Integration of Environmental Considerations into Legal Decision Making at the Domestic Level

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ABSTRACT

The internationally recognised need to integrate ecological considerations into all levels of decision making calls for three important revisions of the domestic legal systems of industrialised and industrialising nations -

1 Constitutional protection of environmental rights

2 Re-evaluation and codification of civil law to institutionalise civil mechanisms for environmental protection

3 Legal recognition of social and environmental responsibilities which pervade title to land.

That these revisions are compatible with western democratic social and economic organisation is demonstrated by practical examples in jurisdictions where similar revisions already have been implemented. Such revisions will have the most marked effect on land law and, specifically, land title registration systems. The initiatives are completely compatible with technical innovations in electronic cadastral database construction, and indeed carry further the opportunities that these developments offer.

Keywords and phrases: constitutional reform; civil rights; environmental rights; ecologically sustainable development (ESD); common law; codification; property rights; Torrens system; environmental responsibility.

INTRODUCTION

When the UN appointed World Commission on Environment and Development articulated the concept of *sustainable development* in its report *Our Common Future* –

> ... development that meets the needs of the present without compromising the ability of future generations to meet their own needs[1]

it also reaffirmed the need to integrate environmental considerations into all levels of decision making -

> The common theme throughout this strategy for sustainable development is the need to integrate economic and ecological considerations in decision making. They are, after all, integrated in *the workings of the real world*. This will require a change in attitudes and objectives and in institutional arrangements at every level.[2]

Legal decision making is also touched by this need for integration -

> Sustainability requires the enforcement of wider responsibilities for the impact of decisions. This requires changes in the legal and institutional frameworks that will enforce the common interest. Some necessary changes in the legal framework start from the proposition that an environment adequate for health and well-being is essential for all human beings - including future generations. Such a view places the right to use public and private resources in its proper social context and provides a goal for more specific measures.[3]

The path toward integration of the concept of *ecologically sustainable development* into International Law was pointed out to us by the Vice President of the International Court of Justice, His Excellency Judge Weeramantary, in his separate opinion in the *Danube Dam Case*.[4] His Excellency formulated this international concept as a principle of International Law exhibited by the practice of civilisations with far longer histories than the three centuries of western industry. The principle is a dialectical synthesis between the right to develop and the imperative to provide for future generations. This principle delimits the concept of *dominion* in International Law - in other words, it delimits the *sovereignty* of nations. Applied to domestic public law, the power of the State over its subjects and territory must be similarly delimited, and this must be made enforceable by constraints in favour of environmental rights embedded in an entrenched constitutional recognition of civil rights. Applied to domestic private law [civil law], this limitation of the concept of *dominion* logically manifests in an inherent constraint on *ownership*.

I explore below three major legal areas which must be reformed if the international program to integrate environmental considerations is to be successful in market economies -

1 Constitutional protection of environmental rights

2 Re-evaluation and codification of civil law to institutionalise civil mechanisms for environmental protection

3 Legal recognition of social and environmental responsibilities which pervade title to land.

1 Constitutional Protection of Environmental Rights

Historically, the declaration of a Republic has been accompanied by a *Declaration of the Fundamental Human Rights*, the truths of a citizen's political existence *vis à vis* the new polity which the citizenry joined in creating and thus legitimates.

Internationally, in the post-war era new *Constitutions* have generally been built upon enduring constitutional guarantees of civil rights, developed through earnest reflection on heart rending experiences of massive internal and global conflict. The modern German *Constitution*[5] is one particular example which demands our respect. The statement of fundamental rights which it contains has been interpreted by the German courts to embrace environmental responsibilities and rights.

A human rights approach to environmental protection is self-evidently anthropocentric, but its value should not be dismissed for that reason alone. The European Human Rights Court has already held that a state of pollution can be an interference with the *right to respect for private and family life* which is protected in Article 8 of the European Convention for Protection of Human Rights and Fundamental Freedoms.[6] The enjoyment of other human rights is also affected by environmental factors.[7] The protection of natural ecosystems should also be included.

In the course of democratising formerly totalitarian East European governments, the German constitutional model has been adapted in drafting *Constitutions* for the new German states such as Brandenburg[8] and Thüringen.[9] These *Constitutions* were drafted in negotiation with the former Christian Democratic Union (CDU) federal government of Chancellor Kohl, which probably was the most electorally successful western conservative government of the post-war era. From a global perspective these new *Constitutions* are progressive models. Express environmental rights and responsibilities have been included in these new compacts.

The first reference to the environment is found in the Preambles. The people of the Free State of Thüringen, for example, joined in forming their *Constitution* -

> ... with the purpose of respecting freedom and dignity, of organising community life in social justice, *of conserving and protecting nature and the environment, of fulfilling the responsibility to future generations*, of promoting inner as well as outer peace, of maintaining the democratically constituted legal order and of overcoming divisiveness in Europe and the World ...

Naturally there are rights against interference with health and personal security and these have environmental applications, however, one also finds statements of

environmental values as elements of the fundamental values of the polity being constituted. In a division headed *Nature and Environment* the *Constitution* of Thüringen provides in Article 31 -

> (1) Protection of the natural bases of human life is a responsibility of the Free State and its inhabitants.
>
> (2) The natural ecosystem and its sound functioning are to be protected. The native species of animals and plants and particularly valuable landscapes and areas are to be preserved and placed under protection. The State and its regional administrative bodies will so far as possible work toward elimination or remediation of environmental damage caused by humans.
>
> (3) Natural resources and energy are to be dealt with sparingly. The State and its regional administrative bodies will promote an environmentally just supply of energy.

Article 32 goes on to state the human relationship with animals. The *animal rights amendment* of the German *Civil Code* has already specified that as a matter of private law an animal is not *a thing* to be owned, but rather a living thing to be handled and for which responsibility must be taken according to law.[10]

> Animals are to be respected as living things and companions in creation. They are to be protected against handling which is not appropriate to their species and suffering which is avoidable.

Article 33 provides a right of access to public information about the environment.

> Everyone has the right to information about data which concerns the natural environment in his or her area and has been acquired through the Free State, so far as this is not contrary to legislation or the rights of third parties.

These constitutional provisions are largely repeated in the *Constitution* of Brandenburg,[11] which also integrates environmental considerations into economic, property and related rights. With respect to a guarantee of property rights, the *Constitution* of Thüringen basically reproduces Article 14 of the Federal German *Constitution,*[12] which since the 1950s has been interpreted as imposing environmental obligations on proprietors.[13] With respect to economic rights, Article 38 of the *Constitution* of Thüringen provides -

> The organisation of economic life shall correspond to the fundamental principles of a socially and ecologically obligated market economy.

Similarly, Article 42 of the Brandenburg *Constitution* provides -

> (1) Everyone has the right to free development of individual economic initiative, so far as he or she does not injure the rights

of others and does not contravene the *Constitution* or laws that accord with it. The State will strive after competition and equality of opportunity.

(2) Economic life is to be formed pursuant to the fundamental principles of a socially just market economy obligated to protection of the natural environment. The misuse of economic power is impermissible and to be prevented.

Article 43 of the Brandenburg *Constitution* goes on to make specific provision with respect to agriculture and forestry -

(1) The use of land for agriculture and forestry must be oriented to spatial justice, sustainability and ecological viability.

(2) The State will specifically promote the contribution of agriculture and forestry to care for the cultural landscape, to support of rural areas and to protection of the natural environment.

The wisdom of the German constitutional approaches, gained from unenviable experiences, should be appreciated and not effaced through "it could not happen here" dreaming. Not least, the German compacts show us what can be done within existing political constraints.

2 Re-evaluation and Codification of Civil Law to Institutionalise Civil Mechanisms for Environmental Protection

I have referred to the internationally acknowledged need for integration of ecological considerations into all levels of decision making.[14] In the public sector the issues are relatively clear. However, ongoing transfer to the private sector of major fields of decision making which involve public welfare and global environmental quality must be balanced by commercial internalisation of the costs of environmental damage. This induces a truer reflection of environmental production costs in the market and helps to curtail economic advantages gained at the expense of the environment generally, and at the expense of commercial operators adhering to sound environmental standards specifically.

Achievement of this requires complete transformation of the *civil law*; that is, the law operating between private citizens. The internal dynamics of this legal discipline have, to generalise, hardly been touched since the 19th century. Instead, horizontal layers of public regulation were applied to constrain dysfunctional social and environmental impacts.[15] As these public constraints are removed through deregulation, the impact of the surpassed social and environmental values of archaic civil law is again released unmediated into our own era - an era of immense human technological powers, driven by powerful and rapid global economic forces, unimaginable to our great-great-grandparents who were nevertheless capable of deforesting vast tracts with a machine so simple as the steam traction engine within a generation.[16]

Principles of the Civil Law

For example, in Common Law systems the usual legal remedy for a breach of the civil law is an award of monetary damages to the party disadvantaged. However, in view of the extreme consequences of most forms of environmental damage it must be prevented before it actually takes place - no application of funds will be a complete remedy after the event. The need to structure *precautionary action* into private transactions through civil law has already been recognised by some authors,[17] and will emerge as one of the great legal challenges of the new century. The Common Law systems already recognise that a compulsive remedy is appropriate when something unique is at stake, such as an interest in land, and extension to ecosystems seems a small step.

Another example might be the grounds for having a contract set aside. It is simple law that a transaction lacking good conscience in relation to one of the parties may be set aside. A transaction leading to a situation contrary to the principle of *ecological sustainable development* could easily be regarded as unconscionable in relation to future generations, and thus be at risk of being set aside, along with a proprietary transaction made in consequence of it. Third parties who later acquire proprietary interests in the same land might not make a *good faith acquisition* if, on the facts, the ecological unsustainability had been so apparent that they must have closed their eyes to it. These parties would thus squarely be liable for the costs of remediation as a matter of basic civil law - an ecological *Equity of Rectification* - without such strong need for convoluted statutory schemes with their inevitable legal vacuums which emerge when interpreted in the light of civil law traditions received from the 19th century, and the "orphan" land parcels which result. Financial institutions which have scooped "laundered" interest and fees from the unsustainable practices could share liability on unjust enrichment principles[18] - there was no juristic reason for the enrichment at cost of an ecologically sustainable ecosystem.

Such transformations of the civil law to reflect contemporary international ethics would, at least, internalise the need for scientifically based environmental assessments into private transactions. The weighting of insurance risks would change as a consequence, and financiers taking land based securities would take a more directly supervisory interest in the activities of their mortgagors.

The thorough and integrated revision of our civil law necessary to implement these and further adjustments, and thus to achieve urgent internationally accepted environmental objectives, can only be accomplished in the course of developing a comprehensive green *Civil Code* integrating into all private transactions the incentives and disincentives which can guide them toward the most acceptable environmental outcomes.

Problems with Common Law Method

Many legal problems resulting from rapid economic and technological change are simply *unprecedented*. The hugely magnified technological power of humans to alter the environment is one major source of these legal issues, and we anticipate that the rate of technological change will continue to accelerate. We must dare to ask whether the precedent-based Common Law system has an adequate capacity to

renew its basic legal principles; whether its glacial process of adaptation to changing social and environmental conditions is capable of dealing with the urgent issues which actually confronted us more than ten years ago,[19] but only now have made it on to the political agenda for change, let alone the corresponding legal agenda. Many vital common law principles have practically fallen *otiose* because they are so hopelessly bound up with antiquated social values that they cannot found a just resolution of environmental disputes. Contemporary environmental lawsuits can rarely be framed around them with any expectation of success - the doctrine of public nuisance is a good example.[20] The failure of the Common Law system to address these problems is not an isolated problem - it portends the future and can only intensify with ever accelerating social and environmental change.

Common Law countries could assert creativity in the integration of environmental considerations into the civil law in the course of developing their own *Civil Codes*. Among many available sources of inspiration there is the project to develop a *European Civil Code* under the auspices of the European Union,[21] and Germany is in the process of approving an *Environmental Law Code*.[22] I do not propose to freeze a new *status quo* in a Code, but rather to open basic legal renewal to a transparent process more responsive to multi-disciplinary human knowledge. A permanent law reform structure with democratic underpinning could be instituted to monitor implementation of the new *Code* and initiate further development, complementing creative judicial interpretation. This is not a "legal isolationist" or "nationalistic" attitude. It would increase the importance of mature international comparative legal approaches conducted according to recognised methodologies, in place of present post-colonial and neo-colonial relationships between the common law jurisdictions.

The need to integrate ecological considerations into land law, and especially the decision-making of those who hold private proprietary rights, is a pre-eminent example of this great challenge in the civil law.

3 Legal Recognition of Social and Environmental Responsibilities which Pervade Private Title to Land

The origins of most land title registration systems in the world can be traced back to the system developed in the free Hanseatic cities of Northern Europe.[23] This includes the Torrens system.[24] The similar system initiated in England was inspired by a number of sources such as the Torrens and Prussian models[25] and the findings of extensive 19th century inquiries.[26] In many other parts of the world land title registration models have been derived directly, as in Japan, or indirectly, as in South Korea, from German sources. The contemporary German land title registration system resembles the Hanseatic model, with important modifications. Other land title registration systems also closely resemble Hanseatic and later German models in basic principle, such as the Dutch system.

In the German legal system it is express that rights of property carry responsibilities.[27] Although in the contemporary German legal system this is recognised as a public law responsibility, this has not always been the case. Until the latter part of the 19th century the land title registration system of the Free and Hanseatic City of Hamburg was an emanation of the social and environmental responsibilities of the land owner. The Hamburg system of the 1840s was the unmistakable precursor of the Torrens

system, the Prussian system,[28] and, with some modification, the contemporary German land title system. The modern distinction between public and private law realms, with its strong emphasis on the public realm in social and environmental issues, should not be invoked to obscure this fact in our era of thoroughgoing privatisation. This modern distinction, and exclusive emphasis on public law, actually developed in the course of the industrial revolution in an attempt, which was plainly inadequate, to stabilise the dysfunctional social and environmental effects precipitated by these very industrial challenges. Graphic descriptions of environmental conditions created during the unregulated industrial revolution are to be found in the literary works of Charles Dickens generally, and also in the early sociological work of Engels.[29]

This history of land title registration, and its long overlooked underpinning of wider obligation, begs national court systems to recognise that in most of the world, as a matter of civil law, title to land is held subject to implicit social and environmental responsibilities.

This recognition would mesh with the prevailing international perspective and give legal voice to contemporary environmental ethics. It would also reinforce the efforts of public instrumentalities to achieve our urgent objectives of environmental protection. In this connection it is interesting that a recent critique of the globalisation process has identified the recognition of obligations which pervade private property as critical in addressing many of its undesirable repercussions.[30]

The responsibilities of a particular private land owner are to be ascertained relative to the social and environmental context of the land in question. The power of contemporary *Geographic Information System* (GIS) technologies is a very substantial aid in establishing this context, and thus to inform the possibilities for integration of ecological considerations into the decision making of private land owners, and their land conservation support groups, as well as regulatory authorities. In this way, the registration of private ownership of land can be re-established in industrialising and industrialised societies as a reciprocal public acknowledgment of responsibility for the long term ecological sustainability of land, as well as entitlement to the fruits and benefits which the land is physically capable of bearing within principles of orderly management, scientifically informed.

Recording reciprocal public acknowledgment of responsibility and entitlement was indeed the original function of the city records which evolved into the globalising conclusive land title register.

POSTSCRIPT

In the elucidation of these approaches to reform of domestic legal systems I have used many German examples to illustrate possibilities for the resolution of problems in the integration of ecological considerations into the legal sphere. This is not to say that German Environmental Law is the best or most stringent in the world. There are, however, many good reasons why viable starting points can be identified through reflection on the German system.

Foremost, the basic legal principles of land title registration emanated from free mercantile cities such as Hamburg, Lübeck and Gdansk. It is very educative to see

how these principles have evolved to meet the challenges of the 20th century through analysis of contemporary German law. Secondly, Germany has the largest national economy in the European Union and is often referred to as a *locomotive* industrial-capitalist economy. Thus, it cannot be asserted that a principle of social and environmental responsibility pervading the concept of property is incompatible with an economic system based on a concept of private property. Indeed, the era in which many of the principles of responsibility reached fruition was governed mainly by a conservative CDU government, which enjoyed a remarkable record of electoral success.

Doubtless, a more ambitious program could be, and probably should be developed but these achievements are at least inspiring, and provide a basic admirable standard from which discussion may depart.

REFERENCES

[1] Also referred to as the *Brundtland Report* – see World Commission on Environment and Development, *Our Common Future*, Oxford University Press, Australia, 1990, 87. The concept comprises a range of sub-principles, such as inter-generational equity, the precautionary principle and environmental impact assessment, and the preservation of biodiversity: see the *Rio Declaration* in S P Johnson, *The Earth Summit: The United Nations Conference on Environment and Development (UNCED)*, Graham & Trotman/Martinus Nijhoff, 1993.

[2] *Brundtland Report*, above note 1, 106 [my emphasis].

[3] *Brundtland Report*, above note 1, 107. These concerns were manifested as expressions of international will in Principle 4 of the *Rio Declaration on Environment and Development* and in Chapter 8 of *Agenda 21*, entitled "Integrating Environment and Development in Decision-Making": text in S P Johnson, *The Earth Summit: The United Nations Conference on Environment and Development (UNCED)*, Graham & Trotman/Martinus Nijhoff, 1993.

[4] *Hungary v Slovakia (Judgment)* (1998) 37 *International Legal Materials* 162. Also at http://www.law.cornell.edu/icj/icj6/ihsjudweeraman.htm This separate opinion was in agreement with the majority result in the case.

[5] *Grundgesetz für die Bundesrepublik Deutschland* vom 23. Mai 1949 (BGBl. S. 1), the title of which is often translated as the *Basic Law*.

[6] *López Ostra v Spain* [1994] European Human Rights Court, Strasbourg, 41/1993/436/515.

[7] See generally, T Simpson & V Jackson "Human Rights and the Environment" (1997) 14 *Environmental & Planning Law Journal* 268.

[8] *Verfassung des Landes Brandenburg* at http://www.brandenburg.de/land/mi/recht/lverf/index.htm

[9] *Verfassung des Freistaats Thüringen* at http://www.thueringen.de/verfassg/ver1_1.htm

[10] See § 90a and § 903 *BGB*. See also *Poodle Access Case* (1997) 50 *Neue Juristische Wochenschrift* 3033.

[11] See above note 8, Article 39.

[12] See above note 5.

13 See M Raff, "Environmental Obligations and the Western *liberal* Property Concept" (1998) 22 MULR 657.

[14] See above at note 2.

[15] Early examples of the *social* include workers compensation schemes operating without proof of fault in the event of industrial accidents. Early examples of the *environmental* include public health legislation, later broadening in the 1920s into land use planning and the creation of nature reserves.

[16] T Griffiths & L Robin, *Ecology and Empire - Environmental History of Settler Societies*, Melbourne University Press, 1997.

[17] See for example, C H Seibt, *Zivilrechtlicher Ausgleich ökologischer Schäden*, J C B Mohr (Paul Siebeck), Tübingen, 1994 [Max-Planck-Institut für Ausländisches und Internationales Privatrecht - Studien zum Ausländischen und Internationalen Privatrecht Nr 42].

[18] See Toohey J in *Baumgartner v Baumgartner* (1987) 164 *Commonwealth Law Reports* 137, and see *Peter v Beblow* (1993) 101 *Dominion Law Reports* (4th) 621.

[19] See M Raff, "Come Back King Canute! Green House Effect and the Law" (1989) *6 Environmental & Planning Law Journal* (Australia) 271.

[20] See *Ball v Consolidated Rutile Ltd* [1991] 1 *Queensland Reports* 524.

[21] See A S Hartkamp *et al*, *Towards a European Civil Code*, Kluwer, Dordrecht, 1994.

[22] Deutschland, *Umweltgesetzbuch* (UGB-KomE), Entwurf der Unabhängigen Sachverständigenkommission zum Umweltgesetzbuch beim Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit, Duncker & Humblot, Berlin, 1998.

[23] The Hanseatic trading cities were among the first *free cities* in Europe, excised from the medieval feudal hinterland and turned over to free mercantile activities. This qualified them for membership of the Hanseatic League of mercantile trading cities.

[24] This includes the Torrens System. For an extensive list of jurisdictions which have adopted the Torrens system, see S R Simpson, *Land Law and Registration*, Cambridge University Press, 1976, 77.

[25] C Fortescue-Brickdale, "Registration of Title in Prussia" (1888) 4 *Law Quarterly Review* 63. See also C Fortescue-Brickdale, *Methods of Land Transfer - Eight Lectures*, Stevens & Sons, London, 1914, 129-130: "The population affected by the system [in Germany and Austria-Hungary] amounts to 95 millions, whereas the population of Australasia is only 5½ millions. The general conditions also combine in many ways to render this Central European system the most useful and general study for study and imitation."

[26] For an overview of these inquiries see Simpson, above note 24.

[27] Article 14 of the German *Constitution*, see above note 5.

[28] With respect to the English system, see text above at note 25.

[29] See F Engels, *Conditions of the Working Class in England* [trans & ed W O Henderson and W H Chaloner] 2nd ed, Blackwell, Oxford, 1971.

[30] H P Martin & H Schumann, *The Global Trap: Globalization and the assault on prosperity and democracy* [trans P Camiller], Zed Books, London, 1997, 128.