LAW'S PATH TO

SUSTAINABLE DEVELOPMENT

PROF. PHILIP EBOW BONDZI-SIMPSON

Barrister and Solicitor

Founding Dean, Faculty of Law

University of Cape Coast

Paper submitted to the Ghana Bar Association on 20 August 2013 for presentation on 17 September 2013 at the Bar Conference to be held at Ho, Volta Region, Ghana.

(Originally presented to the Editors of the Book of Readings to commemorate the 50th Anniversary of the University of Cape Coast.)

2012

CONTENTS

SYNOPSIS

The aim of law is to direct the behaviour of members of society and to solve social problems through rules that are enforceable by the coercive machinery of the State. Sustainable development conjures images of qualitative, quantitative and distributive dimensions of development of a State that is not at the expense of the continuing and future enjoyment of members of the State. This paper shows that law, through customary law, legislation, international instruments and protocols, and court decisions, has played a role in pursuing sustainable development. But two fundamental factors that impede development, namely, the unsatisfactory land tenure and administration arrangements and the inadequate resource mobilisation situation, are yet to be boldly confronted and appropriate legal responses presented to tackle them.

The original contribution of this paper is that it puts forth legal responses to effectively address the two named cankers. Thus, a legal framework for land reform and for resource mobilisation – being key drivers of sustainable development – are designed and presented. In particular, under land reform, a case is made for enacting an Investment in Lands Act to vest presently undeveloped land in the State and to establish Regional Land Allocation Committees with specified functions and powers. And under resource mobilisation, a case is made for national proportional income tax, an annual citizen's tax with varying city, town and village rates, and for directives in respect of long-term bank lending for capital projects. The thrust of this paper is thus conceptual and normative.

LAW AND SUSTAINABLE DEVELOPMENT

Economists (Lewis, 1955; Killick, 2010), geographers (Mabogunje, 1976, 1980, 2011) agriculturalists (Ayorinde, 2010), political scientists (Diamond, 2005) and, of course, development scholars (Kendie, 2011; Kendie and Martens, 2008) have spoken aloud on development. Jurists have not spoken as much or as loud. But development issues engage jurists, as they must, because in a civilized society, law has a say on every matter. Indeed it is law – not the chief or the elders or the sovereign – that rules (Dicey, 1885), hence the expression, "the rule of law".

A legal order is characterised by rules that are enforceable by the State's coercive machinery. Rules state what to do (*rules of prescription*), what not to do (*rules of proscription*), how to achieve desired results (*rules of procedure*), what rights and privileges one may enjoy (*rules of entitlement*), who is qualified for various entitlements or offices (*rules of eligibility*) and consequences for violation (*sanctions*). Within these parameters, by pronouncing edits, guiding behaviour, sanctioning misbehaviour, and providing the institutional framework, law tackles development issues. According to Ocran (1978), law serves as a *brake* by the checks it imposes; and it serves as an *accelerator* by speeding up the development agenda.

When *customary law* prescribes a day off farming or fishing activity – and when traditional practices call for shifting cultivation, crop rotation, and nomadic animal husbandry that do not threatened settled life or farming activity – they promote sustainability by affording time for replenishment and rest. When Parliament enacts *legislation* prescribing environmental impact assessment and clearance prior to industrial activity (Environmental Protection Agency Act, 1994), or protecting water

bodies (Water Resources Commission Act, 1996), it keeps in view sustainable development. When the local government assembly passes *bye-laws* on waste disposal and management and so on, it is directly promoting sustainable development.

When international organisations enact *international instruments and protocols*, such as the Lagos Plan of Action (1980), the Millennium Development Goals (2000) or the New Partnership for African Development (2001) mandating member States to adhere to certain standards and achieve certain targets, law, albeit inchoate, speaks to sustainable development. Indeed, the community of nations, comprising all 193 members then of the United Nations Organisation, plus another 23 international organisations, in September 2000 signed the Millennium Development Goals setting what must be done and targets to achieve along various timelines culminating in 2015 (Wikipedia, 2011). The eight-point Millennium Development Goals are as follows:

1. Eradicate extreme poverty and hunger.
2. Achieve universal primary education.
3. Promote gender equality and empower women.
4. Reduce child mortality rates.
5. Improve maternal health.
6. Combat HIV/AIDS, malaria and other diseases.
7. Ensure environmental sustainability.
8. Develop a global partnership for development.

And when our judges, in matters before them for *adjudication* take positions that are pro-environment, pro-social welfare, pro-future generations, and pro-justiciability, the law, again, takes a bold step to achieving sustainable development. The Supreme

Court of Ghana in *Ghana Lotto Operators Association v National Lottery Authority* [2007-2008] held the Directive Principles of State Policy of the 1992 Constitution to be justiciable, thereby reversing a position held earlier in respect of the 1961 Constitution when then Supreme Court in *Re Akoto* [1961] found the Bill of Rights to be non-justiciable. In *Adjei Ampofo v Attorney-General and Accra Metropolitan Assembly* [2007-2008], the Supreme Court decried the practice of carrying night-soil in pans and provided the Second Defendant a time frame to phase out the undignified practice. In *South Africa and 3 Others v Grootboom* [2000], the South African Constitutional Court directed the Republic, Province, Metropolitan Council and the Municipality to address the housing concerns of needy squatters. In all such cases, the courts have taken bold, pro-sustainable development measures.

It is clear then that at the local or national level (Kendie, 2011; Kendie and Martens, 2008) and at the international level (Asante, 2006), development issues are of concern. It is also clear that law must address development issues (Elias, 1973; Ocran, 1978; Date-Bah, 2008). Law is assertive and pronounces public edits (Hart, 1961; Kelsen, 1945 and 1967). Law is fair, compassionate and embodies an inner morality (Fuller, 1965). Law is principled and protective of rights (Dworkin, 1977). Law, indeed, is a key pillar to achieve sustainable development (Ocran, 1978). Strict enforcement by States of the relevant legislation and subsidiary legislation is called for; and the full commitment by States to meeting their obligations under international instruments must be demonstrated.

Sustainable development is development that is sustainable. Development is said to be sustainable when it is not achieved at the expense of future enjoyment (Kendie and

Martens, eds, 2008; Opoku-Agyemang, ed, 2010) As the Fanti proverb goes, *dzidzi dada ye sen dzidzi preko*, to wit, it is better to have something modest to eat every day than to have a buffet for today only with nothing left for tomorrow! Development itself has quantitative, qualitative and distributive dimensions (Bondzi-Simpson, 2011): a bigger pie, with more nutritious and varied toppings and fillings, shared fairly amongst members present. A pie too small is no good and is not big enough for a toddler's hungry belly! A large pie of crust and air has no nutritional value and while it may be belly filling, it is prone to lead the consumer to *kwashiorkor*, *beriberi*, scabies or other deficiency disease! A large rich pie that is being eaten only by the table head and cronies, with hungry onlookers present who are themselves willing and able to eat, will benefit only the consumers and is prone to stir envy and incitement among the ill-fed non-participant observers! As with the pie, so too it is with development.

Quantitatively, a nation is developed when its gross domestic product and per capita income exceed a certain threshold (cf. Killick, 2010). Economists are the masters of determining those thresholds, not lawyers. Qualitatively, a nation is developed when certain social services critical for the enjoyment of life are generally available – notably, a sense of security (law and order), literacy (education) and medical care (health) (UNDP, 2003). Distributive development means that the tangible and intangible benefits of the nation – the goods and services – are largely available to the majority of citizens (cf. Rawls, 1973). In other words, by these indicators, no country can be said to be developed when the rich few ride on the backs of the slaving many. Such a country may have possessions and may be affluent, but it is not developed – and it will end up deploying unnecessary force to keep the status quo. When a social

order does not operate for the general welfare and good but for sectional interests, legitimacy is undermined and the order ultimately yields – either through transformation or revolution (Carter, 1995). Witness what happened to colonial Europe, segregationist USA, apartheid South Africa, and undemocratic Tunisia, Egypt and Libya.

According to Bondzi-Simpson (2011), three key threats to sustainable development are (1) land tenure and systems that make it virtually impossible or too costly to acquire lands for large-scale agricultural, industrial, commercial, and town and country planning purposes; (2) inadequate resource mobilisation measures resulting, on one hand, in insufficient collection of public funds and the mass leakages and diversions of the little that has been collected, and, on the other hand, in the paucity of private long-term lending to the productive sectors; and (3) weak legal systems that result inevitably in weak governance and accountability structures, such that crooks and corrupt officials have a field day. This paper will however address the first two cankers.

LAND REFORM: THE PROPOSED INVESTMENT IN LANDS ACT

There is a major problem national problem when, for example, more than half of the cases in the Ghanaian courts relate to disputed ownership of land (Twum, 2010) – and when many more persons choose not to litigate! There is a major national problem when one has to deal with scores of persons to buy a parcel of land, and to deal with scores more when the land required is vast. There is a major national problem when you build your house today and when tomorrow you come out from your house to find that your new neighbour has built her house on the street! There is a major

national problem when you think that your major land problem has been solved at last so you start developing your commercial farm or building your factory – and then a faction of the family or a different family shows up to claim the land! By my reckoning, land is the greatest challenge to development. And the land question should be resolved pronto.

Operating on the proposition that the lands of a State belongs to the State, are protected by the State and are for the benefit of the citizens of the State, this paper suggests that all lands not already developed in the State should vest in the State and should be held in trust for the citizens of the State. This is not to nationalise lands but to ensure the public administration of the remaining undeveloped lands for sustainable development purposes. It is proposed that legislation should be passed, called *Investment in Lands Act*. Under the provisions of the said act, where a person requires vacant land – whether for residential, farming, industrial or other purposes – and the investment in the land required shall exceed one million cedis per defined area or other threshold that Parliament may decide, which investment is to be made within three months after the allocation of land applications for vacant lands, an application shall be made to a *Regional Land Allocation Committee* (RLAC). The application shall state the area required and the purpose for which the land is being sought. The application shall attach proof of the availability of the funds for the intended purpose. The RLAC shall comprise seven members, namely, a representative of the President other than a minister, deputy minister or mayor as chairman (for a non-renewable term of five years), the president of the regional house of chiefs or representative, the regional lands officer or representative, the regional representative to the Council of State, a member of parliament from the region elected by the members of parliament

representing the constituencies of the region, and two other persons appointed by the President for a non-renewable term of five years, versed in land, property, development or legal matters and who ordinarily reside in the region. The mandate of the Regional Land Allocation Committees will be to consider the feasibility of land requests, satisfy itself of the availability and immediate application of funds for the intended purposes should the application be granted, and to give clear title of land to the approved applicants. The price for the lands will be quoted by the RLAC concerned and payment will be made, for approved applications, to the RLAC. Within four weeks after a grant of land, RLAC shall cause to be published in the gazette the area of lands it has allocated and to whom the allocations have been made. Moneys paid for lands allocated will be held for whoever can satisfy the RLAC as being entitled to it, less a 10% administration fee which shall be payable into Government's consolidated fund. Any dispute as to who is entitled to payment can be resolved in court by the disputants, with the RLAC being an interested party only. RLAC will abide by whoever the court declares as entitled to receive the moneys paid. Until then, moneys will be held in trust. If no person comes forward as entitled to receive payment within six years of publication in the gazette, the moneys so held in trust will automatically become Government funds. By having competent, non-partisan, secure-tenured Regional Land Allocation Committees, a major problem facing commercial agriculturists, industrialists and property developers will have been addressed. Urban planning, farming and industrialisation can then go on in earnest for the betterment of all!

RESOURCE MOBILISATION: TAXES AND BANKING

It takes money to develop – tax money and borrowed money. Politicians complain about a small tax net; but public sector employees and champions of business complain about being overtaxed. The result is that too few people pay too much tax, nay, all the taxes! Yet population censuses are held periodically, on average every ten (10) years, Ghana's last census having been held in 2010. And, under the 1992 Constitution, general elections are held every four years, the next to be held in November 2012. By virtue of population census results and other statistics, the State knows how many people there are, where they are, what they do and what they want! People make a legitimate demand on the public purse. These same people are a legitimate source to replenish the public purse! Countries should not depend on few people paying too much but rather on everyone paying a little. And the taxpayer, because of the financial contribution and commitment to the State – what I will term *the pecuniary pinch* – is the best watchdog over the spending of public resources. If all voters were taxpayers, accountability of politicians will increase, and political sycophancy and foot soldier siege will sooner rather than later flee into oblivion! The clarion call is: let all pay a little! Little drops of water, it is said, make a mighty ocean.

We propose therefore that States' tax collection policy should focus on two main taxes. The first tax proposed is a *national proportional income tax* of 25%. 25% for a fantastically rich company will give the state a lot of money. 25% for an unemployed person will give the state nothing. A proportional tax is fair to all: each pays according to the income. And such single national tax will considerably reduce the vast assortment of taxes, the complicated and humongous tax bureaucracy, and the

costs associated with tax collection and administration. The second tax proposed is the *annual citizens' tax* payable by all adults. If an adult citizen is entitled to vote, if a citizen will enjoy the opportunity of public schooling, if a citizen will receive police protection, if a citizen will use a public road, whether tarred or not – for short, if a citizen will enjoy or expects to enjoy the largesse of the State, the citizen, specifically the adult, will have to contribute a token to the State. Sustainable development requires cultivating a sense of giving, accounting and calling to account. We propose, for the citizens' tax, a *city rate*, which will be higher than a *town rate* which will itself be higher than a *village rate*. The widow gave her mite! All persons – save for those below 18 and those who on medical grounds are unable to earn income – are to pay this annual tax. To facilitate collection, local governments should be mandated to collect the annual citizens' taxes on behalf of central government and to retain what they have collected. Central government remittances to local governments should take into account and deduct the amounts that the local governments should have collected on behalf of central government. Cities, towns and villages may have the various religious organisations operating there help raise the funds, and persons required to pay may have family and friends help them pay their due. In the light of existing demographic data, collection targets should be set by central government for every local government assembly. Of course, the successful collection of the annual citizens' tax will depend heavily on data, notably, who is where. But if the same data is available to census organisers and elections managers, then it is available. Submission of the last year's citizens' tax payment certificates should then be required for the current enjoyment of health and voting privileges by adults.

Beyond these two taxes proposed – the national proportional income tax and the annual citizens' tax – any other tax or levy ought to be minor. Local governments should be free to impose levies for business operating permits.

Again, on resource mobilisation but moving away from taxes, it has been observed that financial institutions tend to lend short-term to importers, who will make a quick turn-around of money (Darko, 2001). But no country has ever developed that way! And interest rates in developing countries tend to be exceptionally high (Kwakye, 2011) – double digit in many instances, sometimes between 25-35% per annum or possibly higher! Development call for long term loans to viable projects at affordable lending rates. Sustainable development calls for *pro-sustainable development banking*! Government's role is to create the enabling environment for development. Through legislation or subsidiary legislation, banks should be directed to advance 70% of their lending portfolio to long-term borrowers. Such a directive is enough: market forces will determine which viable investors will get the funds and which opportunistic, usurious banks will fold up!

SUMMARY AND CONCLUSION

This paper has demonstrated that law – to wit, customary law, legislation and subsidiary legislation, international instruments and protocols, and judicial precedent – has been and is a sound instrument to achieve sustainable development. Development is only sustainable when present enjoyment is not at the expense of future enjoyment. This paper seeks to frontally tackle two key drivers of sustainable development and it recommends provisions for land reform and resource

mobilisation. The paper's conclusion is that the above two measures, if adopted, will virtually guarantee to sustainable development.

REFERENCES

Constitutions and Legislation

Constitution of the 1st Republic of Ghana (1961) Accra: Assembly Press.

Constitution of the 4th Republic of Ghana (1992) Accra: Assembly Press.

Environmental Protection Agency Act, 1994 (Act 490)

Water resources Commission Act, 1996 (Act 522)

Judicial Decisions

Adjei Ampofo v Attorney-General and Accra Metropolitan Authority [2007-2008] SCGLR, SC

Ghana Lotto Operators Association v National Lottery Authority [2007-2008] SCGLR 1089, SC

Re Akoto [1961] GLR 523, SC

Republic of South Africa, Province of Western Cape, Cape Metropolitan Council and Oostenberg Municipality v Mrs Ireene Grootboom and 900 others. CCT 11/00. Heard 11 May 2000, decided 4 October 2000. South African Constitutional Court.

Papers, Articles and Books

Asante, S.K.B. (2006). *Implementing the New Partnership for Africa's Development (NEPAD): Challenges and the Path to Progress*. Accra: Ghana Academy of Arts and Sciences.

Ayorinde, K.L. (2010). "Sustainable Food Production in Africa: Emerging Issues." In Opoku-Agyemang, K. (editor) (2011). *Culture, Science and Sustainable Development in Africa*. Refereed Papers from the First University of Cape Coat and University of Ilorin Joint International Conference. Cape Coast: University of Cape Coast Press, 145-154.

Bondzi-Simpson, P.E. (2011). *Green Jurisprudence: Law's Place in Sustainable Development*. Refereed conference proceedings on the theme "Law and Sustainable Development" organised by the Faculty of Law, University of Ilorin, Ilorin, Kwara State, Nigeria, 6-9 November 2011 – Forthcoming.

Brundtland, G.H. (1987) *Our Common Future.* World Commission on Environment and Development. Oxford: Oxford University Press.

Carter, S.L. (1995). *The Dissent of the Governed: A Meditation on Law, Religion and Loyalty*. Cambridge MA: Harvard University Press.

Darko, K. (2001). "Transforming Agriculture" In. Ghana Academy of Arts and Sciences. *Some Crucial Development Issues Facing Ghana.* Accra: Ghana Academy of Arts and Sciences.

Date-Bah, S.K. (2008). *On Law and Liberty in Contemporary Ghana*. Accra: Ghana Academy of Arts and Sciences.

Diamond, L. (2005). *Democracy, Development and Good Governance: The Inseparable Links*. Accra: CDD.

Dicey, A.V. (1885). *Introduction to the Study of the Law of the Constitution.* Downloaded from www.wikipedia the free encycloppedia on 4 December 2011 at 8.16GMT

Dworkin, R. (1977) *Taking Rights Seriously*. Cambridge, MA: Harvard University Press

- *Law's Empire* (1986). Cambridge, MA: Harvard University Press

Elias, T.O. (1972). *Law in a Developing Society*. Benin City: Ethiope Publishing.

Fuller, L. (1965). *The Morality of Law*. New Haven: Yale University Press.

Ghana Academy of Arts and Sciences (2001). *Some Crucial Development Issues Facing Ghana.* Accra: Ghana Academy of Arts and Sciences.

Hart, H.L.A. (1961). *The Concept of Law*. Oxford: Oxford University Press.

Kelsen, H. (1945). *General Theory of Law and State*. Translation by Wedberg, A. Cambridge, MA: Harvard University Press.

- (1967) *Pure Theory of Law*. 2nd ed, English translation by Knight, M. Berkley, CA: University of California Press.

Kendie, S.B. (2011). *Reclaiming Development: Appreciating the Basics for Effective Local Level Development*. Inaugural lecture delivered at the Auditorium of the University of Cape Coast on Wednesday, 30 November 2011.

Kendie, S.B. and Martens (editors) (2008). *Governance and Sustainable Development*. Cape Coast: Marcel Hughes.

Killick, T. (2010). *Development Economics in Action: A Study of Economic Policies in Ghana.* London: Routledge.

Kwakye, J.K. (2011). "The Problem of High Interest Rates: Don't Control but Please Regulate". 19.3 *Legislative Alert* May/June 2011. Accra: Institute of Economic Affairs.

Lewis, W. A. (1955). *The Theory of Economic Growth.* London: Allen and Unwin. Referred to in Killick, T. (2010). *Development Economics in Action: A Study of Economic Policies in Ghana.* London: Routledge.

Mabogunje, A.L. (1976). *Cities and African Development.* Ibadan: Oxford University Press.

- (1980) *The Development Process: A Spatial Perspective*. London: Hutchinson & Co (Publishers) Ltd.
- (2011) Keynote address at the Second University of Cape Coat and University of Ilorin Joint International Conference on the theme "Climate Change and Sustainable Development, held at Ilorin, May 2011.

Ocran, T.M. (1978) *Law in Aid of Development: Issues in Legal Theory* Accra: Ghana Publishing Corporation.

Opoku-Agyemang, K. (editor) (2011). *Culture, Science and Sustainable Development in Africa*. Refereed Papers from the First University of Cape Coat and University of Ilorin Joint International Conference. Cape Coast: University of Cape Coast Press.

Rawls, J. B. (1971, revised 1975). *A Theory of Justice*. Cambridge, MA: Belknap Press of Harvard University.

Twum, S. (2010). *Performance Evaluation of the Land Courts and Review of Conflicting Judgments/Claims in Gbawe-Accra*. Paper submitted to the Ministry of Land and Natural Resources.

United Nations Development Programme (UNDP). (2003). *Human Development Report*. New York: Oxford University Press.

Wikipedia. (2011). *Millennium Development Goals*. www.wikipedia.org. Downloaded 4 December 2011.