

IS SUSTAINABLE USE A SERVICEABLE LEGAL STANDARD IN THE MANAGEMENT OF WATER?

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ABSTRACT

In the 35 years since economist Kenneth Boulding introduced the idea of “sustainability”, the terms “sustainable development” and “sustainable use” have come into general use, both in legal contexts and otherwise. These terms, which are not necessarily identical in their meaning, have never been given entirely adequate definitions, yet either or both terms have been incorporated into a great many legal documents. These documents have included multilateral and bilateral treaties and national, state, and local legislation and regulations. The requirement of sustainable development even appears in the Preamble to the World Trade Organization Agreement, about as far from an environmentalist manifesto as one can imagine. Recourse to either sustainable development or to sustainable use have become so common and so universal in legal documents that many would now conclude that “sustainability” has become a universal mandate of customary international law and a fundamental legal principle of environmental law generally. The International Court of Justice in The Hague has endorsed this conclusion.

A national and international consensus thus has emerged over the past several decades that “sustainability” is the proper criterion for judging the balance between the exploitation of resources and the protection of the environment. The ubiquity of the concept of sustainability without an entirely adequate definition for the concept raises the question of whether the inclusion of the concept in laws and regulations actually provides a serviceable legal standard. In this paper, I shall examine some of the more prominent legal uses of the term “sustainable” with regard to water management issues, explore its meanings, and consider its application to water management.

The concept of sustainability was always implicit in the law of water management, for the right to use water is a “usufructory” right rather than absolute ownership. The word “usufructory” combines Latin words that express two of the three defining characteristics of absolute ownership: *usus*, *fructus*, and *abusus*. The right to the use of the water and to the fruits of that use simply never included the right to waste, destroy, or fully consume the resource. This tradition, as well as the fact that the hydrological cycle operates on a time scale that is meaningful for humans, suggests that the proper standard for water usage is “sustainable use” rather than “sustainable development.” In short, sustainability of water requires decisions regarding the conservation of water and steps to limit the use of water to uses that do not permanently impair the ecological integrity of the resource.