

Environmental Law as Guarantor of Social Justice

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The objective of this presentation is to take up certain elements of the role that environmental law plays – or at least should play – in the consolidation of social justice.

Having thus identified the purpose, we must begin by defining the components of the relation we intend to establish. Both “environmental law” and “social justice” are studied from different approaches using distinct concepts. While not intending to enter into the rich debate around them, we will constrain ourselves to a simple definition: let us say for our purpose that environmental law is that branch or discipline in the law that concerns the relationship – and the impact – of man with – and on – the environment and natural resources and that “social justice” refers to a state that is desired, if not attained, in which the needs of a given social collective are met satisfactorily and with equity, particularly in qualitative terms that prime “being” over “having.”

If we accept these elements of our equation as at least moderately valid, we will find that the link by which environmental law satisfies justice requirements in human societies is not evident at first glance. Indeed, when we examine environmental law from the conceptual perspective just described, the first level of operation of such Law involves “channeling” human activity such that its impact on the environment and the ways that natural resources are employed does not disrupt to a dangerous degree the environment – of which man forms part but which includes not only mankind but rather all species that populate the planet Earth.

Granted, improved conditions for the environment and natural resources imply greater quality of life for man, which – in principle – should have positive repercussions for the economic and social conditions of human society. From this point of view we should therefore be able to affirm that taking greater care of the environment will lead to social improvements, and as such environmental law could and should also contribute at the level of social justice. In reality, however, the matter is much more complex because, in the first place, Law and Justice are distinct concepts that do not even strongly reinforce each other. Anyone who has operated in the field of Law – seen above all as a system of positive norms – knows that what is legal is not necessarily just, and vice versa. Law is more concerned with the ways that human behavior is subject to norms while Justice embodies an ideal that is not always definable. Environmental law is no exception and not everything that falls in its scope of application necessarily involves justice.

In addition, the relations between man and the environment are not exclusively determined by the effects of man's activity upon the environment inasmuch the processes of production, distribution, exchange, and consumption of the goods resulting from human activity have led to the current global environmental crisis. Indeed, these processes constitute the relations of production through which society expresses its existence. By consequence, the premise "economic improvement leads to environmental improvement leads to social improvement" simply does not work. In fact, the Earth is going through a moment of significant economic and technological development unified with abysmal social disparities and the destruction of natural resources and ecosystems that are nearly past the point of no return. That is why any attempt to deepen the analysis of this subject brings us to the necessity of focusing on the very origin of the environmental problem such that we currently know it.

The origin of the environmental crisis

All human social relations have been formed within and on the basis of interactions with the environment of which man forms part. There has thus always existed an “environmental problem,” for man has constantly had to reconcile – with varying results – his relationships with and within his surroundings.

Nevertheless and without questioning how much of the history of human society – and the history of Law – is a reflection of the relationship between man and his surroundings – natural and manmade – there has occurred in the last two hundred years of our evolution as a species a great rift in these relations on a global scale,¹ a rift first scientifically forecasted in the waning years of the 19th century, gradually leading to a unanimous diagnosis regarding the danger for the survival of the human species that arose from the ways mankind interacted with the environment. The ways that, for generations, men have used the environment and the exploitation, distribution, and consumption of the natural resources have been accelerating at a rhythm that is incompatible with the finite character of the environment, both in terms of providing the goods necessary for the satisfactory continuation of human life and of housing all the waste produced by human activity. As a consequence, Law, which in the past regulated human relations on the basis of a presumption of infinite natural resources over which legislation essentially concerned itself with establishing ownership and regimes for the use of those resources, now faces an imperative need to reformulate the relation, a reformulation that implies a different normative framework that is still struggling to find its definitive physiognomy.

¹ Rifts have occurred throughout history in with regards many previous civilizations – such as that of the Mayans – their downfall as a society was associated, at least partially, with poor management of natural resources. However important these examples may be, however, all of these phenomena have a “local” character that distinguishes them from the global nature of the current crisis.

As has already been mentioned, the first cries of alarm were raised by scientists² and started the gradual incorporation of “environmental” issues into political agendas, a process that culminated in a few major conferences that tied together the themes of environmental protection and economic development.³ The full explanation, however, goes beyond the technological impulse initiated during the 19th century industrial revolution,⁴ even though that impulse exponentially multiplies man’s capacity to interact with and modify the environment.⁵ The technological phenomenon – of such magnitude that it is called a Revolution and continues, in various stages, to this day – takes place within a certain mode of economic and social development. This model is based on class inequality and is by consequence characterized by marked social injustice.

Under the patters of development that characterize the hundreds of years of Industrial Revolution, the capacity to appropriate and exploit more intensely natural resources neither was or is accompanied by a system for distribution to satisfy adequately social needs. On the contrary, from its outset to present day, wealth and poverty have continued to polarize, reaching extremes hitherto unheard of. For that reason, concern for the environment has taken two primary directions:

² The Swedish scientist Svante Arrhenius, awarded a Nobel Prize in 1903, had warned in 1896 that the Earth’s temperature would rise with increased CO₂ emissions. In 1962, Rachel Carson’s book *Silent Spring* denounced the effect of chemicals used in agriculture on bird populations. For their part, Sherwood Rowland and Mario Molina had begun their research on the effect of chlorofluorocarbons on the ozone layer by 1972.

³ In particular the 1972 UN Conference on the Human Environment held in Stockholm and the 1992 Rio de Janeiro Earth Summit.

⁴ The industrial revolution commonly refers to the economic and social process through which society ceased to be based on agriculture and began depending on industry. The first industrial revolution took place in the United Kingdom at the end of the 18th century and affected all processes of production.

⁵ For example, the increase of gases that have a greenhouse effect in the atmosphere (IPCC 2007) in comparison with “pre-industrial” levels of carbon dioxide – 280 parts per million – with post-industrial and current levels – nearly 379 parts per million in 2005.

- First, and this is the origin of the green and conservation movements, there is the most obvious current that seeks a more harmonized relationship with resources and their use, aiming for a planetary equilibrium between mankind, plant and animal species, and the ecosystems.
- Second, and especially stemming from social movement that have gradually been aligning themselves with “green” environmental movements, there are currents that emphasize the importance of improving the processes for extracting and using natural resources and the rights of access to these resources – to water or to land, among others – and argue that the changes in the situation of the global environment will not occur unless changes of great magnitude also take place on social and economic orders.

Of course we have formulated this distinction in purely schematic terms, for the reality is much richer and more complex. The basic idea, however, remains valid: the problems surrounding the environment are the result of many technological and environmental factors, and they are not generally addressed integrally by institutions, policies, or the law.

The unsustainable patterns of production and consumption

While obvious symptoms of stress can be seen on Earth, and more than three billion people suffer from poverty or severely limited access to natural resources, it is calculated that the behavior of approximately 1.7 billion people – more than a quarter of all humanity – follows a model that includes things like dieting, transportation systems, and lifestyles; a model that was until the 20th century limited to the industrialized nations of Europe, North America, and Japan. In China alone it is calculated that 240 million people now live this way, and that the number will soon surpass the corresponding number for the United States of America.⁶

At the same time, consumption among the classes with the greatest economic power – but also increasingly among middle classes – decreasingly represents the habitual manner by which

⁶ www.worldwatch.org/pressnews20040108.html

people satisfy their needs. Rather, consumption is turning into an ends in itself, a status marker that is sought at all costs.

The extreme case is that of the United States, responsible for 25% of the carbon dioxide emissions despite the fact that it only represents 4.5% of the world's population. Statistics show that there are more vehicles on the roads in the United States than there are people with licenses to drive, that houses built in 2000 are 38% larger than houses built in 1975, although the number of people per household has fallen, and that the average size of refrigerators has increased 10% between 1972 and 2001, to take a few examples from the list of statistics that characterize the most unsustainable of all the models of living.

Levels of consumption are significantly lower in developing countries, particularly among the poorest sectors of the population. To give an example, while the average U.S. citizen used more than 300 kilograms of paper per year in 2004,⁷ the levels in developing countries are notably less, averaging 18 kilograms and decreasing to 4 kilograms in India and less than one kilogram in many African countries. According to United Nations calculations, between 30 and 40 kilograms of paper per year per citizen are necessary to meet minimal education and communication needs, meaning that the needs are “overserved” in developed countries and “underserved” in developing countries, which is a clear case of social injustice. Similar analyses could be applied to multitude of basic goods and services.

The incompatibility of environmental protection with social justice and the dominant modes of production and consumption.

The ecological system functions as a provider of basic goods to the economic system, which in turn converts them into consumer goods or services. At the same time the ecological

⁷ <http://www.worldwatch.org/system/files/Paper.pdf>

system acts as a dumping ground for the waste that is a side product of the processes of production and consumption.

Following the dominant development models, the economic system does not take the requirements of the ecological system into account and what happens in practice is that the environmental resources and services are used at a higher rate than the one at which they naturally replenish themselves, and waste is produced at a rate higher than which the ecosystem can assimilate it. This is why neither social nor environmental objectives are congruent with the private character of economic processes.

In addition, capitalist growth is based on the constant creation of needs in order to sustain increasing demand for new goods. The consumer is therefore the servant of the producer, as the consumer is conditioned to absorb the output. These production processes also have built-in obsolescence, meaning that the goods acquired last less time than consumers expect.

The commercial incentives under this scheme are not going to be tied to the real needs of human beings through the production of basic goods. Instead non-essential consumption goods, in demand from minority high-income groups, proliferate, leading to unsustainable modes of production and consumption, all of which translate into greater pressure on natural resources.

This leads to what Leonardo Boff has described as “the knot of global social injustice,”⁸ saying:

“How much injustice and violence can the human spirit bear? It is unjust and pitiful that in the current order of globalized capital, 20% of humanity possesses 83% of the vital resources (in 1970 it was 70%) and the poorest 20% must subsist on 1.4% (in 1960 it was 2.3%). This social cataclysm is neither innocent nor

⁸ http://www.ecoportal.net/Temas-Especiales/Economia/La_contradicion_capitalismo_ecologia

natural. It is the direct result of a type of development that does not measure its consequences on nature and social relations. At the same time, consumption among the classes of greater economic power – although also increasingly among middle classes – no longer represents methods habitually employed to meet one's needs, but rather has become an end in and of itself, a status marker that is sought at any price.”

The ecological reaction.

The term ‘ecology’ first appeared in the 19th century and is defined as the science of relationships between individuals, the ways in which they are organized, and how they interact with their surroundings.⁹ When the term is applied to man, which is done through a process of translation of the concept into a new context, ecology can encompass society and the environment biunivocally, as the former transforms the latter and the latter provides the sustenance that the former requires. This inevitably leads to the “ecological” analyses that end up including the economic, social, and political variables of human existence. In this way political and ethical debates of the greatest importance come under the purview of ecology.

This point reached, conditions were suitable for the results of environmental analyses to shift to the political sphere, which, following a line of questioning focusing on the way our mode of production and consumption modifies our environment, led to confronting the system of social organization itself. The second question also fell under its own weight – if we recognize that our modes of production, distribution, and consumption are unsustainable, how should we reorganize them?

Implicit in ecology and environmental movements that developed around it, then, is a call for the reassessment of the values orienting the social project that centers on the modes of production, consumption, and even life; modes that are built on systematic productivity,

⁹ Leonardo Boff. La contradicción capitalismo/ecología, en www.ecoportal.net. 25-07-06

quantitative growth at any cost, and unhindered waste. In complementary fashion, a call to reassess personal relationships is made, following the understanding that the relation of man to nature cannot be divorced from the relations between men and women themselves. The need to change human mentality is thus recognized, reorienting it to a new style of life in which solidarity, justice, and ethics come first.

The ecological doubt.

One of the best expressions of the predominant conflict between environmental interests and social justice is the concept embodied in the idea of Ecological Debt.¹⁰ This concept emphasizes the responsibility of industrialized countries for the destruction of the planet and explains how the deterioration of and through exploitation of natural resources has occurred outside their borders. The concept of Ecological Debt therefore holds that the industrialized countries are responsible for and have an obligation to the developing world, which has been pillaged for centuries to fuel the growth and fortunes of the rich countries. It should also be observed that the ecologically unequal exchange that increases the Ecological Debt does not take into account the social requirements or the cultural protection of our peoples.

The Earth Charter.

A relevant example of the way environmental considerations should be woven into political environmental initiatives appears in the Earth Charter, which states:

The dominant patterns of production and consumption are causing environmental devastation, the depletion of resources, and a massive extinction

¹⁰ The Word ecology has its roots in the Greek oikos (house) and "logie" (study). Generalized in the last decades of the 19th century, the term adopts the meaning "the most satisfactory organization of our house Earth in its relations with the nature that surrounds it."

of species. Communities are being undermined. The benefits of development are not shared equitably and the gap between rich and poor is widening. Injustice, poverty, ignorance, and violent conflict are widespread and the cause of great suffering. An unprecedented rise in human population has overburdened ecological and social systems. The foundations of global security are threatened. These trends are perilous—but not inevitable.¹¹

The Charter adds that it is necessary to build democratic societies that are just, participatory, sustainable, and peaceful. It is necessary to ensure that communities, at every level, protect human rights and basic freedoms, provide opportunities for everyone to develop to their fullest potential, and promote social and economic justice to make it possible for everyone to lead a secure, dignified – and ecologically responsible – life. Likewise it affirms that eradicating poverty constitutes an ethical, social, and environmental imperative and accurately points out that this implies “[g]uarantee[ing] the right to potable water, clean air, food security, uncontaminated soil, shelter, and safe sanitation, allocating the national and international resources required.”¹²

Strengthening the role of environmental law in the quest for social justice.

What has been said up to now are only analytical notes on a reality that has been exposed in much greater detail and depth by several authors: there is no isolated environmental problem; any attempt to reverse the current degradation of the planet necessarily involves the transformation of the dominant patterns of production and consumption and hence an entirely new – or at least fully renovated – model for social and economic development which would give space for full human development.

¹¹ The Earth Charter is a non-binding instrument that seeks to advance environmental principles and concepts beyond the current frameworks sanctioned by governments. See: <http://earthcharter.org/discover/the-earth-charter/>.

¹² Ibid.

There exists absolutely no long-term possibility for the realization of this transformation if effort is only made in one direction. Any political or legal focus that isolates the environment and concentrates solely on it will end up stumbling over the economic and social needs of millions of people. Any brash attempt at economic development will further aggravate the already compromised environmental situation on Earth and will fail to serve the needs of broad sectors of the population unless it is accompanied by adequate social policies. There exists no opportunity for social improvements that do not involve intervention in economic processes and proper management of natural resources.

It is precisely at this intersection that environmental law must seek a position to contribute to a successful regulation of economic, social, and environmental variables. The task, notwithstanding a few isolated achievements, is far from complete. We live in a world where law, a superstructural factor that depends on the economic base, attempts to tackle problems that are being driven in another direction by that base. Law in general and environmental law in particular has certainly been “beaten up” many times by this reality. Regarding this contradiction between what environmental protection “should be” and the dominant economic and social practices, a crystal-clear affirmation particularly relevant to our region has been provided José María Borrero:

The environmental norms of Latin American countries exhibit structural and techno-legal limitations. The former correspond to the limited capacity of environmental law to modify social relations, political institutions, and values entrenched in the unsustainable systems of natural intervention. Environmental law is the scapegoat for the ethical paradox of societies that promulgate norms for environmental protection while perpetuating technological mechanisms and modes of production that generate environmental deterioration and contamination. In such circumstances the environmental norm merely

represents “legislative inflation” driven by governmental rhetoric as part of a political strategy to undermine efforts to effect structural changes.¹³

The challenge is two-fold. First the law must reflect aspirations that go against the grain of the reigning economic model and then it must be capable of implementing them – an even more complicated task. Without doubt, the problems facing environmental law, nature itself, and environmental conflicts lie much more on economic, political, and social orders more than in the domain of law.

In the conflict, furthermore, excessive predominance is granted to technological and economic paradigms to the detriment of a vision that gives due attention to nature and life itself.

As Leff Enrique puts it:

The process of modernization, guided by economic growth and technological progress, has depended on a legal regime founded on positive law, forged from an ideology of individual freedoms that privileges private interests. That legal order has been used to legitimate and create norms and instruments for the deployment of market logic in the process of economic globalization. The globalizing momentum that leads to a single lifestyle and worldview that is the measure of all others denies, neglects, and ignores nature – not on the ontological order or as the material organization from which life emerges, but as a “productive ecology” and condition for the sustainability for any economic and social order whatsoever.¹⁴

Echoing what has already been described, there is consistent recognition in the formulation of environmental policies that there is a problem at the very heart of their *raison d’être*, one we have already observed: the modes of production and consumption. If we followed the logical chain of

¹³ Borrero, José María. “Promesas y Límites del Derecho Ambiental” Pág.413. En “La transición hacia el desarrollo sustentable: perspectivas de América Latina y el Caribe” México, Agosto 2002. Primera Edición.

¹⁴ Leff Enrique, “Los derechos del ser colectivo y la reapropiación social de la naturaleza: a guisa de prólogo”, en “Justicia Ambiental: construcción y defensa de los Nuevos Derechos Ambientales, Culturales y Colectivos en América Latina” Red de Formación Ambiental, Serie Foros y Debates Ambientales No.1, PNUMA /UNAM 2001.

these observations, and took law to be the embodiment of policy and strategy, then we would think the primary function of environmental law would be advancing the design and application of formulas to modify human behavior and, for that to happen, the current patterns of production and consumption. A quick look, however, at the legislative manifestations of environmental law, at least at national levels, demonstrates that this is not the case.

To attain the depth necessary for environmental law to reach the economic and social dimensions of the problem, it must strike a balance that recognizes, on one side, the intrinsic weaknesses of the current formulas for sustainable development while, on the other, not shying from optimistically engaging in an audacious project. It is also worth noting that some criticism of the dominant development models targets the whole conceptual machinery of sustainability, including the very concept of sustainable development, positing that these concepts were developed with the market and the present development goals in mind to satisfy – and distract – the environmental concerns of vast sectors of society. It is argued, from this perspective, that development and sustainability are in fact irreconcilable, and that:

In practice the crucial factors that impede and hinder the supposed union of development and environment have been artfully avoided. The the current international economic model, both in industrialized countries and in the majority of developing countries, is, in definitive, incompatible with significant reduction in environmental deterioration. The two phenomena described, the global environmental crisis and the socio-economic decline of the South, are clearly interconnected, leading to unacceptable production systems in the North and development models completely incompatible with sustainable development in the South.¹⁵

¹⁵ Allende Landa J. Financiación y conflicto Norte-Sur en la Cumbre Oficial de Río". Ecología Política. Cuadernos de Debate Internacional No.5., 1993. Icaria, Fundación Hogar del empleado. CIP.

At the other extreme of this equation is a much more acritical vision; one which generally assumes that the existing economic models are valid and consider environmental problems as reparable defects of the models. Much of environmental law is based on this paradigm. The former are right to say that the way of framing the entire issue would be much better if it did not involve profound political and economic transformations. Without doubt law would be organized along the lines of fresh premises and its task would be infinitely simpler.

The main problem, however, if we set our agenda according to this perspective, is the paralysis that may set in as we wait for the expected change. By consequence we must, as long as we are aware that the change is not occurring or that those who hold the economic power are not favorable to it, continue working and struggling to advance in every space possible. For this environmental law must be given much more depth and set its sights on more distant, ambitious goals than it currently has. If we look at the legal systems in force on our continent, we see that, beyond a few high altitude declarations in constitutional norms and general laws on the environment, these systems perpetuate and validate the existing development models and go no further than giving them a “green” tint through procedures for the evaluation of environmental impact, environmental licenses, monitors, risk assessments, and other tools that, despite their validity and the need for them, are insufficient when it comes to bringing about profound changes in our traditional ways of doing things.

Regarding the limitations of environmental law, the comments of Dr. Raúl Brañes Ballesteros at the Johannesburg Summit on Sustainable Development (2002) are worth recalling:

Among the factors that make environmental legislation inefficient are, in my opinion, both the lack of development and the mistaken approach that it assumes for the handling of environmental issues when some or all of the following elements converge: 1) the absence of the idea of sustainable

development in the legal system in general and, in particular, in economic legislation; 2) the lack of appropriate instruments for its application, in particular those of a preventive nature; 3) the lack of consideration of social and natural questions involved in environmental issues; and 4) its heterogeneity, not only material but also structural. Among the factors that make environmental ineffective, I see: 1) the insufficient social value the public attributes to environmental law, and even their ignorance of it; and 2) the deficiencies of the institutions charged with administering and legally enforcing it.

The challenges associated with the application of environmental law must not discourage or demoralize the efforts to employ it. In fact, the way this field of law has progressed in recent years and the undeniable results that can be attributed to it in specific areas are extremely noteworthy, even if the bulk of the effort has focused “on the end” of the production chain and is still bound to traditional legal tools that have proven insufficient not only to reverse but just to detain the current patterns of environmental deterioration.

Although some of the challenges seem more accessible, especially those that require intelligent revision and often revolutionary changes in our legal institutions, the truth is that all the challenges inevitably need to be confronted, for otherwise we will reach a point where not just legal institutions but no institution created by man will be able to avert a global environmental crisis. As commonly occurs, conceptualizing the problem is simpler than finding its solution, but that is our task, and, again, in the words of Brañes Ballesteros:

It is important to keep in mind that none of these phenomena are the result of the “natural” evolution of society, but rather the consequence of human decisions and, hence, social actions that must be countered by political measures on a scale that corresponds to the gravity of the situation. There are many reasons for pessimism, but none for giving up on the will to change; social institutions are the creation of human beings and are eminently perfectible.¹⁶

¹⁶ Raúl Brañes Ballesteros Ob. Cit. Pag. 114.