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## DECIPHERING “SUSTAINABLE DEVELOPMENT”\*

CHRISTOPHER D. STONE\*\*

“Sustainable development” is increasingly surfacing in discussions, in policy documents, and even in international agreements. Professor Helen Endre-Stacy has several objections to the term and to the ways in which it is used. Sustainable development is a “still slippery concept”<sup>1</sup> that is “trapped by its own (self-imposed) boundaries”<sup>2</sup> and must “enliven itself” with “revitalized ideas of community and precaution.”<sup>3</sup> Above all, the term lends itself “to seal the intellectual chasm between the developmentalist and the environmentalist.”<sup>4</sup> Much of Endre-Stacy’s paper—on either side of her dispatch on developments in Australia—is an attempt to draw from a “postmaterialist” vision of society cues for bridging this chasm.

Other commentators might have been found who would have reflected more deferentially on these verdicts in the context of Endre-Stacy’s larger project, which is “to undermine the coherence of the very idea of poststructuralism, whilst accepting its targets of critique.”<sup>5</sup> Even at this stage, her agenda—to cross-illuminate trouble in the environment with fashion in intellectual theory—is formidable. Many of the authors whose writings have inspired Endre-Stacy,<sup>6</sup> and whose style she emulates, while professing concern for language regrettably use it—indeed, treat it—rather badly, and in a manner that frustrates formation of the “inclusive” community they prescribe. In my experience, the effort of prodding through the mounds of jargon, commonly unmortared by any logic (apparently dropped from the building code), is seldom rewarded by any genuine, novel insights awaiting on the other side. Endre-Stacy, or her other readers, may have better luck or fortitude.

\* Based on comments delivered on Helen Endre-Stacy’s *Sustaining ESD in Australia*, 69 CHI. KENT L. REV., 935, at the Chicago-Kent Conference on The New Ecology and the Law, October, 1993.

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1. Helen Endre-Stacy, *Sustaining ESD in Australia*, 69 CHI.-KENT L. REV. 935, 935 (1994).

2. *Id.*

3. *Id.*

4. *Id.* at 936.

5. *Id.* at 959 n.96.

6. See, e.g., JÜRGEN HABERMAS, *LEGITIMATION CRISIS* (Thomas McCarthy trans., Beacon Press 1975) (1973).

On the merits of what I do decipher, I find myself more tolerant than Endre-Stacy that an ill-defined term has worked its way into authoritative documents. In international agreements in particular one should expect certain key phrases, and indeed many instruments as a whole, to be diplomatically inexplicit. Domestic legislation ordinarily requires only majority vote, but in the international arena a unanimity rule prevails: a majority of states cannot drag a reluctant minority into a convention. The dynamics invite equivocal language, which, particularly in the early (framework-setting) stages, can mask a failed consensus in a way that permits negotiations to continue while differences get, hopefully, resolved. The fact that "sustainable development" means different things to different people is, in this context, understandable, even an asset.

So far as there is an enduring problem, I find the root to be less the "intellectual chasm" between "developmentalists" and "environmentalists" that Endre-Stacy suggests, than it is a conflict of interests. The developmentalists include much of the world that is poor and getting poorer and laboring to repay international debt and feed itself from day to day. People who are so prematerial that they have never seen indoor plumbing are not an easy sell for "postmaterialism." If there is a choice between turning a hardwood forest into lumber and preserving it as a habitat for exotic creatures or as a genetic library that may pay medicinal dividends in the mid-twenty-first century, the poor will opt for the lumber and cash. The environmentalists include many constituencies in the developed countries who value conservation, even if it comes at the cost of economic development (perhaps particularly someone else's). Well-fed, well-clothed, and well-housed, they will often judge the nonmarket-measured value in a forest area (its beauty and biodiversity) to exceed its market appropriable value (its lumber and latex).<sup>7</sup>

In other words, the term "sustainable development" is not merely vague—a masker of failed consensus—the way key terms in the U.S. Constitution are vague and require case by case elaboration. "Sustainable development" functions to gloss over not only failed consensus, but a latent collision course. The chasm is less a failure of language, as Endre-Stacy maintains, than a poignant tussle between, roughly, Rich and Poor. The indigenous native who extinguishes a

7. Endre-Stacy relays that in a conservationist mood the Resource Assessment Commission adjudged *water* "to hold *intrinsic* value, though this value was not quantified in monetary terms." Endre-Stacy, *supra* note 1, at 942.

species for food is not trapped in orthodox semantics of conventional prematerialist *homo economus*' cost-benefit analysis.<sup>8</sup> He is trapped in hunger (just as we, the rich, are so often trapped in moral blindness). There is no reason to suppose that killing off a species pains him less than it does us. And at any rate the dilemma is not one that logotherapy, the academic's favored home remedy, will cure.

We saw this tragic friction played out on a large scale at the United Nations' 1992 "Earth Summit" in Rio. The Conference was convened in the name of Environment and Development. The Rich's diplomats deplained wanting, mainly, Environment; those of the Poor, mainly, Development. The text that emerged was more heavily weighted towards Development because the poor countries outnumber the rich. Their message was clear and united: "Don't tell us what to do with our forests." Protection of the environment, with fewer supporters, received relatively less tribute than it had in Stockholm twenty years earlier.<sup>9</sup>

Whatever the roots of the lingering tensions, the impasse between environmentalists and conservationists is not insurmountable. Those who are observing and commenting on the process should try to find ways of conceiving problems and addressing areas of activity in which multiple constituencies can be satisfied—or, at least, no one made less well-off. The negotiating space includes a region of potential alliances for cooperative gains, even if cooperation has to take the form of debt-relief, forest "rentals," and transfer payments from rich to poor.<sup>10</sup> Hence, Endre-Stacy is right to call our attention to aspects of the intellectual environment that make some of the friction more intractable than it needs to be. On the other hand, a common ground is not to be established by deriding and dismissing the language of economics and social choice theory. The gap between these fields and environmental ethics can be bridged (or better, their interests woven) to the benefit of both "sides," but both have to listen.<sup>11</sup> Environmentalists commonly are inclined to underestimate how flexibly the frameworks of economics can accommodate many, although probably not all, of the interests and values for which they wish to speak.

8. See *id.* at 954.

9. For two good evaluations of the Earth Summit, see Marc Pallermaerts, *International Environmental Law from Stockholm to Rio: Back to the Future?*, in GREENING INTERNATIONAL LAW 1 (Philippe Sands ed., 1994) (emphasizing the set-backs), and, less pessimistically, Ileana M. Porras, *The Rio Declaration: A New Basis for International Cooperation*, in GREENING INTERNATIONAL LAW *supra*, at 20.

10. See CHRISTOPHER D. STONE, *THE GNAT IS OLDER THAN MAN* 39-45 (1993).

11. See AMARTYA K. SEN, *ON ETHICS AND ECONOMICS* (1987).

Indeed, Endre-Stacy reports that in one of the mining disputes, a survey based on contingent valuation ("CV"), an economic tool, indicated that the amount Australians reported themselves willing to pay to preserve a National Park outweighed the \$82 million that would be gained from mining it.<sup>12</sup> In other words, a robust cost-benefit analysis sided with conservation and the aboriginals. She reports that the contingent valuation was criticized on several grounds,<sup>13</sup> but stops short of sharing with us where she herself would have come out if she were speaking, say, in one of the broadly participatory, local-level consulting forums that she favors.<sup>14</sup> Would she renounce any discussion in CV terms because it would backtrack us to an obsolete "code of orthodox discourse"?<sup>15</sup>

Settling the differences that the phrase "sustainable development" cloaks requires more than shifting among "discourses." There are issues of substance and strategy involved. But the strategy depends upon characteristics of the situation—the substance—that vary from case to case.

First, there undoubtedly exist many projects where developmental and environmental goals are virtually congruent. These win-win cases should be identified, coalitions strengthened, and the indicated solutions vigorously pursued. On the positive side, energy conservation and transfer of technology present clear opportunities for mutual gain.<sup>16</sup> And there is room for alliances designed to stall actions where the pause works to mutual advantage. Fred Pearce's study of massive water projects documents how commonly such undertakings have disrupted local economies at the same time they were devastating the environment.<sup>17</sup> Whatever else "sustainable development" is, the term is not pure sham, but often an earnest invitation to constructive cooperation. Indeed, considering their limited resources, the relevant international agencies, including the United Nations Environmental Program, the Global Environmental Facility, and the Commission on Sustainable Development, may find their hands full just identifying and launching programs that are uncontroversially worthwhile to all sides.

12. Endre-Stacy, *supra* note 1, at 943.

13. *Id.*

14. *Id.* at 968-69.

15. *Id.* at 954.

16. See NICHOLAS LENNSEN, EMPOWERING DEVELOPMENT: THE NEW ENERGY EQUATION (Worldwatch Paper No. 111, 1992).

17. See FRED PEARCE, THE DAMMED 181-202 and *passim* (1992); *The Beautiful and the Dammed*, ECONOMIST, Mar. 28, 1992, at 93.

In a second range of cases, where the mutual benefits are not immediately evident, these same agencies are competent to perform the investigation and education that alliance-building requires. Experience shows that the country sacrificing its environmental amenities may be overlooking certain ominous causal links, or environmentally benign alternatives. A searching inquiry may show that a seaside development which threatens a wildlife refuge does not pencil out favorably for the local economy either.

The tensions between environment and development get more unruly when we enter a third level. Suppose that the project threatens a wildlife refuge that is the traditional homeland of an indigenous people, but the project is economically sound. Now, in these cases it seems fair to say that the antagonistic positions are likely to be described and advocated in different vocabularies. The pro-development position (the reasons favoring mining the National Park) is spelled out in terms of economic value and discount rates. The arguments on the other side (favoring leaving the park undisturbed) are likely to be expressed in the looser language of other, competing values, such as respect for nature and the honoring of national commitments.

But conflicting values do not make differences irreconcilable. Governments routinely resolve tensions between "efficiency" and "fairness" (or equity) that are no less perplexing than those between the environment and development at their most aloof. In fact, the parallel is instructive. As Brian Barry has pointed out, just as preferences across a basket of ordinary commodities—grapes and potatoes—can be represented by indifference curves expressing marginal preferences as a function of endowments, so can efficiency and fairness.<sup>18</sup> The less wealth we have, the more likely we are to sacrifice advances in fairness for advances in wealth; and conversely, the better we are fed and clothed, the more apt we are to sacrifice advances in wealth for advances in equity values. Consistent patterns of indifference can meet standards of rationality, even if equity and efficiency cannot be reduced to the same metric—indeed, even if neither can be satisfactorily reduced to its *own* metric. The same appears to hold for trade-offs between wealth and facets of the environment not captured in markets, such as the existence value of dolphins. As wealth grows (as countries become more developed) so too do populations, in general and by degrees, become readier to trade marginal wealth for mar-

18. BRIAN BARRY, *POLITICAL ARGUMENT* 3-6 (1965).

ginal environmental amenities. One would expect this inclination to display itself in contingent valuation surveys.<sup>19</sup> These surveys, moreover, are a perfectly sensible (though imperfectly realizable) way of seeking a common denominator to reconcile the contending interests. Forging cooperation among the parties may take more imagination and patience. But it can be done.

The more intractable difficulties are introduced at a fourth level. There are certain cases in which even the ideal CV survey (in which respondents were fully informed, nonstrategic, and candid) would leave us unsatisfied. Endre-Stacy's illustration of the Jawoyn people might be a case in point. It is not at all clear that their claims—to ancestral land and the preservation of their culture—ought to be measured by what others, who are not choosing the rules from behind a veil of ignorance, say they are worth.<sup>20</sup> The surveyed others, who have interests in conflict with those of the Jawoyn, cannot be impartial or even (feelings considered) *fully* informed.

Endre-Stacy backs two contemporary proposals that may be intended to relieve or skirt the tensions between development and the environment in cases of this sort. The first is "the precautionary principle"<sup>21</sup> and the second, a more widely participative style of government, an ethic of dialogue.<sup>22</sup>

That "the precautionary principle" has become as fashionable as it has is a sad testament to the level of the new legal scholarship. There is a large literature on risk management that deserves the attention of all of us concerned about environmental catastrophes.<sup>23</sup> Anyone who puts in the effort to read this stuff will learn, at a minimum, that there is no "the" precautionary principle, but text-books full of precautionary principles, plural. Risk management is complex—far too complex to conclude (or stand pat on the proposition) that we should take precautions against risks. Sure, if the costs of avoiding

19. Might this phenomenon explain why Northern Territory residents were bafflingly prepared to pay considerably less than the national average to ensure preservation of the proposed mining venture Endre-Stacy relates? See Endre-Stacy, *supra* note 1, at 943.

20. I could not figure out from Endre-Stacy's account what the position of the Jawoyn people was towards the mining: were they against it because it compromised ancestral lands or for it because it promised them marginal mining revenues, or for it on better terms than they were offered? See *id.* at 947.

21. *Id.* at 969.

22. *Id.* at 966.

23. In fact, the notion of what some observers are fumbling for in terms of precaution may be best addressed through a sophisticated concept of "quasi-option value." See Kenneth J. Arrow & Anthony C. Fisher, *Environmental Preservation, Uncertainty, and Irreversibility*, 88 Q. J. ECON. 312 (1974); Anthony C. Fisher & W. Michael Hanemann, *Option Value and the Extinction of Species*, 4 ADVANCES APPLIED MICRO-ECON. 169 (1986).

risks are nil, let's get rid of them. But in real situations risk avoidance (minimization) often carries a significant price tag. How much risk is to be avoided at what cost? Further, risks ordinarily linger whichever course we choose. On the one hand there are risks of burning fossil fuels: we raise the probability that more energy will be retained in the atmosphere, and, one way or the other, the added energy is almost sure to break out in ways that are troublesome. On the other hand, a rapid throttling of carbon use worldwide would lead to a rapid deceleration of the global economy, raising risks of its own—of massive unemployment, freezing, brown-outs, and widespread civil unrest. Being cautious is no answer, because both policies, a continued use of carbon or a stifling of carbon, involve risks. Not that we are left to flip a coin. We should try to figure out how much use of carbon, or of anything else, is most sensible; but it is unclear how the sensible resolution is drawn from "the precautionary principle."

In fact, Endre-Stacy's spin on the precautionary principle jaunts her onto some pretty perilous thin ice. Her version endorses regulation "*where there is no proof of a causal link between toxic emissions, for example, and harm.*"<sup>24</sup> Is one permitted to ask how we know a substance is "toxic" if there is *no* proof of a causal link to harm? In the eyes of Endre-Stacy, who champions the unhorsing of elite authorities such as scientists and economists, the very raising of the question undoubtedly exposes my delegitimacy.

I find a lot to like in Endre-Stacy's proposals about local participation. There are undoubtedly instances in which mistakes could have been avoided had planners been more open and receptive to the views of local populations before a project began.<sup>25</sup> And anyway, good governments listen. One might draw from this an argument that an ideal government (with infinite patience and pocketbook) is obliged to hear out, even respect, everyone's views, even if, when all is said and done, some of its plans proceed (perhaps in modified form) anyway. In all events, we need, as Endre-Stacy indicates, improved modes of public participation.

But what reforms would constitute *improvement*? Central to Endre-Stacy's vision is an "ideal of community as a horizontal and cooperative sharing of information,"<sup>26</sup> indeed, of "unceasing dialogue."<sup>27</sup> As a general principle, it is hard to take issue with openness, informa-

24. Endre-Stacy, *supra* note 1, at 969 (emphasis added).

25. See PEARCE, *supra* note 17, at 252-71 and *passim*.

26. Endre-Stacy, *supra* note 1, at 971.

27. *Id.* at 970.

tion sharing, and public participation. Endre-Stacy particularly values these as integral to her larger vision of community as a search "for alternative, noncoercive forms of existence."<sup>28</sup> The problem is that decisions have to be made, and dialogue and delay are costs. National Parks have to be mined or not mined. Cities have to expand or not expand. Discussion about individual projects (as opposed to dialog about the good society) cannot go on forever. At some point, someone has to decide. A principle of sharing information, within limits, is worthy—but is no substitute for a rule of decision.

On this score, I cannot pin down what Endre-Stacy's rule of decision *is*, perhaps because she is more interested, here, in an over-all process (the integration of government with its communities, an independently vital question on which she has much to contribute) than in the sequence of discrete resolutions that constitutes a government in practice. We get a clearer idea what she does not like. She takes a poke at the Australian ESD (Ecologically Sustainable Development) process for being "activated by and acting out our Cartesian anxiety,"<sup>29</sup> a token of new Criticism that is beyond my ken to decode. She cues: "The tyranny of dualism meant that the only two available alternatives were well-mannered discussions, or someone or some interest group being 'forced to take the medicine.'" <sup>30</sup>

But do we infer, then, that she would insist on consensus as a condition of proceeding ahead? *That* would be the strong medicine. Ensconcing unanimity as the collective choice rule is equivalent to giving each participant a veto power. The trouble is, telling participants more and more about a problem, and even encouraging them empathetically to put themselves in the other person's shoes, does not assure that disputants will converge on an agreement. In fact, clarifying their differences may only harden opposition. As a result, demanding consensus as a necessary condition of social change poses the same risk as posed by her version of the precautionary principle: it is likely simply to freeze the status quo—an ironic position for social reformers to take.<sup>31</sup> The logjam would get worse if, as she appears to

28. *Id.* at 967.

29. *Id.* at 959 n.95.

30. *Id.*

31. Endre-Stacy acknowledges the criticisms this point stirred at her presentation in Chicago and marshals a response in the form of an ironic and I found feeble paraphrase of her critics: " 'They' (the locals) could not be trusted to do the right thing . . . could not see beyond their own noses. 'They' wanted to protect their own environmentally damaging job. . . . I detected a siege mentality. Environmental, political and legal strategies needed not so much to be ambitious, as *didactic*." *Id.* at 964 (emphasis in original).

recommend, just about everybody in Australia would be given a say in just about every decision. But why stop the bounds of community at Australia? Should not the decisions on Australian land use and fishing await input from (here I may be slipping into a pre-postmaterialist term) "outsiders"?

These sentiments are not entirely wrong-headed. On the contrary, they put some ideal considerations on the table, and may encourage a circle of young scholars, not heretofore concerned with the environment, to enter the discussions with some fresh and challenging thought. But if so, they shall have to bone up on, and join, what Endre-Stacy rightly labels the "next phase," the growing body of literature that has gone on to address "*how* society is to make the transition to ecologically sensitive decision making, and consider[s] the role of institutions within that transition."<sup>32</sup> Write on.

32. *Id.* at 973.