillroy found that sustainability "has emerged as the core concept of the current environmental debate within international law"[1] and that sustain-

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1. John Martin Gillroy, *Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of "Environmental Sustainability" in International Jurisprudence*, 42 STAN. J. INT'L L. 1, 2 (2006).

ability is present in *obiter dicta*, illustrating its moral significance, but not in *rationes decidendi* of the decisions.[2] In fact, there is a notable gap between general references to sustainability and its actual recognition as a guiding legal principle. This anomaly exists for conceptual, normative and institutional reasons.[3]

First, conceptually, the use of the term "sustainability" is often confusing. While the word is derived from the Latin *sustinere* (*tenere*, to keep or hold; *sus*, up) and as such akin to the endurance of anything, the historical origins and context makes it clear that sustainability refers to the endurance of the natural resource base or ecological systems that human development is depending on. Historically, the idea of sustainability has its roots in ancient civilizations seeking to live in harmony with nature,[4] in the European context, for example, as a legal concept of care for the "commons" in England, or "Allmende" in German-speaking countries[5]. The term sustainability emerged in the seventeenth century as a translation from the German *Nachhaltigkeit* where it had been defined as an economic term to describe the endurance of the natural resource base for human enterprise.[6] In today's parlance, this means ecological sustainability. The term remains, therefore, as a distinct and defined principle irrespective of its inflationary use in other contexts.

Second, normatively, for a principle to guide international dispute resolution, sustainability must not only be a legal principle, but a rule-generating adjudicatory norm. This has not occurred for sustainability because the "principle" of sustainable development itself is not of a sufficiently definitive rule-creating character; it contains a number of competing and even contradictory sub-principles that dilute its normative power.

On the other hand, sustainability is much older and more fundamental than the late-twentieth century concept of sustainable development. Its normative character can be in little doubt considering that at the core of sustainable development is the moral imperative to pass on an undiminished world to future generations. For many centuries, this imperative has been widely accepted across

2. *Id.* at 5-6.
3. *See* KLAUS BOSSELMANN, THE PRINCIPLE OF SUSTAINABILITY 67 (Ashgate Publishing 2008).
4. *Id.* at 12.
5. *Id.* at 14.
6. *Id.* 16-22; *see also infra* at 343-46.

many cultures. In our age of unprecedented short-sightedness, it would be a bitter irony to not consider the consequences of today for the long-term tomorrow. I will return to the rule-generating potential of sustainability towards the end of this essay.

Third, institutionally, the international judiciary system has been evolving as a set of parallel, closed legal regimes with specific adjudicatory norms. Therefore, a new legal principle, in order to become an adjudicatory norm, may require institutional refinements. Among these refinements are special environmental branches of the court system, including the long-standing proposal for an International Environmental Court.

The Institutional Dimension

Fundamentally, international law is shaped around the core value of state sovereignty. This has not changed over the past sixty years despite new challenges to sovereignty, for example, through the emergence of human rights as universal norms or the emergence of global concerns such as economic liberalization and environmental sustainability. The International Court of Justice (I.C.J.) has not altered its core adjudicatory norm of sovereignty to accommodate sustainable development. Instead of sovereignty, the equivalent adjudicatory norms of other international tribunals are the law of the sea (International Tribunal for the Law of the Sea), free trade (Panel and Appellate Body of the World Trade Organization) and human dignity (United Nations Human Rights Council). This allows for greater flexibility, however, none of these tribunals have referred to sustainable development in any way other than *obiter dicta*.[7] Overall, the norm-generating quality of sustainable development has not been recognized.

The classic case on sustainable development is the I.C.J.'s Gabçikovo-Nagymaros case,[8] which concerned a hydroelectric dam on the Danube River. Project planning began in 1977 after Hungary and (then) Czechoslovakia signed a bilateral treaty. In 1989, Hungary suspended the project and by 1992 it tried to pull out of the project because it would divert 80% of the flow of the Danube away from Hungary.[9] Hungary cited ecological necessity as its basis for

7. BOSSELMANN, *supra* note 3, at 67-72.
8. Gabcikovo-Nagymaros Project (Hung. v. Slovk.) 1997 I.C.J. 7 (Sept. 25).
9. *Id.*

withdrawing from the treaty and stopping the project. As a result, the Court was faced with the argument of sustainability and environmental damage as well as the usual questions of law of watercourses, state responsibility, and law of treaties.[10] The Court readily acknowledged that the concerns expressed by Hungary for its natural environment in the region affected by the project related to an "essential interest" of that state.[11]

While the Court held that these arguments were insufficient to terminate the 1977 treaty or pardon Hungary of responsibility for its failure to comply with it, the Court did consider the nexus between environmental protection and economic development relevant to international law. Quoting from its decision in the Advisory Opinion on the Use of Nuclear Weapons, the Court requested that the parties renegotiate the treaty reasoning:

> Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — … new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[12]

In his Separate Opinion, (then) Vice President Weeramantry stated that the right to development and the right to environmental protection are principles currently forming part of the body of international law and that they need to be reconciled with the principle of sustainable development which is a recognized principle of international law.[13] He considered it "a general principle of international law recognized by civilized nations" and "an integral part of modern international law," "by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community."[14]

10. Gillroy, *supra* note 1, at 43.
11. Gabcikovo-Nagymaros Project, 1997 I.C.J. at 41.
12. *Id.*at 78.
13. *Id.* at 88-89 (separate opinion of Judge Weeramantry).
14. *Id.* at 95.

The Court concluded that the treaty remained in effect, however, and required the parties to negotiate a proper balancing of environmental and developmental needs.[15]

It could be argued that the reluctance of the I.C.J. to make sustainable development an overarching concern of international law is due to its jurisdictional constrains. Such constraints might be less of an issue if the long-proposed International Environment Court were established. A specialized court of this nature would most likely increase chances for better enforcement of international environmental law. Yet, the traditional, state-centered approach to institutional reform may be adverse to any calls for institutionalizing new adjudicatory norms.

The experience of New Zealand may be of some relevance here. New Zealand established a nation-wide Environment Court in 1994, becoming the first — and still only — country to do so. The Court was established in conjunction with a major environmental law reform culminating in the Resource Management Act (RMA),[16] a statute with sustainability at its core.[17]

Conceptualizing it as "sustainable management," section 5(2) of the RMA defines the term as follows:

> (2) In this Act, "sustainable management" means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while —
>
> a. Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonable foreseeable needs of future generations; and
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> b. Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
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> c. Avoiding, remedying, or mitigating any adverse effects on activities on the environment.[18]

This definition and its application has been the subject of many debates and decisions in the New Zealand Environment Court.

15. *Id*. at 83 (majority opinion).
16. Resource Management Act, 1991 (N.Z.).
17. *See* David Grinlinton, *Contemporary Environmental Law in New Zealand*, *in* 1 ENVIRONMENTAL LAW FOR A SUSTAINABLE SOCIETY 19-46 (Klaus Bosselmann & David Grinlinton eds., New Zealand Centre for Environmental Law 2002).
18. Resource Management Act, 1991, § 5(2) (N.Z.).

Under a straightforward reading of section 5, decision-makers need to secure the outcomes detailed in paragraphs a, b, and c which operate as high-level constraints.[19] However, the meaning of the word "while" has been controversial. Are the various purposes of resource use, mentioned in the first half of section 5(2), conditional to a, b, and c? This is the "environmental bottom line" approach. Or is the word "while" merely requiring one to additionally consider a, b and c? This is the so-called "overall judiciary approach." A number of Environment Court decisions follow the environmental bottom line approach. This approach would be consistent with the principle of (ecological) sustainability or "strong" sustainability.[20] The overall judiciary approach, on the other hand, reflects the more traditional weighing of potentially conflicting objectives and leads to compromises or trade-offs.

The Environment Court and other courts increasingly follow this approach, once the socio-economic consequences of environ-mental-bottom-line reasoning became more apparent. Essentially, the "weak" sustainability approach, clearly favored by government and the corporate sector, demands no more then considering environmental impacts or "business-as-usual."

The New Zealand experience suggests that sustainability can, in fact, play an important role in both legislation and court decisions. However, it is also possible to conclude that neither well-written legislation nor the existence of a specialized Environment Court would per se make a difference. Obviously, reasoning around the fundamental importance of sustainability has had some impact on the way judges approach environmental cases. Leading Judge Peter Salmon, for example, has repeatedly stated the fundamental importance of the sustainability principle "as the only meaningful cure to the problems that face the world."[21] The Parliamentary Commissioner for the Environment criticized authorities and courts for not sufficiently focusing on the Act's "core thrust" with its

19. Simon Upton et al., *Section 5 Re-visited; A Critique of Skelton and Memon's Analysis*, 10 RESOURCE MGMT. J. 10, 13 (2002).

20. *See* Klaus Bosselmann, *Strong and Weak Sustainable Development: Making the Difference in the Design of Law*, 13 S. AFR. J. ENVTL. L. & POL'Y 14 (2008).

21. Peter Salmon, Paper Presented to the Auckland Branch of the Resource Management Law Association: Sustainable Development in New Zealand 3 (Oct. 30, 2002).

recognition of "intrinsic values" and ecological "bottom lines."[22] The Commissioner has repeatedly reminded the people of New Zealand that sustainability is a foundational principle for society and its economy ("strong sustainability") requiring a profound shift of values and policies.[23]

The Normative Dimension

Generally speaking, the reception of sustainability in the jurisprudence of courts and tribunals has not been particularly significant. The predominant approach internationally[24] and in New Zealand[25] has been to consider sustainability amongst other — mostly social and economic – concerns without giving it priority.

This "weak" approach is arguably in contrast with the actual importance and wider history of sustainability. Its history did not begin with the 1987 Brundtland Report but in the ancient traditions of most major cultures, including Europe.[26]

The situation of pre-industrial Europe is worth noting. By the mid 1800's, most forests were gone. Deforestation had reached a degree that threatened the entire economy of Europe.[27] This opened up two possibilities for the future: to look for a new energy source to refuel the economy or to look for an alternative economy. Of course, coal replaced wood and fired up the industrial revolution. But the alternative was available too, i.e., the "discovery of sustainability."[28]

Forest management scholars in Germany proclaimed the wisdom of replacing every felled tree with the planting of a new one.

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22. *See* OFFICE OF THE PARLIAMENTARY COMM'R FOR THE ENV'T, TOWARDS SUSTAINABLE DEVELOPMENT, THE ROLE OF THE RESOURCE MANAGEMENT ACT 1991 7 (1998); OFFICE OF THE PARLIAMENTARY COMM'R FOR THE ENV'T, SUSTAINABILITY REVIEW 2007: NEW ZEALAND'S PROGRESS TOWARDS SUSTAINABLE DEVELOPMENT (2007).

23. *See* OFFICE OF THE PARLIAMENTARY COMM'R FOR THE ENV'T, CREATING OUR FUTURE: SUSTAINABLE DEVELOPMENT FOR NEW ZEALAND 35 (2002).

24. *See* BOSSELMANN,, *supra* note 3, at 67-72.

25. *See* Klaus Bosselmann, *Judiciary and Environmental Governance in New Zealand*, *in* THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 355 (Louis Kotze & Alexander Paterson eds., Kluwer International 2008).

26. BOSSELMANN, *supra* note 3, at 13-22.

27. *See* JOACHIM RADKAU, NATUR UND MACHT EINE WELTGESCHICHTE DER UMWELT 245 (Beck 2000). This work was recently published in English as JOACHIM RADKAU, NATURE AND POWER: A GLOBAL HISTORY OF THE ENVIRONMENT (Cambridge University Press 2008).

28. *See* ULRICH GROBER, *DIE ENTDECKUNG DER NACHHALTIGKEIT* (Kunstmann 2010).

They cited the medieval land use system ("*Allmende*") as the mother of sustainable economies. The Allmende system recognized public ownership of the land to guide any form of private land use. That way the substance of the land could be protected from overuse, thereby preserving it for future generations. In 1714, this effect was termed *"Nachhaltigkeit"* by German accountant and administrator Hans Carl von Carlowitz.[29] The term and concept eventually dominated forest economic theory and were exported, for example, to the French Forest Academy where, in 1837, its director Adolphe Parade translated it to "soutenir" (showing its Latin roots: *sustinere* = to keep, preserve, sustain). From there it reached the English translation of "sustainability." By the mid-1800's, the notion "living from the yield, not from the substance" was widespread among forest academies and indeed science and economic faculties throughout Europe. It was state-of-the-art knowledge.

The fact that the industrial revolution ignored this knowledge does not render it useless, obviously. It only meant that the idea of sustainability did not fit the all-persuasive idea of progress. Essentially, this has not changed to this day — except for the fact that the case for sustainability has never been stronger.

The modern chapter of the sustainability discourse began with the Report of the United Nations Commission for Environment and Development[30] (Brundtland Report) that created the composite term "sustainable development," but did so — or should have done so — on the basis of a well-established history of the sustainability concept. The famous Brundtland definition[31] is, of course, incomplete. It leaves open the question of what might be the needs of future generations and consequently what may have to be passed on. It is fair to assume that the Brundtland Commission called for a fundamental duty to keep the basic options open for future generations. The only way to

29. HANS CARL VON CARLOWITZ, SYLVICULTURA OECONOMICA, ANWEISUNG ZUR WILDEN BAUM ZUCHT [FOREST ECONOMY OR GUIDE TO TREE CULTIVATION CONFORMING WITH NATURE] (TU Bergakademie Freiburg 2000) (1713). *See also* Ulrich Grober, *Tiefe Wurzeln: Eine Kleine Begriffesgeschichte von "sustainable development" – Nachhaltigkeit* [*Deep Roots: A Short History of the Concept of "Sustainable Development" – Sustainability*], 3 NATUR UND KULTUR 116 (2002).

30. WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE (Oxford University Press 1987).

31. "Sustainable development is development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs." *Id.* at 8.

keep these options open, however, is to sustain the ecological basis of development. The Commission was quite clear about this. The inaugural meeting of the Commission in October 1984 set out the objective "to build a future which is more prosperous, more just, and more secure because it rests on policies and practices that serve to expand and sustain the ecological basis of development."[32] In many passages, the Report emphasized that we are borrowing the environmental capital from future generations and that economic growth must be constrained to preserve the Earth's ecological integrity.[33]

History, science and ethics all seem to point to the same, rather simple idea: any form of development must respect ecological boundaries to avoid decline or collapse. This characterization has three important implications for the sustainability discourse. The first is that sustainability is separate from sustainable development. Both terms are often used interchangeably, but need to be kept separated from each other. The second implication is that the notion "sustainable development" relates development to sustainability in a sense that the former is grounded in the latter. Like "sustainable management," "sustainable use" and similar composite terms, "sustainable development" represents an application of the principle of sustainability, nothing more and nothing less. The third implication is that sustainability is the most fundamental of all environmental principles, although this fundamentality has yet to be recognized by the courts.

There are important parallels between the idea of sustainability and the idea of justice.[34] The justice discourse has always maintained certain distinctions that are equally relevant to the sustainability discourse. First, justice is different from composite terms such as "just society." Second, the notion of a "just society" relates society to justice in a sense that the former is grounded on the latter. Third, the term "just society" represents an application of the principle of justice which is fundamental to civilized nations, similar to the principles of

32. *Id.* at 356.

33. For example: "We borrow environmental capital from future generations with no intention or prospect of repaying. They may damn us for our spendthrift ways, but they can never collect on our debt to them. We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions." *Id.* at 8.

34. *See* BOSSELMANN, *supra* note 3, at 9.

freedom, equality – and sustainability.

This all amounts to what the New Zealand Ministry for the Environment once aptly pointed out: "Sustainability is a general concept and should be applied in the law in much the same way as other general concepts such as liberty, equality and justice."[35]

Conclusion

The characteristic of fundamental principles is that they cannot per se be defined in precise terms, yet they are absolutely indispensable as guiding ideals for the design of public policy and law. Governments may fail to live up to these ideals, but they are constitutionally obliged to pursue them. The same goes for the judiciary.

One premier role of the law is to promote fundamental principles, often expressed in constitutions and human rights catalogues, and ensure that the legal process is reflective of them. If sustainability is perceived as one of such fundamental principles, the legal process will have to be reflective of it. If, by contrast, the principle of sustainability is perceived as just one of an array of environmental principles, it will compete with these and almost certainly vanish in the politics of governments still fixated on economic growth and international competition.

It would be too presumptuous to think that a fundamental concern such as the one just described has guided the creators of the New Zealand *Resource Management Act*, the more ambitious judges of national or international tribunals, the drafters of the *World Charter for Nature* or the creators of the *Earth Charter*. More likely, there was not a coordinated and coherent effort behind these various pursuits.

However, it would be even more presumptuous to assume that the mentioned activities were guided by an attempt to merely "balance" economic, social and environmental concerns. Surely, such a balancing act would not reflect what most feel when we think of climate change, biodiversity loss and water scarcity. The global ecological crisis came about because of a profound imbalance of economic, social and environmental dimensions of human activity and not as a technological glitch. The more appropriate assumption

35. N.Z. Ministry for the Env't, *Resource Management Law Reform: Sustainability, Intrinsic Values and the Needs of Future Generations* 9 (N.Z. Ministry for the Env't, Working Paper No. 24, 1989).

is, therefore, a fairly common acceptance that the ecological basis of human survival is at risk. If, for example, climate change is threatening our life conditions, then any trade-offs and compromises between economic prosperity and ecological sustainability seem almost suicidal. Today's concerns are either those for ecological sustainability or do not exist at all (favoring business-as-usual or overly naïve trade-offs).

The role of courts is to safeguard the fundamental principles and values of society. This normally means watching over the rule of law and constitutionality of governmental actions. Yet, sometimes safeguarding the fundamentals may require more. If courts are faced with governmental failures and breakdowns that threaten long-term sustainability, they surely must be proactive and insist on law's ultimate promise.