

Sustainable Development and Solidarity in EU and International Law

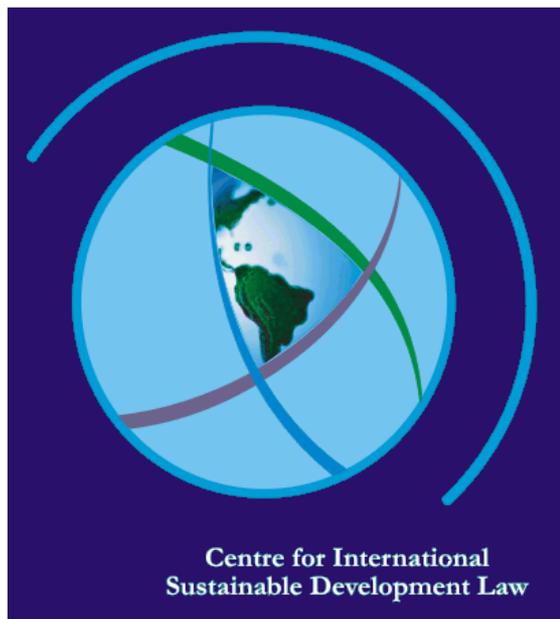
Model Institutions for a Sustainable Future: A Comparative
Constitutional Law Perspective, 26 April 2014, Budapest

Markus Gehring, Dr. jur (Ham) LL.M. (Yale) MA (Cantab)
Deputy Director, Centre for European Legal Studies (CELS),
University Lecturer in Law, Faculty of Law,
& Law Fellow in Law and DoS (Hughes Hall)
Chaire Jean Monnet *ad personam* en droit du développement durable, Université d' Ottawa

Sustainable development and Solidarity in EU and International Law

- 1. Introduction**
- 2. Solidarity in EU Law**
- 3. Sustainable Development in EU Law**
- 4. Sustainable Development in International Law**
- 5. Solidarity in International law**
- 6. Conclusions**

CISDL



Centre for International
Sustainable Development
Law (CISDL)
www.cisd.org

- **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 Trade Law* (Kluwer, 2005); *World Trade Law in Practice* (Globe, 2006); *Sustainable Development in World Investment Law* (Kluwer, 2010),
- *Sustainable Development, International Criminal Justice, and Treaty Implementation* (Cambridge University Press 2013); *Legal Aspects of Implementing the Cartagena Protocol on Biosafety* (Cambridge University Press 2013).

Introduction

- The former Canadian Supreme Court late Justice Charles Gonthier emphasised at the UNEP Global Justices Forum in 2002 just before the Johannesburg Summit on Sustainable Development the close relationship between *fraternité* and the idea of sustainable development, emphasising the social dimension:
- “[The concept underlines the] importance of environmental values, and a spirit of solidarity or, as I put forward in Montreal, ‘fraternité’, being reminded of Art. 1 of the Universal Declaration of Human Rights: ‘All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’”
- Solidarity first occurring in the 1804 Code Civil and is strongly associated with *fraternité*.
- Solidarity and sustainable development “are part of how European society works and how Europe engages with the rest of the world” *Commission 2008*

Solidarity in EU Law

- Multiple references to solidarity in the EU treaties (Treaty on European Union and Treaty on the Functioning of the European Union)
- For example solidarity between the sexes, Art 2 TEU, between generations and between member states, Art 3(3) TEU and ‘among peoples’, Preamble and Art 3(5) TEU
- Article 222 – new Solidarity Clause: “The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. Strong solidarity references in recent citizenship case law (*Bidat*)
- Entire chapter on Solidarity in the Charter (Title IV) and preamble “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity”
- Art 37 (Title Solidarity) “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

See Ross and Borgmann-Prebil (eds) *Promoting Solidarity in the European Union*, OUP 2010 for details.

Sustainable Development in EU Law

- Introduced as an objective of the Community in the Treaty of Amsterdam (Art. 2 EC).
- EU's 2002 Council Decision on A Strategy for Sustainable Development, the well-known Brundtland definition for sustainable development was adopted: "Development that meets the needs of present generations without compromising the needs of future generations."
- In Art. 3.3 TEU Lisbon Version, clear three pillar approach, where Members agree that the EU "shall work for the sustainable development of Europe - based on balanced economic growth and price stability, / a highly competitive social market economy, aiming at full employment and social progress,/ and a high level of protection and improvement of the quality of the environment."
- Also Art. 21.2 "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development"

Sustainable Development in EU Law

- Article 11 Treaty on the Functioning of the European Union (TFEU)
“Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.” and Title XX Art 191: “Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
- Not a lot of case law yet: Arguments based on the sustainable development objective, (see AG Leger in *First Corporate Shipping* or trade unions in *Viking/Laval*). Very few judgments in which the ECJ actually relied on sustainable development (perhaps the *Cartagena Protocol Opinion* and *Small Arms Judgment*).
- Doctrinal debate if principles are hard legal standards or just guidelines (see *Kraemer*)

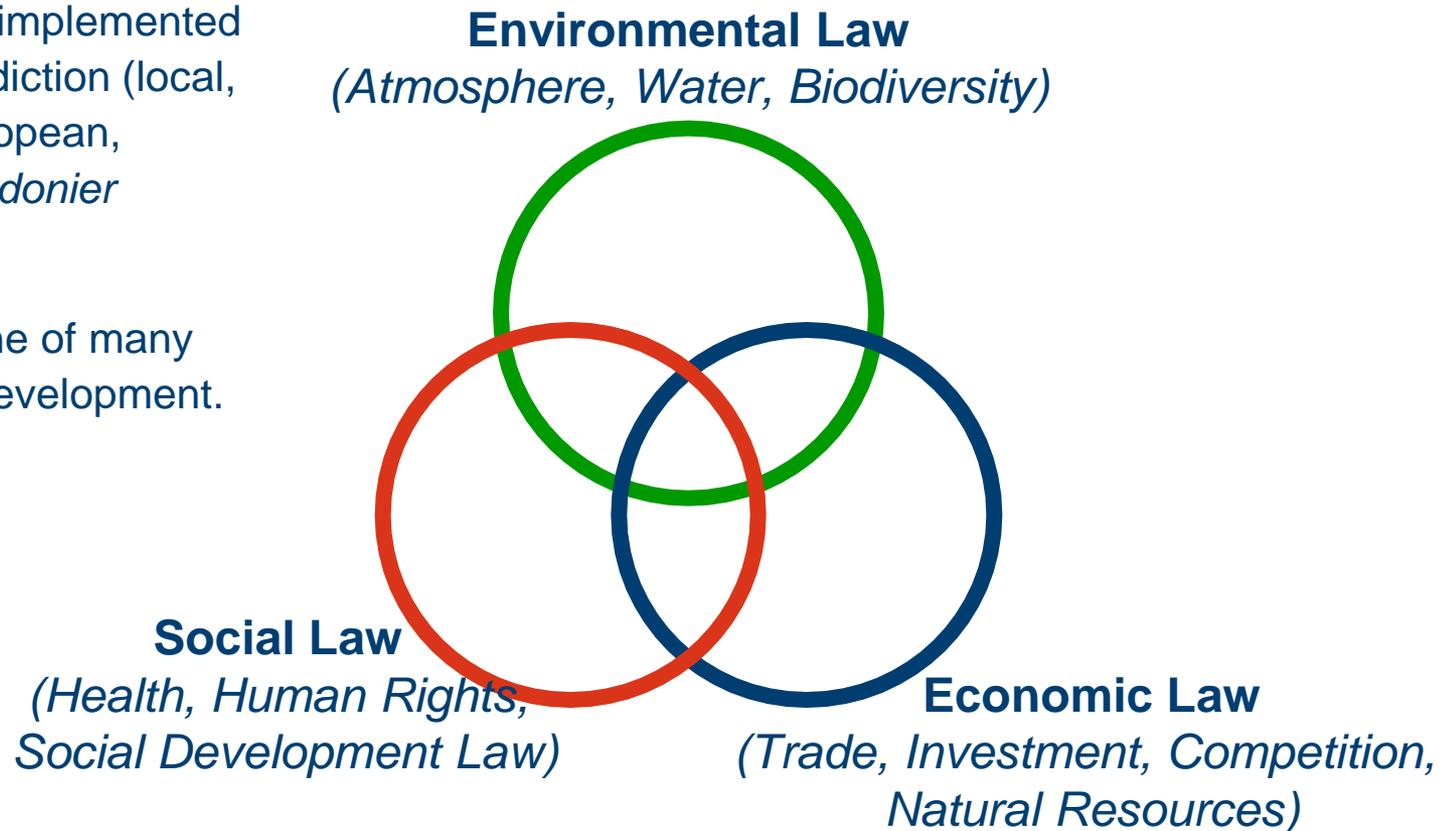
Legal Status of Sustainable Development in International Law

- *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*). See also powerful opinions by Judge Weeramantry.
- 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.

Concept of Sustainable Development Law

SD laws are currently being reformed, designed & implemented at many levels of jurisdiction (local, regional, national, European, international), see *Cordonier Segger & Khalfan*.

Caveat: Law is only one of many tools for sustainable development.



Solidarity in International Law

- Strong scholarly debate about the legal value of concept of solidarity in international law.
- Few deny its value as an interstitial norm or ‘structural principle’ (*Wolfrum et al*) but some argue it is a full-fledged legal principle.
- Strong link between intergenerational equity and solidarity in international law.
- Many treaty instruments, especially on natural resources make reference to future generations (see *Shelton*).
- 2005 Human Rights Council Study on Solidarity and Human Rights emphasised intergenerational equity.
- The UN Committee on Economic, Social and Cultural Rights (CESCRs)’ interpretation of several rights contained under the ICESCR raises a number of concrete inter-generational equity considerations. For example, according to *General Comment No. 15*, the right to water must be realised for both “present and future generations”. (see *Khalfan & Jodoin*)

Intergenerational Equity

- *1985 Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment (Jeddah Convention)* aims to protect the marine environment of the Red Sea and Gulf of Aden “for the benefit of all concerned, including future generations.” Article 1 of the *Jeddah Convention* further defines “conservation” as allowing “optimum benefit for [the] present generation while maintaining the potential of [the] environment to satisfy the needs and aspirations of future generations.”
- Strong ICJ Separate Opinions: In the *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, in his extensive separate opinion on the issue of ‘equity’, Judge Weeramantry discussed an historical cultural framework for inter-generational equity in global legal traditions. He subsequently insisted on the recognition of equity as an international legal principle in his dissents in *Nuclear Tests (New Zealand v. France)* and *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Advisory Opinion)*.

Intergenerational Equity as a General Principle?

- In countries such as India, the Philippines and Australia, we see courts establishing the principle of intergenerational equity as a matter of law, sometimes going so far as to generate the concept of intergenerational responsibility and justice.
- The Land and Environment Court of New South Wales, Australia has extensively applied intergenerational equity. In one of its early and landmark cases on climate change litigation, *Gray v The Minister for Planning and Ors.*, the Court referred to three fundamental principles underpinning the principle of intergenerational equity, identified by Justice Brian J. Preston: “(i) the conservation of options principle which requires each generation to conserve the natural and cultural diversity in order to ensure that development options are available to future generations; (ii) the conservation of quality principle that each generation must maintain the quality of the earth so that it is passed on in no worse condition than it was received; (iii) the conservation of access principle which is that each generation should have a reasonable and equitable right of access to the natural and cultural resources of the earth.” [2006] NSWLEC 720.

Conclusions

- Sustainable Development and Solidarity including intergenerational equity are starting to become justiciable concepts especially in the form of their underlying principles.
- There are close links between these two fundamental ‘interstitial’ norms; Sustainable development properly understood requires solidarity between generations and within generations.
- Both sustainable development and solidarity require environmental protection, social cohesion and economic fairness. Solidarity in EU law is not limited to solidarity between Union and Member States, or between Member States or between EU citizens but rather extends to solidarity with other parts of the world.
- The EU and International law are based on these norms and have developed closely defined principles to realise them.

Köszönöm / Danke / Merci / Gracias / Many thanks

mwg24@cam.ac.uk