p-ISSN 2300-4088
e-ISSN 2391-5951

Progress in Economic Sciences

Czasopismo Naukowe Instytutu Ekonomicznego
Państwowej Wyższej Szkoły Zawodowej im. Stanisława Staszica
w Pile

Nr 4 (2017)

Wersja elektroniczna czasopisma jest wersją pierwotną.

Piła 2017

p-ISSN 2300-4088
e-ISSN 2391-5951

Projekt realizowany
z Narodowym Bankiem Polskim
w ramach programu edukacji ekonomicznej

NBP Narodowy Bank Polski

Poglądy autorów publikacji nie mogą być utożsamiane ze stanowiskiem Narodowego Banku Polskiego.

Publikacja współfinansowana przez

Enea Operator

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Czasopismo jest indeksowane w następujących bazach:
BazEcon, BazHum, CEJSH, DOAJ, Index Copernicus, ERIH Plus

Przygotowanie i druk:
KUNKE POLIGRAFIA, Inowrocław

Spis treści

ARTYKUŁY

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Progress in Economic Sciences Nr 4 (2017) p-ISSN 2300-4088 e-ISSN 2391-5951
DOI: 10.14595/PES/04/013

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Value problem in perception of sustainable development in international public law

Introduction

Since the 1990s there is wide interest in administration, institutions and law, and consequently for their role in promoting development. In that context, the rule of law was promoted as a cause and a consequence of development [Wolfensohn, 1997, p. iii]. As the rule of law became relevant in terms of the state's legitimacy and the model of imposed democracy, the concept of development has implicitly become the support for universalization.

During this period, two trends spread globally: international legal liberalism and liberal activism for human rights. They have provided the ideological framework for active involvement in the development discourse of international economic institutions, on their own initiative. Instead of creating the framework for political action, their interpretation of the rule of law has had the function of increasing the impact of international economic institutions and subjecting developing countries to external supervision and will [Stevanović; Đurđević, 2015, p. 15–16].

The internationalisation of the rule of law, at the expense of the rule of international law, undermines the belief that sustainable development can be achieved through the global consensus of states. The dominant legal positivism only imposes a certain range of value statements on development, while the terminological apparatus being used is universal.

Development is, in a normative sense, in a constitutive relation with freedom, which is thus at the same time an instrument for achieving development. Therefore, basic political freedoms, such as human rights, should be integral to the legal aspect of development [Sen, 1999, p. 188].

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Substantive legal aspects of sustainable development practices

Contemporary public international law is, in addition to rooting the process of globalisation in economic practice, marked by two regulatory trends: articulation of the view that concepts based on materialism and growth strategy generate threats to the resistance of the properties of nature which support life; and the gradual shaping of the sustainable development strategies and the quest for sustainability. The concept and practice of development are today limited to interpretations; sectoral, national and mainly economic. If it is accepted that development is a tendency of every individual and that equitable development is a condition for peace, the necessary mechanism of realisation of development is the existence of the right to development.

Full development requires an appreciation of values of the physical, moral and civic integrity of individuals. Empirically, these categories can be divided into eight indicative values: power, wealth, wellbeing, attachment, enlightenment, skills, respect and honesty [Lasswell, 1992, p. 336–338]. In this context, the right to development consists of values, each of which represents a human right (health, food, education, housing etc.) and the corresponding obligations, and duties of public authorities in areas which concerns those rights [Qerimi, 2012, p. 38].

Perceived in such way, the value content of sustainable development implies a key denominator is economic growth. The World Commission on Environment and Development (WCED) report determined the concept of sustainable development as a concept for a new era of economic growth[1]. The preparatory works for the United Nations Conference on Environment and Development (Rio Conference) as a task formulate a „sustainable and environmentally valid development"[2]. The Rio Declaration recognises the right to development as unconditional and the protection of the environment as an integral part of development, in order to achieve sustainable development [Sands *et al*., 2012, p. 217]. Thus, development is conceptualised as a right that is unconditional but limited by nature and justice.

An important role in the concept of sustainable development is public participation, which stems from the sustainability of development. Also, it indirectly supports the idea that states should take necessary precautions. Precaution, as a principle of sustainable development, implies that countries should act with diligence and foresight when deciding on matters that can have

[1] Brundtland, Gro Harlem, *Our Common Future, Chairman's Foreword*, Report of the World Commission on Environment and Development: 'Our Common Future', UN doc A/42/427 (4 August 1987), Annex.

[2] UN General Assembly, *United Nations Conference on Environment and Development*, UN dok A/RES/44/228 (22 December 1989), Ch. I, para. 3.

consequences for the environment. In a wider sense, it imposes an expectation to regulate activities that could be harmful to the environment, regardless of the clear scientific evidence of their dangers. The most widely understood public participation institutionalises precaution in the sense that it shifts the burden of proof on to those whose activities are observed.

A number of instruments define sustainable development in general. For example, the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) refers to the balance between environmental protection and economic development and that states should integrate these two factors in order to achieve the best results for humanity. A states has the sovereign right to use its natural resources but must ensure that it does not adversely affect the environment of neighbouring countries. The World Charter for Nature recognises the importance of environmental protection in economic development, and that guidelines and country-specific principles of environmental protection should be a factor in economic development.

Sustainable development is a concept elaborated in the instruments of the Rio Conference. The Rio Declaration proclaims the key sustainability principles: integrity, precaution, intergenerational equity and polluter pays. States are, generally, expected to take into account the issues of development and the environment in the decision-making process, i.e. to ensure that environmental issues are integrated into development goals and that development needs are taken into account when looking at the environment.

Duties arising from many international treaties may be connected to the principle of sustainable development. Some include precautionary principles and intergenerational solidarity[3]. These are the guiding principles of the Convention on Biological Diversity (1992). The term sustainable development, in the field of protection and sustainable development of marine and coastal environments, is defined as „the process of change in the quality of life of human beings through economic growth with social equity and changing production and consumption patterns and development that is sustainable in terms of ecological balance and the vital support of the region"[4]. In that context, the process includes respect for ethnic and cultural diversity and the full participation of the population in peaceful coexistence and harmony with

[3] For example, the Ramsar convention on Wetlands (1971); World Heritage Convention (1972) refers to the natural and cultural heritage for the benefit of mankind; and the Vienna Convention for the protection of the ozone layer (1985) and the Montreal Protocol on substances that deplete the ozone layer (1987) provide for the adoption of precautionary measures which prevent damage to the ozone layer. The UN Framework Convention on climate change (1992) implies the principle of sustainable development in its aim and principles. Convention on the law of the non-navigational uses of international watercourses (1997) contains the principles of precaution, intra-generational and inter-generational solidarity.

[4] *Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific* (2002), Art. 3. http://goo.gl/NUJIvA (accessed on 3 January 2017).

nature, which at the same time represents a qualitative demand on economic growth. Mentioned treaties reflect the consensus for the need for the minimum standards of environment protection, but they do not constitute obligations for states (except for the Framework Convention on Climate Change, Kyoto Protocol and the Montreal Protocol). States are expected to provide implementation, in their national laws, of duties which are not stipulated as binding.

International administrative practices of sustainable development

There is a rift between the concepts of sustainable development and free trade. The Rio Declaration proclaims the cooperation of the main job of poverty eradication as a necessary demand of sustainable development[5], and frames sustainable development as well as growth on a practical level. On the other hand, the General Agreement on Trade and Toll (GATT) follows the premise that trade is good for the environment because when it makes a country more prosperous, they will allocate more to the environment[6].

After the Rio Conference, the World Bank introduced the concept of „good administration" as a „necessary annexe to economic growth"[7]. This principle includes evaluation of public sector management, responsibility, a legal framework for development, information and transparency. The World Bank's guidelines seek to provide practices respected by states' borrowers; fair and equal treatment, non-discrimination, prevention and control of corrupt practices, improving accountability and transparency in dealing with foreign investors, compensation for expropriation and compulsory international dispute resolution. As indicators of respect, it applies an assessment of standards concerning the rule of law, the prohibition of arbitrary conduct, the protection of legitimate expectations and property rights. This approach tends to impose formal requirements regardless of the national regulations [Cordonier, Newcombe, 2011, p. 123]. The authority of these standards is based on an access to the investment capital.

To survive in the global lenders' market, the World Bank has organised a sustainable development network, through which it seeks to implement the Country System Approach, where the protective mechanism rules envisaged in the operational policies are applied. This way it, *de facto,* shapes the development discourse in the capacity of the international bureaucracy, and as a financial lender it affects how borrowers' governments think and act

[5] UN General Assembly, *Rio Declaration on Environment and Development*, UN doc. A/CONF.151/26(vol. I) (14 June 1992), Preamble, Principle 5.

[6] GATT Secretariat, *Trade and the Environment*, GATT doc. 1529 (3 February 1992), (1992) 4 World Trade and Arbitration Materials 1, Overview and Summary, pp. 37–56.

[7] World Bank Guidelines on the Treatment of Foreign Investment, [in:] *Legal Framework for the Treatment of Foreign Investment*, Washington: World Bank, 1992.

[Marschinski, Behrle, 2009, p. 128], thus establishing a norm through its internal innovation [Park, 2010, p. 184]. These measures represent a constituting norm, with regard to the protection of the environment, concerning the lending instruments. At the same time, guiding rules create new categories, participants and activities and protect policies that support them, which, in addition, determine the rules, which are also regulatory. These rules translate the principle of sustainable development into guidelines, which can be classified into:

- ❏ those related to the environment (environmental assessment, natural habitats, management of poisons, forests, safety of dams);
- ❏ those relating to social policy (physical cultural property, involuntary resettlement, indigenous peoples); and
- ❏ those relating to the legal policy (international waterways, and disputed areas)[8].

Substantially, these rules include criteria for the classification of projects. In the procedural sense, within the World Bank's structure are the Inspection Panel and the Environment Department [Buntaine, 2016, p. 112]. These rules are formally valid and, if necessary, stipulated in the loan agreements. They become widely accepted, as borrowers apply them with other multilateral development banks and lenders from the private sector.

Good governance, sustainable development and climate change have become key concepts which redefine the role of the World Bank. This change is legitimated through free interpretation of the mandate and allows social and economic conditioning of the borrower country [Chimni, 2010, p. 39]. This is problematic since the agreement about the establishment of international financial institutions stipulates that neither the bank nor its officers shall interfere in political affairs, nor affect the decisions of the political character of a member state[9].

Sustainable development is also mentioned in the international arbitration practice. For example, in the Rhine railways, the Arbitral Tribunal noted that the right to environment and the right to development cannot stand as alternatives, but as mutually supporting, integrated concepts which require an obligation to prevent or mitigate significant harm to the environment by development. In the opinion of the Tribunal, this obligation has become the principle of general international law[10].

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[8] The World Bank, *The World Bank Operations Manual: Operational Policies*, Bank Policy: Operational Policy (7 April 2014), OP/BP 4.01, 4.04, 4.09, 4.36, 4.37, 4.11, 4.12, 4.10, 7.50, 7.60. http://siteresources.worldbank.org/OPSMANUAL/Resources/EntireOM_External.pdf (accessed on 3 January 2017).

[9] IBRD, *Articles of Agreement*(27June 2012), Art. IV (10). http://go.worldbank.org/0FICOZQLQ0 (accessed on 3 January 2017).

[10] Arbitral Tribunal The Hague, *The Iron Rhine Railway*, (Kingdom of Belgium v Kingdom of the Netherlands), Award (24 May 2005), 27 RIAA 35, paras. 58, 59.

Within international respect for sustainable development, in the 1990s, international organisations recognised undemocratic operations [Hunter, 2010, p. 209]. The Johannesburg Declaration sought „more effective, more democratic and accountable international and multilateral institutions"[11]. States are the most important subjects of international relations and international law, and hence for sustainable development, but non-governmental organisations seek to gain the right to become direct participants in that process. In time, in the context of sustainable development, international administrative procedural rules are created [Archer, 2015, p. 76–77], which are accepted as principles of international law. These administrative principles can be applied, with the tacit approval of the government and in accordance with the principle of public participation in environmental protection[12], regarding decision-making, access to information, participation, or access to justice. However, they cannot, under the guise of good governance, be extended in matters within the *domaine reserve*.

Bringing the security of the individual into the international agenda has, through international human rights standards and the rule of law, led to the development of the concept of human security. This normative concept of protection of the individual is a result of „efforts to build a global society"[13]. Its reflection is the disputed concept of the responsibility of the international community to protect basic human rights, including aspects of sustainable development.

As a task of global public policy, a practice is developing of adapting international investment treaties to the needs of sustainable development. The heads of the most developed countries (G8) have emphasised the role of investment as a driver of economic growth and integration, especially long-term investment, in emerging and developing countries and, in view of the complementary role of government and the private sector in achieving sustainable growth, called for efforts to promote responsible business practices[14]. In that context, the heads of state of the G20 countries have adopted explicitly accepted responsibility for the achievement of internationally agreed goals, with developed countries providing international economic and finan-

[11] UN General Assembly, *Report of the World Summit on Sustainable Development*, UN Doc. A/CONF.199/20 (4 September 2002), Annex: Johannesburg Declaration on Sustainable Development, para. 28.

[12] UN General Assembly, *Rio Declaration on Environment and Development*, UN doc. A/CONF.151/26 (vol. I) (14 June 1992), Report of the UN Conference on Environment and Development, Principle 10.

[13] Lloyd Axworthy, Norman, *A Second Wind for Human Security*, Global Brief. 18 June 2013. http://globalbrief.ca/lloydaxworthy/2013/06/18/a-second-wind-for-human-security, (accessed on 3 January 2017).

[14] G8, *Responsible Leadership for a Sustainable Future*, l'Aquila, Italy, 8 July 2009, para. 49, 53. http://www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final,0.pdf (accessed on 3 January 2017).

cial architecture, and have expressed commitment to the implementation of a new model of sustainable growth, which takes into account social and environmental dimensions[15].

Improving the integration of developing countries into the world economy through trade and investment at the international level was institutionalised through the United Nations Conference on Trade and Development (UNCTAD) in 1964. The role of UNCTAD in this process was formalised in 1993 by taking over the work programme of international investment agreements[16]. In this way, the central role for all matters related to foreign direct investment was established within the framework of the UN Secretariat. This role is based on three pillars: assistance in developing intergovernmental consensus; providing research and analysis guidelines for development prospects: and providing technical cooperation and capacity building in developing countries[17].

The division between rich and poor countries is shown in the open animosity towards international financial institutions, liberalisation and the G7 countries. Centuries of exploitation left most undeveloped countries without significant domestic economies, any substantial infrastructure development or technical resources. After the decolonisation process, the imperialist economic structures survived, maintaining raw materials bases and markets for products from developed countries [Sornarajah, 2015, p. 85]. The new international economic order was based on the premise that developing countries have the right to assistance on the basis of *inter alia* previous exploitation. This has, as the legal base, found implementation in the national laws concerning compensation of indigenous or certain ethnic groups (e.g. Indians and African-Americans in the United States), but the international order is still failing to establish an appropriate legal regime to ensure the conditions for sustainable development.

Imposing rules of conduct in the ever-growing field of sustainable development by international organisations, without legal basis, is based on the interpretation of the goals, guided by a broader understanding of the tasks within the current regime of international law and evolutionary understanding of development. The problem is the legal substance on which the rules are imposed by international institutions that are not signatories to the relevant conventions. This follows, *a contrario,* from the view of the International

[15] G20, Core Values for Sustainable Economic Activity, [in:] G20 *Leaders Statement: The Pittsburgh Summit, Pittsburgh, USA, 24–25 September 2009*, Annex, paras. 3, 5. http://www.g20.utoronto.ca/2009/ 2009communique0925.html, (accessed on 3 January 2017).

[16] UNCTAD, *UNCTAD's Work Programme on International Investment Agreements: From UNCTAD IX, Midrand (1996), to UNCTAD X, Bangkok (2000)*, UNCTAD/ITE/IIT/Misc.26, p. ii.http://unctad.org/es/Docs/ itemisc58_en.pdf (accessed on 3 January 2017).

[17] UNCTAD, *Trends in International Investment Agreements: An Overview*, UNCTAD/ITE/IIT/13, New York/Geneva: United Nations, 1999, p. ii. http://unctad.org/en/Docs/iteiit13_en.pdf (accessed on 3 January 2017).

Law Commission that a country „cannot avoid its obligations, by creating an international organisation that would not be tied to restrictions that bind the member states"[18]. Global order that would ensure sustainable development, perceived as growth with fairness and accountability in the protection of the environment and other global concerns, without the legal ground, is embodied in the inclusion of new participants, within the constellation of power [Bunn, 2012, p. 16, 18; Solomon, 2013, p. 34].

The framework of the national administration of sustainable development

Part of the doctrine advocates sustainable development as a general principle of international law, with legal force in relation to the state. The rationale for the notion of sustainable development, as a guiding principle of judicial decision-making, recalls long period of time since its reference in the normative instruments, as well as on the soft law instruments which proclaim the right to development as an element of sustainable development. This, however, has no confirmation in practice, since sustainable development is not determined as a rule, but mostly implemented as a means or a process through which environmental issues are integrated into regulating markets.

Countries adopt regulations that seek to improve sustainable development at the national level, some only declarative, others by providing specific rights and procedures. With regard to national approaches to sustainable development, at international level only the issues of the fight against corruption and the outsourcing of certain authorities to the institution of Ombudsman were discussed. The United Nations Development Programme (UNDP) is critical of the institution of a citizens' representative with a mandate to fight corruption[19]. Some countries, such as Denmark, New Zealand, Uganda, Ghana and Namibia, have applied the exception to the totally non-judicial nature of the Ombudsman. This solution is criticised as anti-corruption activities can undermine the other functions of the Ombudsman [Ayeni, 2001, p. 44].

Most ombudsmen are mandated to deal with environmental issues indirectly, within proceedings concerning the acts of administration regarding human rights. This is primarily related to the inquiry into questions related to the respect of the environmental rights if they are provided by national laws.

[18] International Law Commission, *Draft articles on the law of treaties between states and international organizations or between international organizations with commentaries*, [in:] Yearbook of the International Law Commission1982, Vol. II, Part Two, UN Doc. A/CN.4/SER.A/1982/Add.l (Part 2), pp. 52–53, Arts. 47, 48.

[19] UNDP, *Corruption and Good Governance*, Discussion paper 3, 1997, p. 85. https://www.un.org/ruleoflaw/files/AC_Pub_corruption-goodgov.pdf (accessed on 4 January 2017).

Some countries define multiple mandates for the ombudsman, by stipulating responsibilities in the protection of the environment (e.g. Namibia, Lesotho). Another development is the practice, as in New Zealand and Canada, to introduce a Special Commissioner for the environment. The evolution of the interest for the self-management of indigenous peoples has led to the establishment of the Ombudsman for a specific territory (Yukon and Alberta in Canada and Nebraska in the USA) [Reif, 2013, p. 10–11, 13].

As an important element of institutional initiatives towards sustainable human development, UNDP includes good administration, perceived as management that is participatory, transparent, subject to accountability, effective and fair[20]. Good administration is explicitly mentioned in the agreement between the EU and African, Caribbean and Pacific countries, in which this term includes the protection of human rights, democratic principles and the rule of law, as part of the long-term development and of the relationship between these two international organisations[21].

Recognising that environmental problems transcend national boundaries has led to the development of a new area of research in international law. The normative response to the threat of human activity for the integrity of the biosphere, as a value, is the subject of international environmental law. It is a means of support for the promotion of sustainable development. The adoption of rules concerning the prevention of ozone depletion, cross-border movement of hazardous waste and loss of biodiversity, has necessitated legal instruments, which have enabled the formation of United Nations Environment Programme (UNEP), and periodic reviewing of environmental rights[22].

Sustainable development means development that will not compromise the ability of future generations to meet their needs. In theory, sustainable development requires a confluence of economic development, social justice and environmental protection. In national practice, it is often manifested in the form of environmental constraints as a factor of development, or primarily economic growth, as a basic value. Facing the challenge of natural resources that are in danger, or whose quality is compromised to a level that would constitute a threat to biodiversity and the environment, requires a change in the value relationship towards the level of consumption in developed countries. This requires a normative framework for the consumerism and the use of resources on an international level, since it is not realistic to expect countries to voluntarily implement limitations to their economic behaviour.

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[20] UNDP, *Human Development Report 2000*, Jolly, Richard; Fukuda-Parr, Sakiko (eds.), New York: UN Publications, 2000, pp. 10, 78.http://goo.gl/jUJu8W, (accessed on 4 January 2017).

[21] *Cotonou Agreement* (23 June 2000), OJ L 317, 15.12.2000, revised OJL L 247 09.09.2006, Preamble, Art. 8(4), 9(3), 20(d).

[22] Currently in force is UNEP's *Fourth Programme for the Development and Periodic Review of Environmental Law*, Montevideo IV, UN Doc. UNEP/GC/25/INF/15 (16–20 February 2009), in light of developments after the Rio+20 conference and the post 2015 development agenda.

From the aspect of normative activities, sustainable development involves regulating economic and social dimensions in each state. It seems that both developed countries and developing countries need specific regulatory regimes for sustainable development. This requires dialogue, cooperation and trust within multilateral institutions and regimes. On the other hand, in the framework of the international order, the conceptual initiatives and regulatory decisions affecting sustainable development (and also the pressures) are created by new actors. In this context, the global financial and economic crisis, which does not show signs of ending, and the undermined confidence in liberalisation and globalisation, are the factors that increase the admissibility of values underlying the concept of sustainable development. New participants, especially international NGOs, have increased the scope and sophistication of engagement in relation to the principle of sustainability. In the private sector, several voluntary initiatives are developed mainly in the field of corporate social responsibility, within organisations such as the World Business Council on Sustainable Development, Ecuadorian Principles, Global Reporting Initiative, and the Extractive Industries Transparency Initiative. Today, the impact of instruments of civil society cannot be ignored, despite of their lack of binding force.

The principle of intergenerational justice contains an implicit value requirement regarding an adequate quality of the environment for the future generations. As a result, states are required to implement regulations in this direction[23]. In some states, this is placed within constitutional obligations[24]. In the context of this duty, some see environmental management based on factual guardianship[25], others in the form of a natural obligation to serve the interests of future generations[26] and some on the tradition of authorisation by the customs of ancient peoples[27]. The Brundtland Commission only articulated that „states shall preserve and use natural resources for the benefit of present and future generations"[28]. The Rio Declaration proclaims that states fulfil the

[23] UNESCO, *Declaration on the Responsibilities of the Present Generations Toward Future Generations*, (12 November 1997), (1998) 1 UNESCO Records of the General Conference 29th Session 69, Art. 1.

[24] *The Constitution of the Kingdom of Norway, as laid down on 17 May 1814 by the Constituent Assembly at Eidsvoll and subsequently amended, in May 2014*, § 112, http://www.stortinget.no/english/constitution. html#fulltext, (accessed on 4 January 2017).

[25] Science and Environmental Health Network, *Models for Protecting the Environment for Future Generations*, Cambridge: Harvard Law School International Human Rights Clinic, 2008., pp. 2–3, 9–11, http://goo.gl/rXraHE, (accessed on 4 January 2017).

[26] Indigenous Environmental Network, *Bemidji Statement on Seventh Generation Guardianship*, 6 July 2006. http://www.precaution.org/lib/prn_bemidji_original.060706.htm, (accessed on 4 January 2017).

[27] ICJ, *Gabcíkovo-Nagymaros Project* (Hungary v. Slovakia), 1997 ICJ Report 1, Separate Opinion Judge Christopher Weeramantry (25 September 1997), pp. 98, 107.

[28] World Commission on Environment and Development, *op. cit.* (footnote 3), Annex 1, para. 2.

right to development „so that equitable development meets the needs related to the environment and future generations"[29]. Concerning intergenerational justice, the Framework Convention on Climate Change states that states shall work for the „benefit... and future generations"[30].

Intergenerational justice is, in terms of international law, related to the environment through the principle of common but differentiated responsibilities. The Stockholm Declaration proclaims that environmental problems can best be solved by „accelerating development through the transfer of significant amounts of financial and technical assistance"[31]. The Rio Declaration also proclaims the principle of intergenerational justice, in relation to *inter alia*: the duty of states to cooperate in order to reduce the disparities in standards of living; special priority for the special situation and needs of developing countries; and in particular, to the health and integrity of the ecosystem protection and restoration in the spirit of global partnership, in which the state, taking into account the various contributions to global environmental degradation, have common but differentiated responsibilities[32]. In accordance with this, the Johannesburg Declaration states that the benefits and costs of globalisation are unevenly distributed, with developing countries facing special difficulties in relation to this challenge, and calls on them to act in a manner that fundamentally changes the life of the poor of the world[33].

The perception of justice relies on the principle of common, but differentiated, responsibilities. It reflects the different positions of the global North and South and, consequently, the acceptance of the historical and moral responsibility of the north for the burden of environmental protection, since it has benefited from its unlimited economic growth. This principle is thus based on a fact that the north has the ability, and also the responsibility, to pay [Yoshiro, 2002, p. 151]. Since it is founded on the perception of distributive justice, the unequal burden represents the maximum of dynamic programming in a global society, and the justification is in the fact that it is intended for the general benefit of environment strategies. This approach is reflected in various agreements, such as: the Vienna Convention for the Protection of the Ozone Layer; Montreal Protocol; Framework Convention on Climate Change; The Kyoto Protocol, The Convention on Biological Diversity; and The Cartagena Protocol on Biosafety. The principle of common but shared responsibility is applied in a way that provides for developing countries: fewer or different obligations, delay of the obligations and requirements, and the demand for the transfer of resources and technology needed for cleaner environment. The Convention on the Law of the Sea stipulates that the deep seabed and its resources are

[29] UN General Assembly, *op. cit.* (footnote 41), Principle 3.
[30] *UN FrameworkConventiononClimateChange*, (1992) 31 ILM 849, art. 3(1).
[31] UN General Assembly, o*p. cit.* (footnote 35), Principle 9.
[32] UN General Assembly, o*p. cit.* (footnote 5), Principles 5, 6, 7.
[33] UN General Assembly, o*p. cit.* (footnote 11), Principles 14, 15.

the „common heritage of mankind" and that extraction and use of mineral resources of the seabed must be „for the benefit of humanity as a whole, taking into account the interests and needs of developing countries"[34]. This approach has met resistance and did not pass the requirements of developing countries that the principles of this work and expand the genetic resources of the seabed[35], unquestionably due to the realities of international relations.

The basis of the concept of sustainable development is the assumption that the environment and development are inextricably linked, and the consequent necessity to integrate concern for both development and the environment. Such integration requirements demand that judicial institutions, in subjects related to development, establish legal reasoning which includes environmental issues and comprehensive approach[36]. This idea is included in the Stockholm Declaration, which admits that environmental deficiencies are generated by underdevelopment. It states that stability of prices and decent salaries that allow for purchasing primary goods and raw materials are essential to environmental management in developing countries. Economic and ecological factors must be taken into account and a range of topics, including science, technology and education, must be integrated[37]. The growth of population, economic growth and the rapid advancement of technology „lock the global economy and global ecology together", which are becoming increasingly intertwined in an „apparent network of cause and effect". The Rio Declaration also proclaims that „environmental protection forms an integral part of the development process and cannot be considered in isolation from it"[38]. However, the scope of this principle is relativized by the proclamation that „environmental concerns cannot constitute a means for arbitrary or unjustifiable discrimination or a disguised restriction on international trade"[39]. An example of this is the application of the principle of integration within GATT which, as legitimate exceptions to free trade, foresees situations: when it is necessary to protect human, animal, or plant life or health; regarding the preservation of exhaustible natural resources if such measures are made effective, and restrictions on domestic production and consumption[40]. The Appellate Body of the World Trade Organization (WTO) has implemented this provision in decisions

[34] *UN Convention on the Law of the Sea*, 21 ILM 1261 (1982), Art. 140.
[35] UN General Assembly, *Report of the Ad Hoc Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity in Areas Beyond National Jurisdiction*, UN dok. A/61/65 (20 March 2006), paras. 71, 72.
[36] The International Law Association, *op. cit.*, (footnote 275), p. 21.
[37] UN Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, A/CONF.48/14/Rev.1 (5 to 16 June 1972), Principles 9–10, 18–19.
[38] UN General Assembly, o*p. cit.* (footnote 5), Principle 8.
[39] *Ibidem,* Principle 12.
[40] *General Agreement on Tariffs and Trade* (15 April 1994), 1867 UNTS 187, Art. XX, *b* и *c*.

regarding the trade-related disputes[41]. In its relativized context, integration implies the complementarity of environmental and economic interests, and ignores the conflict between them, exposing environmental protection to the impact of economic imperatives[42].

State laws related to the environment view it in several ways:

- ❏ as a general law about the environment[43];
- ❏ as a potential environmental protection through the existing rights to life, health and privacy[44];
- ❏ as the use of procedural rights such as the right to information or the right to achieving environmental protection[45].

The approach that ensures both effectiveness and other rights is most widely accepted [Boyle, 2012, p. 642].

The normative concept of sustainable development, as well as the value of the balance between the needs of the environment, development and justice, is subject to criticism from the aspect of the principle of integration, that it is stretchable and without clear content, and may thus undermine the scope of the law in protecting the environment. In addition, the field of environmental protection legitimacy has gained economic growth, trade liberalisation and globalisation, which increases the dilemma whether ecological conditions or the steady growth of economic development are to be preserved. Given that the principle can influence the policy regardless of the legal nature, this exposes a broader problem of the anthropocentric concept of sustainable development. Gradually it is recognised that legal conceptualization of sustainable development includes the integration of social concerns. The concept of sustainable development needs to address the problem of competing values within an

[41] WTO Appellate Body,*EC Measures Concerning Meat and Meat Products (Hormones)*, (United States *etal*. v. European Communities), WT/DS48/AB/R,(1998) (1998) 1 DSR9, Report (16 January 1998), Report (16 January 1998), paras. 236, 237; *id*., *United States – Import Prohibition of Certain Shrimp and Shrimp Products*,(India*etal*. v.United States), WT/DS58/AB/R, (1998) 7 DSR 2821, Report (12 October1998), para. 186.

[42] Pallemaerts, Marc, International Environmental Law from Stockholm to Rio: Back to the Future?' [in:] *Greening International Law*, Sands, Philippe (ed.), New York: Routledge, 1994, p. 17.

[43] UN Sub-Commission on Prevention of Discrimination and the Protection of Minorities, *Human rights and the environment*, UN Doc E/CN.4/Sub.2/1994/9 (6 July 1994), Annex I, Principle 2. eg. the constitutions of South Africa, § 24, http://www.justice.gov.za/legislation/constitution/SAConstitution-web-eng.pdf, (accessed on 4 January 2017), Belgium, § 23, http://confinder.richmond.edu/admin/docs/Belgium2007 English.pdf, (accessed on 4 January 2017), Azerbaijan, § 39, http://www.constcourt.gov.az/laws/26, (accessed on 4 January 2017).

[44] eg. European Court of Human Rights (ECtHR), *Lopez Ostra v Spain*, CaseNo. 16798/90, Judgment (9 December 1994), paras. 50, 51; *id*., *Oneryildiz v Turkey*,CaseNo. 48939/99, Judgment (30 November 2004), para. 104; *id*., *Hatton and Others v The United Kingdom*, CaseNo. 36022/97, Judgment (8 July 2003), para. 97.

[45] eg. *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, op. cit*. (1998) ILM 38, Articles 4, 6.

integrated understanding of sustainable development, as well as anthropocentric and ecocentric approaches. Currently, the UN Development Goals are concentrated around social needs, with a focus on economic growth, and these conceptual variations of sustainable development cannot resolve the issue.

Achieving sustainable development on a crowded, unequal, and degraded planet is the challenge facing our generation. The concept of sustainable development is a normative outlook on the world [Sachs, 2015]. The primary enforcers of international norms remain the states, and although sustainable development may be used by judges, it is not addressed by them. It is addressed by legal subjects. States have a duty to pursue sustainable development; they are bound by an obligation of means, and by implementing countless treaties they contribute to progressively make real sustainable development requirements [Barral, 2012, p. 379]. It is an irony of history that sustainable development appeared on the agenda of the global community at a time when world leaders were embracing neoliberalism [Peeters, 2012, p. 12].

Summary

From the aspect of the content, the progress of the concept of sustainable development is mostly in the phrasings of principles and the consensus on goals. The underlying ideal remains sustained economic growth which, although it can be objected to as a possibility, represents a value statement regarding facing global inequality and the preservation of natural resources.

Within the concept of sustainable development, the idea of needs and an anthropocentric viewpoint has a strong hold. The concept of sustainable development is a value concept and, if establishing justice is a base for a normative order, it has to relate to people. Restrictions imposed by environmental resources and the ability of the biosphere to absorb human activities, implies that the growth has to maintain and expand its base, and is perceived as dependent on technological issues and social organisations, which are human conditioned. Hence, sustainable development also includes the value stance that human activities must comply with current and future needs, and therefore requires normative regulation and the normative concept.

A fundamental normative characteristic of sustainable development is justice in the distribution of living conditions. In this context, the understanding that economic growth must be sustainable for the environment is a reflection of justice in historical circumstances. This stems from the fact that sustainable development relies on the participation of an informed public, international aid to developing countries, and respect for the interests of minority groups.

Fairness in distribution and facilitating the basic needs of individuals imposes topics that are of interest to development and management. Regarding recognition of interconnectedness of economic and environmental changes

and environmental and economic interdependence, institutional changes are legitimised at a global level, related to the balance in terms of trade and the international economy; providing more comprehensive management of global values; inclusion of environmental concerns in national security; and changes in the nature of institutions and laws to reflect the interconnectedness.

Concerning standardisation of states' obligations, in terms of achieving sustainable development, there is no progress in accordance with the commitments and institutionalisation. There are a number of principles related to sustainable development: state sovereignty over natural resources; state responsibility is not to cause transboundary environmental damage; polluter pays, public information, public participation and access to justice. These are established as general rules.

The principles originally related to sustainable development can, according to the nature of the values, be viewed as those that place normative criteria relating to certain aspects of sustainable development: prevention; foresight; sustainable development; sustainable use of natural resources/conservation of nature; protection of the environment; and good administration. These principles promote the duty of ensuring respect for nature as the common value of all states (environment and resources). The second group can be classified as a general principle envisaging common standards of sustainable development: common, but differentiated, responsibility; integrity; international cooperation; implementation of incentive measures; equity. These principles are derived from the concept of sustainable development and advocate common values, with the potential to generate the international normative order. Most of the principles do not establish rights and obligations with regard to sustainable development and are left to the evolution of the practice of states. However, they represent a normative expression of fairness in the distribution of resources and in meeting the basic needs of individuals, as well as the interconnectedness of economic, social and environmental problems.

In the absence of normative order, the concept of sustainable development is contextualised in international relations. This becomes institutionalised in the financing through international financial institutions. In the relationship between the subjects of international relations, this interest is manifested in the practice of sustainable development dictated by the organisations of developed countries (G8, G20) and international organisations (GATT, WTO, IMF, World Bank). On an ideological level, a value platform remains the search for a mode to maintain privileged growth in the existing economic order. This directly affects the states, in the way that their responsibility is reduced to rational management for sustainable development. At an international level, sustainable development gains the functional qualities of political platforms for activism, with no responsibility for the results and consequences, and the structure of networks for exercising global influence. This confirms that sustainable development is a historical category. Problematic for contextualization

is the collaborative partnership of states and interest groups, because these groups are not members of the UN and cannot be governed by this organisation. Bearing in mind the financing of sustainable development and thus indirect administration, as well as the allocation of financial resources, it seems that this increases the risk of installing informal power in the financial mechanisms of sustainable development, and even a framework for corruptive practices.

Resolutions, which proclaim goals of sustainable development, have a normative value as an indicator of the achieved understandings of sustainable development, but not in terms of its content. The doctrine has framed the concept of human rights as the potential foundation of sustainable development. With reservations concerning the existence of „collective" rights, this would be in line with the perception of sustainable development as a historical category.

The features of the concept of sustainable development indicate that the values to which it should lead are related to human development, human rights and social organisation based on equity, on the one hand, and reflection of the knowledge about the connection between human activities, the environment and natural resources and economic growth, on the other.

Distributive justice is the foundation of stability. Some methods of global contextualisation, like bureaucratization, vague formulations, etc. represent a destabilising factor. The interconnective dimension of sustainable development requires solving local problems and thus a stronger role for the states. More importantly, sustainable development is hard to achieve on the concept of needs. Today, the international order relies on capital and competition as the initiators of activities, and a rational activity does not include self-limitation, opposing the basic driving force. Realisation of the needs and competition for growth, without redistribution, deepen the development gap. Sustainable development should thus be viewed as an ideology at international level, aimed at providing organisational and normative fairness in the allocation of resources and in meeting basic needs for all, within the given problems.

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Problem wartości w postrzeganiu zrównoważonego rozwoju w międzynarodowym prawie publicznym

Streszczenie

W niniejszym artykule problematyzowane jest normatywne postrzeganie zrównoważonego rozwoju pod kątem wartości. Autorzy zastanawiają się, dlaczego koncepcja ta jest tak trudna do zdefiniowania w praktyce. Wartości w zrównoważonym rozwoju są obserwowane w jego rzeczowych aspektach prawnych, międzynarodowej praktyce administracyjnej oraz w ramach międzynarodowej administracji, jako konteksty postrzegania. Odkrywamy, że ukryte wartości są związane z rozwojem człowieka, prawami człowieka, sprawiedliwą organizacją społeczną oraz odbiciem wiedzy na temat powiązań pomiędzy czynnościami człowieka, środowiskiem, zasobami naturalnymi i wzrostem ekonomicznym. Ponadto zrównoważony rozwój jest kategorią historyczną związaną z potrzebą sprawiedliwości w zakresie alokowania zasobów oraz spełniania podstawowych potrzeb wszystkich ludzi, choć niektóre metody tej globalnej kontekstualizacji destabilizują uczciwość. Stwierdzamy, że zrównoważony rozwój potrzebuje obecnie przedefiniowania w zakresie wartości w oparciu o sprawiedliwość dystrybutywną.

Słowa kluczowe: sprawiedliwość, uczciwość, wzrost, potrzeby, rozwój człowieka

Value problem in perception of sustainable development in international public law

Abstract

In this article, normative perception of sustainable development is problematized in its value content. The aim is to focus inner logic which makes this concept so difficult to define in practice. The value content of sustainable development is observed in its substantive legal aspects, international administrative practice and in the framework of its national administration, as the contexts of perception. We find that underlying values are related to human development, human rights and equitable social organisation, and the reflection of the knowledge about the connection between human activities, the environment and natural resources and economic growth. Also, sustainable development is

a historical category, concerning the need for fairness in the allocation of resources and meeting basic needs for all, but some methods of its global contextualization destabilise fairness. We conclude that sustainable development today needs redefining in value terms, based on distributive justice.

Key words: equity, fairness, growth, needs, human development

JEL: D63, O15, Q01

Wpłynęło do redakcji: 28.02.2017 r.
Skierowano do recenzji: 06.03.2017 r.
Zaakceptowano do druku: 19.05.2017 r.