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REFLECTIONS ON COMPARATIVE LAW, ENVIRONMENTAL LAW, AND SUSTAINABILITY

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Professor Nicholas Robinson makes an important contribution by focusing on comparative environmental law as a way of fostering sustainable development.[1] But while environmental law is a logical and appropriate place to begin a discussion about sustainable development, it is only a starting point.

An increase in global pollution and deterioration of the earth's natural resource base formed much of the impetus for the 1992 United Nations Conference on Environment and Development (Earth Summit) as well as the 1987 Brundtland Commission report,[2] which paved the way for this conference. The Rio Declaration on Environment and Development, the Earth Summit's summary of basic principles for sustainable development, included the adoption of "effective environmental legislation."[3] In addition, fourteen of the forty chapters in *Agenda 21*, the international blueprint for sustainable development adopted in Rio, are devoted to the conservation and management of natural resources.[4] These include: the atmosphere, land resources, deforestation, desertification and drought, mountain ecosystems, sustainable agriculture and rural development, biological diversity, biotechnology, oceans and seas, fresh waters, toxic chemicals, hazardous wastes, solid and sewage wastes, and radioactive wastes.[5] Although these problems are experienced differently among countries, they have many common features. Auto pollution is auto pollution, whether it is in Nairobi, Bratislava, or Wilmington. The energetic and intense negotiations among nations concerning the specific provisions of *Agenda 21* attest to the existence of these common problems.

The underlying principles of environmental law also include concepts that are essential to sustainable development. These concepts include intergenerational equity and protection of the resource base upon which

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1. Nicholas A. Robinson, *Comparative Environmental Law Perspectives on Legal Regimes for Sustainable Development*, 3 WIDENER L. SYMP. J. 247 (1998).

2. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987).

3. United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), 31 I.L.M. 874 (1992) [hereinafter *Rio Declaration*].

4. United Nations Conference on Environment and Development, Agenda 21, U.N. Doc. A/CONF.151/26 (3 vols. 1992) [hereinafter *Agenda 21*].

5. *Id.*

society rests.[6] *Agenda 21* and the *Rio Declaration* include significant parts of American environmental law. In negotiating these documents, the United States argued, sometimes successfully, that other countries should adopt some of the most prominent American environmental laws. One such law requires an environmental impact statement prior to conducting any major federal action that would significantly affect the quality of the human environment.[7] Another requires public disclosure of the amount and type of toxic chemicals being released from industrial facilities.[8] The Earth Summit documents also endorse a basic feature of American environmental law, citizen participation in the development and implementation of environmental laws.[9]

Because developed countries have at least a quarter century of experience adopting and implementing environmental laws, comparative law provides an attractive approach for discovering which laws have and have not worked for sustainable development, and under what circumstances they have achieved the best results. Comparative law is a practical means of capturing human experience in the development and implementation of environmental laws.[10] Lawyers in the United States use comparative law

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6. Celia Campbell-Mohn, *Objectives and Tools of Environmental Law, in* ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY 119-24 (Celia Campbell-Mohn et al. eds., 1993); *see also* James McElfish, *Back to the Future*, ENVTL. F., Sept.-Oct. 1995, at 14 (explaining how the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370d (1994), could be used to foster sustainable development). The Act declares the "continuing policy of the Federal Government . . . to create and maintain conditions under which man and nature can exist in perfect harmony," applies that responsibility to future generations, and requires federal agencies to conform to its goals. 42 U.S.C. §§ 4331(a), (b)(1), 4333.

7. The National Environmental Policy Act of 1969, 42 U.S.C § 4332 (2)(C)(i) (1994); *see also Agenda 21*, *supra* note 5, ¶ 8.5(b). *But see Rio Declaration*, *supra* note 3, at Principle 17 (requiring an environmental impact statement for all projects that are likely to have a significant adverse environmental effect, whether they are governmental projects or not).

8. 42 U.S.C. § 11023 (1994). *Compare Rio Declaration*, *supra* note 3, at Principle 10 ("[E]ach individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities") *with Agenda 21*, *supra* note 4, ¶ 19.50(c) (encouraging industry to voluntarily adopt community right-to-know programs on the emission of toxins into the environment).

9. *See* Jeffrey D. Kovar, *A Short Guide to the Rio Declaration*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 119, 130-32 (1993) (explaining why inclusion of strong public participation principles was a major objective of the United States and certain other countries). *See, e.g.*, *Rio Declaration*, *supra* note 3, at Principle 10; Agenda 21, *supra* note 4, ¶ 23.1 (stating implementation of *Agenda 21* requires "commitment and genuine involvement of all social groups").

10. *See generally* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (2d rev. ed. 1992) (explaining that comparative law has used human experience in developing and implementing laws and that it fosters international

whenever they examine legislation or case law from other American jurisdictions to learn how others have attempted to solve particular problems. Comparative law teaches that one can, and should, look to other countries without preconceptions about which particular legal means are best.[11] That insight suggests an opportunity for finding creative approaches to sustainable development in places we do not normally look.

Thus, an international commitment to sustainable development requires the use of comparative law in finding, developing, and transferring solutions to the problems that sustainable development addresses. Comparative law is particularly important as we pass the six-year anniversary of the June 1992 Earth Summit. In fact, *Agenda 21* itself recognizes the necessity of comparative law.[12]

In order to monitor progress in its implementation, *Agenda 21* created the Commission on Sustainable Development.[13] Each year, the Commission has gathered to review progress in achieving specific goals of *Agenda 21.* Many nations, upon request, have submitted reports on what they have accomplished.[14] The Commission's progress, out of necessity, involves a comparison of each nation's progress.[15] The common responsibilities identified in *Agenda 21* represent fertile ground for comparative law. They provide a way of understanding what other countries have or have not done, and why. For countries that have not acted, the actions of other nations may provide useful legal models.

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understanding); A. Dan Tarlock & Pedro Tarak, *An Overview of Comparative Environmental Law*, 13 DENV. J. INT'L L. & POL'Y 85 (1983) (comparing and evaluating responses to environmental degradation by different legal systems).

11. ZWEIGERT & KÖTZ, *supra* note 10, at 28-46.

12. *See, e.g.*, Agenda 21, *supra* note 4, ¶ 8.2 ("Exchange of experience between countries can also be significant.") ¶ 8.26 (suggesting the creation of regional assistance centers for sustainable development law-making and implementation for different types of legal systems), and ¶ 8.34 (encouraging exchange of information among countries concerning their experience with the use of various economic instruments).

13. *Agenda 21*, *supra* note 4, ¶ 38.11.

14. *See id.* ¶ 38.13(b) (suggesting the General Assembly decide the frequency and duration of meetings).

15. The Earth Summit commitments are based on a concept of "common but differentiated responsibilities," which represents a compromise between two positions. On one hand, most of the UNCED commitments are shared by all countries. On the other, developing countries are held to a lower standard because of their more limited economic and social situation. *See* Rio Declaration, *supra* note 3, at Principle 7. The United States recorded a statement at the Earth Summit objecting to the lower standard. Kovar, *supra* note 9, at 128-30.

As Professor Robinson noted, the text of a law by itself provides little basis for determining whether it has succeeded.[16] Readily available means of identifying what has worked are therefore essential. Environmental indicators—physical, ecological, or chemical measures of what is actually happening in the environment—are increasingly being used to measure the effectiveness of environmental laws. We all know, intuitively or from experience, that the adoption of a law does not necessarily mean it is enforced. Similarly, the number of fines assessed or permits issued does not necessarily mean the environment is being protected.

To enhance the comparability of various national efforts, the United Nations recently released a set of sustainable development indicators.[17] These indicators cover four broad categories: environment, economy, social issues, and institutional issues such as incorporating sustainable development into governmental decision making.[18] Specific indicators concern, for example, the use of agricultural pesticides[19] and waste recycling levels.[20] The need for real world measures of our progress toward sustainable development was also recognized by the President's Council on Sustainable Development.[21] These, or similar indicators, are also a way of measuring the effectiveness of particular laws. If accepted and applied on a widespread basis, they could foster the use of comparative law because lagging nations could easily identify and emulate the actions of leading nations. Comparative environmental law is thus a useful starting point for identifying and developing laws that foster sustainable development. But it is only that.

The initial inquiry in comparative law is identifying what problem foreign laws were enacted to solve. The problem must be stated "without any reference to the concepts of one's own legal system."[22] If the problem is environmental protection, we might look to environmental protection laws in other countries. However, *Agenda 21* is a response not only to environmental problems but social and economic problems as well,

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16. Robinson, *Comparative Environmental Law Perspectives on Legal Regimes for Sustainable Development, supra* note 1, at 247, 248-50.

17. UNITED NATIONS, INDICATORS OF SUSTAINABLE DEVELOPMENT: FRAMEWORK AND METHODOLOGIES (1996).

18. *Id.*

19. *See id.* at xi (providing this factor as a "driving force indicator" in relation to the chapter in *Agenda 21* which deals with promoting sustainable agriculture and rural development).

20. *See id.* (discussing indicators in relation to Chapter 21 of *Agenda 21*).

21. PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, SUSTAINABLE AMERICA: A NEW CONSENSUS FOR PROSPERITY, OPPORTUNITY, AND A HEALTHY ENVIRONMNET FOR THE FUTURE 12-23 (1996) (describing sustainable development goals and indicators of progress in reaching those goals).

22. ZWEIGERT & KÖTZ, *supra* note 10, at 31.

including housing, poverty, and disease.[23] These seemingly disparate issues were brought together by the recognition that countries can neither coherently nor effectively address the environmental aspects of a problem unless they also address its economic and social dimensions.[24]

The goals of sustainable development are thus broader than those of environmental law. According to *Agenda 21*, countries should "ensure socially responsible economic development while protecting the resource base and environment for the benefit of future generations."[25] Therefore, sustainable development profoundly changes the terms of the traditional environmental law debate.

A quarter century of pollution control laws in the United States has shown how reduced pollution can also achieve social and economic goals.[26] But much remains to be done, including wetlands protection, further reduction of toxic pollutants, and much better use of the land around our cities and towns. This work is unlikely to be effectively accomplished unless we consciously and aggressively strive to make environmental, economic, and social goals work together.[27] In other words, we cannot address environmental protection without also addressing economic development and the human social condition. In the past, those who raised economic issues were adversaries and those who raised social issues were often ignored. In a sustainable world, however, these people need to be allies. A review of any country's sustainable development efforts must necessarily include economic and social development as well as environmental protection.[28]

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23. *Agenda 21*, *supra* note 4, ch. 3 (combating poverty), ch. 5 (demographic dynamics, including population), ch. 6 (protecting and promoting human health), and ch. 7 (promoting sustainable human settlement development).

24. OUR COMMON FUTURE, *supra* note 2, at 27-42.

25. *Agenda 21*, *supra* note 4, ¶ 8.7.

26. *See, e.g.*, ROBERT W. ADLER ET AL., THE CLEAN WATER ACT: 20 YEARS LATER 88-96 (1993) (describing economic value of protected water resources on commercial fisheries, recreational activities, and others).

27. John C. Dernbach, *The Unfocused Regulation of Toxic and Hazardous Pollutants*, 21 HARV. ENVTL. L. REV. 1, 66-80 (1997) (proposing a way of regulating toxic pollutants that also fosters economic development); *see also* TOM HYLTON, SAVE OUR LAND, SAVE OUR TOWNS (1995) (proposing a plan to foster more protective land use in Pennsylvania); *and* Royal C. Gardner, *Banking on Entrepeneurs: Wetlands, Mitigation Banking, and Takings*, 91 IOWA L. REV. 527 (1996) (positing mitigation banking as a way of fostering all of these goals in relation to wetlands).

28. John Dernbach & the Widener University Law School Seminar on Law and Sustainability, *U.S. Adherence to its Agenda 21 Commitments: A Five-Year Review*, 27 ENVTL. L. REP. (Envtl. L. Inst.) 10504 (1997) (assessing social and economic progress since UNCED as well as progress in environmental protection).

In a sustainable world, in short, environmental, economic, and social problems must be addressed together. In Kenya and other African countries, for example, wildlife protection would be impossible if it did not also provide economic and social benefits.[29] In traditional terms, wildlife protection occurs when individual species have quality habitats and are being protected from external dangers. The decision to ban exports of ivory, the sale of which had led to poaching and a dramatic decline in the African elephant population in many countries, was a step in the right direction.[30] Of course, there is an economic reason for the ban—preserving income from tourism.[31] Because of Africa's rapidly growing population, however, the African elephant is not likely to survive outside protected areas unless more people have an economic stake in its protection.[32] Much of the conversation in Kenya and elsewhere in east and southern Africa about wildlife protection concerns three things. These are the government's need to make sure people living in or near wildlife have a stake in its protection, particularly on private land;[33] the government's need to share more broadly the economic benefits of that protection; and the environmental impact of tourism.[34] All of these concerns must be addressed in harmony.

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29. *See* Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT'L L. 1 (1990).

30. *See generally id.* The ban occurred under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, 27 U.S.T. 1087. Species listed under Appendix I are threatened with extinction that may be affected by trade. *Id.* art. II, para. 1. Species listed under Appendix II are not threatened, but may become so unless trade is limited. *Id.* art. II, para. 2. The African elephant is an Appendix I species, which means that trade in ivory and other readily recognizable parts of the elephant is virtually prohibited. *Id.* art. III.

31. Glennon, *supra* note 29, at 216.

32. *See* J.I. Barnes, *Changes in the Economic Use Value of Elephant in Botswana: The Effect of International Trade Prohibition*, 18 ECOLOGICAL ECONOMICS 215, 215 (1996) ("elephant conservation involves investment in land and management, within appropriate property rights") (emphasis deleted).

33. KENYA WILDLIFE SERVICE, WILDLIFE-HUMAN CONFLICTS IN KENYA: REPORT OF THE FIVE-PERSON REVIEW GROUP (1994) (recommending actions to share benefits of wildlife with landowners and to reduce and mitigate conflicts).

34. In June 1997, the conference of the parties for CITES voted to transfer the Botswana, Namibia, and Zimbabwe population of African elephants from Appendix I to Appendix II. The transfer was subject to conditions prohibiting, among other things, commercial trade in ivory until March 1999, and even then with specific limits. Conference of the Parties to CITES, Record of Decisions for CITES COP-10 Proposals, <http://www.unep.ch/cites/outcomes.html> (visited Sept. 17, 1997). The transfer was prompted by claims that the African elephant population in those countries is growing, not endangered, and that long-term protection requires the economic stake in protection that trade revenue in ivory and leather goods would provide.

Sustainable development also broadens the traditional range of subjects covered by environmental law. Under *Agenda 21*, these subjects include: international trade, financial assistance to developing countries, debt relief, poverty, population, health care, control of communicable diseases, and housing.[35] For Westerners in particular, the hardest pill to swallow may be the chapter in *Agenda 21* concerning the reduction in consumption.[36] This particular issue puts on the table one of the great successes and failures of environmental law in the United States—the regulation of automobile air pollution. The United States has succeeded in reducing pollution from each automobile.[37] That reduction, however, is mostly offset by the greater number of cars and miles driven.[38] With the number of cars growing rapidly around the world, including countries such as China, consumption is plainly an issue that needs to be addressed.

Sustainable development law, moreover, is not another name for international environmental law. The great bulk of multilateral environmental treaties concern global issues that transcend national boundaries. Such treaties address climate, biodiversity, ocean fisheries, desertification, and protection of the ozone layer. These treaties, as Professor Robinson observed, must be implemented by individual nations, and attempt to foster sustainable development.[39] But many of the environmental issues faced by most nations, including water pollution, waste disposal, drinking water, air pollution in cities, and sanitation,[40] are not directly covered by these treaties. They are, in simple terms, outside the range of international law. Thus, if we begin a comparative law analysis by asking what problems sustainable development is attempting to solve, environmental problems are a starting point, but only that, and only if the environmental problems are taken together with their attendant social and economic issues.

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35. *Agenda 21*, *supra* note 4, chs. 2(A) & (B) (promoting sustainable development through trade), chs. 2(C) & 33 (debt relief and financial assistance to developing countries), ch. 3 (combating poverty), ch. 5 (population), ch. 6(A) (health care), ch. 6(B) (control of communicable disease), *and* ch. 7 (sustainable human settlements).

36. *Id.* ch. 4 (changing consumption patterns).

37. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 766 (1992) (stating that "[b]etween 1970 and 1987, hydrocarbons and carbon monoxide emmissions in new cars dropped by 96 percent, and oxides of nitrogen by 76 percent.").

38. *Id.* at 768 (citing suggestion by former administrator of U.S. Environmental Protection Agency that the only way to control auto pollution might be by reducing the number of cars and number of miles that can be driven).

39. *See* Robinson, *supra* note 1.

40. WORLD RESOURCES INSTITUTE. ET AL., WORLD RESOURCES 1996-97 at 19-24 (1996) (describing the extent of the problems in many nations).

Finally, universities in general, and law schools in particular, can and should contribute to the achievement of sustainable development goals. They can, for example, conduct comparative research on what has worked in sustainable development law, prepare proposals, and share them with the public as well as government and corporate decision makers. The potential contribution from legal and other scholarship in sustainable development is immense. Although the field is growing, as symposiums like this one attest, the field remains relatively untouched. Law schools can and should give our students the intellectual tools for conducting this kind of work.

Comparative environmental law informs us that some countries have already made progress toward a legal framework for sustainable development. A more difficult question, however, is whether individual countries, including the United States, are moving toward sustainable development or away from it.[41] If the United States is going to make serious progress toward sustainable development, we need to learn from others, even as they learn from us.

41. *See* Dernbach & the Widener Seminar, *supra* note 28 (concluding that the United States made little progress in moving toward sustainable development in the first five years after Rio).