



Protecting the Rights of Future Generations through Sustainable Development Law & Policy

Guest Lecture

“The Right to a Healthy Environment & the Representation of Future Generations Interests in the New Hungarian Constitution”
Consultation by Office of Hungarian Parliamentary Commissioner for Future Generations & Jean Monnet Centre of Excellence of the
Pazmany Peter Catholic University

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CISDL



The Centre for
International Sustainable
Development Law
(CISDL)

CISDL Programming:

- **Dialogue:** Conferences (*Sustainable Justice 2002: Implementing International Sustainable Development Law*, Montreal); Legal Experts Panels (WSSD, UN CBD, WTO, UNCCD); Academic Workshops (McGill, Yale, Oxford), etc.
- **Curriculum:** Legal Seminars & Courses (McGill, Oxford, UVic, Capetown, UdM, Cambridge, Chile, etc.); Judicial Education (UNEP, IDLO, NJI).
- **Research:** Six Research Programmes, led by nine Lead Counsel, with over 80 Legal Research and Associate Fellows and a Student Research Group.
- **Publications:** *Sustainable Development Law: Principles, Practices & Prospects* (Oxford University Press, 2004); *Sustainable Justice* (Martinus Nijhoff, 2004); *Sustainable Developments in World Investment Law* (Kluwer Law International, 2010); Series on *Implementing Treaties on Sustainable Development* (Cambridge University Press); etc.
- **Partnerships:** *International Law for Sustainable Development* Experts Panel Event at the 2002 WSSD launched the CISDL-IDLO-ILA ILSD Partnership.

Protecting the Rights of Future Generations through Sustainable Development Law & Policy

Outline

- Sustainable Development in Int'l Law & Policy
- Emerging Principles & Trends in SD Law
- National Institutions to Implement SD
- Conclusions



Protecting the Rights of Future Generations through Sustainable Development Law & Policy

Sustainable Development in International Law & Policy



Origins of the Concept of Sustainable Development

■ What is development?

- IFI growth of GDP, Chicago School industrialisation, economic progress?
- UNDP participatory progress toward improvements in quality of life, Sen's improvements in freedoms through capability and opportunity?
- The Human Development Index, the Millennium Development Goals?

■ What is sustainable development, then?

- Brundtland's inter-generational equity?
- Club of Rome respecting environmental limits to growth? Carrying capacity?
- Pinchot's wise use of resources and focus on sustained yield? Efficiencies?
- Social empowerment that respects rights to enviro and health? Human scale alternatives?
- Development that can last, founded on integration of environment, social and economic aspects of development decision-making.

Sustainable Development in Global Policy Debates

SD Emerged as a Concept from International Policy-Making Process (1972 –)

- 1972 UNCHE, Stockholm, Sweden (mainly enviro)
- 1987 Our Common Future (Brundtland Report)
- 1992 UNCED, Rio de Janeiro, Brazil
 - the Rio Declaration
 - Agenda 21
- 1992 – 2002 UN Commission on Sustainable Development (1 – 10)
- 1997 UNGASS, New York
- UN Regional Commissions
- 2002 World Summit on Sustainable Development, Johannesburg, South Africa
 - Johannesburg Declaration, JPOI
 - Partnerships
- 2002 – 2012 UN Commission on Sustainable Development (10 – 20)

Treaty Law on Sustainable Development

Public Int'l Law Treaties on Sustainable Development (1966 –)

Four Tracks of Important International Agreements with SD Objectives:

- **1972 – 1992 First Generation of Environmental Treaties:** CITES, Basel Hazardous Wastes, Vienna Ozone & Montreal Protocol, etc.
- **1992 – 2008 Second Generation of Environment and Sustainable Development Treaties:** 1992 – 2008 UN CBD and Cartagena Protocol, UN FCCC and Kyoto Protocol, UN CCD (desertification), Stockholm POPs, Rotterdam PICs, FAO Seed Treaty, etc.
- **1947 - 2008 Economic Treaties:** GATT/WTO and regional agreements (EU, NAFTA, Mercosur, CAN, SADC, other FTAs and BITs)
- **1947 – 2008 Social Treaties:** UN Human Rights Covenants & Instruments, ILO Conventions.

More than 300 Other Relevant International Accords:

- All of the above, including...
- 1966 ICCPR & ICESCR
- 1972 – 2002 UNCLOS, Regional Fisheries and Seas Conventions
- 1968 /02 African Nature Conservation Treaty
- 1983 ITTA
- 1985 ASEAN Convention
- 1998 Aarhus Convention
- 1998 Espoo Convention, etc.

International Institutions for Sustainable Development

Intergovernmental Institutions for Sustainable Development (1900s –)

Three Sets of Intl Institutions:

■ Environmental:

- COPs/MOPs of major treaties like the UN CBD, UN FCCC, UN CCD, etc
- UN Environment Programme, Global Environmental Facility, World Conservation Union (IUCN), etc
- Regional institutions (NAAEC, EU DG, OAS, etc)

■ Economic:

- GATT/WTO, Intl Financial Institutions (WB, IMF, MIGA), ICSID, OECD, FAO, etc
- UN Development Programme, UN Conference on Trade and Development, etc
- Regional Economic Commission (UNECE, ECLAC, etc), and Regional Trade/Investment Agreements (EU, NAFTA, Mercosur, SADC, ASEAN, FTAs), etc

■ Social:

- UN Human Rights Commission, Office of the High Commissioner on Human Rights, ILO, etc
- WHO, UNESCO, etc
- Regional Human Rights Institutions (IAHRC, AHRC, Council for Europe), etc

International SD Forum:

- United Nations Commission on Sustainable Development (UN CSD), under ECOSOC of the UNGA

Other Sectoral /Regional Institutions:

- UNCLOS COPs and Regional Fisheries and Seas Commissions
- Intl Commodity Organisations (metals, tropical timber, etc)
- General Regional Institutions (OAS, OAU, EU, APEC, etc)

International Non-Governmental Institutions and Networks:

- International institutes and civil society organisations (IISD, etc)
- International business organisations (ICCs, WBCSD, etc)

International Disputes on Sustainable Development

Significant ICJ/PCA Decisions

- 1893 *Pacific Fur Seal Arbitration* (United States / Canada)
- 1907 *Trail Smelter Arbitration* (United States / Canada)
- 1974 *Nuclear Tests Cases* ICJ (Australia and NZ / France)
- 1993 *Maritime Delimitation* ICJ (Denmark / Norway)
- 1996 *Legality of Use of Nuclear Weapons* ICJ (Advisory Op)
- 1997 *Gabcikovo – Nagymaros*, ICJ (Hungary / Slovakia)
- 2005 *Iron Rhine Railway*, PCA (Netherlands / Belgium)
- 2006 *Pulp Mills on the River Uruguay*, ICJ (Argentina / Uruguay)

Relevant ITLOS Cases

- 1999 *Southern Bluefin Tuna Prov. Measures* (Australia and NZ / Japan)
- 2001 *MOX Plant Order* (Ireland / England)
- 2003 *Johor Land Reclamation Prov. Measures* (Malaysia / Singapore)

Relevant WTO Cases

- 2001 *Chile – Swordfish Case* (WTO & ITLOS)
- 1991 *US – Tuna Dolphin Case*
- 1996 *US – Reformulated Gas Case*
- 1998 *US – Shrimp Turtle I Case*
- 2003 *US – Shrimp Turtle II Case* (Compliance)
- 1990 *Thai – Cigarettes Case*
- 1998 *EU – Beef Hormones Case*
- 2000 *EU – Asbestos Case*
- 2006 *EU – Biotech Case*
- 2007 *Brazil – Retreaded Tires Case*

The Sustainable Development Objective

So... Sustainable Development in International Law?

- *1987 Brundtland Report, 1992 UNCED, 2002 WSSD*: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”, balanced integration of social, economic and environmental aspects in development decision-making, socially and environmentally sound development, etc.
- “... need to **reconcile economic development with protection of the environment** is aptly expressed in the concept of sustainable development.” (*Case Concerning the Gabčíkovo-Nagymaros Project, ICJ, 1997, para 140*)
- Over **300 treaties** were highlighted by States as **contributing to sustainable development** in the 2002 WSSD Johannesburg Plan of Implementation.
- Sustainable development is recognized as an **explicit objective** in more than 40 recent multilateral & regional treaties, including trade and investment treaties (which reflect SD principles).
- *2002 ILA New Delhi Declaration on Principles of International Law related to Sustainable Development*: **7 operational principles of international law** are found in treaties / laws on SD.

International Law on Sustainable Development

Sustainable Development Law:

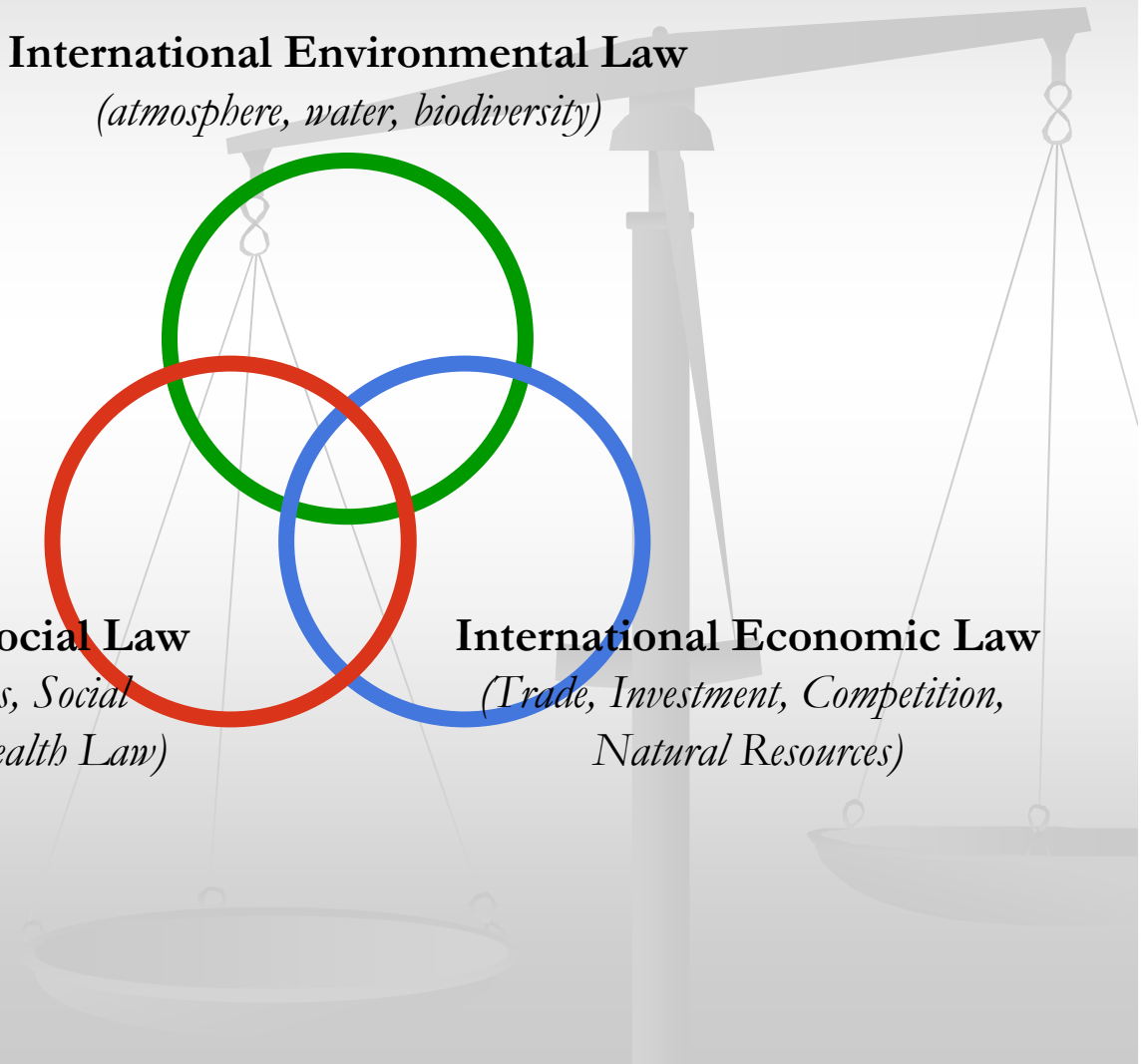
Law at the area of intersection between three fields.

Broad purpose: “socially, economically & environmentally sound development that can last.”

International Social Law
(Human Rights, Social Development, Health Law)

International Environmental Law
(atmosphere, water, biodiversity)

International Economic Law
(Trade, Investment, Competition, Natural Resources)



Protecting the Rights of Future Generations through Sustainable Development Law & Policy

Emerging
Principles &
Trends
in Int'l Law on
Sustainable
Development



International Principles & Trends

1992 Rio Declaration (27 Principles, 'Soft Law')

General

- Principle 1: Human beings are centre of sustainable development...
- Principle 2: Sovereign rights re: natural resources, and responsibility re: damage...

Substantive:

- Principle 3: Right to development, equitable for present and future generations.
- Principle 4: Environmental protection integral part of development process...
- Principle 5: Cooperate to eradicate poverty, decrease disparities in standards of living, and meet needs of majority.
- Principle 6: Special priority to needs of least developed, most environmentally vulnerable...
- Principle 7: Global partnership to conserve, protect & restore health and integrity of the Earth's ecosystem, with common but differentiated responsibilities.
- Principle 8: Reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.
- Principle 12: No arbitrary or unjustifiable discrimination or a disguised restriction on international trade, avoid unilateral actions, decide by international consensus.
- Principle 13: National and international liability and compensation.
- Principle 14: Discourage or prevent relocation and transfer of activities/substances of severe environmental degradation or harmful to human health.

Emerging Principles & Trends

1992 Rio Declaration, cont.

Substantive, cont.

- Principle 15: Precautionary approach, lack of full scientific certainty not used as a reason for postponing measures to prevent degradation.
- Principle 16: Internalization of environmental costs, use of economic instruments, so that polluter should, in principle, bear the cost of pollution.
- Principles 23 – 26: Protection of oppressed peoples natural resources, protection for the environment in times of armed conflict, peace needed for SD.

Procedural

- Principle 9: Build capacity, scientific and technological knowledge, and transfer technology...
- Principle 10: Participation, awareness & access to information, access to judicial and administrative proceedings, including redress and remedy.
- Principle 11: Effective environmental legislation. Environmental standards, management objectives and priorities reflect context.
- Principle 17: Environmental impact assessment.
- Principle 18: Obligation to immediately notify others of disasters or emergencies, and int'l commitment to help afflicted States.
- Principle 19: Prior and timely notification and relevant information, consultation with others at early stage and in good faith.
- Principle 20 – 22: Involvement of women, youth, indigenous peoples
- Principle 27: Commitment to cooperate in good faith, to partnership and to further development of international law in the field of sustainable development.

Principles of Sustainable Development Law

The non-binding Rio Principles can be translated into seven emerging international legal principles that help to deliver sustainable development goals...

- Duty to ensure sustainable use of natural resources
- Equity and poverty eradication
- Precautionary principle
- Common but differentiated responsibilities
- Public participation, access to information and justice
- Good governance
- Integration

Principles and Practices: Emerging Int'l Treaty Law in the Field of Sustainable Development

The duty of States to ensure sustainable use of natural resources

- In accordance with int'l law, States have sovereign right to manage natural resources pursuant to environmental and developmental policies, & responsibility to ensure that activities within jurisdiction / control do not cause significant damage to environments of other States / beyond.
- States under duty to manage natural resources in rational, sustainable & safe way for development of their peoples; conservation & sustainable use of natural resources...
- Common concerns of humankind & common heritage of humankind.
- Reflected in *UN Framework Convention on Climate Change* Preamble (sovereignty & responsibility); *UN Convention on Biological Diversity* Preamble (sovereignty & responsibility), Art 3 Principle and Art 10 (sustainable use); in *UN Convention to Combat Desertification* at Art 3(c) Principles (work toward sustainable use of scarce water & land) and in Art 10.4 (national action plans), Art 11 (regional and sub-regional actions), Art 17.1(a) (research and development), Art 19.1(c) & (e) (capacity-building); in the *WTO Agreement* at Preamble; in *FAO Seed Treaty* at Art 1.1 Objective (conservation and sustainable use of PGRFA) then operational in Art 6 (measures for sustainable use of plant genetic resources).

Principles and Practices: Emerging Int'l Treaty Law in the Field of Sustainable Development

The principle of equity and the eradication of poverty

- ***Inter-generational equity*** (right of future generations to fair level of common patrimony) & ***intra-generational equity*** (right of all peoples currently to fair access to natural resources).
- Present generation holds right to use resources but also obligation to take into account long-term impact of activities, to sustain the resource base & global environment for the benefit of future generations.
- Recognizes right to development, and duty to cooperate to eradicate poverty, if in a position to do so.
- Reflected in *UN Convention on Biological Diversity* at Art 15.7 (access and equitable benefit sharing); in *UN Framework Convention on Climate Change* at Preamble (present and future generations) and at Art 3 Principles (equity); in *UN Convention to Combat Desertification* at Art 16(g) (traditional knowledge sharing), Art 17.1(c) (TK research & development), Art 18.2(b) (tech transfer); and in *FAO Seed Treaty* Preamble (responsibility & benefit-sharing), and at Art 1.1 Objective (ABS) and Arts 10, 11, 12, 13 (multilateral system of ABS for plant genetic resources).

Principles and Practices: Emerging Int'l Treaty Law in the Field of Sustainable Development

The principle of the precautionary approach to human health, natural resources and ecosystems

- Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent risks to human health, natural resources and ecosystems.
- Transfers burden of proving that cost-effective preventive measures are not necessary onto proponent of a potentially damaging activity, in absence of scientific certainty.
- Reflected in *UN Convention on Biological Diversity* in Preamble and operational at Art 14.1(b) (likely adverse impacts) and Art 8(g) (LMOs); in *Cartagena Protocol on Biosafety* at Preamble (precaution), at Art 1 (precaution), at Art 7 (AIA), at Art 10.6 (decision-making), at Art 11.8 (FFP), at Art 15 (risk assessment) and at Annex III.4; in *UN Framework Convention on Climate Change* at Art 3 Principles (precaution); *WTO SPS Agreement* at Art 5.7 (provisional measures); and *NAFTA* at Art 905 (use of international standards) and 907.3 (assessment of risk / provisional regs).

Principles and Practices: Emerging Int'l Treaty Law in the Field of Sustainable Development

The principle of common but differentiated responsibilities

- Recognises common responsibility of States for sustainable development and need to take into account the different circumstances, particularly in relation to each State's contribution to the evolution of particular problem and its ability to prevent, reduce and control the threat.
- Reflected in *UN Framework Convention on Climate Change* Preamble (cbd), at Art 3 Principles and Art 4 Commitments (Annex 1 and non-Annex 1); in *Kyoto Protocol* at Art 10 (cbd in inventories & programmes) and Art 12 (CDM); in *UN Convention to Combat Desertification* at Art 3 Principles (cbd), Art 4, Art 5, Art 6 (affected and developed country party obligations) and Art 7 (for Africa); in the *WTO Agreement* at Preamble; and in *FAO Seed Treaty* at Art 7.2(a) (developing country capabilities), at Art 8 (technical assistance), Art 15.1(b)iii (benefits to least developed and centres of diversity), and Art 18.4(d) (financing).

Principles and Practices: Emerging Int'l Treaty Law in the Field of Sustainable Development

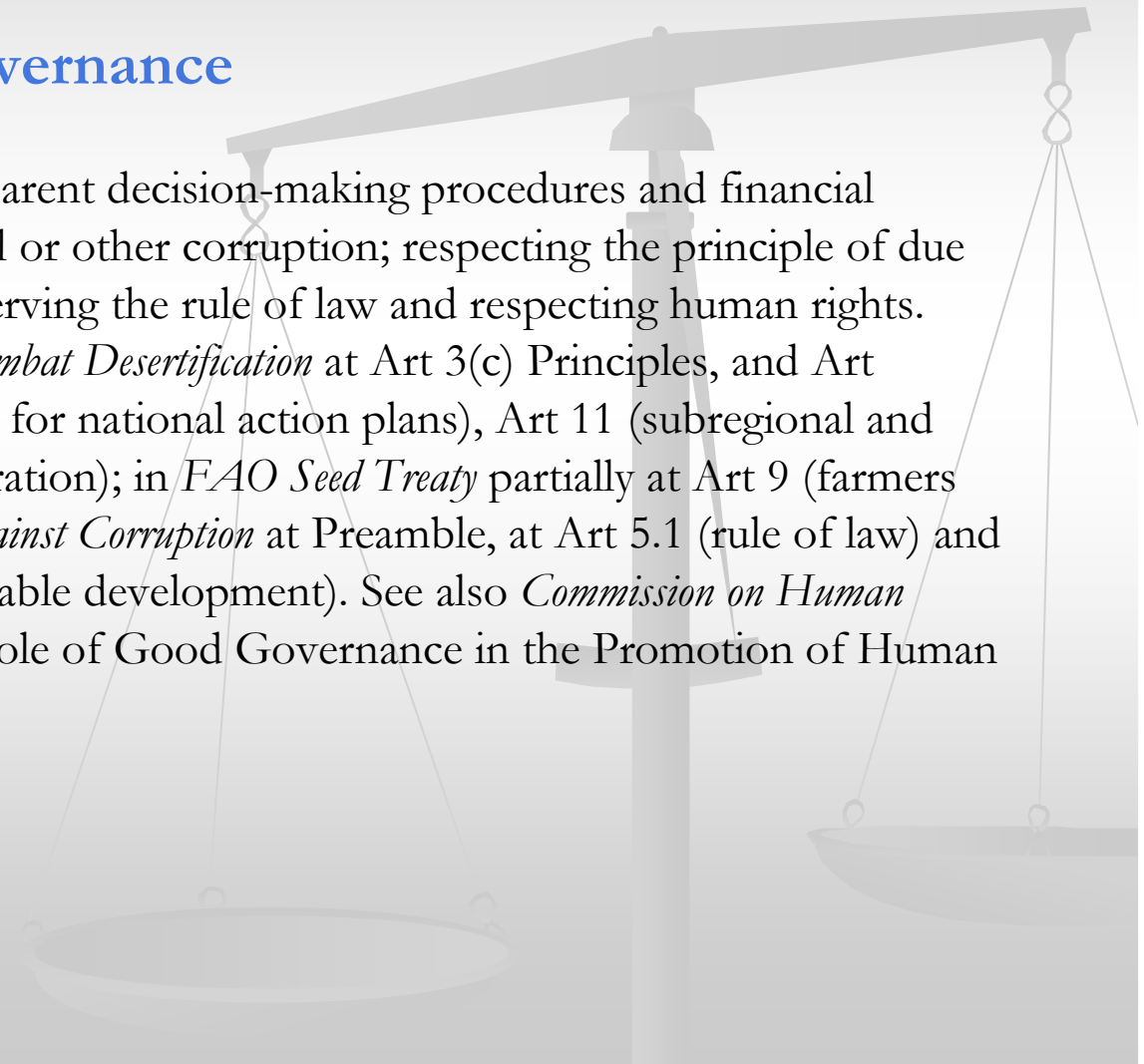
The principle of public participation and access to information and justice

- Focuses on human rights to hold and express opinions and to seek, receive and impart ideas; to access to appropriate, comprehensible and timely information; and to access effective judicial or administrative procedures to challenge decisions and to claim compensation.
- Reflected in *UN Convention on Biological Diversity* at Art 13 (public education and awareness) and Art 14.1(a) (participation in impact assessment); *Cartagena Protocol on Biosafety* at Art 23 (public awareness and participation); *UN Convention to Combat Desertification* at Art 3 (a) Principles and Art 10.2(f) (national action plans); *WTO Agreement* at V.2 (consult NGOs); *FAO Seed Treaty* at Art 9.2(c) (farmers rights to participate), and in *Aarhus Convention on Public Participation, Access to Information and Access to Justice (infra)*.

Principles and Practices: Emerging Int'l Treaty Law in the Field of Sustainable Development

The principle of good governance

- Relates to democratic and transparent decision-making procedures and financial accountability; combating official or other corruption; respecting the principle of due process in their procedures, observing the rule of law and respecting human rights.
- Reflected in *UN Convention to Combat Desertification* at Art 3(c) Principles, and Art 10.2(e) (institutional frameworks for national action plans), Art 11 (subregional and regional) and Art 12 (int'l cooperation); in *FAO Seed Treaty* partially at Art 9 (farmers rights); and in *UN Convention Against Corruption* at Preamble, at Art 5.1 (rule of law) and at Art 62.1 (measures for sustainable development). See also *Commission on Human Rights Resolution* 2001/72 “The Role of Good Governance in the Promotion of Human Rights.”



Principles and Practices: Emerging Int'l Treaty Law in the Field of Sustainable Development

The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives

- Environmental protection shall constitute an integral part of the development process and shall not be considered in isolation from it.
- Social, economic and environmental pillars of sustainable development should be mutually supportive.
- Reflected in the *UN Convention on Biological Diversity* at Art 6 (integrate conservation and use into policies, plans, etc); in the *Cartagena Protocol on Biosafety* at Preamble (mutually supportive) and at Arts 2.4 and 2.5 (other int'l instruments); in *FAO Seed Treaty* at Preamble (synergies) and at Art 5.1 (promote an integrated approach); in GATT at Art XX (exceptions) and in *NAFTA* at Art 103, 104 and 104.1 (relationships with other accords), Art 1114 (enviro standards & investment) and 2101 (exceptions).

Protecting the Rights of Future Generations through Sustainable Development Law & Policy



National Constitutions & Institutions to Implement Sustainable Development

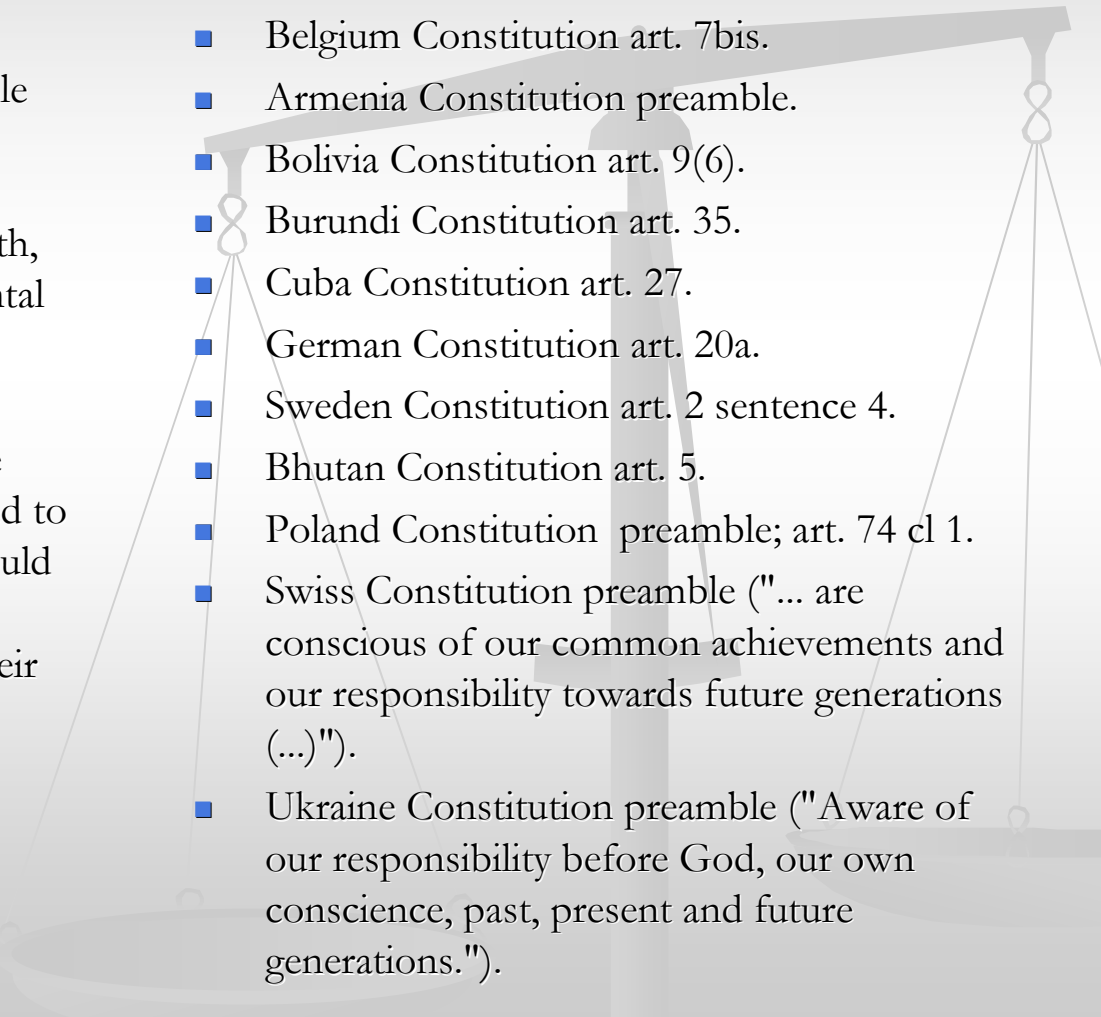
Constitutional Protections for the Rights of Future Generations

Constitutional Protections for the Rights of Future Generations

- **Preamble Approach:** Implicit or explicit recognition of the needs and rights of future generations in a commitment to the Earth and/or to others in humanity, whereby protection of the inherent rights of future generations are seen as part of the *raison d'être* for the Constitution or Charter itself. (*Charter of Fundamental Rights and Freedoms in the Czech Republic, French Charter for the Environment, Estonian Constitution*)
- **Complementary Approach:** Part of a commitment to protection of the environment, and/or as a principle of the Constitution. (*Andorran Constitution, Ecuadorean Constitution, Argentine Constitution, South African Constitution*)
- **Responsibility Approach:** Recognises the rights of future generations both in principle, and as a requirement upon the State and government institutions. (Polish Constitution, Swiss Constitution, Ukrainian Constitution, Czech Charter of Fundamental Freedoms).
- **Practical Purpose Approach:** Commit to pursue sustainable development as an objective, together with future generations, with provisions to operationalize responsibility for sustainability to government institutions. (*Belgian Constitution, Armenian Constitution, Bolivian Constitution, Constitution of Burundi, Cuban Constitution, German Constitution, Swedish Constitution*)
- **Comprehensive Approach:** Protection of future generations as part of development of country / peace-building (*Constitutions of Armenia, Estonia, Poland, Switzerland and the Ukraine*)

Future Generations in National Constitutions

Table of Illustrative Examples

- 
- Charter of Fundamental Rights and Freedoms of the Czech Republic preamble ("The Federal Assembly, (...) recalling its share of responsibility towards future generations for the fate of life on this earth, (...) has enacted this Charter of fundamental rights and freedom.").
 - See French Charter for the Environment ("Considering that, (...) in order to ensure sustainable development, choices designed to meet the needs of present generation should not jeopardise the ability of future generations and other peoples to meet their own needs.").
 - Estonia Constitution preamble.
 - Andorra Constitution preamble.
 - Ecuador Constitution art. 395.
 - Argentina Constitution art. 41 clause 1.
 - South Africa Constitution art. 24.
 - Belgium Constitution art. 7bis.
 - Armenia Constitution preamble.
 - Bolivia Constitution art. 9(6).
 - Burundi Constitution art. 35.
 - Cuba Constitution art. 27.
 - German Constitution art. 20a.
 - Sweden Constitution art. 2 sentence 4.
 - Bhutan Constitution art. 5.
 - Poland Constitution preamble; art. 74 cl 1.
 - Swiss Constitution preamble ("... are conscious of our common achievements and our responsibility towards future generations (...)").
 - Ukraine Constitution preamble ("Aware of our responsibility before God, our own conscience, past, present and future generations.").

Innovations of National Instruments for the Environment, Sustainable Development and Future Generations Rights

How to deliver on a commitment to future generations, in constitutional orders / national decision-making?

What are the rights and interests of future generations, and how can they best be defined and protected? Perhaps to (1) conserve options for sustainable development for future generations; (2) conserve quality of the environment for future generations; (3) conserve access for future generations. (*Brown Weiss*).

To undertake the educational and cultural shift towards this view, there is a **need for strong and innovative national institutions to defend the rights of future generations, providing a voice for the voiceless**. A CISDL preliminary survey identifies three main types of instruments that are being used by national domestic legal and political orders to try to consider and protect the rights of future generations:

- **Auditors / Ombudsmen:** First, there are individual commissioners or ombudspersons which appear to play an independent audit and review function.
- **National Commissions:** Second, there are national commissions or institutions which play both review and deliberative functions.
- **Educational / Civil Society Organisations:** Third, there are many independent or non-profit institutions which play educational, culture change and advocacy functions.

Innovations of National Instruments for the Environment, Sustainable Development and Future Generations Rights

Providing a voice for sustainable development & future generations:

- **Auditors / Ombudsmen:** Appointment of an individual who is mandated to play mainly a research and auditing or monitoring role, characterised by a fairly narrow mandate (ie, environmental protection and perhaps certain elements of sustainable development), protected independence from other institutions, and relatively strong requirements to report to both parliaments and the public. In one leading case (Hungary), this position plays an actual adjudication or ombudsperson role. A great deal depends on securing an excellent selection process, and on the impeccable conduct/character of the individual. (*Hungary, New Zealand, Canada*)
- **National Commissions:** National commissions or institutions can play both establishment of a deliberative body, a commission or standing committee with review and deliberative functions, a mandate to undertake research, provide a forum for public and expert debates, and formulate policy recommendations. These mandates appear to be broadening over time (with the power to consider a more holistic scope of issues of importance to future generations), providing a forum for debate and even consensus-building within societies, in the interest of future generations. While instruments are usually non-partisan or balanced, they do not always appear to be very independent, often are under-resourced, and lack the type of reporting and review powers held by the first category. (*Israel, Brazil, Chile, Finland, France*)
- **Independent Institutions:** Many independent or non-profit institutions play educational, culture change and advocacy functions for future generations interests, part of a broad, vibrant, growing civil society. However, such institutions do not have the authority to review laws or policies of the government, and the work they do to hold individuals or others to account appears to mainly rely on the court of public opinion. (*All countries, including Afghanistan*)

Protecting the Rights of Future Generations through Sustainable Development Law & Policy

Thank you / Merci / Gracias / Danke



INTERNATIONAL LAW FOR SUSTAINABLE DEVELOPMENT:

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