

THE ENVIRONMENT PROTECTION ACT, 1991 AND THE RIGHT OF FUTURE GENERATIONS TO A HEALTHY ENVIRONMENT

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Act No. V of 1991, the Environment Protection Act, recognises in section 2 thereof future generations so much so that it imposes certain burdens therein defined on the Government of Malta to safeguard the interests of future generations. Although the Government of Malta has to fulfil certain duties, no adequate machinery is set up by Act No. V of 1991 to provide for safeguarding the interests of future generations.

Future generations, like animals, cannot defend their interests at the present moment in time for they lack the necessary structures to do so. Indeed, Maltese Law does not impose any obligation on present generations to bequeath to future generations a healthy environment. Again, future generations, due to their physical inexistence, cannot protect or safeguard their interests by, say, instituting court proceedings against the Government of Malta or any individual whomsoever it may be who may be contravening their right to a healthy environment. In the same way that animals cannot put pressure on the government of the day to enact into Maltese Law the Universal Declaration of Animal Rights, future generations presently have no vote to cast so as to induce political parties to formulate and implement a charter of intergenerational rights of humankind into Maltese law when in government.

Contrary to Act V of 1991 which leaves the matter in suspended animation, I intend to show that it is possible to create legal structures to enforce and safeguard the right of future generations to a healthy environment, and I shall do so by exploring five different ways of attaining such a goal.

The Right of Future Generations to a Healthy Environment

I have singled out only one particular right which ought to be granted to future generations and which is directly related to the subject matter of Act V of 1991 – the right to a healthy environment. By this I mean that future generations should inherit a sound, self-regenerating physical environment together with the necessary resource endowment which can sustain development which meets the needs of present generations without development. Furthermore, by sustainable development I understand compromising the abilities of future generations to meet their own needs. As a corollary to this

right, one can also include the right to freedom from prior environmental burdens and the right to improved security from environmental hazards.

Exploring some Legal Structures

In the Civil Law tradition, there is an institute known as that of the Curator. This institute has been in existence for a considerable amount of time both in our law as well as in Roman Law from where Maltese Civil Law is ultimately derived. Indeed, Roman Law and Maltese Civil Law provide for the safeguarding of certain rights (property rights, inheritance rights, etc.) which unborn children acquire but cannot exercise precisely because either they are still unborn or because they are still immature and have not reached the age of majority – they are legally speaking still **incapax**. Thus, section 170 of the Civil Code provides for the curator **ad ventrem** –

“If, at the time of the death of a husband without issue, the wife declares that she is pregnant, the court may, upon the demand of any person interested, appoint a curator **ad ventrem** with a view to preventing any supposition of birth, or substitution of child, and administering the property up to the day of birth, under such directions as the court may deem it proper to give.”

Again, section 172 of the Civil Code outlines the duties of a tutor. A tutor has the care of the person of the minor and represents the said minor in all civil matters. He furthermore administers the property of the minor as a **bonus pater familias**.

Another type of curator contemplated by the Civil Code is that concerning absent persons. Section 194 thereof provides that –

“The presumptive heirs of an absentee, or any other person interested, may apply to the court of voluntary jurisdiction in the island in which the absentee last resided, for the appointment of a curator to manage the property of such absentee, and for any other requisite directions for the preservation of his property.”

Section 929 of the Code of Organization and Civil Procedure, on the other hand, provides for the appointment of a curator **ad litem** so that such curator may appear in and defend proceedings in any civil court when a person is absent from Malta, or he is presumed to be dead, etc.

Then there is Chapter 299 of the Laws of Malta, the Public Curator Act, which unfortunately has not yet been brought into force and still has to see the light of day.

The inevitable question which now arises is whether provision can be made in Maltese Law for the appointment of a curator to represent future generations. Of course, the right which has to be contemplated here is not one relating to property or inheritance rights but to a healthy environment.

1. Curator in the Strict sense of the word

In the same way that the above-mentioned provisions provide for the office of a curator or tutor for a particular class of persons, amendments to Act V of 1991 can provide for the constitution of an public officer to be designated “The Curator of the Right of Future Generations to a Healthy Environment” who shall be entrusted in safeguarding the environment for the benefit of future generations, i.e. to assure himself that sustainable development is being carried out by government. Such officer should be given the necessary powers to institute legal proceedings against any person – including the Government of Malta – whose action does not promote sustainable development as defined above. If the Curator proves in Court that the act or omission of the defendant is one that will cause irreparable damage to the environment or that it is likely to do so in such a manner that it will prejudice the enjoyment of the said right, then the court could inhibit defendant from performing such act or, alternatively, as the case may be, the court could order him to do that particular act which it deems expedient for safeguarding the right of future generations to a healthy environment.

Although this approach seems, at least on the theoretical level, to be conducive to an efficient machinery which implements such right, on a practical level this implies that the Curator has to go to Court each and every time he desires to safeguard such a right and that he will have to institute a considerable amount of law suits. In addition, this also means that he must have a considerable amount of staff to deal with all these law suits, he must pay registry fees (unless he is exempted by law from doing so, in the public interest), he has to have a trained legal section in environmental litigation, etc. When all this is coupled with the exorbitant number of cases pending in court, this remedy seems to exclude an expeditious enforcement of such a right.

Thus a slight variation of this model could be that recourse is had to an administrative tribunal on the lines of the proposed Planning Authority rather than to the Courts of Civil Jurisdiction.

2. Commission of Inquiry which reports to the Executive

Alternatively, the Curator could, instead of going to court, communicate with the Minister responsible for the environment. The latter could then take all those measures which he deems appropriate so that the right of future generations to a healthy environment will not be prejudiced. However, the problem with this latter approach is that if it is left in the discretion of the Minister to take action as aforesaid, it may happen that pressure is put on the said Minister – by other Cabinet Ministers, including the Prime Minister, his political party, canvassers, constituents or even developers – which may convince him to either delay or even take no action at all. So even this latter approach poses certain difficulties.

A slight variant of this model is that where the Curator reports directly to the Cabinet (or to a Cabinet Committee) so that this organ would see to it that the necessary steps are taken to safeguard such a right. However, what happens if the Cabinet has, during a preceding meeting, authorised a project (or some other measure) which the Curator has categorised as one which is a menace to sustainable development? Or where the Minister responsible for the environment has exempted a particular government project from the need of an environmental impact assessment under Act V of 1991 simply because he knows that if such assessment were to take place the project would have to be halted? Will Cabinet or the Minister responsible for the environment reverse their previous decisions in these two cases or will they simply ignore the Curator's recommendation which is not binding upon them?

3. Commission of Inquiry which reports to Parliament

Another structure which can be adopted is that of having the Curator reporting directly to Parliament on any act or omission which he considers as prejudicing the right of future generations to a healthy environment. However, if this approach is implemented, it should be made quite clear that when the Curator refers such a case it has to be deliberated upon and dispensed of with utmost urgency. If the Government does not agree with the Curator's recommendation, the Leader of the House may place it as the last item on the agenda of the House so that it will never be discussed, thus frustrating any chance of enforcing such a right. Again this model may create another problem in the sense that Parliament is already burdened with a considerable amount of legislative work and so it would be quite difficult to fit in a lengthy discussion on the Curator's report. And even if a discussion takes place, there is no guarantee that a remedy is going to be granted by the Honourable Members of the House due to the fact that Parliament has lost its sovereignty and is basically an instrument in the hands of the executive. One may argue that a select committee may be appointed for this task and empowered to take quick remedial action without the need of referring back its decision to the House of Representatives for ratification but if the government of the day is still obdurate in pursuing its course, the Curator's recommendation will be vetoed.

4. Judicial Organ

Another solution that may be offered is that the Curator may be granted judicial powers similar to those given to the Court of Magistrates sitting both as a Court of Inquiry and as a Court of Criminal Judicature. In other words, the Curator may be empowered to receive complaints from any person who alleges that a particular act or omission is not conducive to sustainable development. In such case, the Curator will have to conduct a preliminary investigation, compile evidence, examine such evidence as well as that which may be produced by the complainant or brought by any person who may be effected or who may have an interest in the inquiry. The Curator can also opt

for a public hearing. He will then have to decide what orders he should give so that the right of future generations to a healthy environment would be safeguarded.

In this structure, the Curator is acting in a judicial capacity and delivers orders which have to be enforced by some other machinery, e.g. the Police or the Courts. In this case, provision should be made so that his orders be deemed to be an executive title for the purposes of the Code of Organization and Civil Procedure so that they can, therefore, be enforced by the Courts of Civil Jurisdiction.

Furthermore, the Curator will have a considerable amount of power so much so that he could change any decision taken by a Minister or even by the Cabinet and, consequently, the politicians will surely not favour this option as they will consider it to be a curtailment of their power. No Minister would favour having an independent authority – apart from Parliament where he knows that his political party in power can always muster a majority of the members of the House to support him – ordering him to change decisions taken by him that are labelled as not being conducive to sustainable development. We still have to wait to see that Minister who will propose this option in Parliament!

On the other hand, the advantage of this model is that the Curator can provide the complainant with an expeditious remedy because until he investigates the complaint he may take all those conservative measures which he may deem fit and he may do this without prejudice to his final order. A slight variant to this model would be to permit an appeal on a point of law to the Court of Appeal.

5. Administrative Tribunal

A variation on the previous model is that of creating an Administrative Tribunal (or utilising the proposed Planning Appeals Tribunal, if and when it comes into being) to perform the adjudicative functions of the Curator mentioned above without prejudice to his right to grant conservative measures until he reaches a final order (i.e. an appeal will lie only from his final order and not from the conservative measures if such measures are not accompanied with a final order). An appeal on a point of law may also be lodged from the Tribunal to the Court of Appeal. If this model is adopted it will be the Tribunal which will usually decide the issue rather than the Curator.

CONCLUSION

Although in this study I have contemplated only five structures which may be utilised so as to recognise and enforce the right of future generations to a healthy environment, I would like to point out that other models may be conceived or a combination of two or more of these models may be concocted.

I only want to demonstrate in this article that not even the slightest effort was made in Act V of 1991 by Parliament to create some type of adequate machinery capable of enforcing the right of future generations to a healthy environment mentioned in section 2 thereof.

Further reading:

Dr. Kevin Aquilina. **Analizi Kritika Dwar l-Abbozz Propost ta' Ligi dwar il-Protezzjoni ta' l-Ambjent**, February, 1990 (Cf., especially, Appendix I, pp. 1 – 16 thereof, entitled “Recognition and Enforcement of Future Generations (Healthy Environment) Act, 1990.