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A page for members of the Board of Editors to express their personal views on issues of international and comparative environmental law.

The Missing Environmental Perspective

Jan Schneider points out in her excellent analysis of international environmental law in the July 1973 issue of the *Yale Law Journal:*

> "The traditional legal order of the environment is essentially a laissez-faire system oriented toward the unfettered freedom of states ... Such limitations on freedom of action as exist in the traditional legal order have been formulated from perspectives other than the specifically environmental."

The Stockholm Environmental Conference of 1972 was held for the purpose of developing the missing environmental perspective. It was, in large measure, successful in achieving this objective. In addition to the many action plans agreed to, the Conference unanimously endorsed: (a) the Declaration on the Human Environment, which embodied a number of important legal principles (particularly numbers 7, 21 and 22) postulating the duty of states to preserve the environment and to develop the law on liability and compensation for damage done; (b) the twenty-three principles postulating specific duties of states concerning the preservation of the marine environment; (c) a "Statement of Objectives" affirming the need to manage ocean space and recognizing the special interest of the coastal state in this new management process. Agreement on these legal principles may prove to be at least as significant in law-making terms as the analogous UN Declarations on Human Rights and on Outer Space, each of which laid the basis for subsequent multilateral treaties. However, this agreement did not come easily. It was achieved as a result of nearly four years of preparation and two years of intense, complex and difficult negotiations. Undoubtedly, the negotiating process was accelerated by the sense of environmental crisis existing prior to and during the Stockholm Conference. Today, less than three years after Stockholm, this sense of crisis seems to have dissipated. Instead, there are signs of an increasingly widespread tendency to consider 1972-73 as the "year of the environment" and last year as the "year of the energy crisis".

The "energy crisis" has provided interesting and disturbing indications of the perspectives of the public, the press, the multinational enterprises, the governments of states, and even the inter-governmental organizations and institutions concerning fundamental environmental problems.

While it is understandable that the high degree of concern for the environment aroused during the four years of preparation for the Stockholm Conference could not be maintained at such a pitch indefinitely, the falling off of interest is so marked and so immediate as to give cause for real anxiety.

At least as disturbing is that this switch in attention seems to ignore the symbiotic relationship between resource depletion, energy consumption, and the quality of the environment. The complementary objectives of conservation of energy resources and preservation of the environment are seemingly being regarded as alternative or even mutually exclusive goals. A whole series of retrograde "anti-environmental" measures have been justified nationally on the basis of the energy crisis. There are corresponding developments on the international plane, even on important law-making instruments. The role of the IAEA in implementing certain provisions of the London Dumping Convention has been narrowed and, in the process, the Convention has been eroded to a point close to the original "license to dump" proposals, leaving it to individual states to impose their own controls, an approach firmly rejected at Stockholm and by the London Dumping Conference. Recent recommendations by the U.N. Industrial Development Organization (UNIDO), including environmental expenditures, were supported only by certain developing countries, while none of the developed countries expressed support, and one actually recommended de-emphasis in investment of anti-pollution equipment.

Disturbing also is that whereas the energy crisis demonstrated in the most dramatic terms the need for coordinated action on the whole range of factors in the environmental equation and the consequences of uncoordinated planning, a piece-meal approach seems to be developing, with over-emphasis on energy development and little recognition of the need to relate this problem to those of world population growth, food scarcity and environmental degradation. Perhaps the Special Session of the UN on primary products can serve to remind people of the link.

The "energy crisis" has also revealed basic attitudes towards the "zero-growth" called for by the Club of Rome. There have been wide-spread cries of alarm about the restrictions imposed by the energy crisis upon the growth of the gross national product of developed states. No one seems to have drawn any comfort from this development. It may be that people must have time to adjust to such a radical idea. If so, mankind is a slow learner. In 1857, John Stuart Mills wrote in a widely quoted excerpt from his *Principles of Political Economy*:

> "I know not why it should be a matter of congratulation that persons who are already richer than anyone needs to be should have doubled their means of consuming things which give little or no pleasure except as a representative of wealth ... It is only in the backward countries of the world that increased production is still an important object ... I cannot, therefore, regard that stationary state of capital and wealth with the unaffected aversion so generally manifested toward it by political economists of the old school. I am inclined to believe that it would be, on the whole, a very considerable improvement of our own condition."

There is obviously a wide gap in thinking between John Stuart Mills and contemporary decision makers. In these circumstances, what is the role of the lawyer? Should he fulfill the traditional function of one awaiting instructions, thereby ensuring that he is one step behind the politicians, the economists, the military, the scientists, the engineers and the technicians, or should he be a committed activist attempting to press forward the development of the law, at least at the same pace as the developments in technology giving rise to these new legal problems? The answer surely lies in the

concept of exponential growth which is at the heart of the environmental crisis. The parable, couched in the terms of a French childrens' riddle, referred to in the Club of Rome future shock study on *The Limits of Growth* summarizes the situation graphically. A farmer concerned about the rate at which a lily is growing in a pond notices that the plant doubles in size each day to the point that, while initially small, it eventually covers half the pond. In the words of Wade Rowland in his provocative treatise, "*The Plot to Save the World*," the farmer "decides that he will soon have to cut back its growth. How long does he have to act? Until the next day, of course."

One of the important conclusions of the August 1973 Colloquium of the Academy of International Law of The Hague on *The Protection of the Environment and International Law* was that the lawyer must play the role of the committed activist, analogous to that played by so many lawyers in the field of human rights. Such a role is bound to be a controversial one, even in those organs of the UN dedicated to the preservation of the human environment.

In mid-March of 1974, the Governing Council of the U.N. Environment Programme (UNEP) gave a mandate to the Executive Director of UNEP to convene further informal working groups of legal experts to advise him on how best to contribute to the future development of international environmental law. Even such an unexceptionable decision was opposed by a powerful developed country and an influential developing country. Similarly, the 28th U.N. General Assembly (UNGA) adopted a resolution on the exploitation of natural resources shared by two or more states which called for the provision of information and prior consultation on the exploitation of such resources, and asked the Executive Director of UNEP to report on the international application of the principle. Now the Governing Council of UNEP has agreed on a proposal calling upon the Executive Director to carry out a study of the application of this principle, report the results to the UNGA, develop proposals for future application, and ensure that this principle is taken into account in respect of relevant program activities of UNEP. Even this decision, supported by twenty-nine members of the Governing Council, was opposed by one major developing state, while sixteen representatives abstained. Nevertheless, some encouragement can be derived from the decision; the Executive Director now has a mandate to continue work on the development and application of this most fundamental principle of international environmental law. Clearly, this will not be an easy task in the face of the inertia, apathy and even antagonism and opposition to the development of international environmental law. There is no automaticity in the law-making process in this field. Equally clearly, it can not be left solely to UNEP to provide the impetus and momentum. Yet the need to develop the law is no less real and no less urgent than it was two years ago.

As Jan Schneider concludes in the article quoted above:

> "Technological development has made possible vastly increased rates of resource depletion, energy consumption, and population growth. The perceived imminence of critical pollution and scarcity thresholds has precipitated a sense of global environmental crisis. It consequently is imperative that the legal order respond to these new conditions."

While one may well ask if the sense of crisis still exists, there can be no doubt of the need for the legal order to "respond to these new conditions". How is this to be achieved?

A whole series of international conferences will be held over the next few years (on primary products, on population growth, on food resources, on urban development) raising issues of existing or future environmental law. Of these, one is a major law-making Conference, namely, the Law of the Sea Conference which began in Caracas in the summer 1974. There is no doubt that if the Law of the Sea Conference is to succeed, it can do so only if it produces a radical restructuring of the present "laissez-faire" legal system. For three hundred years, the Law of the Sea has been based on the simplistic concepts of competing rights: total sovereignty over the territorial sea and total freedom of action on the high seas beyond. The concept of sovereignty has been utilized as the basis for resource grabs, unmindful of any need for conservation or rational exploitation and the concept of the freedom of the high seas has served as a euphemism for a right to overfish and a license to pollute. The opportunity now exists of building a new order for the oceans which reflects duties and responsibilities commensurate with the rights which states may enjoy, an approach reflected, after all, in any civilized system of law. The key to the restructuring of the law is clearly an abandonment of its present laissez-faire basis and the adoption of the concepts of management of ocean space, conservation of its living resources, rational exploitation of its non-living resources, maintenance of the necessary freedoms of navigation and scientific research, and the overriding imperative of the preservation of the marine environment.

Anti-environmental pressures will be well represented at the Conference. Only a degree of commitment, motivation and activism on the part of individuals as well as governments can ensure the hammering out of the necessary legal, economic, military, and political accomodations which are essential if this great law-making Conference is to avoid missing what may well be the last chance to construct a new legal order which lays down for the first time binding legal obligations reflecting environmental as well as economic, military and political considerations.

J. Alan Beesley