

Legal & Policy Bases for Sustainable Development in
Hong Kong

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Outline

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Evolution of the concept

- A dynamic concept with accepted parameters, not necessarily constrained by a single universal definition
- Challenges traditional approaches to the creation, implementation and practice of the law

Traditional approach	Sustainable development approach
Directed at a specific economic, social or environmental issue	Directed at economic, social and environmental considerations of issue
Cross-impacts and interrelationships poorly considered or not at all	Cross-impacts and interrelationships fully assessed
Short term outcomes and unresponsive to change	Long term outcomes and responsive to change

Evolution of the concept

Sustainable Development in law and policy

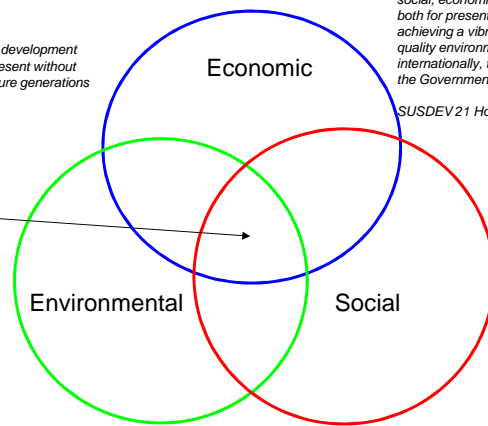
"Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs"

Brundtland Report 1987

Optimum sustainability

"Public policy shall promote sustainable development. To this end, they shall reconcile the protection and enhancement of the environment with economic development and social progress."

Environment Charter, French Constitution



"Sustainable development in Hong Kong balances social, economic, environmental and resources needs, both for present and future generations, simultaneously achieving a vibrant economy, social progress and a high quality environment, locally, nationally and internationally, through the efforts of the community and the Government"

SUSDEV21 Hong Kong

"Establishing laws related to sustainable development is a mechanism for formalizing and codifying strategies and policies for sustainable development."

Chapter 3, China Agenda 21

"Sustainable development is based on a long-term approach which takes into account the inextricable nature of environmental, social and economic dimensions of development activities."

Sustainable Development Act, Quebec

The legal nature of sustainable development

A concept, objective, principle or right?

- A concept is an idea or a theory
- An objective is an aim or a purpose
- A principle is a fundamental rule of law
- A right is an entitlement, justification or claim
- Sustainable development can be all four but it is important to distinguish clearly between them
- It is a generally accepted concept and found as an objective and principle in international and national law. Its status as a right is evolving (cf *Declaration on the Right to Development* [1986]).

Present legal status in Hong Kong

- SUSDEV 21 Study, 1997
 - *“Hong Kong’s approach to sustainable development must take into account the particular conditions and characteristics of Hong Kong (and the wider region) and consideration could be given to enshrining sustainable development principles into law.”*
- A First Sustainable Development Strategy, 2005
- Strategy may be complied with by Government agencies as a matter of policy or internal regulations (see sustainability assessment process)
- It does not introduce any fundamental legal rights or obligations in respect of sustainable development
- A common law development provides some hope (see below)

Making it work in local law

The significance of international law

- Hong Kong is a party to international treaties that require compliance with sustainable development principles: UNFCCC, Kyoto Protocol
- Norms of international customary law may affect local judicial deliberations in sustainable development matters
- A source and reference for accepted sustainable development principles (*New Delhi Principles of International Law relating to Sustainable Development, 2002*):
 - duty of states to ensure sustainable use of natural resources
 - equity – inter and intra-generational
 - common but differentiated responsibilities
 - precaution

Bilateral trade and investment agreement with Mainland China

- *Mainland and Hong Kong Closer Economic Partnership Agreement, Article 2*
“The conclusion, implementation and amendment of the ‘CEPA’ shall adhere to the following principles:
... 3. to accord with the needs of both sides to adjust and upgrade their industries and enterprises and **to promote steady and sustainable development...**”

Making it work in local law

A constitutional right

- EU: *Treaty Establishing the European Community, Articles 2 to 6 as supplemented by the 1997 Treaty of Amsterdam.*
- Switzerland: *Swiss Federal Constitution, Preamble, Articles 2, 54 and 73*
- The Basic Law of the Hong Kong SAR, HK’s mini constitution
- Article 159 vests the power to amend in the National People’s Congress. Envisages amendment bills being put forward by HKSAR. Studied by Committee for the Basic Law before being sent to NPC
- Would require a review of Hong Kong law to ensure consistency with the new constitutional right (note Article 11 of the Basic Law)

Making it work in local law

Incorporation by statute

- Sustainable Development Act 2006, Quebec
- Chapter 3, China Agenda 21 – PRC Renewable Energy Law
- Protection of the Environment Act 1991, Australia
- Individual statutes or overarching statute?
 - The Antiquities and Monuments Ordinance
 - The Protection of Harbour Ordinance
 - The Environmental Impact Assessment Ordinance
 - The Marine Parks Ordinance
 - The Town Planning Ordinance
 - The Urban Renewal Authority Ordinance

Making it work in local law

Evolution of common law

- *Society for the Protection of the Harbour v The Town Planning Board [2004] HKCFA*
 - presumption against reclamation: s3(1) *Protection of the Harbour Ordinance*
 - a special public asset and a natural heritage of Hong Kong people
 - rebutted only if overriding public need for reclamation. This included economic, environmental and social needs of the community
 - where there is a reasonable alternative, an overriding need would not be made out. In considering what is a reasonable alternative, all the circumstance should be considered including economic, environmental and social implications
 - the question of intensity of judicial review remains open
- Cited in *Addenbrooke Pty v Woollahra Municipal Council [2008] NSWLEC 190*

Judicial activism and the legal profession

- Engagement of the judiciary and legal profession
- Articulate their role in the Sustainable Development Strategy
- Consider a specialist environmental and planning list if not dedicated environmental and planning court
- Step up sustainable development in legal education and practice

Way forward

- Develop a comprehensive sustainable development strategy
- Establish a constitutional right or introduce sustainable development objectives and principles into statutory law
- Commit to applying international sustainable development law and best practices in a timely and effective manner
- Actively engage the executive, administrative and judicial branches of government
- Actively engage the community to ensure there is broad based understanding and support for sustainable development

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