

ON THE LEGAL PROTECTION OF THE ENVIRONMENT IN DEVELOPING COUNTRIES

Mexico, 1974

FIRST SESSION: 25th August 1974

In the absence of Mr. *Keba M'Baye*, President of the International Association of Legal Science (IALS), Professor *Blagojevich*, acting as deputy chairman, opened the conference.

Professor *Blagojevich* welcomed the participants and expressed appreciation on behalf of the Association to the National Autonomous University of Mexico (UNAM), and especially to the Institute of Legal Studies of the University, for having made this gathering possible.

Professor *Blagojevich* went on to emphasize the significance of this event involving, as it does, one of the major problems confronting us today: the necessity of legal protection of the environment.

In connection with this, Professor *Blagojevich* mentioned the financial backing from the UNESCO, which has made it possible for the Association to attend more closely to the legal problems of our time.

The chairman ended by welcoming all Latin-American colleagues, whose contributions would encourage an increased awareness of such problems.

In the name of the Mexican Committee, Dr. *Héctor Fix-Zamudio*, representing the UNAM and the Institute, acknowledged the presence of the participants in the colloquium and extended a cordial welcome to them. He pointed out the importance of the colloquium and expressed his hope that agreement could be reached on ways of improving legal protection of the environment.

Speaking for the Director of the UNESCO, Mr. *Mshvenieradze* expressed his good wishes for the success of this event. He gave a special greeting to the members of the Mexican Committee, to the representatives of the UNAM, and to the Mexican social scientists. Mr. *Mshvenieradze* stressed the fact that a gathering of this type was important not only for the scientific community but for the social community in general.

He went on to underline that the world is currently witnessing an intersection between the different sciences and the various disciplines

within one science. Hence, in the case of environmental protection, legal aspects arise which are closely related to the development of social science in general.

He further indicated that this kind of conferences should take place at an international level in order to compare diverse points of view and to make it possible to reach a truly critical approach to the problems involved.

Mr. *Mshvernieradze* pointed out that the UNESCO is interested in backing organizations such as this because the work they do is of importance for the programs which will eventually lead to a solution of the problems falling within the objectives of this world organization.

The speaker informed the assembly that the UNESCO will face the problems under discussion by this colloquium within the next two years, and that the Association might well have an outstanding participation in the forming and fulfillment of the resulting project.

Mr. *Mshvernieradze* concluded by saying that he hoped great achievements and valuable discoveries in the legal approach to the problem would be made, and that these would contribute towards the progress of legal science and to the greater prestige of legal scientists.

Following this, Professor *Blagojevich* requested that Mr. *Blanc-Jouvan* read the agenda and outline the objectives of the colloquium.

Mr. *Blanc-Jouvan* pointed out the necessity, in view of the short time available, of restricting the subject matter even at the risk of excluding many important aspects.

He expressed that the general theme selected, "The Legal Protection of the Environment in Developing Countries", presupposes a clarification of the following question: do the problems facing developing countries differ from those afflicting industrialized countries? He said that this was indeed an important question, but that the colloquium's function was not to attempt to solve such general problems, but rather to address itself to more specific tasks. Therefore, this distinction would simply be taken for granted as a heuristic hypothesis.

Mr. *Blanc-Jouvan* pointed out that the different experiences of the participant countries would be very relevant to the discussion. He recognized that many of the views expressed would be those of industrialized countries; nevertheless, he said that this did not pose a contradiction but, on the contrary, that it would ensure a better presentation of the problem.

Finally, Mr. *Blanc-Jouvan* indicated that the person best qualified to state the objectives sought in this colloquium was Mr. *Sand*, who had prepared the agenda for the conference. The subjects for discussion were presented by Mr. *Sand*:

1. The legal-institutional framework for environmental resources management.
2. The effects of national regulation of environment on international trade and foreign investments.
3. Legal Means to control and avoid trans-frontier pollution.

Mr. *Sand* explained how the Organizing Committee came upon the choice of these themes, and also indicated that it had been necessary to leave pending another very important subject: "The Rights of Man and the Limits of the Legal Protection of the Environment".

When he proceeded to explain the reasons for the selection of the three themes and of the objectives of the colloquium, Mr. *Sand* pointed out that the first topic is the most general, as well as the most pertinent, especially taking into account the conclusions arrived at in the United Nations' Stockholm Conference. It was at this Conference that the difference between the problems of developed and developing countries was raised. However, Mr. *Sand* stated that this difference was not to be considered as dogma nor even as a central point of discussion, for what would definitely be put up for consideration concerned whether or not the legal demands varied from one type of country to the other. He pointed out that the elaboration of a general theory was not the goal of the Conference, but rather the fulfillment of a specific need of the developing countries. Furthermore, he stated that the purpose was not the analysis of positive law, but raising the issue of the law that was required for solving the problem.

Mr. *Sand* indicated that he was looking forward to a most interesting discussion on this subject, which would be presented by Professor *Jaro Mayda*. Professor *Mayda* has recently finished work on a project for a code on this subject for the Government of Colombia. He anticipated similar valuable contributions from Argentina, Venezuela, Mexico, Uruguay and Brazil, with the specialists from these countries each having their own contextual approach.

Finally, he explained that the main issue was not the protection of human health, but the administration of natural resources related to the environment, as Mr. *Reinikainen* has pointed out.

As for the second topic, relating to the effects of legal regulation on international trade and foreign investments, Mr. *Sand* commented that there, too, the point of departure was natural resources in relation to the environment. He explained the fact that certain types of regulations have had a harmful effect on international trade and on foreign invest-

ment, and that this could well form a differentiating criterium among nations.

He asserted that, in any case, this was not a totally new field but, on the contrary, one which had been amply studied, especially in the field of Comparative Law.

Regarding the third theme on the agenda concerning the legal means of avoiding transfrontier pollution, Mr. *Sand* pointed out that, in principle, no differences were to be found between the two types of countries, but he recalled that the UNO program for development contemplates distribution of resources, and that this problem, which is still under discussion, will be reported on by the UNO.

He added that an attempt would be made to contribute to the solution of the problems involving international law and, for the purposes of this colloquium, the comparison of national laws was of secondary importance. In this way the colloquium would differ in emphasis from a conference on Comparative Law, adding that this is no way questioned the usefulness of the comparative lawyers' approach.

Following this introduction, the papers for the discussion of the first theme were presented. Professor *Jaro Mayda*, as main speaker, gave the assembly a general address:

Mayda: As comparative lawyers, we are in a position to make important contributions. The comparative method, however, is not without its disadvantages, especially since environmental problems require an interdisciplinary approach.

A law that will regulate the environment must necessarily be based on technical principles. There is a risk that such proposals remain a simple outline of plans, which are never enacted by governments.

We must be "effective" not only as writers of laws but as legislators and forgers of public opinion, in order to move governments into adopting adequate measures.

The different problems we face are not isolated from each other; on the contrary, they are closely related. One must be wary of the official versions concerning the division existing between industrialized and underdeveloped countries; much of what applies to the first also pertains to the second.

What we are interested in is not the situation of human civilization as we know it today, but the establishment of an effective administration and protection of the "ecosystems".

We do not propose to discuss pollution, an essentially technical problem, but, rather its total impact on the environment, the population, urbanization, technology, economy, and culture, all of which make up a human ecosystem.

When a system's balance has been affected, two reactions set in: one is an automatic reaction through "negative feedbacks", and the other is a conscious one (man-aided remedial), which implies the concept of management. It is in the latter sphere that the lawyer has a part to play.

With respect to this disturbance of balance, we can establish that there exist no major differences between the two types of nations, except that the developing countries have a greater opportunity of anticipating such problems, rather than resolving them after they have become manifest.

Colombia has already put into operation the first practical application by establish legal bases within its own jurisdiction, with the idea of developing a code with a common philosophy, going from general principles to concrete details. A unified model was to be the point of departure. It became evident that there was no contradiction between such general aims and their practical enactment.

I hope to clarify this further during the discussions.

Professor *Blagojevich* proceeded to open the discussion period.

Magariños de Melo: It is practically impossible to solve a problem without the foundations of a general theory, though this is not precisely the occasion for such an elaboration.

The *Founeux* report is of a political nature and has, therefore, been taken out of circulation. However, it is a half-way point between "developers" and "conservatives" and it has developed some of the problems posed at the Stockholm Conference in an interesting way.

After the meeting in Brussels, we founded a National Institute for Environmental Protection in Montevideo. Both public and private sectors participate in this Institute, and environmental legislation has been the result. This may, in the future, prove valuable, but is as yet law in name alone.

The environment is something that we must define as life itself, as an asset belonging to all of humanity. Hence, the need to realize that these problems have no geographical frontiers.

In this Institute we have discussed, apropos of the project for the new Uruguayan code, the abuses committed against the environment. The Executive Branch of our Government has also commissioned us to prepare a project for the protection of animal life and habitat. This project, with an approach based on the ecosystem or integral environment, will form part of the Environmental Law.

It is my belief that this is the only place—in Uruguay— where an attempt has been made to form a legislation; to provoke a mental attitude; and to awaken an awareness among lawyers of the need to protect the environment.

The grave problem to be found in underdeveloped countries is the great difference that exists between written law and its application. In order to achieve success at a legislative level, we must first determine precisely what has to be recommended.

We are witnessing a transition of a problem from the international field to the national level. The problem is no longer a technical one; it now appears as a full reality. It is not merely a question of claiming responsibilities that one or another country should assume; a new mentality is needed: all nations must realize that the goal is the welfare of the world and not of one or another nation.

Cabrera: In Mexico we are in the experimental stage; we can not yet draw up a proper code. Three years ago, a law was passed to prevent air and soil pollution. We have already proposed specific statutes aimed at the protection of air and water. There are also pragmatic resolutions of an anarchic nature: fiscal duties levied on the importation of contaminating goods, and sanctions such as fines or even confiscation of companies.

Industrialized nations have produced more contamination, but the distinction between developed and underdeveloped countries, in this context, is insufficient because of the significant differences existing among the latter.

It is not a simple matter for developing countries to avoid the mistakes of industrialized nations, because we often do not possess a sophisticated technology and "know-how" and so must compensate with methods that may have adverse effects on the environment.

Despax: I would like to insist upon certain points which, to some extent, have already been touched upon.

In the first place, it is not always possible to successfully apply the experience acquired in developed countries to underdeveloped nations.

At the administrative level, I consider that there should be a ministry in charge of these problems, although it is necessary to point out that the distribution of responsibilities is not always easy to define. In any case, such a ministry should look into all matters pertaining to the "*aménagement de territoire*", which tend to produce grave ecological problems.

A ministry for the protection of life would encompass various areas such as ecology, culture, and tourism.

Our problem is to determine at what level administrative decisions should be taken. Should they be taken at the highest level by the governments of each country?

The most democratic procedure would be to give the power of decision in environmental matters to local authorities, though experience has taught us that they tend to accept risks of contamination provided that industrial complexes settle within their jurisdiction. This is, indeed, a serious problem.

Referring to another point already raised, I agree that laws passed in developing countries are often laws in name alone, without real power of enforcement. Many years can go by before environmental problems are recognized, but this is a situation shared, to a certain extent, by all countries. Therefore, control in the application of these laws becomes highly important. In my opinion, laws applicable to industrialized nations should not be transferred to underdeveloped countries. There should be a relationship at an international level, an agreement on a cooperative basis.

Finally, I would like to point out that, in the case of industrialized nations, private corporations and all public enterprises must comply with the law. This should include all work done by the government itself.

Magariños: The best solution lies in the creation of an international organization to look at environmental problems. All economic enterprises which might, in any way, affect the environment, should be managed in accordance with the principles established in Montevideo.

We are currently preparing at the Institute the legislation for the establishment of a national ministry which will advise, appraise, and decide on compensation measures, but which will not have executive power. There are five other ministries which have a measure of control over the environment. However, they will be bound by the legal code drawn up for the new ministry.

In our developing countries there is a great difference between the capital city and the rural zones, which makes the application of decisions coming from the central power at a national level more difficult to apply.

Malmstroem. In Sweden there is a Central Board for Environmental Protection that presented important material at the Stockholm Conference. This material, in essence, is still valid today.

National tradition affects the scope of a ministry for the environment. It would be contrary to our own tradition to have a ministry wielding such power. The Board submits consideration of these problems to the government. In general, I would say that Mr. *Magariños'* propositions depend largely on a country's tradition. Thus, in Sweden we feel that it is dangerous to render certain powers to local authorities who are concerned only with problems of an immediate nature. In view of this, we consider that authority should be centralized.

On the other hand, in regard to the paper presented by Mr. *Mayda*, I would like to mention that “first generation” problems also imply legal complications and that these are not merely technical.

It is important to point out that there are many problem-solutions that cannot be exported, depending as they do on the rules that a certain country has in the fields of Civil Law, Civil Responsibility, etc.

Ancel: When we speak of environment, we must be careful to distinguish between the term as used nationally and internationally. It becomes important to emphasize that Environmental Law is multidisciplinary, which is characteristic of modern systems, and that is why it has become so complex.

Though the complexities may vary from country to country, there are many similarities in environmental problems to be faced by any state, whatever the nature of its government might be.

Finally, environmental problems are better solved by a legal approach rather than by enforcement with government policies. We need a precise approach which only the law can provide.

Regarding the possibility of establishing ministries of environment, in France its objectives seem doubtful and I find it difficult to understand what its functions would be.

Valladao: New laws are born of old frames. New problems arise from the administrative point of view. Environmental laws produce consequences of general interest which pertain to the *ordre public*.

Brazil has a special Board of Environment that exercises influence on the respective ministries.

Zajtay: On the one hand, the political aspects involved are still uncertain; clear objectives have not yet been defined. In my experience as a civil lawyer, governments have little interest in protecting what has not been clearly defined.

On the other hand, the concept of legal right (“subjective law”) differs from one legal system to the other—in Common Law, in Civil Law and in Socialist Law. There are even different terminologies in different languages. This is of basic importance.

Before speaking of administrative responsibilities, it is necessary to determine just what must be protected.

Mayda: As for the concept of legal right, ever since the Stockholm Conference, the right of every human being to an environment that will allow him to live, has been recognized as one of man’s fundamental rights. The object of protection, then, has been defined: the human ecosystem.

Regarding Mr. *Despar's* and Professor *Malmstroem's* observations, we must keep in mind that, in questions of semantics, discussions at different levels should be avoided.

When mention is made of a first or a second generation problem, what is meant is that there are more problems than had been anticipated. As for the problems themselves, these are indeed of a technical nature since their solution is technical.

Concerning the level of authority which should deal with these problems and the establishment of a special ministry, as Mr. *Despar* proposes, it is not a question of assigning labels, but rather of determining the type of problems that have to be handled and that this ministry will be faced with.

First of all, we must define the problems and the manner in which they must be approached; also, we must consider what resources may be available to us for this purpose. In other words, as Doctor *Ancel* said: policies must be established. I agree that it is a difficult task. Input coming from all sciences is needed; a coherent plan is possible only through this input.

After these policies have been formed, they must be translated into positive legislation at national and international levels. At this stage, the problem is one of legislative technique.

Finally, we come to what we can call the *executive* or *control* stage. At this point it is necessary to determine who will be in charge of enforcing the policies that have been adopted and have become laws. Two bodies are needed for this purpose: first, a type of committee with the participation of scientists—a body to form models, outlines, and principles to be fulfilled in terms of administration; and second, a special ministry which should not be a political agent, but merely one of enforcement; a ministry that will be *unus inter paris*.

Therefore, we have a right that is clearly defined, an object for study, and a basic model. This is not an abstract object, but something that belongs to the *nature des choses*.