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Instruments of Environmental Governance: A Guarantee of Sustainability in Cuba

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INSTRUMENTS OF ENVIRONMENTAL GOVERNANCE: A GUARANTEE OF SUSTAINABILITY IN CUBA

*Dagniselys Toledano Cordero**

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I. INTRODUCTION

In the legal history of Cuba, we find the first environmental protection regulations starting at the end of the 19th century. However, the legislation in those days had a utilitarian character lacking a holistic view of the environment, a situation that remained unchanged until the middle of the 20th century.¹ In the wake of the revolutionary triumph a set of rules was developed that had as its starting point the promulgation of the Constitution of the Republic [*Constitución de la República*] in 1976.

Our Magna Carta contains environmental protection in Article 27,² whose original formulation, in consonance with environmentalist thought of the time, had as a central element the protection of nature in order to achieve citizens' welfare. In 1992 the constitutional precept was modified, adding to the obligation to protect the State, citizens, and

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1. See ÁLVAREZ CONDE, José, *Historia de la Botánica en Cuba*, Junta Nacional de Arqueología y Etnología, La Habana, 1958, p. 179; CARBALLO MAQUEIRA, Leonel, *El derecho ambiental. Realidades y esperanzas*, Publicaciones Acuario Centro Félix Varela, La Habana, 2014, pp. 77-82; VIAMONTES GUILBEAUX, Eulalia, et al.: *Derecho ambiental cubano*, 1ª ed., Ed. Félix Varela, La Habana, Cuba, 1998, pp. 35-49.

2. Artículo 27: Para asegurar el bienestar de los ciudadanos, el Estado y la sociedad protegen la naturaleza. Incumbe a los órganos competentes y además a cada ciudadano velar porque sean mantenidas limpias las aguas y la atmósfera, y que se proteja el suelo, la flora y la fauna. *Constitución de la República de Cuba*, texto aprobado en 1976, Gaceta Oficial Edición Especial No. 2, de 24 de febrero de 1976. [Article 27: To ensure the wellbeing of citizens, the State and society protect nature. It is incumbent on the corresponding institutions and each citizen to keep the water and atmosphere clean, and to protect the soil, flora and fauna.]

foreigners the recognition of its relatedness to the achievement of sustainable development.³

A reading of this precept indicates that the Cuban Constitution is among those that have as their focal point the State obligation of environmental protection, a position that today has been superseded in various constitutional texts that directly endorse the right to healthy enjoyment of the environment, even recognizing the citizens and the community as its owners.⁴ Despite the preceding, we believe that the recognition of the duty of environmental protection permits the realization of the right to enjoy a healthy environment; only if the holders of the right are required to preserve the object of that right will they be able to exercise it.

The duty to protect the environment and natural resources, in order to ensure the satisfaction of the needs of present and future generations, as consecrated in the Cuban Constitution requires direct State intervention. The environmental equilibrium is usually affected by constant aggressions against the environment, which are occasionally necessary for the development of life. However, the need for development is not incompatible with the preservation of the environment; it is only necessary to establish a harmony between both questions, by issuing serious and reasonable regulations, in accordance with the reality in which they will be applied, which should be effectively controlled.

In this sense, it is necessary for the State to achieve an effective environmental governance and to adopt necessary regulatory, fiscal, and legal guarantees. In this way, the instruments of environmental governance become a concrete means to materialize the state duty of

3. Artículo 27: El Estado protege el medio ambiente y los recursos naturales del país. Reconoce su estrecha vinculación con el desarrollo económico y social sostenible para hacer más racional la vida humana y asegurar la supervivencia, el bienestar y la seguridad de las generaciones actuales y futuras. Corresponde a los órganos competentes aplicar esta política. Es deber de los ciudadanos y extranjeros proteger el agua, la atmósfera, conservar el suelo, la flora y todo el rico potencial de la naturaleza. *Constitución de la República de Cuba*, texto reformado en 1992 y en el 2002, Gaceta Oficial Extraordinaria Nro. 3, de 31 de Enero del 2003. [Article 27: The State protects the environment and natural resources of the country. It recognizes its close link to sustainable social and economic development in order to make human life more rational and to ensure the survival, wellbeing, and safety of current and future generations. It is incumbent upon competent institutions to apply this policy. It is the duty of citizens and foreigners to protect the water and atmosphere, to conserve the soil, flora, and all the rich potential of nature.]

4. We also find environmental protection as a State duty in the constitutions of Honduras, Peru, and Uruguay. Examples in Latin America of the recognition of the right to enjoy a healthy environment are Venezuela, Ecuador, Argentina, Colombia, Mexico, Bolivia, and Costa Rica. For more information see: HERNÁNDEZ AGUILAR, Orisel: "Retos ambientales para la Constitución" en *Retos y tendencias del Derecho Ambiental contemporáneo*, 1^a ed., Editorial ONBC, La Habana, Cuba, 2011, pp. 29-46.

environmental protection.

II. ESSENTIAL ELEMENTS OF ENVIRONMENTAL GOVERNANCE

Environmental Governance is the cornerstone in the achievement of environmental sustainability, with various definitions having been formed of this. COLBY is one of the authors that offer a broad vision of this category, considering that it should be understood: “as the field that seeks to balance the demand for natural resources with the capacity of the natural environment on a sustainable basis.”⁵

For his part, RODRÍGUEZ CÓRDOVA suggests that “Environmental Governance [*Gestión Ambiental*] is defined as the running, management, control, and administration of the use of environmental systems through specific instruments, regulations, rules, financing, and institutional and legal provisions.”⁶ From the preceding definition it may be inferred that these are acts of dissimilar nature, a feature that is also present in the conceptualization of environmental governance made by RAÚL BRAÑES, according to whom it should be understood as: “The array of human activities that have the object of managing the environment. Their principal components are environmental politics, law, and administration. Consequently, environmental governance comprises not only the material acts involving the use of the environment, as is usually thought, but also everything related to such use.”⁷

The U.N. Environment Programme (UNEP) also has defined environmental governance as the “strategy by which human activities that affect the environment are organized in order to achieve the maximum social welfare and to prevent and mitigate potential problems attacking its root cause,” thereby summarizing the principal elements contained in the rest of the cited definitions.

We likewise find concepts of environmental governance in the regulatory field. In the Cuban case the definition of Environmental Governance is found in Article 8 of Law 81—“of the Environment”—which seems very complete to us. In conformity with the stated precept it is understood as the “Array of activities, mechanisms, actions, and instruments directed at guaranteeing the rational use and administration of natural resources through the conservation, improvement,

5. COLBY M. E: *Environmental Management in Development: The Evolution of Parading*, World Bank Dissensions Poppers, 1990, p. 1. Traducción de la autora.

6. RODRÍGUEZ CÓRDOVA, Roberto: *Gestión Ambiental de empresas*, Universidad Nacional Autónoma de Nicaragua, Managua, Nicaragua, 2012, p. 25.

7. BRAÑES, RAÚL: *Manual de Derecho Ambiental Mexicano*, 2ª ed., Ed. Editorial Política y Derecho, México, 2000, pp. 191 y sgtes.

rehabilitation, and monitoring of the environment and the control of human activity in this area. Governance applies the established environmental policy through a multidisciplinary focus, keeping in mind cultural heritage, accumulated experience, and citizen participation.”⁸

The systematization of the preceding concepts allows us to identify these common elements: the notion of action, its state character, and the specific purpose of environmental protection; to a lesser degree we find reference to citizen participation and the multidisciplinary nature of the actions that are executed.

There is no doubt that this primarily involves State action, given that the State possesses the principal means and undoubtedly carries the greatest responsibility. It is also important to underscore that environmental governance cannot take place exclusively in the area of public administration because of the holistic character of the environment. It involves a decision-making process that starts with different levels of planning.

It is evident that Environmental Governance has the goal of balancing human action with protecting the environment. It seeks the modification of human action in relation to environmental components to avoid or mitigate negative effects on the development of our species.

III. INSTRUMENTS OF ENVIRONMENTAL GOVERNANCE AND ITS REGULATION IN THE CUBAN LEGAL SYSTEM

Environmental Governance is embodied in specific mechanisms referred to as instruments or tools, existing in a wide range that varies from country to country. Such instruments are usually classified according to their function in terms of environmental protection; today they are often referred to as administrative, planning, command, control, economic, and development instruments.

Our environmental law dedicates Title III to the instruments of political and environmental governance, which are specifically regulated in Article 18 of Law 81.⁹ The text of this precept recognizes

8. Ley No. 81, del Medio Ambiente, Gaceta Oficial Edición Extraordinaria No. 7, de 11 de julio de 1997.

9. Article 18.- Cuba’s environmental policy is implemented through the following instruments:

- a) The National Environmental Strategy, the National Program of Environment and Development, and all other programs, plans, and projects for economic and social development.
- b) The current law, its supplementary legislation, and further legal regulations intended to protect the environment, including technical standards on matters of

that only through the implementation of all the instruments mentioned above can the ultimate goal of environmental protection be achieved.

The first of the instruments established in subsection (a) of Article 18 is the National Environmental Strategy, which is the governing document of Cuban environmental policy, formulated to achieve the goals of sustainable economic and social development. The first version of the Strategy was approved in 1997; since then it has gone through three draft cycles, and is currently in a preparation phase that will be in effect until 2020.¹⁰

The National Environmental Strategy has the goals of: (a) achieving a higher level of protection and rational use of resources, (b) improving the quality of the environment by confronting the effects of climate change, and, (c) raising public awareness and quality of life. It is a dynamic instrument that has been adjusted to the environmental and developmental needs of the country as well as to the institutional changes that have taken place.¹¹

Additionally, it is a point of reference for the delimitation of work projects along sectorial and territorial lines. It should not be forgotten that since its second version the international situation has been taken into account in environmental matters as well as the country's international commitments, with Cuba being a party to the majority of the international environmental agreements and conventions. Likewise, all the cycles of the National Environmental Strategy contain an assessment of the main environmental problems, which allows the present needs to be identified with a view to the future.¹²

environmental protection.

c) Environmental management [el ordenamiento ambiental.]

d) Environmental license.

e) Environmental impact assessment.

f) The system of environmental information.

g) The State Environmental Inspection System.

h) Environmental education.

i) Scientific investigation and technological innovation.

j) Economic regulation.

k) The National Environmental Fund.

l) The systems of administrative, civil, and criminal responsibility [los regímenes de responsabilidad administrativa, civil y penal.].

10. The cycles of the National Environmental Strategy from its first version to the present have been: 1997–2005, 2007–2010, 2011–2015.

11. See REY SANTOS, Orlando: *Tres ciclos de la Estrategia Ambiental Nacional cubana (1997/2010)*, unpublished digital version.

12. Among the main environmental problems addressed in the latest draft of the Strategy are: soil degradation, deforestation, the loss of biodiversity and deterioration of ecosystems, water management difficulties including the availability and quality of water, the impacts of climate change, and declining sanitation conditions in human settlements.

Together with the National Environmental Strategy, the National Program of Environment and Development is recognized as a planning instrument, along with all other social and economic development programs, plans, and projects. The National Program of Environment and Development contains the projection of Cuba's environmental policy; it was approved in 1993 in response to the commitments made at the Rio Summit, being the foundation for the country's environmental governance. Other programs and plans contribute more specifically to the management of some of the country's environmental problems.¹³

In matters of legislation, in addition to the aforementioned environmental regulations, there are a number of complementary rules. Special regulations are in force touching upon forestry, mining, fishing, special violations, coastal zones, and protected areas, among others. It is important to note that some of these rules predate the Environmental Law, occasionally requiring dynamic revisions in response to structural and institutional changes in the country, advances on the international level, adjustments in sectorial legislation, and the empowerment of local governments.

Environmental management [*ordenamiento ambiental*], in accordance with environmental regulation, seeks to ensure the sustainable environmental development of the land, based on the comprehensive analysis of various factors with the goal of harmonizing the relationship between society and nature.¹⁴ Environmental management also is aimed at achieving equal development between

13. Prominent among these instruments are the Soil Improvement and Conservation Program, the National Forestry Program, the Program to Fight Pollution, and the Environmental Education Strategy.

14. Article 21: Environmental management will have as its main objective ensuring the sustainable development of the territory based on fully considering all environmental aspects and their link with economic, demographic, and social factors, in order to achieve the maximum harmony possible in the interrelations of society with nature, including:

- a) The nature and characteristics of the different ecosystems.
- b) The conditions of each región and the delimitation of their áreas according to their natural resources.
- c) The ecological imbalances that exist as a result of human settlements and natural phenomena. Los desequilibrios ecológicos existentes por efecto de las actividades que se desarrollan, las características de los asentamientos humanos y los fenómenos naturales.
- d) The crucial balance between human activities and environmental conditions.
- e) The protected áreas and their buffer zones.
- f) The interdependence of man and his surroundings.
- g) The environmental impact of new human settlements, works of infrastructure, and other related activities.
- h) The requirements of national defense.

different territories. In the Cuban context, we find special regulations for territorial planning, which has been conceived in a more restricted sense that does not always correspond with that in which environmental management was envisioned in Law 81.¹⁵

The Environmental License is an official document enabling one to carry out a specific activity. It contains a series of requirements related to the prevention, mitigation, correction, and compensation for environmental effects. The license can be obtained through a process of Environmental Impact Assessment, but this evaluation does not take place in all cases.

The Environmental Impact Assessment is an independent instrument. The basis for its development is found in Law 81, supplemented by the provisions of Resolution 132/09¹⁶ of the Ministry of Science, Technology and Environment (CITMA). In general, both regulations establish the activities that must be submitted to this process; significantly, both new and existing activities can be subject to evaluation if they are the object of expansion or modification, or if by their nature they can generate a significant negative environmental impact. The Assessment process comprises four stages: the application for the environmental license, the environmental impact study in appropriate cases, the assessment itself, and the decision whether to grant the license.

The environmental law framework regulates instruments of promotion, including the systems of environmental information, environmental education, scientific research, propagation, and technological innovation. Law 81 dedicates various articles to each of these, establishing their own objectives and institutional framework.

Law 81 recognizes economic regulations as economic instruments, which must be articulated in accordance with environmental regulation “on the basis of the utilization, among other measures, of tributary, tariff or differentiated price policies, for the development of activities that affect the environment.” In the national context, Law 113 was enacted in 2013, establishing the Tax System, which includes five taxes for the conservation of ecosystems and natural resources; the approved fees were: the Tax for the Approved Dumping of Wastewater in River Basins, the Tax for the Use and Exploitation of Bays, the Tax for the Use and Exploitation of Forest Resources and Wildlife, and the Tax for the Right of Use of Groundwater.

The other economic instrument that is in force is the National Environmental Fund, whose primary purpose is the total or partial

15. See CÁNOVAS GONZÁLEZ, Daimar: Bases jurídicas para el ordenamiento ambiental, unpublished digital version.

16. Gaceta Oficial Ordinaria No. 37, de 28 de septiembre de 2009.

financing of projects or activities directed at the protection of the environment and the rational use of resources, the guiding organisms being the Ministry of Finance and Prices and the Ministry of Economy and Planning. The Foundation is articulated in Joint Resolution 1/2008¹⁷ which provides for sources of income, the destination of financial resources, as well as procedures of administration and execution.

The final governing instruments we will examine are those of Command and Control. Among these we can identify, in addition to legislation, the state environmental inspection system and liability regime.

The State Environmental Inspection System is regulated by Resolution 103/08¹⁸ of the Ministry of Science, Technology and Environment. Environmental inspection is the activity of control, auditing, and supervision of compliance with current legal provisions and regulations in matters of environmental protection, with the goal of evaluating and determining the adoption of pertinent measures to guarantee the preservation of the environment.

The Inspection System encompasses the State Environmental Inspection, the State Environmental Biosafety Inspection, the State Nuclear and Radiological Safety Inspection, the State Inspection for the Control of Chemical Substances, and the State Safeguard Inspection. The responsible authority for the inspection varies according to the type of inspection contemplated, including: the National Center for Biological Safety, the National Center for Nuclear Safety, the Executive Center of the National Authority for the Prohibition of Chemical Weapons, and the Territorial Delegations of the Ministry of Technology and Environment. Both natural and legal persons may be the object of inspection.

Articles 67 to 75 of the Environmental Law establish the basic liability regimes, distinguishing between the administrative, penal, and civil spheres.

In administrative matters, Article 67 provides for administrative sanctions for natural persons as well as for legal entities that commit any of the violations identified in the existing provisions.¹⁹ The subsequent article recognizes the fine as the principal sanction, leaving the determination of additional sanctions to the supplementary

17. Gaceta Oficial Ordinaria No. 12, de 10 de marzo de 2008.

18. Gaceta Oficial Ordinaria No. 41, de 2 de julio de 2008.

19. Artículo 67: El régimen de sanciones administrativas en materia de protección del medio ambiente incluye a las personas naturales y jurídicas que incurran en las contravenciones establecida en la legislación complementaria a la presente ley. [Article 67: The system of administrative sanctions regarding environmental protection applies to natural and legal persons who violate supplementary legislation enacted under this law.]

regulations of environmental law.²⁰ Finally, Article 69 establishes that the complaint can be made at the request of a party or *ex officio*.²¹

The complaint at the request of a party should be understood as a means to obtain justice in this area. Any person who knows of an infraction can make a complaint and activate the system of administrative responsibility. In consonance with the precepts of Law 81, Law 200 (“of Environmental Offenses”)²² sets out in its Article 17.1 the actions for the corresponding authorities upon receiving a complaint. In this sense it is significant that the complainant has no obligation to demonstrate that he or she has a legitimate interest regarding the violation; the fact that he or she knows of the existence of the infraction is sufficient.

With regard to criminal protection of the right in question, we must start with the fact that in our Penal Code, Law 62 of December 29, 1987,²³ which is referred to by Law 81,²⁴ does not provide for the criminalization of so-called environmental crimes, but only regulates some forms of unlawful conduct that damage the environment; in other words, the law does not recognize the Environment as an independent legal asset. Criminal environmental protection in Cuba is found throughout the existing Code. It is associated with the protection of health, life, personal goods, and the national economy.

In our legal system, the majority of crimes are ones of public action, for which the Public Prosecutor must bring a criminal action before the court, but any person may report the offense in question. Acts that can be identified as environmental crimes do not evade the general rule. Likewise, there are applicable provisions relating to the duty to report,

20. Artículo 68: Las contravenciones se sancionarán con multas cuyas cuantías se fijan para cada caso, sin perjuicio de las demás sanciones accesorias aplicables de conformidad con la legislación vigente. [Article 68: Violations will be punished with fines whose amounts are determined for each case, notwithstanding other applicable sanctions in accordance with existing legislation.]

21. Artículo 69: El que conozca de la comisión de cualquiera de las contravenciones establecidas en la legislación complementaria a la presente ley lo pondrá en conocimiento de la autoridad competente, la que estará en la obligación de informarle sobre las medidas dispuestas y su cumplimiento, cuando así lo interese dicha persona. [Article 69: Whoever knows of the commission of any violations of legislation enacted under the present law will alert the competent authority, which will inform him or her of the measures taken and their fulfillment, when such information concerns that person.]

22. Gaceta Oficial Ordinaria No. 83, de 22 de diciembre de 1999.

23. Gaceta Oficial Edición Especial No. 3, de 30 de diciembre de 1987.

24. Artículo 75: Las acciones u omisiones socialmente peligrosas prohibidas por la ley bajo conminación de una sanción penal, que atenten contra la protección del medio ambiente, serán tipificadas y sancionadas a tenor de lo que dispone la legislación penal vigente. [Article 75: Socially dangerous acts or omissions that infringe upon environmental protection and are prohibited by the law under the imposition of a criminal sanction will be classified and punished in accordance with the provisions of existing criminal legislation.]

noncompliance with which results in a criminal sanction for whoever knows of the commission of the act; this is a manifestation of the duty of environmental conservation and protection established by our Constitution as well as by Law 81.

Regulations in terms of civil responsibility appear in Chapter XII of Title III of the Environmental Law. Generally speaking, the provisions about this topic are sparse and their content is limited as far as scope of responsibility is concerned. The obligation to repair damage is found in article 70,²⁵ and the ability of entitled persons to claim compensation or indemnification is recognized in article 71²⁶, but in none of the precepts do we find reference to the actions that competent Courts can take.

As a consequence, it is necessary to refer to rules of procedure. Our procedural law, the Law of Civil, Administrative, Labor, and Economic Procedure,²⁷ provides that the Popular Tribunals [*Salas de lo Económico de los Tribunales Populares*] are those that should: “hear and resolve lawsuits arising from noncompliance with regulations for the protection of the environment and natural resources, or related to environmental harms resulting from economic activities carried out by legal or natural persons.”²⁸ As can be observed from a reading of the precept, Cuban

25. Artículo 70: Toda persona natural o jurídica que por su acción u omisión dañe el medio ambiente está obligada a cesar en su conducta y a reparar los daños y perjuicios que ocasione. [Article 70: Any natural or legal person who by act or omission harms the environment is obligated to cease his or her conduct and repair the damage incurred.]

26. Article 71: Those entitled to claim compensation or indemnification for damages are:

- a) the Office of the Attorney General of the Republic;
- b) the Ministry of Science, Technology and Environment;
- c) Whoever has personally suffered harm or impairment..

The officials identified in subparagraphs a) and b) of this Article can act in defense of the social interest in the protection of the environment.

27. Ley No. 7, de Procedimiento Civil Administrativo, Laboral y Económico de 19 agosto de 1977, Gaceta Oficial Ordinaria No. 34 de 20 de agosto de 1977, actualizada en el 2004 y modificada por el Decreto-Ley No. 241, publicado en la Gaceta Oficial Extraordinaria No. 033 de 27 de septiembre de 2006.

28. Article 741: It is also the responsibility of the aforementioned courts to hear and resolve disputes arising from noncompliance with regulations on the protection of the environment and natural resources, or related to environmental harm resulting from economic activities carried out by legal or natural persons, whether Cuban or foreign, in the national territory, including inland waters, the territorial sea, the exclusive economic zone, and the continental shelf.

Actions for redress or compliance to preserve the environmental and protect natural resources are the province of the People’s Courts, whether brought by legal or natural persons, province of the People’s Courts to hear restrictive actions or compliance actions for the preservation of the environment and the protection of natural resources, which are promoted by Cuban legal or natural persons, or in turn by the Ministry of Science, Technology and Environment, the Office of the Attorney General of the Republic, or the Ministry of Agriculture, the latter in matters of

legislators have only envisioned access to justice through this route for cases arising from economic activity in violation of a regulation for environmental harm, which, moreover, when defined in the substantive rule is limited to cases in which it occurs in contravention of a rule or legal provision.²⁹

When litigation is presented outside the context of an economic activity it must go to civil courts, and in such cases the existence of an environmental harm is also required. As a result, it may be concluded that there is no expeditious recourse for the violation of the subjective right of enjoyment itself, which can be affected even if there is no direct non-compliance with the protection regulations and even without environmental damage.

IV. CONCLUSION

As can be seen, the great majority of the instruments of environmental regulation are not new to public governance, but rather exist as a specific—and relatively new—way of looking at means the administration traditionally uses to carry out its activities. The effective exercise of the right to enjoy the environment, and by extension compliance with the constitutional mandate of environmental protection, depends on its regulation and implementation.

the National Forests.

Artículo 741: Corresponde asimismo a las expresadas salas de justicia, conocer y resolver los litigios que surjan con motivo del incumplimiento de las regulaciones sobre la protección del medio ambiente y los recursos naturales, o relacionados con los daños ambientales, resultantes de actividades económicas desarrolladas por personas jurídicas o naturales, cubanas o extranjeras, en el territorio nacional, comprendidas las aguas interiores, el mar territorial, la zona económica exclusiva y la plataforma continental.

Son del conocimiento de las salas de lo Económico de los tribunales populares, las acciones resarcitorias o de cumplimiento para la preservación del medio ambiente y la protección de los recursos naturales, que se promuevan por personas jurídicas o naturales cubanas, o, en su caso, por el Ministerio de Ciencia, Tecnología y Medio Ambiente, la Fiscalía General de la República o el Ministerio de la Agricultura, este último en materia de Patrimonio Forestal.

29. Article 8 of the Environmental Law defines environmental harm as: any loss, diminution, deterioration, or impairment to the environment or to one or more of its components produced in contravention of a rule or legal provision.