Abstract. This paper recommends nine measures for institutional capacity building to be implemented by the State of Malta in order to achieve sustainable development in the Maltese Islands. These measures are also aimed at giving better effect to Chapter 10 of the World Summit on Sustainable Development’s Plan of Implementation. The proposed actions deal with (a) the allocation of Government entities entrusted with environmental functions to the Environment Ministry; (b) the establishment of a Sustainable Development Authority; (c) the appointment of a Parliamentary Commissioner for the Environment and Sustainable Development; (d) the constitution of a select committee of the House of Representatives addressing sustainable development issues; (e) the setting up of the Office of Curator of the Right of Future Generations to a Healthy Environment; (f) the codification of Maltese Environmental Legislation; (g) the creation of an Environmental Court; (h) the preparation and enforcement of a national strategic plan for the sustainable development of the Maltese Islands; and (i) the strengthening of the role of environmental non-governmental organisations.

Introduction

When the expression “sustainable development” was coined in the report of the World Commission on Environment and Development in 1987, it was defined as “… development to ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs” (WCED, 1987: 43). From a legal perspective, sustainable development has been defined as “a comprehensive economic, social and political process, which aims at the sustainable use of natural

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resources of our planet and the protection of the environment on which
nature and human life as well as social and economic development
depend and which seeks to realise the right of all human beings to an
adequate living standard on the basis of their active, free and meaningful
participation in development and in the fair distribution of benefits
resulting therefrom, with due regard to the needs and interests of future
has been written on the subject. Not only so, international law, EU
legislation and Maltese national law have taken this concept on board.

This paper proposes the adoption of a new institutional framework aimed
at attaining sustainable development goals in Malta. Essentially, the
steps involved in the national institutional set up proposed in this paper
can be divided into nine actions, respectively dealing with:

• the allocation of Government entities entrusted with environmental
  functions to the Environment Ministry;
• the establishment of a Sustainable Development Authority;
• the appointment of a Parliamentary Commissioner for the Environment
  and Sustainable Development;
• the constitution of a select committee of the House of Representatives
  addressing sustainable development issues;
• the setting up of the Office of Curator of the Right of Future Generations
  to a Healthy Environment;
• the codification of Maltese environmental legislation;
• the creation of an environmental court;
• the preparation and enforcement of a national strategic plan for the
  sustainable development of the Maltese Islands; and

1. Vide, for instance, the Framework Convention on Climate Change, the Convention on
Biological Diversity, the Anti-Desertification Convention, just to cite three international
treaties on the subject.
2. The Amsterdam Treaty of 1997 amending article 2 of the Treaty of European Union
includes objectives such as “economic and social progress and a high level of employment
and to achieve balanced and sustainable development”.
3. Both the Development Planning Act (Chapter 356 of the Laws of Malta) and the
Environment Protection Act (Chapter 435 of the Laws of Malta) refer to sustainable
development. In the case of the former enactment, the Malta Environment and Planning
Authority has the function, inter alia, of promoting sustainable development of land and
sea (article 5(1)(a) of the DPA). On the other hand, the Environment Protection Act is
replete with references to sustainable development and is the leit motif of the enactment.
For instance the competent authority appointed in terms of article 6 advises the Minister
responsible for the environment “in the formulation and implementation of policies
relating to the promotion of sustainable development, protection and management of the
environment and the sustainable management of natural resources.”
• the strengthening of the role of environmental non-governmental organisations.

The rest of this paper will consider these proposed actions in turn.

**Government Entities**

In the current legislature, a new allocation of ministerial responsibilities has come into being. The Ministry for Rural Affairs and the Environment has been created and is responsible for: rural development, agriculture, horticulture, fisheries, aquaculture, environment, the Malta Environment and Planning Authority (MEPA) and veterinary services.

The latest assignment of ministerial duties is not as all embracing as one would have expected it to be: it should be developed further in order to establish on a sound footing a Ministry for Rural Affairs and the Environment which would encompass all environment protection related entities. Once this Ministry is the lead Ministry in implementing all the E.U. environmental acquis⁴ as well as other international and regional environmental treaties adhered to by Malta – especially where Malta is unfortunately defaulting in implementing certain obligations – an institutional structure which is capable of reflecting and implementing the environmental acquis and international/regional environmental treaties in their entirety is of paramount importance. Towards this end, the Ministry for Rural Affairs and the Environment should include, within its ministerial portfolio, responsibility for the Superintendence of Cultural Heritage (SCH) currently under the Ministry for Tourism and Culture as well as other entities which, in one way or another, regulate the environment.

Further, an Environment Co-ordinating Unit within the Ministry for Rural Affairs and the Environment should be set up in order to ensure better co-ordination between the entities falling under the Ministry and those which have an environment protection function but which fall under a different Ministry (such as the Malta Maritime Authority with

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⁴. The E.U. environmental acquis deals with the following aspects: Air Quality, Waste Management, Water Quality, Nature Protection, Industrial Pollution Control, Risk Management, Chemicals and Genetically Modified Organisms, Noise, Nuclear Safety and Radiation Protection, Civil Protection, Climate and Horizontal Legislation (such as EIA and Environmental Information).
regard to marine pollution; the Occupational Health and Safety Authority with regard to radiation and major accident hazards involving dangerous substances; and the Civil Protection Department with regard to the implementation of emergency plans in case of an environmental catastrophe).

In view of the above proposed enlargement in Ministerial responsibility it would also be desirable to assign a Parliamentary Secretary, focusing on sustainable development issues, within the new structure.

**Establishment of a Sustainable Development Authority**

It is incumbent to further trim down the current institutional structures by merging the MEPA with the Directorate for Mineral Resources Regulation (DFMRR) of the Malta Resources Authority.

There tends to be an overlap between MEPA and the DFMRR and, as has already happened in the case of the Planning Authority (PA) and the Environment Protection Department (EPD), MEPA and DFMRR should be fused together. Prior to the 2002 fusion, the PA had an Environmental Management Unit which, to a certain extent, was duplicating certain functions undertaken by the EPD. The PA (now MEPA) is also entrusted with cultural heritage functions through its Resource Management Unit thus duplicating the work carried out by the Superintendence of Cultural Heritage (SCH). The new regulatory authority which ought to emerge from the fusion of MEPA, the DFMRR and the SCH should be appropriately styled “Sustainable Development Authority” (SDA).

The institutional framework should, as far as possible, be kept as simple as possible. Any institutional set up should be directed at achieving integrated environmental resource management so as to achieve sustainable development. In addition, the SDA should be established to cater for the various components of the environment, both natural and cultural. At a later stage, one should investigate whether it is sensible to hive off the environmental duties carried out by the Occupational Health and Safety Authority, the Malta Maritime Authority and the Civil Protection Department to the SDA. Other entities which perform environment related functions have to be identified for possible future assimilation and/or coordination of functions.
In order to bring about integrated environmental resource management it is appropriate to have one authority responsible for the various aspects of the environment rather than having various fragmented structures all focusing on one particular aspect of the environment and at times adopting different (not to say divergent or opposing) strategies to achieve the same common objective. The advantages of this proposal are various and include the following:

- **To avert inter-departmental and inter-authority conflict.** The departments/authorities above-mentioned end up, all in their diverse ways, regulating the same subject. Having one authority would iron out all piques and conflicts between the officials directing and managing such departments/authorities thereby bringing about more coherence, consistency and uniformity in decision-making.

- **To make better use of limited human, technical and financial resources.** As things stand today these departments/authorities have their own separate structures which can easily be fused together. Each has a sectoral enforcement mechanism, I.T. staff, human resources or personnel section, accounts or financial services section, communications or media relations section, customer care section, corporate affairs section. All this duplication implies that scarce resources are wasted on the bureaucracy itself rather than on achieving the ends for which these departments/authorities were originally set up.

- **To rationalise current structures.** Enforcement powers are better exercised when enforcement officers are knowledgeable in all aspects related to the regulation of the environment. As things are organised at the moment, there could be the danger that one officer passes the buck from one department/authority to another. The rationalisation of structures could also lead to a one-stop-shop which would be beneficial to the consumer as this would permit the public to deal only with one entity, rather than with a multitude of institutions.

- **To reduce public service spending.** Duplication of institutions is a strain on public coffers and should be avoided. The money saved could easily be redirected to achieve sustainable development (rather than in subsidising unsustainable money-dissipating entities) and where enhanced co-ordination can be better achieved;

- **To provide a holistic (i.e. integrated) approach to environmental resource management.** Environmental resources are better managed holistically in so far as the resources are today the subject of regulation by diverse departments/authorities where one department/authority
is not aware of what the other department/authority is planning to do, with regard to sustainable use of environmental resources.

The first step in this direction has already been taken through the fusion of the PA and the EPD. In addition, in order to implement the EU environmental acquis and all international treaties regulating the environment, an integrated structure is imperative. Otherwise the environmental acquis and the environmental treaties will end up not being enforced at all or only partially enforced. Unfortunately, past history demonstrates that Malta lacks effective and timely enforcement mechanisms.

The establishment of an integrated authority is therefore the best solution to achieve sustainable development in order to have better coordination, less squandering of resources and optimum sustainable use of environmental resources. The SDA would work hand in hand with the National Commission on Sustainable Development, established under the Environment Protection Act (EPA), and with the Minister responsible for rural affairs and the environment.

The proposed SDA could have three directorates, as follows:

- one addressing natural environment protection and the cultural heritage (combining the current Planning Directorate and Environment Directorate within MEPA, the current DFMRR within the MRA and the current Superintendence of Cultural Heritage);
- one addressing corporate affairs (information technology, human resources, staff training, internal audit, budgetary role, procurement of supplies and services, financial management services, public and media relations, etc); and
- one addressing integrated environmental enforcement (that is, this directorate will enforce in a holistic manner all environmental legislation as opposed to the fragmentary sectoral approach which has obtained in Malta since independence till to date).

National non-governmental environmental organisations should be represented on the SDA’s board. Members of Parliament should not sit on the Authority so as to avoid any possible conflict of interest which they might have with their parliamentary duties, both as members of the House and/or members of the proposed select committee of the House addressing sustainable development issues.
Parliamentary Commissioner

The Development Planning Act (DPA) has a provision establishing an Audit Officer\(^5\) – a kind of Ombudsman for planning matters – who reviews all the functions and workings of the MEPA and suggests what redress, if any, should be given. Although the term “Audit Officer” is not a happy choice, such Officer should have his or her terms of reference widened to cater for all planning and environmental affairs. The Audit Officer should be restyled as “Parliamentary Commissioner for the Environment and Sustainable Development”.

For instance, in New Zealand – apart from the national Ombudsmen – the New Zealand Environment Act 1986 provides for the establishment of a Parliamentary Commissioner for the Environment (Joseph, 1993: 330-4). The New Zealand Environment Ombudsman’s mission statement is that of ensuring that public authorities and others are held accountable for their planning and management as it affects the environment.

In Canada, the mandate of the Commissioner of the Environment and Sustainable Development is to make the government accountable for greening its policies, operations and programmes. In terms of article 21 of the Auditor General Act 1995, the Canadian Commissioner provides sustainable development monitoring and reporting on the progress of certain departments towards sustainable development, a continually evolving concept based on the integration of social, economic and environmental concerns which may be achieved, *inter alia*, by the integration of the environment and the economy, protecting one’s health and that of ecosystems, meeting international obligations, promoting equity, an integrated approach to planning and making decisions that take into account the environmental and natural resource costs of different economic options and the economic costs of diverse environmental and natural resource options, preventing pollution, and respect for nature and the needs of future generations.

The Australian Commissioner for the Environment Act 1993 establishes the office of Commissioner for the Environment to investigate complaints

\(^5\) Article 17C of the DPA entered into force on 1st February 2002 (Legal Notice 20 of 2002), the Audit Officer being appointed in February, 2004.
regarding the management of the environment by the Australian Capital Territory or by a Territory authority, conducting such investigations as may be directed by the Minister and conducting, on his or her own motion, investigations into actions of an agency where those actions would have a substantial impact on the environment of the Australian Capital Territory.

**A Sustainable Development Select Committee**

The 2001 amendments to the Development Planning Act have established a Standing Committee on Development Planning. This Committee of the House of Representatives reviews development plans referred to the House and discusses any report referred to it by the Minister responsible for planning relating to the structure plan or its review. Once again, it is being proposed to widen the terms of reference of the Committee to discuss and decide upon matters relating to sustainable development; to discuss the SDA’s annual report and statement of accounts; to discuss recommendations and reports made to it by the Parliamentary Commissioner for the Environment and Sustainable Development and, in keeping with the participatory role of environmental NGOs in the decision making process, to act as a forum for dialogue with environmental non-governmental organisations. In this way, non-governmental organisations can have a direct link with the Parliamentarians.

The Select Committee could also ensure that Government departments, statutory authorities and other government entities adopt policies which promote sustainable development and it should be consequently empowered to discuss these policies with the respective head of department, authority and entity during a public hearing.

**Curator of the Rights of Future Generations**

Article 4 of the Environment Protection Act, 2001 provides that it is “the duty of the Government to protect the environment for the benefit of the present and future generations” but fails to establish a specific machinery to ensure that future generations are bequeathed a healthy environ-
ment. Article 5 of the Environment Protection Act 2001, goes one step further and also provides that the provisions of article 4 of the enactment “shall not be directly enforceable in any court” even if “the principles therein contained are this notwithstanding fundamental to the Government of the State”. Quite a legislative contradiction in terms! The only relevance of these fundamental principles is to aid interpretation... “those principles shall be employed in the interpretation of the other provisions of this Act or of any other law relating to matters governed by this Act.”

It is being proposed that a Curator of the Rights of Future Generations be given the necessary powers by law to institute legal proceedings against any person – including the Government, its Ministers, Departments, statutory bodies and other entities in which the Government has a controlling interest as well as against the private sector – whose actions in the Curator’s opinion are not conducive to the promotion of sustainable development. If the Curator proves before the Environment Court that the act or omission of the defendant is one that will cause or is likely to cause irreparable damage to the environment or that, by applying the precautionary principle, it is likely to do so in such a manner that it will prejudice the enjoyment of the right to a healthy environment, then the Court could inhibit defendant from performing such act or, alternatively, the Court could order him or her to do that particular act which it deems expedient for safeguarding the right of future generations to a healthy environment. If, on the other hand, the act is carried into effect, the Curator would still be entitled to obtain a remedy before the Environmental Court by requesting the liquidation of environmental damages and the taking of remedial action such as restoring the environment as much as possible to its original state, a *restitutio in integrum* for the environment.

**Codification of Maltese Environmental Legislation**

Maltese Environmental Law should be codified into a Code of Environmental Law. There are diverse laws which regulate the multifarious aspects of the environment, spread all over the statute book, rendering it very difficult to access information efficiently. In addition, some provisions tend to be outdated, others anachronistic, still others do not
provide for adequate enforcement. Some even contain conflicting provisions. For instance, article 5 of the EPA dealing with the non-enforceability in any court of any breach by the Government or any person in their respective duties should be deleted as it is not in line with the concept of sustainable development. An important objective of sustainable development is to identify adequate means of redress (both judicial and administrative) to empower citizens and non-environmental organisations through recourse to judicial and administrative structures to protect the right of future generations to a healthy environment. The Future Generations Curator should be empowered through an *actio popularis* to enforce the right to a healthy environment both in the interest of present and future generations. The definition of sustainable development in the 1987 UN Report of the World Commission on Environment and Development deals with the right of future generations to enjoy a healthy environment. Article 5 of the EPA on the other hand is nothing but a negation of this right. It is therefore anathema from the sustainable development point of view.

In addition, although the 1995 amendments to the 1976 regional Barcelona Convention for the Protection of the Mediterranean Sea against Pollution have recognised the need to give effect to the rights of future generations (Malta played an important role in the formulation of these amendments). The concept has been featured frequently in the literature (see for example Agius and Busuttil, 1994; Agius *et al.* 1998, Brown Weiss, 1989). In spite of this, the EPA has not given adequate attention to this concept. Indeed, one observes a contradiction when reading the EPA. Whilst on the one hand the Government tries to legislate the concept of sustainable development into national law, it is not courageous enough to establish in the EPA adequate institutional means to implement sustainable development as outlined in AGENDA 21, in the UNCED documents and in the World Summit on Sustainable Development Plan of Implementation. The setting up of a Sustainable Development Authority, proposed in this paper, could serve to resolve such contradictions.

In this regard, the powers granted to the Minister responsible for the environment under all environmental legislation to make subsidiary legislation should be exercised by him or her with the advice or concurrence of the proposed SDA and after having consulted the National Commission on Sustainable Development. Such legislation should con-
Kevin Aquilina

tinue to be published in draft form – as happens with regard to subsidiary legislation made under the current EPA (article 10) – and finally approved, with or without amendments by the Minister following public hearings.

It is being proposed that the enforcement powers of the Sustainable Development Authority should be clearly and exhaustively written into the law.

**Creation of an Environmental Court**

An Environmental Court should be set up to hear appeals on a point of law from all decisions of the SDA and to take on board the duties currently exercised by the Planning Appeals Board under the DPA.\(^6\) It should also serve to enable applicants for a licence under the EPA to have a right of appeal to the Court, and to administer all environmental penal legislation by inflicting, where required, the necessary punishments. The Court would also apply a coherent and uniform sentencing policy with regard to environmental offences.

This Court should have a threefold jurisdiction namely (a) criminal (b) civil (in so far as liquidation of environmental damages, ordering restitution of the environment to its original state and the issuing of prohibitory injunctions are concerned) and (c) administrative. It should have three members with a judge of the Superior Courts as chairperson. The two other members would be selected from different panels according to the subject matter of the appeal, such as planning, pollution, waste, wildlife, radiation and the cultural heritage.

The Court should also deal with new penal and administrative sanctions to be imposed when environmental offences are committed. Such sanctions could include closure of works, withdrawal of the licence to operate, imposition of daily, suspended or conditional fines, the obligation to lodge a deposit, entering into a compulsory planning obligation, providing

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\(^6\) The Planning Appeals Board hears appeals from certain development planning decisions of the MEPA. For instance, the Irish Planning Appeals Board (An Bord Pleanála) deals not only with development planning appeals, including third party appeals, but also with appeals of an environmental nature concerning water pollution and air pollution.
bank guarantees or bonds for a specified period and purpose and compulsory supervised restoration works. In addition the Court should be empowered to impose the publication of the relative penal conviction or administrative sanction in the media (daily newspapers, and the broadcasting media) at the expense of the defaulter, to keep a public register of environmental defaulters, to establish an environmental community service order, to impose the payment of clean up costs on the polluter, and to request the defaulter, if a company, to clean up the damage itself or through sub-contractors paid by it (see, Council of Europe, 1978; 1988 and EU, 2002).

Dividing penalties into criminal and administrative ones should also be considered. Certain penalties should be imposed by the Sustainable Development Authority without recourse to the Environmental Court as is the position today with MEPA under article 58’ of the DPA and the compromise penalty under article 26ª of the EPA; other penalties namely those involving imprisonment and penalties higher than say ten thousand liri, should be left to the Environmental Court.

The establishment of an Environment Court is not a new idea. For instance, in New Zealand, the Environment Court is established by the Resource Management Amendment Act, 1996. In Australia, the Planning and Environment Court was constituted in 1990 by the Local Government (Planning and Environment) Act. The Land and Environment Court Act 1979 of New South Wales gives the Land and Environment Court the power to deal with environmental, development, building and planning disputes.

**Strategic Plan for Sustainable Development**

A Plan for the Sustainable Development of the Maltese Islands – which should essentially implement AGENDA 21 and related instruments – should be drawn up by the SDA, building on the strategy developed by the National Commission on Sustainable Development (NCSD)⁹ and to be

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7. The MEPA can award a pecuniary penalty for illegal development which it subsequently authorises.
8. An environmental offender may pay a pecuniary penalty to be agreed to by the MEPA instead of being prosecuted in court for an environmental offence.
9. The National Commission for Sustainable Development has been set up in terms of the EPA and one of its remits is to prepare a Sustainable Development Strategy.
approved by the Select Committee of the House on Sustainable Development. The Plan should be published in the form of an Act of Parliament to ensure that the public and private sector comply with it. Penal and/or administrative provisions should be introduced against non-compliance. The structure plan currently drawn up in terms of the DPA could well form an integral part of the Strategic Plan for the Sustainable Development of the Maltese Islands after the structure plan is updated to present day needs.

The Johannesburg World Summit on Sustainable Development’s Plan of Implementation encourages states to take immediate steps to make progress in the formulation and elaboration of national strategies for sustainable development and begin their implementation by 2005. Moreover, all countries are enjoined to promote sustainable development by enacting and enforcing clear and effective laws that support sustainable development and to strengthen governmental institutions (UNDESA, 2002).

The Role of NGOs

No environmental plan is complete if it does not involve the participation of environmental non-governmental organisations. International environmental law has developed at such a rapid pace to a large extent due to the contribution of international non-governmental organisations such as Friends of the Earth, Greenpeace, and others. Maltese non-governmental organisations have a vital role in the preservation of the natural and cultural heritage, through their expert advice on the subject and the pressure they put on the Government to adopt sustainable policies. Suffice it to mention here the vital contribution made by national non-government environmental organisations to the restoration of the Maltese natural and cultural heritage.

As stated eloquently in Chapter 27 of AGENDA 21, “Non-governmental organisations play a vital role in the shaping and implementation of participatory society.” (Johnson, 1993: 419). Environmental non-governmental organisations should be consulted on an ongoing basis and not haphazardly on governmental measures so that they could, through their expertise, contribute their input in implementing national policies in line with the principle of sustainable development.
Conclusion

In Malta decisions relating to the environment tend to take considerable time to be reached and implemented. For example, although the PA was established in 1992 and fused with the EPD in 2002, the idea of establishing a planning authority for Malta dates back to 1945. From the period 1945 to 1992 several reports were drawn up all favouring the constitution of such an authority but, it appears, that political will was lacking in this regard (Aquilina, 1999:1). It is augured that the institutional changes proposed in this paper, should be considered, debated and hopefully implemented in a reasonable period of time. The underlying purpose for proposing such an institutional reform is to enable the State of Malta to be in a position to give better effect to the concept of sustainable development within the Maltese Islands for the benefit of present and future generations as enunciated in Chapter 10 of the WSSD Plan of Implementation.

References


