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ЗАЛУЧЕННЯ ПРИНЦИПІВ СТАЛОГО РОЗВИТКУ В ЕКОЛОГІЧНІЙ КОНСТИТУЦІЇ ЗЕМЛІ: ОГЛЯД ЮРИДИЧНИХ АСПЕКТІВ ТА МОЖЛИВОСТЕЙ

На основі регіональних, державних та міжнародних прикладів розглянуто такі питання, що торкаються конституційних положень для інституціоналізації ідей сталого розвитку в політичній та економічній системах: (1) Чому політики вважають конституційне забезпечення ефективним засобом інституціоналізації принципів сталого розвитку? (2) До яких основних юридичних питань звертаються ці заходи? (3) Виходячи з наведених прикладів, які висновки можна зробити і застосувати з метою сприяння прийняттю Екологічної Конституції Землі? Завдяки аналізу кожного з прикладів окреслено і запропоновано ряд фундаментальних засад, на яких повинна базуватись Екологічна Конституція Землі, щоб бути ефективним інструментом втілення в життя принципів сталого розвитку.

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Incorporating Sustainable Development Principles into a World Constitution: A Survey of Legal Issues and Opportunities

Using state, national and international examples this paper addresses the following questions that surround the use of constitutional provisions to institutionalize sustainable development concepts in political and economic systems: (1) Why do policy makers believe that a Constitutional provision is an effective means to institutionalize sustainable development? (2) What are the primary legal issues that these sample measures addressed? (3) From these examples, what lessons can be learned and then applied in the context of promoting the adoption of a World Environmental Constitution? As a result of analyzing

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each of the examples, a set of common elements is drawn and put forth as the fundamental principles that a World Environment Constitution ought to address to be an effective measure to adopt sustainable development principles.

A. Introduction

Sustainable development principles and ideas are not new ideas. Recognizing the need to conserve resources has been faced at various times throughout human history when observant people recognized that the available supply of resources was limited and the demand for them was greater than the supply. For example, Thomas Robert Malthus "Essay on the Principles of Population"¹ described a doomsday scenario in which population increases at a geometric ratio, while food production increases at an arithmetic rate. This creates the condition where population levels inevitably outstrip food supplies resulting in misery and reduces population numbers to levels more in balance with supply. In Malthus view, the tension between population growth and food production was an immutable natural law from which man could not escape. To be sure, hunger, starvation and poverty have not been eliminated from the modern world, but the fact that we are here today is an indication that the world society has not surrendered to the natural forces that Malthus feared would overcome the world's population.

Some of the observant people set out to address the problem the identified by searching for ways to increase the supply of needed resources, others searched for substitutes, while others found a place for conservation measures as the means to best manage the pressures of shortages. Technological change has accomplished great things, but are there problems which are not readily solvable by technology? Is it easier for society to rest its hopes on technological solutions rather than on other solutions that require personal sacrifice to accomplish desired goals? The existence of this Conference is tribute to the fact that while these measures have been effective in some cases, problems remain and further action must be taken. Can we turn to a legislative or normative rule to institutionalize the sustainable development ethic in the minds and hearts of populations across the world?

In this paper I will address the following issues: 1) Why do we turn to adoption of a World Constitution as the mechanism by which sustainable development principles will become institutionalized in political and economic systems across the world; 2) What are some current examples of measures that recognize sustainable development principles; 3) What are the primary legal issues that have been addressed in regard to these current measures; and 4) What lessons can we learn from this experience that can then be transferred into a World Constitution proposal to be presented to World Leaders?

B. Why do we turn to a World Constitution to institutionalize sustainable development principles?

In today's world, the most common form of government is one where the governed elect their political leaders to operate within a system of government that recognizes the power of the governed to participate in their government. In many parts of the world, Constitutions represent the terms of the relationship existing between the governed and the government that is elected by it. Statements of fun-

¹ John Fred Bell, "A History of Economic Thought" Second Edition, pps. 180,181, The Ronald Press, New York, 1967.

damental rights and privileges become the basic protections that legislative leaders must follow when passing laws or taking other forms of government action affecting the governed, the property they own or property in which they have an interest. Constitutional standards are applied to determine if laws and normative rules have satisfactorily complied with them. Constitutions, therefore describe the essence of the legal and political structure of the Country that has adopted it. Strict adherence to the terms of the written constitution is essential to the constitution's validity and to the proper functioning of society which has adopted these rules.

As Constitutions occupy such a prominent place in national political and legal systems, their provisions are subject to more rigorous methods for amending current provisions. These methods are aimed at determining public support for these measures before their adoption, through referendums or plebiscites that measure support by political institutions and a majority of the population.

Over time, constitutional principles are interpreted by judicial bodies tasked with enforcement of these principles. Such interpretations run the risk that later interpretations will differ from the intent of the drafters.¹ This may cause certain constitutional provisions to be questioned if the current interpretation is believed to be at odds with the original intent. Questionable interpretations may change over time, or even be replaced by later amendments that replace them with language that reflects current social and political thought on the issue. As documents at the core of political and legal systems, Constitutions should be adaptable to change that reflects shifting social and political thought regarding important issues.

If sustainable development principles are going to take root within a political and legal system, then being embedded within a Constitutional document will enhance the significance of these principles and make them a measure against which other action can be judged.

C. What are some current examples of Constitutional provisions that adopt sustainable development principles?

To begin this discussion of examples that have recognized sustainable development principles, I will refer to several principles that address the essence of sustainable development theory. The references I am making are to the International Legal Experts Group's book, *"Our Common Future"* (1987) that published a summary of proposed legal principles for environmental protection and sustainable development that were recognized by the group of experts on environmental law. This summary included the following principles:

"All human beings have the fundamental right to an environment adequate for their health and well being."

"States shall conserve and use the environment and natural resources for the benefit of present and future generations."

"States shall maintain ecosystems and ecological processes essential for the functioning of the biosphere, shall preserve biological diversity, and shall observe the principles of optimum sustainable yield in the use of living natural resources and ecosystems."

The following excerpts are examples of current Constitutional provisions that recognize sustainable development principles;

¹ See dissent of Justice Clarence Thomas, in *Kelo v. City of New Haven*, 125 S. Ct. 2655, 162 L. Ed. 2d 439, 2005 LEXIS 5011 (2005) and his discussion of whether a "public purpose" satisfies a Constitutional requirement of "public use" in the context of affirming government action that takes privately owned property for a public activity.

(1) Bavarian Environmental Protection:

*"The protection of the natural living conditions, in view of our responsibility to future generations, is the particular task of every individual and of the state community. All natural resources must be protectively and economically treated. It is also one of the primary duties of the State, communities and corporations under public law to preserve the soil, water and air as natural essentials of life, ... to maintain the efficiency of natural surroundings and constantly to improve them, to safeguard the forests because of their special significance to the balance of nature, as well as to rectify any damage already done or to compensate for it...."*¹

(2) Ukraine Constitution (1996)

*"Land, its mineral resources, air, water and other natural resources located within the territory of Ukraine ... shall be the objects of the right of ownership of the Ukrainian people. Bodies of state power and bodies of local self-government shall exercise the rights of owner on behalf of the Ukrainian people within the limits determined by this Constitution. Property shall establish responsibility."*²

*"Every person shall have the right to a safe and healthy environment and compensation for damage caused by violation of this right. The right to free access to information about the state of the environment, the quality of food stuffs and everyday objects as well as the right to disseminate his information shall be guaranteed to every person."*³

(3) The Charter of Fundamental Rights of the European Union provides in its Preamble:

"The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.

Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities ...

The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States ... it seeks to promote balanced and sustainable development

This Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, ... Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.

The Union therefore recognizes the rights, freedoms and principles set out hereafter:

"A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." (European Union Statement of Fundamental Rights. Art II-97)

"Environmental protection requirements must be integrated into the definitions and implementations of the policies and activities referred to in this Part, in particular with a view to promoting sustainable development." (European Union Statement of Fundamental Rights III-119)

(4) European Union Draft Constitution Article I-14 Areas of Shared Competence between the Union and Member States

1. The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17.

2. Shared competence between the Union and the Member States applies in the following principal areas: ...

(d) Agriculture and fisheries, excluding the conservation of marine biological resources;

(e) Environment; ...

(i) energy; ...

(k) common safety concerns in public health matters, for the aspects defined in Part III.

(5) Natural Resources and the Public Estate found in a State Constitution in the U.S.

*The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. [The State's] public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the [State] shall conserve and maintain them for the benefit of all the people."*⁴

¹ Article 141, Constitution of the German Federal State of Bavaria

² Ukraine Constitution, Section 1, Article 15.

³ Ukraine Constitution, Section 1, Article 50.

⁴ Article 1, Section 27 Constitution of the State of Pennsylvania, U.S. On April 21, 1969, House Bill 958 was introduced in the Pennsylvania House of Representatives. The bill would be mandated to protect Pennsylvania's resources and

(6) The 1992 Report of the United Nations Rio de Janeiro Conference on Environment and Development proclaimed the following sustainable development principles as part of its report:

*"Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."*¹

*"States have, in accordance with the Charter of the United Nations and the principles of International Law, the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdictions or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."*²

*"The right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations."*³

*"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."*⁴

D. Comments Regarding these Examples

The following comment categories summarize important issues found in the six constitutional provision examples listed above. The summary format will aid in understanding the comments.

(1) Recognition of Fundamental Human Rights

Examples 1-5 and 6 each contain statements that individuals have a right to a clean and healthful environment. The unanimous recognition of this as a fundamental human right serves to affirm this as an essential part of a Constitutional approach to establishing sustainable development as a normative standard.

(2) Who owns a Nation's Natural Resources?

Example 2 indicates the ownership of land and its mineral resources shall be the objects of the right of ownership of the Ukrainian people and emphasizes that with ownership comes responsibility. Example 4 designates that public natural resources are the common property of all people. In Example 6, State authority is recognized to extend to a state's own natural resources, subject to the condition that state action does not cause harm or injury beyond the state's boundaries. The difference in emphasis in these comparisons is stark if the intent is to indicate that a state has no obligation to use its natural resources for anyone else in the world other than its own citizens.

(3) State Responsibility

Perhaps the strongest statement of State responsibility is Example 4 that designates the State as Trustee of the environment for present and future generations. In the context of that legal system a Trustee has a unique legal obligation to use the property which it holds in trust for the benefit of current and future generations.

propose a change in the government's attitude toward the environment. It declared that the people have a right to a decent natural environment. On May 18, 1971, HB 958 was approved and became Article I, Section 27. The State Environmental Protection Agency describes the impact of this provision in these words: "Article 1, Section 27 has had a significant impact on Pennsylvania's government and environment. It has provided the courts and administrative agencies with a solid legal basis for protecting the environment. Prior to 1966, there was no effort to protect Pennsylvania's air, land or water. As the Commonwealth developed, there were no laws regulating the harvesting of the state's natural resources. Pennsylvania's legislature and economic success were dominated by the mining of coal and iron which provided the basis for the railroad and steel industries. By the mid-1960's, the economics of Pennsylvania was no longer dominated by these factors. As knowledge of the environment increased, the public became more aware of the environmental damage that was being inflicted by unregulated taking of the natural resources.

¹ Rio Declaration on Environment and Development, June, 1992, Principle 1.

² Rio Declaration, June, 1992, Principle 2.

³ Rio Declaration, June, 1992, Principle 3.

⁴ Rio Declaration, June, 1992, Principle 4.

Failing to fulfill this duty can be separately enforced by those who would benefit from it. That being said, how is such an obligation enforced? Is some type of legislation needed to make initiate action against the State for failing to fulfill its trust obligations? Is the obligation self-executing, which would allow anyone to initiate a legal action against the state for failing to fulfill its obligations. Who can bring suit against the State government to enforce this trust?¹ What harm or injury must the party show in order to be able to pursue its claim?

(4) Individual Responsibility

Example 1 identifies responsibility at the individual level as well as the state level without making any distinction as to how this responsibility is shared or apportioned. The second sentence makes an even stronger statement about State responsibility and creates what might be viewed as a duty to preserve. It is of note that when considering individual responsibility, the provision recognizes that corporations are also responsible parties. In many parts of the world corporations are viewed as examples of entities that insulate owners from responsibility for their actions.² In Bavaria, however, it would seem that the issue of corporate liability is addressed in a straight forward manner.

Example 2 references two items that may prove to be of significance. First it recognizes that ownership of designated natural resources is held by the people. However, it goes on to indicate that with property comes responsibility. While this reference may be open to some interpretation, one plausible interpretation is that individual responsibility for use of property is intended. Owners of property bear responsibility for its use. Would the same responsibility flow to those who are simply users of property under lease arrangements rather than ownership?

(5) Enforcement of the Sustainable Development Provision

An important element of state responsibility is the duty to enforce the obligations that are created by these provisions. A clear duty to act is identified, such as in Examples 1, 2, and 4, which make the clearest statements about this obligation and therefore provide the clearest indicators of how parties who seek enforcement can go about identifying a process to enforce these obligations. The effectiveness of enforcement is a question that may not be answered from these provisions alone.

(6) Achieving Sustainable Development by Integrating Environmental Protection with Development

Examples 3 and 6 recognize the practical necessity to integrate environmental protection measures with development decisions and implementation.

(7) Clarity of What is Intended by the Cited Provision

In Example 1, the statement is made that all natural resources must be "economically treated" but no further explanation is given or any hint given of the specific intention being considered. Is a cost versus benefit analysis contemplated, a cost effectiveness test available or can the cost of implementation be used as an argument to seek relief from the environmental protection obligations identified? This provision is weaker as a result of the ambiguity in its terms.

¹ *White v. Township of Upper St. Clair*, 799 A.2 d 188 (Pa. Cmwlth. 2002): Article I, section 27, provides taxpayers and residents standing to enforce terms of dedication of public park.

² For example, See Kevin Danaher and Jason Mark, "Insurrection: Citizen Challenges to Corporate Power", Routledge, New York, N.Y. 2003.

Examples 3 and 6 identify the need to integrate environmental protection with development processes to achieve sustainable development goals. While the principle is recognized the degree of integration called for by this provision is not. For example is every development proposal to be evaluated from the point of view of its impact on the environment? At what point is the impact of a development proposal on the environment so great that environmental protection considerations will prevail over development considerations? Laws that require a pre-decision assessment of the environmental impacts of development proposals serve a worthwhile purpose, but would their effectiveness be enhanced by a requirement that proposals must meet certain environmental protection requirements in order to be approved? It is not enough to identify the impacts before a decision is made without specifying how these impacts will affect the decision on a proposal being evaluated.

E. Comments on a variety of Issues and Conclusions

In modern regulatory theory, much attention is being devoted to studies of the use and effectiveness of market force measures rather than the more direct application of government power to effect change. How will market forces influence sustainable development decision behavior on a significant scale?

Any normative rule designed to change behavior must be effective. How is "sustainability" measured to determine if the rule is effective? Is it measured at two points in time? Over periods of time? Based on a specific set of sustainability indicators? Is it measured locally, regionally or nationally? Which institutions are able to reliably measure sustainable performance at any level? An internal or external organization? A multi-lateral organization, such as the U.N.?

From the six examples described above in paragraph C, the following conclusions can be drawn. First, the most descriptive measures define individual rights to a clean environment as a fundamental human right. Second, individual enforcement of that right is a preferred provision as it gives all people an incentive to protect their interest. Individual enforcement can be in conjunction with parallel State obligations. Third, some measure of determining whether sustainable development standards are met should be incorporated to test its effectiveness in pre-decision assessment cases. Fourth, as a World Constitution, individual nations will commit to the principles of sustainable development by adopting a multi-lateral treaty. Within nations, the relationship between the national obligation and state and local commitments to the same obligation should be addressed.

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ПРАВА ЛЮДИНИ, ДЕРЖАВ ТА ЕКОЛОГІЧНА КОНСТИТУЦІЯ ЗЕМЛІ

На конференції, присвяченій федералізму у США та колишньому Радянському Союзу, що проходила в Університеті Хофстра (м. Нью-Йорк) 1992 р., член української делегації професор Юрій Туниця вперше висунув ідею створення Екологічної Конституції Землі (ЕКЗ) саме під цією назвою.

Серед багатьох функцій ЕКЗ, вона гарантуватиме кожній людині, як громадянину світу, громадянське право на безпечне та здорове довкілля, яке у даній публі-