TRENDS IN LAW RELATED TO CONSERVATION AND PRESERVATION OF NATURAL RESOURCES *

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The Commission for the Environment has no standing in law; it is an unusual government institution which has no Act to set it up and no Act to administer. It was set up by Cabinet decision, and could just as easily be disestablished by Cabinet decision if it were decided that this was the appropriate thing to do. But, because it is not defined in law, the Commission has a great deal of flexibility in how it works and what it does. For without precedents to follow, and without any powers which law might give, we are feeling our way, and seeking to use the best available ideas and the best available commonsense to decide where we should put our efforts so that we are as useful and effective as we can possibly be. For the planning and management of man's environment does not usually mean following a well-worn path with a clearly laid out set of mile pegs and easily recognised direction indicators. It rather involves attempting to analyse the consequences of sets of possible actions, to examine alternatives, to seek to evaluate these consequences, and to express these in a form useful for the decision-makers, so that their decisions may be as well-based as possible as they seek to interpret what the people wish to be done with our country and its resources in the future.

I want to stress this right at the outset-that environmental planning and the development of environmental policy are not matters of meeting legal requirements-the *mechanics* of the system may, to a greater or lesser extent, be defined in law, but the development of the policy, and the determination to carry it out are administrative management at the highest level.

However, within this scene, there is a major and rapidly expanding legal structure. The field of natural resource conservation and management is a relatively new one for the law. Man's early need to develop rules for the guidance of his conduct sprang primarily from ,his m;eds as a social animal. And while nature, too, had her basic rules which it was folly to break, the chief pressure towards the development of norms came from the interacction of individuals and communities. Hence, the, legal system has been mainly concerned with persons and property; and this concern expressed itself in the twin concepts of right and duty.

In so far as the common law and early statute law touched on natural objects, they did so only in respect of those properties of natural objects that reflected the proprietary rights of human beings. such as land ownership, riparian rights and the laws of trespass. Apart from some detailed applicationss of the law of nuisance, common law was never designed, and has little potential, as a, tool of resource management.

In common law the litigant must have standing, and he must have a right which he can show has been infringed by the defendant if he is to get his case before a court of law. Without some new right of standing that makes a complete break with the old concepts of personal and proprietary rights, the individual has had the utmost difficulty in bringing before the courts his grievances about the mishandling of natural resources.

In the field of natural resources ,the role of government .is vital. Not only does the government have power, through statute, to develop new trends in the law to cope with natural resource problems, but also in most countries government has the widest control over those natural resources,. either by virtue of. ownership, or through "he multiplicity of ways in which it controls development relating to them.

New Zealand's legislative approach to natural resource problems has been incremental in nature. Problems, have been tackled as they arose, and where the problems were sufficiently pressing legislation has conferred wide powers on administrative bodies constituted to deal with, the difficulty. The administration of resources- has thus come increasingly under the control of Government departments. However, over the last five years there has been a: growing awareness that the public should participate in resource management decision-making. The concept of multiple use is gaining momentum and, with it, the realisation that various viewpoints must be gathered together in the very early planning

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stages and that, while public involvement may take time, final decisions are usually the richer for it.

Let us look back over New Zealand's history of law related to conservation, taking some samples to illustrate trends. The Soil Conservation and Rivers Control Act 1941 marked a new era in resource management legislation in New Zealand. The provisions of the Act were far reaching, with wide powers given to the Soil Conservation and Rivers Control Council and Catchment Boards in a country where the landowner as a matter of tradition claimed the right to deal with his land as he saw fit. In some parts of New Zealand this system had led to devastation of land and waterways. Though the Act was originally drafted as a flood control measure, it was during Select Committee hearings, involving representations from local bodies and affected organisations, that the integrated concept of soil conservation and rivers control was developed-an encouraging example of the role of individuals in the statutory process.

The Water and Soil Conservation Act of 1967 carried this concept much further. It gave to the Crown immense powers in respect of the use of natural water. In one stroke the Act removed all common law rights in respect of natural water (rights to dam, divert, take, discharge and use) and vested them in the Crown, the individual's right to use now being limited to the obtaining of a water right under the Act. The basic concept was a bold one and quite revolutionary at the time. It is an indication of the importance attached to the integrity of natural waters that a land-owning nation, which had based its conduct on the laissez-faire approach of the common law, should accept such a change willingly, and generally with an attitude of responsibility towards an important natural resource. The result of this legislation has been a great improvement in management of the water resource and a more balanced understanding of it by the public as a unit in New Zealand's basic assets.

There have been legal problems in administering the Act; there has been criticism of the complex bureaucratic structure set up to administer the Act, and of the fact that the Crown is not subject to the same procedures as the private individual in seeking water rights. While the status for objecting to ordinary water rights is wide enough to obviate problems of standing, the objector to a Crown water right must show that the decision to grant the right will affect him and that such detrimental affect will be appreciable. This rule has caused difficulty for individual objectors, and for interest groups such as environmental groups. There are certain limitations on the persons or bodies who may object to final classification and these, also, have caused difficulties for objectors. Perhaps the most fundamental aspect of concern in this legislation is that the person seeking to preserve the resource is cast in the role of objector to a concrete proposal for its utilisation. Whereas the proposer is in a position to justify his proposed use, and assess its effects, it is the objector who must take the onus of establishing the detrimental nature of the use, both at first instance and on appeal. It is for this reason that the Commission for the Environment prepared a discussion paper on Wild and Scenic waters which included the suggestion that the preservation of such waters might be recognised as a "use" against which proposers of other uses might submit objections. The implications of this proposal are still under investigation, and hopefully this concept will be incorporated into the review of water and soil legislation which is at present being made, leading to the preparation of a new Act during the period of the present parliament.

The Forests Act of 1949 set out clearly the policy for State forest land, and the role of the Minister of Forests and the New Zealand Forest Service in administering it. Two functions of forestry-protection and production-were given priority, with forestry recognised from both an economic and a soil and water protection point of view. Although other uses were mentioned in the Act, they were clearly subservient to what were recognised as the main priorities at the time. By 1965 the need to facilitate public recreation and the public enjoyment of forests had become sufficiently pressing to demand statutory recognition, and in an amendment to the Act of that year, provision was made for setting aside areas of state forest land as state forest parks, with power to set up advisory committees in respect of their management. State forest parks were to be managed under working plans and in areas where no advisory committees had been set up, the public was given a limited right to object to the working plan. No right of appeal was provided from the Minister's decision on objections lodged with him.

In 1976 the Forests Act was further amended to increase the scope of public participation, all management plans being made open for public inspection and comment As before, the Minister is required to give full consideration to all objections lodged with him, but there is no appeal from the decision he makes. The 1976 Amendment also gives the public .the right to comment on Ministerial decisions to set apart or revoke sanctuaries, or wilderness areas, but again without right of appeal against the Minister's decision. The 1976 Amendment to the Forests Act marks new emphasis on the

balanced use of a Crown-owned natural resource. Whereas the original Act provided for production and protection purposes, with recreational uses recogniged only wher~ they were not t'rejudidal to forestry, the concept of balanced use is now brought to the forefront. This, together with the increased provision for public participation, is a reflection of the growing public interest in natural resources, and the realisation that single purpose use of a resource can be inefficient and wasteful and destructive of the resource itself. The concepts of sustained yields, adjustable emphasis on different uses, and matching the use of the resource to the needs of the people, provide for dynamic policies within legal limits which are healthy and challenging ways of managing a national resource.

The National Parks Act 1952 was designed "to present in a more clear-cut and concise manner a policy for the control and administration of these vast areas of open spaces which we call our national parks". This legislation was the outcome of some twenty years of pressure on the Government by user and interest groups, in which the Federated Mountain Clubs took a leading role. Two main concepts were provided for by the Act-preservation in perpetuity, and Use and enjoyment by the public -concepts which are not easily reconciled and which are constantly being weighed up in administering the Act. Although the public does not have a direct right of participation in the management of national parks, opportunity exists for comment on major developments, since any development not provided for in the National Parks Act must be sanctioned by legislation.

The Town and Country Planning Act of 1953 dealt with the environment in the widest sense of the term but was probably intended to control property use rather than natural resources. Regional schemes were intended to affect the conservation and economic development of the region by means of "classification of the lands for the purposes for which they could best be adapted", a formula which indicates the stress on utilisation that has been typical of most of the measures that have dealt with the natural environment. Regional planning was not mandatory and the individual had no legal right to participate in the process, although as a resident or property owner he had rights to participate in district planning, where it affected him.

The scope of the 1977 Town and Country Planning Act shows a deeper concern for conservation and management of natural resources. This change in approach first manifested itself in 1973, with the insertion in the 1953 Act of certain matters to be recognised and provided for in schemes. Those were the wise use and management of New Zealand's resources, the preservation of the natural character of the coastal environment and the margins of lakes and rivers, and the protection of land having high actual or potential value for the production of food. These have been carried forward into the 1977 Act as matters of national importance, together with the conservation, protection and enhancement of the physical, cultural and social environment. The 1977 Act not only points the way towards protection and management of natural resources; it also provides a better framework so that planning can facilitate this management. Regional planning is now mandatory, and binding on the Crown, as it must be if it is to be effective when the Crown controls so much of the nation's resources. Furthermore, the right of the individual to participate in the regional planning process is recognised-a gratifying break away from the traditional proprietary rights basis for participation in planning.

It is too early yet to forecast the future of regional schemes under the new Town and Country Planning Act. The opportunity is there for Government departments that manage the Crown's natural resources, through participation in the regional planning process, to develop guidelines for resource management in regions, based on well thought-out national policies. The success of this new Act will depend on the effectiveness of the regional schemes, and the way in which this focus is used to bring together consideration of what resources are available and how they should best be used in the local, regional, and national interest. Here is the opportunity for true multi-objective planning, hopefully carried right through to the stage of considering how people's lives and living conditions would develop under the range of options available.

Native plants have only limited protection. In national parks and many reserves they may not be damaged or removed but the Native Plants Protection Act under which any plant may be declared protected by Governor-General's warrant cannot be applied to the protection of bush generally. Specific urban trees have been protected by some local authorities under the planning powers of the Town and Country Planning Act initially as "objects of beauty", but later under the 1977 Act using specific powers to reserve or conserve trees, bush, plants and landscapes. This provision is very useful but discretionary. The legal "standing" of trees is still very indeterminate!

The principal body set up specifically by conservation legislation is the Nature Conservation Council established in 1962. Its function is to act as a central body for obtaining and co-ordinating

thed views of organisations and persons interested in nature conservation. The Council reports to the Minister of Lands and has wide powers of investigation (including the power to act as a Commission of Inquiry) and the power to publish its recommendations and reports, once they have been cQnveyed to the Minister. The Council has no control over Government action, but it can work independently" of Government agencies and may criticise Government policy. It has concerned itself principally' with development proposals in an endeavour to ensure that, as development goes ahead, it does so with the least possible harm to the environment. Its statutory powers are adequate to enable it to act as information-gatherer, critic, and leader in the field of policy.

In;J977 the establishment of the Queen Elizabeth II National Trust, with its wide powers to ensure the preservation of land for public use by either acquisition or covenant, has opened up a new field of ensuring that resources, especially open. spaces, are maintained for the use and enjoyment of present and future generations. It is interesting that this concept arose largely from the concern of a group within Federated Farmers that efficient and versatile farming methods were rapidly depleting New Zealand of parts of its heritage of native forests and bush landscapes. This concern, led by the people who were most involved in changing the face of New Zealand, has now led to the provision of a new and very versatile tool for resource conservation.

Environmental policy is the result of a Government decision made to solve the problems of a society's relationship to its physical environment. The search for the "best or most effective" solution to a problem is subject to a number of constraints. Many of these are practicality constraints, such as the availability of funds and resources, or political considerations at the time. In addition there may be legal constraints, or the policy decision itself may lead to the enactment of legal constraints for future decision-making. Government may decide to formulate a rule of law intended to restrict its freedom for future decisions in a manner favourable to environmental considerations. The decision to bind the Crown by regional planning schemes is an example. Alternatively, a statute may be provided with a key concept around which it is to be administered, for example the "matters of national importance" in the Town and Country Planning Act, and "proper land use" in the Wild Animals Control Act. This is a device that is becoming more frequent in statutes having environmental implications. It gives clear recognition to the view that the maintenance of environmental quality is an entitlement of the people. But so far the enforcement of this entitlement is largely untested. In reviewing discretionary powers the court system is not designed to review merits or to make policy: its function is to keep the decision maker within the four comers of the statute which delineates the policy.

This brings us back to the opening paragraphs of this paper. Enough has been said to indicate that while the law can be of assistance in implementing the conservation of natural resources, it must have a basis in sound policy and genuine dedication. Some people will state this in terms such as "The fight to save the environment cannot be won unless society wishes it". We prefer to express it as "The law should only reflect the wishes, enthusiasms, and activities of the people, and environmental management should be based on what a well-informed public really wants".

New Zealand's policy stand on environmental matters is developing, but there are still gaps and loopholes. These cannot be filled simply by enacting some sort of a law. The procedures for decision-making must be improved in both the public and private sectors, with emphasis on information-gathering, consideration of alternatives, and the early disclosure of proposals. It is of vital importance to ensure .that the potential costs, risks and adverse consequences of proposals are articulated as fully and vigorously as the potential benefits. The inclusion of environmental considerations in a number of recent statutes is encouraging evidence of developing public consciousness of the importance of these issues. But strengthened law can only follow strengthened public policy.