

# Judges and the Rule of Law

Creating the Links: Environment,  
Human Rights and Poverty

Edited by Thomas Greiber



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Edited by Thomas Greiber

Papers and Speeches from an IUCN Environmental Law Programme (ELP) Side Event  
at the 3rd IUCN World Conservation Congress (WCC) held in Bangkok,  
Thailand, 17–25 November 2004

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This publication has been made possible in part by funding from BMZ, the German Federal Ministry of Economic Cooperation and Development.

Published by: IUCN, Gland, Switzerland and Cambridge, UK, in collaboration with IUCN Environmental Law Centre, Bonn, Germany

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Citation: Greiber, T. (Ed.) 2006. *Judges and the Rule of Law. Creating the Links: Environment, Human Rights and Poverty*. IUCN, Gland, Switzerland and Cambridge, UK. x + 105 pp. [in press]

ISBN-10: 2-8317-0915-6

ISBN-13: 978-2-8317-0915-4

Cover image: Markus Kahlenberg, magoodesign

Typeset by: Bookcraft Ltd, Stroud, UK

Produced by: IUCN Publications Services Unit

Printed by: Page Bros, Norwich, UK

Available from: IUCN Publications Services Unit  
219c Huntingdon Road, Cambridge CB3 0DL  
United Kingdom  
Tel: +44 1223 277894  
Fax: +44 1223 277175  
E-mail: [books@iucn.org](mailto:books@iucn.org)  
[www.iucn.org/bookstore](http://www.iucn.org/bookstore)

A catalogue of IUCN publications is also available.

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# Foreword

The role of the judiciary to achieve environmental conservation was recognised in the last decade by Agenda 21. Paragraph 8.26 states that “efforts to provide an effective legal framework for sustainable development should be oriented towards improving the legal-institutional capacities of countries to cope with national problems of governance and effective law-making, and law-applying in the field of environment and sustainable development.” Most recently, the Johannesburg Principles have emphasised that “the fragile state of the global environment requires the judiciary, as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws ...” The necessity of further strengthening the rule of law and its complementary national frameworks, especially each country’s ability to effectively implement and enforce existing environmental law through national authorities and adequate judicial institutions, has been repeated in the Johannesburg Plan of Implementation.

Hence, at the 3rd IUCN World Conservation Congress (WCC) held in Bangkok, Thailand, from the 17th to the 25th of November 2004, the IUCN Environmental Law Programme (ELP), through its Commission on Environmental Law (CEL) and the Environmental Law Centre (ELC), held a two-day major event - “Judiciary Day” - to showcase the role of the judiciary in upholding the rule of law.

The President and the Director General of IUCN had extended personal invitations for judges to participate as speakers or panellists in the Judiciary Day, demonstrating the importance with which IUCN views the role of judges. Judges and practitioners from around the world, as well as representatives of UNEP, UNDP, FAO and the World Bank Institute responded to the invitation to attend and actively contribute to the outcomes of the Judiciary Day. Participants engaged in fruitful debates on the links between environment, poverty and human rights, judicial capacity building, the ethics of judging, public interest litigation and whether the courts have a role in “judicial activism”.

The ELP recognises the critical role of the judges in the development, enforcement and compliance with environmental law as well as the great challenges that face them. As a consequence, the ELP in collaboration with its partners will continue to organize and contribute to initiatives, as it has done in the past, in order to support judicial capacity building at a national, regional and global level, to create a global network of judges and to promote the role of the judiciary in environmental law and sustainable development.

The ELP is very proud of having organized Judiciary Day with its partners, and wishes to thank all those who have contributed to the preparation and implementation of this outstanding event. We gratefully acknowledge the financial support provided by BMZ (Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung), the German Federal Ministry for Economic Cooperation and Development, to publish distinguished papers and speeches that led to the success of the Judiciary Day. Through making Judiciary Day proceedings widely available, we hope to further sensitize people and help them better understand the crucial role of the judiciary to implement environmental law and thus conserve the environment.

**Dr Alejandro O. Iza**

Head, IUCN Environmental Law Programme

Director, IUCN Environmental Law Centre

**December 2005**



# Preface

The importance of environmental law to achieve good governance and thereby conserve the environment and its ecosystems has been repeatedly demonstrated and remains unquestioned. The further development and improvement of environmental legislation is crucial for a successful environmental conservation strategy. However, new legislation cannot, on its own, be the ultimate solution to stop future environmental degradation. At the same time, improving the implementation and enforcement of existing laws must not be neglected. In other words, environmental laws, regardless of how “good” they might be, are nothing but empty shells unless their effective implementation is secured.

The adoption of environmental laws must be complemented by an efficient judiciary that people can rely on to adjudicate evolving disputes. Clear linkages between sustainable and equitable economic development on the one hand and the existence of a functioning legal and judicial system on the other hand have been proven. Unfortunately, lack of exposure to environmental law by members of the judiciary may hinder its implementation. Appropriate training of judges is clearly required. Such training must focus among others on jurisdiction in environmental law, its special instruments and problems of enforcement, as well as related scientific knowledge which is necessary to sensitize judges for environmental cases.

Besides its role as the guardian of the rule of law, the judiciary can also play the part of a decision-maker and opinion-former. However, judicial activism to advance or improve environmental law is seen differently in legal systems such as the common law or Roman law systems.

Finally, the empowerment of affected people to exercise and insist on their rights is equally important for the implementation of environmental law. In this regard, an obstacle exists in the unbalanced power structures in many parts of the world, with strong interest groups who degrade the environment for mostly economic profits on the one side and people suffering from environmental degradation who are voiceless, poor or unorganized on the other side. A rapidly evolving means to overcome this barrier is Public Interest Litigation (PIL). Nevertheless, insufficient rules on public access to and sharing of environmental information, as well as unclear legitimacy and legal standing of the organizations involved in PIL processes are problems that remain unsolved in many countries.

These are just a few topics among many cutting-edge themes regarding the importance and role of the judiciary in environmental conservation. Through this publication a wide community of readers is given the chance to benefit from the fruitful outcomes of the discussions held by environmental law specialists from around the world at the IUCN Judiciary Day in November 2004. IUCN stands ready to further share its experience where needed and to help influence and strengthen the role of the judiciary at national or international levels to achieve the crucial goals of sustainable development and nature conservation.

**Ms Sheila Abed de Zavala**  
Chair,  
IUCN Commission on Environmental Law

**Professor Nicholas A. Robinson**  
Former Chair (1996–2004),  
IUCN Commission on Environmental Law

**December 2005**



## Part I

# The rule of law and the judiciary: A review of global initiatives



# Helping make rights a reality: support to the judiciary in implementing Mozambique's new natural resource laws

*Kerstin Mechlem, FAO Development Law Service, Rome, Italy*

The past decade has been a period of intense activity and innovation around the world in the revision of national laws concerning natural resources and the environment.<sup>1</sup> In the areas of law on which FAO's Development Law Service advises FAO member countries – including forestry, land, water, fisheries, wildlife, food, biodiversity and genetic resources – literally hundreds of new laws have been adopted, reflecting to greater or lesser degrees new thinking about the relationship of law to the principles of sustainable development. While each sector has its own legal issues, there are a number of well-established themes that are now routinely sounded in the laws from all or many of these subject areas – from greater public participation and enhanced rights of a variety of public and private stakeholders in resource management, to decentralization of government institutions and greater accountability in decision-making.

Yet it goes without saying that many laws around the world, however well-crafted to reflect new thinking and locally-appropriate strategies, lie unutilized or under-utilized. The explanations put forward for this phenomenon are familiar – government institutions lack the financial and human resources to monitor and control activities; government officials entrusted with enforcing laws or protecting private rights under those laws often have more to gain by condoning violations or engaging in violations themselves; court systems are backlogged or bankrupt; the imperatives of daily life for the rural poor overwhelm any likely risks associated with violating the law; etc. The point here is obvious and yet its importance is frequently under-appreciated by governments and by donors alike. Laws that ostensibly empower people will remain empty shells unless they are used. Often they remain underused because people have not developed the understanding and tools to exercise or insist upon their new or confirmed rights or to comply with new responsibilities, and government is ill-equipped to administer those rights or responsibilities.

In response to these types of problems, and the growing disappointment associated with policy and legal reforms that have failed to live up to their promise on the ground, there now is increasing international experience with legal literacy and other types of law-related capacity building in various natural resource contexts, aimed at rural resource managers and their advocates, judges, lawyers and administrators, and non-governmental organizations.

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<sup>1</sup> For a comprehensive survey, see FAO Legal Office, *Law and Sustainable Development Since Rio: Legal Trends in Agriculture and Natural Resource Management* (FAO, 2003).

The purpose of this short paper is to describe one such effort on the part of the Mozambique government, through the Centro de Formação Jurídica and Judiciária (CFJJ), that FAO is supporting with financial assistance from the Government of the Netherlands.

## **Mozambique's new legal regime for land, environment, forestry and wildlife**

On 31 July 1997, the Mozambican Assembly approved the Land Law (No. 19/97) and the Environmental Law (No. 20/97), and, more recently, on 7 July 1999, the Forestry and Wildlife Law (No. 10/99). Each of these laws, and their related regulations, are innovative in certain significant respects, and as such pose new challenges for courts in terms of the legal issues and types of cases that are likely to come before them.

The Land Law, intended to bring the regulation of land issues in line with current political, economic and social realities, seeks to improve access to and secure possession of land by local communities and other stakeholders. In applying this new law, it is expected that courts will be called upon to resolve new types of disputes and adjudicate unfamiliar issues. For example, the Land Law expressly requires courts to apply customary law with respect to, *inter alia*, the use and exploitation of land and the management of natural resources and conflict resolution, which will require that judges have a solid understanding of customary rules and practices. With respect to the formalization of use/exploitation rights, boundary disputes will likely arise between adjoining communities. Disputes may also arise between individuals holding formal legal title under the former legal regime and those holding possession under customary law.

The Environmental Law is intended to promote sustainable management of Mozambique's environment. Features of this and related laws include mandatory environmental impact assessments of projects and activities, and environmental licensing. There are several aspects of the new environmental law regime that may result in new types of cases coming before the courts. One aspect concerns coordination among the relevant agencies. The Ministry for the Coordination of Environmental Action (MICOA) does not control natural resource management directly, as this responsibility rests with other ministries. MICOA is largely responsible for coordinating and controlling actions. However, with the introduction of environmental licensing and environmental impact assessments, and the approval of a law regarding environmental crimes, MICOA's role will increasingly intersect with the interests of other ministries. It is possible that issues arising from this may require judicial attention to the extent that they cannot be resolved administratively. Additionally, the new law provides that any citizen may seek judicial assistance with respect to violations of rights granted under the Environmental Law or the prevention of future violations. It also provides for injunctive and other equitable relief. Both are concepts which are unfamiliar to Mozambique's judicial system in the context of environmental protection.

The Forestry and Wildlife Law seeks to empower local communities and mobilize private-sector resources in the areas of forestry and wildlife. The new rights and responsibilities created by the Law, and the new modalities of interaction between communities, private sector and government may be expected, from time to time, to give rise to disputes requiring judicial intervention. Among other issues, the delimitation of, and enforcement of new rules in, protected areas could be problematic to the extent that these interfere with the resident population's use of natural resources or if residents are not consulted in advance. In addition, the Forestry and Wildlife Law identifies a series of crimes and penalties that will require judicial intervention. This is particularly true with respect to discretionary power of district court

magistrates in the conversion of penalties and the consideration of aggravating circumstances, reoccurring offences, joint liability and the consequences of penalties.

## **Need for training, resource materials and comparative experience**

In developing a package of support to the judiciary in the implementation of these laws, the following assumptions were taken into account by CFJJ and FAO. First, it is clear that, with the adoption of these new laws, judges will be called upon in the near- to medium-term future to adjudicate disputes related to a variety of issues with which they are not familiar and for which no supporting materials exist. In light of the fact that successful implementation and application of these laws depend upon the judiciary's ability to base decisions on the text of the laws and underlying principles, it is essential that the members of the judiciary have (i) a thorough understanding of these laws/principles and (ii) resources in the form of treatises or explanatory reference material at their disposal to which they may turn for guidance.

Second, in addition to understanding better the specific laws themselves, there is also a need for the judiciary to engage in an assessment of its own overall structure, procedures and training strategies. The effective implementation of these new laws, as well as the administration of justice generally in Mozambique is likely to depend on the progressive reform of these aspects. In this respect, it was felt that access to comparative experience of court systems in other countries that have undergone administrative, procedural and educational reform would be important, particularly systems that, like the Mozambique judiciary, are confronted with the need to apply innovative new laws concerning land and the environment, and to seek a better integration of customary law and community-based tribunals into the overall legal system.

Finally, it was recognised that a focus on formal judicial institutions would be too narrow, particularly given the intricate relationship between the resources and activities covered by these laws and the livelihoods of rural communities. In Mozambique, as in many African countries, there are a range of local, community-based institutions, from statutory community tribunals to informal customary mechanisms, which are likely to have a bearing on the implementation of new rights and responsibilities under the new laws. There is a need as part of improving the judicial climate for implementation of the laws to explore and define the optimal interaction between the formal and informal levels, as in practice the boundaries between them are permeable to a degree. Indeed, each of the new laws recognises this "permeability" to some extent, by providing for the application of customary law principles in certain situations. Furthermore, although the cases that come before community-based institutions are typically small cases, their effective settlement will serve the purpose of keeping formal courts freer to handle larger and more complex cases concerning land, natural resources and the environment. It is therefore important that methods and material be developed and tested for the training of local informal institutions in the basic principles of the new laws.

## **Project activities**

In response to these considerations, a series of project activities were designed, with implementation beginning in 2001 (the project will conclude at the end of this year, though a series of follow-up activities have been planned). The activities fall into four clusters:

- **Training of District Judges:** The CFJJ and national legal experts, with FAO technical assistance, have designed a training methodology and prepared training manuals covering each of the three laws. Over a three-year period, a total of ten two-week training courses have been presented in three different geographic regions – Southern, Central and Northern Mozambique – with participation of around 85% of Mozambique’s more than 200 District Judges. In addition to providing judges with training in the legal principles and details of the laws, the courses have aimed to provide a greater understanding of the social, economic and environmental issues that lie behind the law reforms, and for this purpose, selected experts in non-legal matters have made contributions to the training. Between the training courses conducted in each year of the project, the methodology and training materials were reassessed based on the experience gained, and revisions made as necessary. In this, the final year of the project, the CFJJ has begun the formal publication of the training manuals, making them available to law schools in the country. The project is also conducting a survey of judges and public legal officers who have passed through the CFJJ training programme, to identify those who have since handled land and natural resources cases, and to assess how they have dealt with the issues raised. Results from this work will feed back into improvements to the training manuals, and allow the CFJJ to build concrete experiences and case studies into a longer-term training programme.
- **Production of legal reference books on each of the three subject areas:** In addition to the training material described above, the project has supported the production of three in-depth legal reference books or interpretative guides/treatises, designed for use by the judiciary, legal professionals, law students and legal academics. Again, material has been included on the social, economic and environmental context, as well as pertinent comparative material.
- **Study tour to Brazil and return visit of Brazilian experts to Mozambique:** The project has supported exchange visits for Mozambican and Brazilian judges and judicial administrators. Members of the Mozambique Supreme Court have travelled to Sao Paulo and Pernambuco, Brazil, for exposure to the experiences of these two legal systems in legal education, special courts, judicial restructuring and adjudication of land and environmental issues. Following this study tour, a team of six judicial specialists from Pernambuco travelled to Mozambique to work with members of the Mozambican judiciary to assess the court system and possible methods for strengthening their procedures in addressing land and environmental cases.
- **Enhanced understanding of the role and training needs of community-level institutions:** Early in the project, the CFJJ conducted socio-legal field research into the role and functioning of community tribunals and other community-based institutions in the resolution of disputes in Mozambique and their relationship to the formal judiciary in order to ascertain the types of disputes they most frequently encounter and to assess their training needs with respect to land, environmental, forestry and wildlife law issues. This work, among other things, identified an expanded range of actors for whom training in these laws would be important. For example, even where customary mechanisms do resolve conflicts, other ‘non-customary’ actors often play key roles. Work in other FAO projects supporting Land Law implementation suggests that executive agencies frequently assume quasi-judicial powers and responsibilities. This is especially the case with conflicts that involve outsiders, such as new investors seeking land or natural resources to exploit. The roles and behaviour of these actors must be fully understood and taken into account. There may also be longer term training implications for these other actors, who as well as district and provincial judges and public attorneys, include district administrators, cadastral service and other staff of the Ministry of Agriculture

and Rural Development, and NGOs. This work will improve understanding of the non-judicial, 'non-customary' dimensions of conflict resolution. A working hypothesis is that these other structures must be taken into account in any reform proposals, and may in fact point to important alternative proposals for local-level conflict resolution mechanisms and the people who should be trained. Fieldwork indicates for example that local conflict resolution specialists (*Regulos* etc) are asking for training in land and natural resources laws. Their legitimacy and role will not change in the foreseeable future, and a draft training package for this level of trainee can already be prepared and tested alongside the proposed fieldwork. Through this work programme, a research capacity is being established at the CFJJ (*Nucleo de Investigação*) focusing on land and natural resources issues, with the hope that it will be endowed with sufficient technical capacity over the longer term, to monitor and assess the performance of tribunals in these areas, and the relationships between communities and the State at local level. The case studies for the fieldwork will also form the basis of a body of jurisprudence in land and natural resources issues; and has provided case material for the training package.

## Conclusion

Effective implementation of these new laws is a multi-dimensional affair, involving a wide range of actors. It is certainly not the presumption of the project described above that enhancing the capacity of the judiciary to understand and apply these laws will in itself substantially improve the prospects that rights written into legislation will become a reality for most Mozambicans, as genuine tools for them to improve their livelihoods. Indeed, even measuring the extent to which judicial decision making has improved as a result of training will be a challenge in itself, let alone assessing the extent to which those decisions have helped alter ground-level realities. But there can at the same time be little doubt that without these types of focused interventions on one set of crucial actors, the promise of much new legislation will be squandered.



# A review of global initiatives conducted by ELI

*John Pendergrass, Director, Judicial Education, Environmental Law Institute*

In accepting ELI's 1989 Annual Award for lifetime service to environmental law, Judge James L. Oakes, Chief Judge of the U.S. Court of Appeals for the Second Circuit, told hundreds of environmental attorneys that judges in the U.S. were generally unprepared to handle the complex legal, scientific, and evidentiary issues that arise in environmental litigation. He challenged ELI and the environmental bar to build the capacity of judges so they would be prepared for cases that would come before them.

Before leaving the auditorium that night, ELI's President Bill Futrell had accepted the challenge and asked ELI staff to develop a programme for judges. The objective of ELI's Judicial Education Program is to build the capacity of judges around the world to ensure the enforcement of laws relating to sustainable development. In 1991, ELI held its first educational programme on environmental law for state judges from Maine, New Hampshire, Vermont, Connecticut, Rhode Island, and Massachusetts. This programme was, to our knowledge, the first of its kind for state judges in the U.S. ELI planned and organized the programme in partnership with Andrew Savitz, an attorney who had heard Judge Oakes' speech and had been General Counsel for the Executive Office of Environmental Affairs for Massachusetts, and the Flaschner Judicial Institute, an educational institute for New England judges.

In planning the programme we adapted a methodology ELI had developed for intensive training programmes for environmental professionals. We began by contacting the Chief Justices of each jurisdiction and asking them to support the programme. We conducted extensive in-person interviews of judges from each jurisdiction to learn what they thought the most relevant issues were in environmental cases in their courts. Some of these judges were asked to continue to assist the programme development team as an advisory panel. We also interviewed attorneys who appeared in those courts to learn their views of the critical issues facing the courts, and what new types of cases and issues they expected might be litigated in the future. The programme team used this research to determine what issues to cover, plan the curriculum, identify experts who could speak knowledgeably and interestingly on the chosen topics and assist them in preparing their presentations, identify or prepare materials to provide in a reference book, and develop interactive exercises for the judge-participants.

Since the first ELI programme for judges in New England, and particularly since the Earth Summit in 1992, there has been an explosion of international, national and local laws addressing critical aspects of sustainable development. These laws have addressed a variety of complex topics ranging from natural resource damages to pollution prevention, public participation in decision making to access to genetic resources, hazardous materials transportation to indigenous and traditional community rights. Regardless of whether they work in civil or common law traditions, judges around the globe have found themselves in the position of deciding cases involving legal instruments that did not even exist when they attended law school. These cases also involve the application of economic tools and understanding of scientific principles that are foreign to most judges.

In August 2002, more than one hundred Supreme Court and other judges from more than fifty countries meeting at the Global Judges Symposium on Sustainable Development and the Role of Law in Johannesburg, South Africa, concluded that “the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law” and emphasised the “urgent need” to train judges in environmental law.

ELI has continued to apply the methodology described above as it expanded its judicial education programme to other states and regions in the U.S. and then to Central and South America, Central and Eastern Europe, India and Africa. Since our first programme in the U.S., in 1991, ELI has provided programmes for about 800 judges from 15 states in the U.S., and 15 countries, including Bolivia, Brazil, Cameroon, Colombia, Costa Rica, Ecuador, Honduras, Hungary, India, Paraguay, Peru, Russia, Tanzania, Uganda and Ukraine.

The New England course also illustrates a few principles that have guided ELI’s judicial programme from the start. First, we work with local partners who have expertise in the specific environmental law of the jurisdiction. Second, we work with the courts, with the existing judicial education institutions. Third, we assumed, and judges throughout the world have confirmed this, that the judiciary wants unbiased information. Therefore, the programmes ELI has helped to create present the state of the law, and where relevant, science, economics and evidence. We may include speakers who represent particular parties in environmental litigation, but only when the chief justice in the jurisdiction or the judicial training institute approves such advocates as speakers. Some courts, such as Uganda’s Supreme Court through its Judicial Training Committee, have preferred the presenters to be respected advocates from their jurisdiction. In other jurisdictions, such as the Bombay High Court, covering Maharashtra state and Goa in India, the court chose to specifically exclude speakers who were advocates currently litigating cases in the court. In either case ELI seeks to include speakers from government, private parties, non-governmental organizations, and academia.

Because tailored programmes for judges are critical, ELI does not have a standard off-the-shelf course to provide judges. Rather, we have a process for working with the judiciary and with local experts to meet the needs of the courts in a particular jurisdiction. Needs and cultures vary among courts and countries. For example, interactive teaching methodologies are welcomed more by some courts than others. Some jurisdictions have barred asking judges to answer questions about hypothetical situations, while others, such as in Uganda, encouraged judges to participate in full moot court exercises. The Chief Justice of Uganda opened one of the programmes for trial court judges by telling them how useful he had found his experience participating in a similar exercise at a conference on a different topic. Most jurisdictions that we work with have Judicial Training Institutes, which have been valuable partners providing insight into practical issues such as teaching methodologies and, in some cases, facilities and even speakers. All states in the U.S., the U.S. federal courts, and many countries such as Brazil, Uganda and, in a large country like India, the state courts, have training institutes. Yet few of these judicial institutes have expertise in environmental law.

Critical to our process is working with local partners, starting with Andy Savitz in New England. Since then every judicial education programme that ELI has been involved in has depended on outstanding local partners including, but not limited to, Antonio Benjamin and Law for a Green Planet in Brazil, Charles Okidi in Kenya and East Africa, Kenneth Kakuru and Greenwatch in Uganda, EcoPravo in Ukraine, M.K. Ramesh and National Law School in south India, Anand Grover and Lawyers Collective in Bombay, H. C. Ravindranath and Environment Support Group in Karnataka, India, Dr Ram Boojh and

Centre for Environmental Education in Lucknow, India, and Sheila Abed and the Institute for Environmental Law and Economy (IDEA) in Paraguay.

A common response from judges to the programmes has been surprise about the content and breadth of environmental law. One judge said, “Oh, so that is what environmental law is – then I have a case right now.” As a judge in Uganda was paging through the reference book of cases and other materials he exclaimed, “I’ve been looking for this case for four months!”

We also are beginning to see results from our programmes in the way judges handle environmental cases. In Uganda, the partnership of Greenwatch, the Judicial Training Committee of the Supreme Court, and ELI has trained every pre-existing judge in the country. In addition, the United Nations Environment Programme (UNEP) and World Resources Institute (WRI) have co-sponsored and assisted in developing and delivering some of the judicial programmes in Uganda. As a result of these programmes, Uganda’s judges no longer view its environmental laws as empty words on a page, but have recognised them as critical to the welfare of the public and are working to protect Uganda’s natural and human environment. Before Ugandan judges had received this training, many routinely dismissed environmental cases on procedural grounds. That has changed. In 2004, a case was brought by Greenwatch to enjoin the Uganda Wildlife Authority from exporting chimpanzees to China. The Government argued that it should have been given forty-five days notice of the suit, an argument that in the past was usually accepted, including by the specific judge assigned to this case. The presiding judge, Justice Gideon Tinyinondi, who had participated in one of the environmental programmes, wrote “[t]his rationale cannot apply to a matter where the rights and freedoms of the people are being or are about to be infringed. The people cannot afford to wait forty-five days before pre-emptive action is applied by Court. They need immediate redress.”

The State of India has been a leader in the constitutional aspects of environmental law. But that leadership paradoxically led many district judges to assume that, since they had no jurisdiction in constitutional issues, environmental law was not relevant to them. In an ELI programme in Lucknow last year, several High Court judges told such district court judges clearly that the civil and criminal codes had many environmental provisions that they had a duty to uphold when cases came before them.

ELI plans to continue to work with judges throughout the world to assist them in building their capacity to understand environmental law, sustainable development, and the complex scientific, economic and social issues that arise in environmental litigation. Since it began its Judicial Education Program fifteen years ago, ELI has recognised the critical importance of working with partners to ensure that judges receive the highest quality education on these issues. The 2002 Global Judges Symposium in Johannesburg has served to highlight the need for judicial education in the environmental field and has allowed all who have been working on this issue to better understand the efforts of others. ELI welcomes the opportunity to work with these other organizations, many of whom also have extensive experience and expertise to provide to judges. ELI looks forward to continuing to work with such partners as IUCN, UNEP, World Bank University, Law for a Green Planet, Greenwatch, IDEA and others to provide judges the education they need in environmental law.



# Project for an International Court of the Environment – origins and development

*Deirdre Exell Pirro, International Relations Officer, International Court of the Environment Foundation, Rome, Italy*

## Introduction

For over 10 years the International Court of the Environment Foundation (ICEF), a United Nations' accredited NGO, has been promoting the creation of a universal jurisdiction for a more effective protection of the environment at the legal level, by improving the dispute resolution mechanisms.

ICEF believes that there is an incontestable urgency for the establishment of an International Court of the Environment based on the following needs:

- environmental need: to ensure sustainability of life on earth
- economic need: to delimit and define opportunities for the global economy
- legal need: to provide a universal guarantee for the human right to the environment and ensure the enforceability of international environmental law
- social need: to provide individuals and NGOs with information, participation in, and access to, justice
- political need: to prevent and solve environmental conflicts by enabling a peaceful and balanced development
- ethical need: to react to the degradation of the planet through new rules on individual and social liability
- cultural need: to provide the common heritage of mankind with a common defence in the interest of future generations
- scientific need: to provide an independent global forum which fosters the truth about the destiny of the planet

Therefore, the platform of the Foundation focuses on dispute resolution mechanisms within international environmental law and on the access to “green information”, participation in environmental decision-making processes and access to justice, in keeping with Rio Principle 10.

Its aims are:

- creation of an International Court of the Environment in the form considered to be most appropriate by the international community, giving access not only to the States but also to associations and to individuals;

- for matters relating to international environmental crimes, the creation of an ad hoc global environmental court or the inclusion of those crimes within the competence of the already constituted International Criminal Court;
- promotion and support of an International Centre for the Prevention and Management of Environmental Conflicts with proper technical and technological support;
- support and co-operation with national governments, UNEP, FAO, UNESCO, the Council of Europe and the European Union for studies and research – and operational projects – that contribute to the implementation of international environmental conventions, especially to the three Framework Conventions on Climate Change, Biodiversity and Desertification; the oceans and seas (with special attention focused on the integrated Mediterranean-Black Sea system); and the protection of flora and fauna, wildlife and landscape;
- collaboration in common initiatives with the scientific community and with the Supreme Courts of different countries for identifying and monitoring, within their territory, cases of environmental damage.

## **History of the project**

The idea of global environmental justice has been deeply felt on all continents as a universal common value in order to assure both the enforcement of the human right to the environment and sustainability of life on earth.

However, it was in Rome, the universal city for its tradition and culture, that international environmental justice took its first steps. In 1968, the Club of Rome, founded by Aurelio Pecci, vigorously raised the scientific question of the “limits to growth” at the first meeting held at the Accademia dei Lincei.

Almost twenty years later, in May 1986, an International Forum on “Justice and Environment” was held in Rome, at the Accademia dei Lincei. This initiative was taken by the Italian Supreme Court and the newly established Italian Ministry for the Environment with the participation of the EEC Commission and experts from 15 countries. The Conference was supported by IRI, presided over at that time by Romano Prodi. In such a venue, the need for a Supranational Environmental Protection Agency and a Global Court was also stressed with a view to protecting the environment and environmental damage being considered as economic damage just after the Chernobyl disaster.

In 1988, the International Court of the Environment Foundation (ICEF) was established as an NGO, presided over by Amedeo Postiglione, Justice of the Italian Supreme Court. In April 1989, once again at the Accademia dei Lincei in Rome, the First ICEF Conference was held at a global level. It expressly linked the question of a more effective International Human Right to the Environment to that of creating an International Tribunal for the Environment. The Conference was organized and chaired by the Italian Supreme Court, with the support of ENI and the participation of outstanding experts from 32 countries.

The Final Recommendation of the 1989 Rome Conference accepted the proposal of establishing an ad hoc international jurisdiction for all the problems concerning the environment, also giving access to civil society and not only to States, together with an International Administrative Authority charged with supervision, planning and management.

## **Promotional campaign prior to the UN Conference in Rio de Janeiro**

Immediately after this, in 1990, a promotional campaign for the Project of an International Court of the Environment was launched in several countries in consideration of the UN Summit scheduled for June 1992 in Rio de Janeiro with the participation of NGOs, universities, scientific bodies and outstanding representatives from within the cultural domain.

From 13–15 December 1990, ICEF took part, as an NGO, at the World Meeting of the Associations for the Human Right to the Environment in Limoges, France. The Limoges Declaration – containing 12 recommendations for the Rio Conference drawn up by jurists from 43 countries – referred to the proposals made by the Brundtland Commission and recommended two brand-new institutional mechanisms: an International Commission for the Environment – indeed established in Rio – and a High Commissioner for the Environment and Development, a kind of independent International Ombudsman.

ICEF submitted a long report on “The Human Right to the Environment: National and International Recognition” which was published and accepted in principle. It stated, as to its fundamental issue, the matter of “placing environmental conflicts under international jurisdiction open to all States.” Recommendation No. 4 defined the idea of the environment as a human right and insisted on the need for access to justice on the part of individuals before an international tribunal.

In 1990, ICEF also participated in a conference organized at Fort Myers by the State University of Florida, and, in 1991, in two scientific meetings in Tokyo, with the Universities Gatushuin and Rijikkid resulting in the Japanese Federation of Bar Associations supporting the Project.

A specific International Conference was held in order to examine the project for an International Court of the Environment at Palazzo Vecchio in Florence, in May 1991. The initiative was organized and chaired by the Italian Supreme Court and was supported by the Tuscany Region, the Province and the Municipality of Florence, the European Commissioner for the Environment and authoritative experts from 25 countries. The conference was very successful and supported by Italian and foreign scientific institutions, the press and economic bodies such as IRI, ENI, ENEL, Alitalia, ENEA, ESSO, Iritecna, Alenia and others. From the institutional and moral point of view, it was also given the support of the Holy See and the Chief Justice of the Italian Constitutional Court.

The Chief Justice of the Italian Supreme Court, H.E. Antonio Brancaccio, who chaired the International Conference in Florence, then decided on his own initiative to establish a Scientific Secretariat of ICEF by a Special Decree of 24 September 1991 with a view to future development. The Scientific Secretariat, an organ of the Court, is located at the Court and directed by Judge Amedeo Postiglione.

ICEF took part in the Preparatory Conference of Rio de Janeiro in the autumn of 1991, organized by the Municipality of Rio de Janeiro, and submitted the project for an International Court of the Environment which was published in full in the proceedings of the meeting.

ICEF also took part in a conference organized by the Portuguese Catholic University in Lisbon, from 15–24 November 1991.

Furthermore, from 16–20 December 1991, ICEF participated and presented a video on its project at a conference at the Ministry of the Environment in Paris, France.

The third ICEF Conference themed “Planet Earth: A Global Village without Regulations” took place at Campidoglio in Rome in 1992, with the participation of many ambassadors from different continents. The Mayor of Rome attended the conference which was held in the Sala della Protomoteca.

Soon after, ICEF became a Foundation by means of a public deed executed in Rome on May 5, 1995. The Foundation was supported by Alenia and Iritecna maintaining its headquarters at the Italian Supreme Court where the Scientific Secretariat then worked.

On 17 May 1991 and 9 March 1992 the European Parliament adopted a Resolution, (B 30718/91, B302262/92) in view of the Rio Conference about the constitution of an International Tribunal for the Environment, signed by Alexander Langer and other MPs from several European countries. Sadly, the Resolution was not discussed at the Rio Conference.

## **UN Conference in Rio de Janeiro**

In June 1992, a large ICEF delegation consisting of experts from Italy and other countries took part in the conference held in Rio de Janeiro and presented the project by submitting a special volume “The Global Village Without Regulations” – Giunti Editore, Florence, 1992 – and, on this occasion, it also had a meeting on the topic with the Japanese Federation of Bar Associations, which is actively involved in supporting the idea.

## **EEC study document**

On June 14, 1993, the EEC published a study on “The Idea of an International Court of Justice for the Environment” by the General Directorate for Studies of Luxembourg, IV/WIP/93/03/152, where it compared the ICEF project which aimed at establishing an independent court for the environment with already existing institutions – the Court of Justice at The Hague, the Court of Justice of the European Communities in Luxembourg, the Court of Human Rights in Strasbourg. The conclusion underlined the scientific and legal seriousness of the ICEF project, especially with reference to access to environmental justice for all individuals meant as the expression of a fundamental human right.

After the Rio Conference, ICEF participated in many international congresses and meetings such as the conference, in April 1993, organized by the International Society of Doctors for the Environment in Lucerne, Switzerland, and the meeting, in October 1993, on the establishment of an ICEF South America Committee, at the University of Buenos Aires and the Universidad del Museo Social Argentino. In June 1993, ICEF began its ongoing co-operation with the UN Commission on Sustainable Development and met its President, Niton Desai.

From 31 January to 2 February 1994, in New York, ICEF took part in the meeting of the Commission on Sustainable Development and held a press conference about the conference it was to hold in Venice from 11 to 28 April 1994.

## **Development of the idea**

In 1994, ICEF brought the idea of the establishment of an International Court of the Environment before the following fora: Japanese Federation of Bar Associations conference on “Sustainable Society”, 19–21 March, Kobe, Japan; European Environmental Bureau, 21–23 March, Brussels, Belgium; IUCN-European Environmental Bureau, 29 April, Bonn, Germany; Klima Bündnis-Climate Alliance of European Cities, 1 May, Loccum, Germany; Victoria Falls-AICEM II, 18–21 October, Zimbabwe; House of Commons Meeting with MPs and Representatives from the Department of the Environment, 11 November, London, UK; International Court of Environmental Arbitration and Conciliation, 21–26 November, Mexico City, Mexico.

From 2 to 5 June 1994, the fourth ICEF International Conference “Towards the World Governing of the Environment” took place in Venice. It was supported by the Chief Justice of the Italian Supreme Court and was held under the auspices of the President of the Italian Republic. The conference was organized thanks to the economic, political and cultural efforts of the Municipality of Venice, the Province of Venice, the Veneto Region and the Italian National Research Council. The great number of international experts attending the Conference made the project for an International Court of the Environment gain consensus from legal, economic, social, cultural, scientific and religious viewpoints through the contribution of the five ICEF Forums.

On 2 April 1995, during the Conference on Climate Change, ICEF took part in a special meeting on an “International Climate Tribunal”, organized in Berlin by Eurostar and several NGOs from Germany and Austria.

Also in 1995, ICEF brought up the idea of the establishment of an International Court of the Environment at the following meetings: UN World Summit on Social Development, Copenhagen, Denmark; United Nations Commission on Sustainable Development, 11–28 April, New York, USA; Conference “Basic principles of environmental law in the European Union”, 19–21 April, Seville, Spain; FAO Meeting, 12 May, Rome, Italy; Universidad del Museo Social Argentino Jornadas Internacionales de Medio Ambiente, 22–23 June, Buenos Aires, Argentina; Municipality of Epidaurus “Italian Legislation for the Conservation of Nature” Conference, 14–16 September, Epidaurus, Greece; UN World Summit on Women, 4–14 September, Beijing, China; European Environmental Tribunal “Green Access to Justice”, 21–23 September, Brussels, Belgium; Cilame-Jerry Bourgeois, 21 October, Paris, France; International Court of Environmental Arbitration and Conciliation, 27 November–3 December, Cancun, Mexico; “Instruments for Solving Environmental Conflicts at a Global Level”, 4–6 December, San Jose, Costa Rica. The ICEF Delegation met the President of the Republic, the President of the Parliament and the Minister of Justice. The Government of Costa Rica also attended the meeting.

In Venice, on 5–6 May 1995, the ICEF Social and Women’s Forum organized a special simulation of judgments rendered in the most relevant cases of environmental damage on the various continents through the participation and the testimony of women from different countries such as India, Ecuador and Canada.

The year 1996 was entirely dedicated to the preparation of a new International Conference at Paestum by attending, as usual, the work of the Commission on Sustainable Development in New York in April. On 29 October 1996, the Sixth International ICEF Conference convened at Capidoglio in Rome. The meeting was themed “Global Environmental Crisis: the Need for an International Court of the Environment” and was supported by the Mayor of Rome, the Minister for the Environment and the representatives of the Municipality of Paestum, the Province of Salerno and the Campania Region.

Ambassadors from several countries also attended the meeting and the First ICEF Report was also submitted.

In 1997, ICEF brought the idea of the establishment of an International Court of the Environment before the following international fora: “Control of the implementation of international conventions”, 10–11 January, University of Marseille, France; “Great issues of our times: the environment in the Maastricht Treaty”, 11–14 April, University of Valencia, Spain. ICEF also attended the meeting of the UN General Assembly in New York.

From 5–10 June 1997, the scheduled ICEF International Conference was held at Paestum, in the Campania Region, in the south of Italy, and dealt with “Environment and Culture: The Common Heritage of Humankind”. The Italian Government, through the Prime Minister’s Office, co-ordinated the various Ministries interested in giving their political and economic support. So the project for an International Court of the Environment experienced a new boost. The conference was supported by the local municipalities, the Province of Salerno, the Campania Region, the Cilento National Park, CNR and many other institutions and recorded the extraordinary attendance of many countries, among others, Japan, China, India, Russia, Pakistan, countries in North and South America, countries of the European Union and some African countries.

From 5–10 December 1997, ICEF participated at a Prep-Com in Addis Abeba for the Pan-African Conference together with other NGOs, the Organization of African Unity and the UN in Africa. The project was very interesting and concerned the practical identification of environmental conflicts, due to pollution or misuse of resources, and their examination at a first Pan-African Environmental Conference, but it failed to come to fruition because of the lack of appropriate political or economic support.

## **Involvement of governments and parliaments**

In 1998, ICEF published its Second Report in English and sent it to all governments of the world. From 25–29 April, ICEF attended the annual meeting of the Commission on Sustainable Development in New York. In June and July 1998, ICEF supported, together with other NGOs, the Conference on the International Criminal Court held in Rome, at the FAO headquarters and during a special meeting suggested that crimes against the environment should also be included. From 10–12 September, ICEF promoted and attended the conference on “Implementation of the Right to Environmental Information in Europe”, held in Crete, Greece. ICEF sent a qualified delegation chaired by H.E. La Torre, Deputy Chief Justice of the Italian Supreme Court and representatives from several other bodies, such as the Council of Europe, IUCN, EPA, EEA and the ISPRA Research Centre.

ICEF successfully caused the Italian Supreme Court to undertake a new scientific initiative. On 11 December 1998, the first “Environment Day” took place at the Court. The project for an International Court of the Environment was presented once again as an institutional priority. There was co-operation from the bench, scientific bodies, the public administration, the police forces, environmental associations and the political world. The proceedings were published.

On 18 February 1999, ICEF attended the ceremony for the 100th Anniversary of the Permanent Court of Arbitration in The Hague and encouraged the use of this institution – on a voluntary basis – for settling environmental disputes before a real global and

mandatory jurisdiction for the environment is established, which will also allow access to individuals. ICEF co-operation with the Permanent Court of Arbitration had already begun during the Venice Conference in 1994, with the participation of its then Secretary General, Dr Jonkman, later succeeded by Tjaco Van den Hout.

## **Co-operation with the Council of Europe and the Interparliamentary Union**

From 25–27 February 1999, ICEF participated in the Fifth Conference on the Mediterranean and Black Sea Basins, organized in Turkey by the Council of Europe, and submitted the project raising the interest also of the Interparliamentary Union. ICEF's Report was sent to all governments and parliaments of the world. ICEF's most recent initiatives have once again looked towards the problems to be solved in relation to these ecosystems.

## **The Washington Conference**

In April 1999, ICEF co-operated with George Washington University in a conference themed "Is there a need for a body to resolve international environmental disputes?" The final resolution of the conference supported the project for an International Court of the Environment and ICEF was encouraged by other authoritative bodies – CIEL, International Bar Association, EPA, Catholic University of America, ICEF North America Committee – to continue its work.

## **Other conferences and meetings**

Also in 1999, ICEF participated in a meeting on "State responsibility and access to international courts" organized by the Committee on the Environment, Regional Planning and Local Authorities, Council of Europe and held on 20 May in Paris, France. It also participated in the Council of Europe workshop on "The Bern Convention on National Case Law affecting Implementation", 28–29 June, Strasbourg, France.

On 6 October 1999, the second Environment Day took place at the Italian Supreme Court and took an integrated overview from the scientific, institutional, social and political point of view. In this new model, there was informal consensus on the idea of environmental justice at a national, Community and international level. The ICEF Report was sent to all governments and parliaments of the world.

In September 2000, ICEF attended the proceedings at the Special Millennium Summit of the United Nations and the State of the World Forum. ICEF received the support of the Italian Government through the Ministry of Foreign Affairs and the Ministry for the Environment.

On 10 November 2000, in Rome, ICEF's third Environment Day took place, marking the first political involvement of the Italian Government in favour of the International Court of the Environment.

On 20–22 January 2001, in Athens, Greece, ICEF participated in a meeting organized by the Biopolitics International Organisation with the theme: "Resolving the Environmental Crisis: The Need for an International Court of the Environment", along with the Secretary General of the Permanent Court of Arbitration, members of the Council of

Europe and the European Commission, scholars, MPs, diplomats and other eminent personalities.

In 2002, ICEF attended the WSSD (Rio+10) Conference held in Johannesburg, South Africa.

## **ICEF and the judiciary**

Increasing the value of the role of case law in the enforcement of environmental law comes within the strategy of both the ground-breaking work of UNEP's Global Judges Programme and that of the IUCN CEL Specialist Group on the Judiciary. ICEF believes this strategy is deserving of its full support and it has, therefore, adopted this as one of its major objectives for this new millennium. This strategy, inaugurated in Johannesburg, South Africa on 18–20 August 2002, with the Global Judges Symposium was organized by UNEP with the participation of 120 Supreme Courts. ICEF took part as an observer.

After Johannesburg, the following events, at which ICEF participated as an observer, came within this strategy:

- The Symposium on Environmental law for European Judges held in London, United Kingdom on 10 and 11 October 2002 on the initiative of the European Environmental Law Association and IUCN.
- The Judges' Planning Meeting for the implementation of Johannesburg Principles – Nairobi, Kenya, on 30 and 31 January 2003, on the initiative of UNEP.

As a result of these initiatives, ICEF organized (with the support of various organizations including UNEP, IUCN, OECD, the European Environmental Law Association and the Italian Environmental Law Association) the Symposium entitled "Johannesburg Summit Next Step: the Role of the Judiciary in the Implementation and Enforcement of Environmental Law", held in Rome, Italy, on 9 and 10 May 2003, and supported by the above mentioned bodies and, significantly, by the Italian Council of Judiciary, Italian Government, Italian Constitutional Court, Italian Supreme Court, Italian Council of State, The Cousteau Society and many other organizations. As a direct consequence of this Symposium, the West European Environmental Judges Network was established, thanks to ICEF's role as a facilitator.

As its most recent initiative, ICEF hosted a Preparatory Meeting for the Conference "The Protection of the Mediterranean-Black Sea Ecosystem" which was held in Venice on 8 and 9 October 2004. Participants included, amongst others, John Scanlon, Head of IUCN's Environmental Law Programme and Adel Omar Sherif, Deputy Chief Justice, Supreme Constitutional Court of Egypt, Cairo, Egypt in representation of the Arab Union of Judges for the Protection of the Environment. In organizing the Conference which, it is hoped, will take place in mid-2005, a special session is being planned for judges from countries bordering on the Mediterranean and Black Sea to compare their experiences and to discuss specific cases and problems they have encountered.

## **Organizing Committees**

National and Regional Organizing Committees supporting the institution of an International Court of the Environment, work in close contact with ICEF in Rome. They promote the Foundation's aims and assist in its public awareness campaign. They organize

conferences and seminars where international environmental issues are debated and innovative global solutions sought.

Currently, there is a growing network of Organizing Committees present in the following countries: Argentina, Armenia, Australia, Austria, Balkan States, Belgium, Bolivia, Bulgaria, Canada, Chile, Columbia, Costa Rica, Czech Republic, Germany, Greece, Honduras, Hungary, Israel, Italy, Japan, Korea, Luxemburg, Macedonia, Maldives, Malta, Mexico, Portugal, San Marino, Seychelles, Slovenia, South Africa, Trinidad and Tobago, San Salvador, Ukraine, United Kingdom, United States, Uzbekistan.

## **Publications**

Over the years, since its inception, ICEF has dedicated significant resources to the publication of material relating to its activities (in English). These publications include:

*Ambiente News* Newsletter Vol. I-III.

Postiglione, Amedeo. 1994. *The Global Village without Regulations: Ethical, Economical, Social and Legal Motivations for an International Court of the Environment*. Florence, Giunti Editore, 2nd ed.

Postiglione, Amedeo. 1996. *The Global Environmental Crisis: The Need for an International Court of the Environment*. Florence, Giunti Editore.

Postiglione, Amedeo. 2003. *Justice and the Global Environment*.

Proceedings of all ICEF conferences, seminars and meetings.



# Promoting the judiciary in environmental compliance and enforcement

*Durwood Zaelke, Director, and Ken Markowitz, INECE Secretariat*

Good afternoon ladies, gentlemen, fellow members of the IUCN Commission on Environmental Law, and distinguished representatives of the judiciary from around the world. It is my honour and privilege to introduce you to and update you on the activities of the International Network for Environmental Compliance and Enforcement (INECE), on behalf of our Director, Mr Durwood Zaelke, and the over 3000 participants in the INECE Network.

Increasingly, the world is recognising that we need a stronger and more global rule of law, and that we need stronger and more global enforcement efforts, if we are to curb the excesses of globalization – including excesses of pollution, excesses from natural resource exploitation, and other adverse environmental impacts.



Indeed, enforcement and compliance are a fundamental part of the broader rule of law needed to address globalization; together, enforcement and the rule of law are the foundation for good governance and ultimately for sustainable development.

But at the same time as there is a cry for more global rules, and more enforcement, and a stronger rule of law, the world also fears centralized global government, and wants to ensure continued local accountability of those who govern.

One answer to this dilemma – that we need more global law and more global enforcement, and yet fear centralized “world government” that is not accountable to local interests – is the rise of transnational networks such as INECE.

INECE is an informal network dedicated to strengthening both cross-border and internal domestic co-operation by judges and the rest of the environmental enforcement team – investigators, prosecutors, regulators, parliamentarians and NGOs.

This is what INECE does. We’re a global network, bringing together enforcement and compliance practitioners from around the world to build co-operation, strengthen capacity and raise awareness to respond to shared challenges in environmental enforcement and compliance.

INECE is helping build the stronger and more global rule of law that the world needs, but we are doing it through a decentralized network of accountable enforcement officials with the input of interested representatives from civil society.

INECE provides opportunities for sharing experiences, lessons learned and “best practices” – including best practices of the judiciary.

INECE is working on a project on comparative judicial remedies, to show how judges around the world remedy the environmental violations found in their societies. This ultimately will include comparative data on penalty policies, and a “penalty calculator” tool built on the best practices of judges and regulators from around the world.

Another INECE project on remedies is analysing how the “Porter design principles” can be used by judges to fashion the most effective remedies.

The Porter design principles grew out of the work of Harvard Business School Professor Michael Porter and others working on the “Porter Hypothesis” – strict enforcement and compliance with properly designed laws provides “innovation offsets” that compensate for or even exceed the cost of compliance.

The growing empirical data, from developing as well as developed countries, confirms that this approach improves the competitiveness of firms and of countries, especially in natural resource based economies.

INECE is also looking at other opportunities for judges to encourage broader process changes both at the level of the firm, and also at the level of the regulators and even the parliamentarians. This might include issuing “legislative remands”, when judges force an issue back to the legislative body for clarification. It also might include exercising the oversight function many judges have, for example over rules of procedure, or over other aspects of judicial administration.

An example of such a simple administrative procedure change is provided by the Philippine Supreme Court. Working with an INECE Board member, the Philippine Supreme Court recently established a requirement for lower courts to report on the status of their environmental cases on a regular basis. This simple process change is having a big impact on making sure the cases move forward at a suitable pace.

Furthermore, INECE has developed a considerable body of literature on enforcement and compliance through the proceedings of our six international conferences. Over 600 articles are on the INECE web site, in a full-text searchable database. We’re also editing a new book with the best of the literature in this field, for publication next spring, in time for our 7th INECE International Conference, which will be held in Marrakech, Morocco, in April of 2005.

Finally, the INECE Compliance and Enforcement Indicators Project has inspired pilot countries around the world to better measure and manage compliance and enforcement activities. On Thursday evening, INECE will co-sponsor, with the Commission on Environmental Law and the World Bank Institute, a workshop on applying the lessons we have learned on performance measurement for conservation issues.

We encourage you to participate in the INECE Network and visit our web site at [www.inece.org](http://www.inece.org) to learn more about INECE activities and opportunities that can assist you in responding to the challenges presented regarding excesses of pollution, natural resource exploitation, and other adverse environmental impacts.

Thank you very much for this opportunity, and I wish you all a very successful World Conservation Congress.

# Development and implementation of environmental law in India

*Justice D. M. Dharmadhikari, Judge, Supreme Court of India*

## Introduction

“Better late than never” is an apt description of the growing sense of awareness amongst Indian people of the need to preserve nature and environment. It is a tragedy that it should happen to a country which has a great spiritual heritage and a tradition not only of protecting nature and the environment but also of worshipping the bounties of nature. Expressing gratitude to Nature as the source of sustenance to human life has been one of our ancient traditions. One of our Rigveda prayers invokes benediction of God for harmony between man, natural resources and energies thus blessings are sought for peace and happiness of all.

“Om. May there be peace in heaven. May there be peace in the sky. May there be peace on earth. May there be peace in the water. May there be peace in the plants. May there be peace in the trees. May there be peace in the Gods. May there be peace in Brahman. May there be peace in all. May that peace, real peace, be mine.”

Indian philosophy of the Vedic period recognises five natural elements as *panchmahabhut* for *stavan*, meaning worship. These five basic natural elements are water, earth, food-grains, sun, air and sky. Since the Vedic period, Earth and Rivers are worshipped as mothers:

*Mata Bhumi Putaro Abam Prithvaiya*

Before putting feet on the earth in Vedic prayer, the Rishi seeks the forgiveness of Mother Earth as the sustainer of life:

*Vishnupatni Namastubhayam Padsparsb Cbhamsav May*

Ganges, Godavari, Narmada, Krishna, Kaveri, Bramhaputra and many others are highly venerated rivers in India.

Religious Hindus from time immemorial take a journey round the river Narmada as a pilgrimage called *Parikrama*. In Ishopanishad there is a verse saying that ‘a selfish man over-utilizing the resources of Nature to satisfy his own ever increasing needs is a thief because using resources beyond one’s needs would result in the utilization of resources to which others have a right.’ This was imbued by Gandhi into his social philosophy when he says: “The earth provides enough for everyone’s need but not for some people’s greed.” I am purposefully tracing the Indian philosophy, culture and history as well as religious practices to emphasise that prudent and restrained use of natural resources has always been viewed as a necessity for human existence. This relationship between

natural resources and social justice should be a constant reminder to us in the course of our development plans based on natural resources.

## **Problems**

Excluding the very ancient period of Rishis and some period of Indian Kingdoms, right from the onset of the Mughal period and thereafter British rule in India, there has been unscrupulous exploitation of natural resources and consequential degradation of nature. A very big chunk of mineral wealth has already been extracted. Forest was destroyed for building ships and railways. Geologists and mining engineers, who have done geological surveys, tell us that there have been large-scale mineral activities already undertaken and long completed in India. As we are all aware, natural resources develop over billions of years but their exploitation by man may take only a few hundred years. Land and forests in India have already been exploited indiscriminately for thousands of years. Now a period has arrived for India to conserve nature and natural resources not only for the present generation but also for the generations to come. Once we attained independence, in the blind enthusiasm for development, we have indulged in reckless exploitation of nature unmindful of the evil consequences for human life. Human activities all over are based on exploitation of nature for development. Development for some people may mean under-development and dispossession of many. When development aims at commercialization of natural resources, they are transformed from 'common things' for the enjoyment of all into 'commodities'. Such development hits politically weak communities hard and deprives them of their source of survival. Maybe it helps in general growth of the market for more privileged groups in society. The human activists assert that nature and people are not seriously taken note of in development plans.

In free India, Dam projects were described as our new *Tiraths*, meaning "holy places". Gradually, we have started realizing that these projects conflict with the interests of tribes and peasant communities who are dispossessed and lose their source of survival which is not markets but nature. Such poor and highly oppressed people find themselves in conflict with interests of big international financial institutions and public authorities created by the government for the projects. It is high time for us to take care that our development plans like forestry projects, dam projects and fishery projects do not crush and destroy the life of tribal, rural and peasant communities. Ours is a welfare state. Our notion of democracy is wider and deeper than the market democracy. We have to resist the destruction of nature caused by state-managed market development. The big development projects benefit most of the urban population and industries by providing electricity and water for irrigation to produce cash crops as raw material for the industries. The large section of the Indian population in villages who live below the poverty line and whose survival depends not on markets but on natural resources are the "lost and forgotten" people. A welfare state should proceed towards a new world order where there would be neither supremacy of the state nor the markets, but there would be supremacy of the citizens.

The problem that India faces is its unlimited development aspirations and its limited natural resources. This has given rise to a conflict between the State committed to development in the name of "the greater common good" with catastrophic effects on the rural population mainly the marginalized, poor, women, tribes and peasants. The current ecology movements have emerged as the people's response to this new threat to their survival and as a demand for the ecological conservation of their vital life-support systems. The life-support systems in addition to clean air are common property resources of water, forests and land on which the majority of the people of India depends for

survival. The human activists oppose the development projects involving huge and long-term exploitation as activities which most benefit the educated minority. The elite is the main beneficiary while the large rural and forest populations surviving on nature feel neglected.

Thus, the diversion of resources from sustenance needs to the demands of the market generate conflicts between commercial interest and people's survival. Conflicts on natural resources are therefore conflicts over rights. Development with growth of international-trade-community indirectly allows global market domination. Such development creates needs for international aid and foreign debt which provide capital for such development. When such large projects funded by international organizations and based on utilization of natural resources are undertaken, the local resources go out of control of local communities and go into the hands of governments and the international financial institutions. The conditions for the loan determine the mode of utilization of natural resources. The cost involved in such large-scale projects is so great that sometimes it becomes imperative to utilize the benefits of projects like dams for cash crop cultivation, maybe sometimes for generation of electricity. In the process many times there is wastage of water and land gets water logged. It becomes an arid desert. When people living on the natural resources protest against such projects, they are perceived as obstructionists and anti-progress, although such people's movements are committed to halt the process that results in "progress for a few and hardships for many". These conflicts between development plans of the State requiring exploitation of nature and the people dependent for their survival on nature, have given rise to demands for protecting nature and the need to strengthen people's collective rights to common natural resources. A life-support system can be shared, it cannot be owned as private property or exploited for private profit.<sup>2</sup>

## **International law**

The Declaration of the United Nations Conference on the Human Environment adopted at Stockholm on 16th June, 1972 is the first formal international recognition of the need for protection of the environment between persons of the same generation and between persons of present and future generations. The said declaration recognises that development should be conditioned with due regard to the environment and the international interest. The declaration of Stockholm formulates 26 principles and the first principle gives the substance of the other principles: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of equality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."

Other principles like Nos. 5 and 9 imbibe the principles of social justice. They say that "the non-renewable resources of the earth must be employed in such a way as to guard against the danger of future exhaustion and to ensure that benefits from such employment are shared by all mankind".

Principle No. 9 states that "[e]nvironmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic efforts of the developing countries and such timely assistance as may be required."

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<sup>2</sup> Vandana Shiva. *Ecology and the Politics of Survival*.

Based on this Stockholm Declaration, a number of international Conventions and Treaties were entered into by the nations. The most significant among them is the Rio Declaration of 1992. In that declaration emphasis is on the concept of “sustainable development” and “inter-generational equities”. The first principle is: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”. Principle No. 3 declares: “The right to development must be fulfilled as to equitably meet development and environmental needs of present and future generations”.

## **Sustainable development**

Internationally, it is now recognised that with the joint endeavour of technologists, experts and ecologists, the direction of development should ensure social justice with sustainability, equity and ecological stability. Destruction of conditions of life of people and their well-being is not only to be measured in money; it is a matter of life itself. Internationally therefore, there is a rethinking due to the delicate relationship between development, economy and ecology. It is time to look for a new philosophy to live in harmony with nature and ecology and to revive our age-old Indian traditions. The meaning of “sustainable development” broadly is a commitment to preserve natural resources for the benefit of present and future generations. It also includes fixation of appropriate standards for the exploitation of natural resources based upon harvests or use. Thus, the exploitation of nature is to be sustainable, prudent, rational, wise and appropriate. The third meaning of it is “equitable use of natural resources” suggesting that use of natural resources by one state must take account of the needs of other states and people. Finally, the requirement of sustainable development is that “environmental considerations be integrated into economic and other development plans, programmes and projects”.<sup>3</sup>

Thus, internationally it is well recognised that “environmental sustainability is the over-riding aim of sustainable development”. It is widely accepted that for achievement of sustainable development; the State should adopt a number of organizing principles. In Agenda 21, the key-principles summarised are as follows:

- the right to development;
- inter-generation equity;
- integration of environmental protection and economic development;
- creating an open and supportive economic system;
- intra-generational equity;
- sustainable utilization of resources;
- “precautionary principle,” “sound scientific knowledge”, and “the polluter pays principle”;
- procedural principles: transparency, information, participation and access to justice.

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<sup>3</sup> Philippe Sands. Environmental protection in the 21st century: sustainable and international law, p. 374. In: Richard L. Revesz, Phillippe Sands and Richard B. Stewart. *Environmental Law, the Economy, and Sustainable Development*.

As a consequence, the International Law through inter-state agreements needs to recognise the importance of environmental limits so that sustainable development can provide a supportive economic system, and improve social equity.<sup>4</sup>

## **Precautionary principle**

The “precautionary principle” emerged among international instruments in the mid 1980s although it already existed in some domestic legal systems. The meaning of the “precautionary principle” is not clearly defined but it conveys that where the exploitation of natural resources for community use poses threats of serious or irreversible damage, lack of scientific certainty shall not be a reason for not undertaking cost-effective measures to check environmental degradation. Every big endeavour/project affecting the environment is likely to have ill-effects, such as rising of water-tables, salinity, waterlogging, soil erosion, ozone depletion and climatic changes.

The precautionary principle, therefore, obligates the authorities undertaking developmental activities based on large-scale exploitation of Nature to take precaution against minimum possible degradation of Nature, irrespective of lack of full scientific knowledge about it. This precautionary principle is particularly of relevance to big dam projects undertaken for electricity and irrigation.

## **The polluter pays principle**

The polluter pays principle refers to “the requirement that costs of pollution are borne by the person or persons responsible for causing pollution and the consequential cost”. Apart from the above-mentioned “precautionary principle” and “polluter pays principle”, standards have been evolved and adopted regionally and globally to address an even wider range of matters. These standards have been adopted through separate international conventions for the protection of particular resources. The most important resources are identified as flora and fauna, water quality, air quality, hazardous substances and waste. For example, the dumping of radio-active waste at sea may result in harm not only to aquatic life but to land-based resources resulting from long-term storage. The efforts to address this problem have led to the emergence of the concept of the integrated pollution control which requires states and project operators to consider and minimize the impact of activities on all environmental resources at each stage of the process which contributes to that activity. This growth of international law has recognised the importance of environmental information techniques and participation of citizens in decision-making processes.

International agreements now insist on two essential aspects: (1) ensuring that the multilateral development lending institutions incorporate environmental considerations into their activities and (2) ensuring availability of international public sector funds to assist developing countries in meeting the costs associated with increasingly stringent international environmental requirements.

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<sup>4</sup> Victoria Jenkins. Learning from the past: Achieving sustainable development in the reform of local government. *Public Law* spring 2002, p. 132.

## **Solutions**

Having thus identified some of the problems and conflicts over the use of natural resources between the authorities and the people, the solution appears to be to strike a balance between development ecology and social justice. As Public Interest Litigation, we now want Public Interest Science. Public Interest Science would mean development through science in a manner to best protect people's interest. The public interest does not mean merely "the greater common good", but also the good of the deprived sections of society who solely depend on natural resources for their survival. The Father of the Nation, Mahatma Gandhi, has given us a talisman for testing our so-called welfare activities to ensure that they are really in the public interest.

"Whenever you are in doubt, or when the self becomes too much with you, apply the following test: Recall the face of the poorest and the weakest man whom you may have seen, and ask yourself if the step you contemplate is going to be of any use to him. Will he gain anything by it? Will it restore him control over his own life and destiny? In other words, will it lead to Swaraj for the hungry and spiritually starving millions? Then you will find your doubts and ... self melting away."

The choices before us, therefore, are between environmentally friendly and environmentally hostile technologies. In other words, it is a stark choice between reticence and activism by all organs of the State including the judiciary. The enforcement of environmental rights and duties should aim at ensuring that the executive branches of government strike impartiality between the "green conception of a worthwhile life and rival conceptions."

## **Domestic law**

In India, the solution of problems on environmental issues may be found in four branches of law: crime, tort, statutory regulations and fundamental rights in the Constitution.

## **Constitutional provisions**

When the Constitution was framed in 1950, we find no mention of the environment, neither in Part III relating to "Fundamental Rights" nor in Part IV relating to "Directive Principles of State Policy". The environmental topics for legislation were divided between State and the Union within the federal structure. It is only in the year 1976 that Article 48A was introduced as a new environmental provision in Directive Principles of State Policy which says that "the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country." Directive Principles are not directly enforceable and do not create any independent procedural rights. Article 37 provides that although the directive principles "shall not be enforceable by any Court, they are nevertheless fundamental in the governance of the country", and it shall be the duty of the State to apply these principles in making laws. A new provision on "Fundamental Duties" was introduced by Article 51A which says in clause (g) that "it shall be the duty of every citizen to protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures". There is, however, no mention of their enforcement by writ or other legal provisions. Nevertheless the two articles, 48A as a Directive Principle of State Policy and Article 51A (g) as a fundamental duty of a citizen, have played an important role in the emergence of environmental law in India. By adoption of new strategies like public interest litigation, the

courts in India have developed environmental law which finds mention and appreciation in international forums as models to be emulated by other nations.

The International Treaties of United Nations to which India is a party have greatly influenced the development of statutory law on environment in India. The passing of the Water Act of 1974 and the Air Act in 1981 sought to control the menace of environmental pollution by constituting Pollution Control Boards who had to monitor and secure compliance with the laws. The boards were also conferred with power to impose penalties, fines and to initiate prosecution. To conserve the forest and wild life, the Forest Conservation Act and the Wild Life Protection Act have been passed. The real genesis of environmental law, much before the Rio Treaty of 1992, and without reference to such concepts as “sustainable development” and the “precautionary principle” or the “polluter pays principle”, can be traced to the Supreme Court decision in the “Ratlam Municipal Council” case which arose from proceedings before a magistrate and order of the High Court of Madhya Pradesh. Thereafter, the growth of environmental law started with the Supreme Court entertaining Public Interest Litigations under Article 32 of the Constitution. The traditional concept of standing and locus standi was relaxed for diffused rights on the environment and particularly of the deprived sections of the people. Case by case, the principles contained in international law were enforced in domestic law by the superior Courts with the aid of Article 21 of the Constitution.

By interpreting Article 21 of citizens’ “Fundamental Right to Life”, the Supreme Court expanded its meaning to read several basic human rights into it. This jurisprudence fully developed with the decision of the Supreme Court in the case of Francis Mullin [AIR 1981 SC 746]. Article 21, thereafter, began to expand in many directions to include implicitly within it the “Right to Livelihood”<sup>5</sup> and “Right to Potable Water”.<sup>6</sup> The Court is now more concerned not only with the “Right to Life” but with “Quality of Life”. With the expansive interpretation in Article 21 of the “Right to Life”, environmental issues are being resolved under its new dimensions. The first case which came to be decided with reference to Article 21 was of Rural Litigation & Entitlement Kendra vs. State of Uttar Pradesh [AIR 1985 SC 652]. The petitioner sought the closure of limestone quarries in Doon Valley on the grounds that it would cause soil erosion, deforestation and river silting. The Supreme Court then took support of Article 21 to hold that the “right of people to live in a healthy environment with minimal disturbance of ecological balance” is also a fundamental right and the relief was granted. Reading together Article 21, Article 48A and Article 51A (g), the Supreme Court has been entertaining petitions based on complaints about alleged disturbance of ecological balance. The Court also ruled that the fundamental duty in Article 51A (g) extended not only to citizens, but also to instrumentalities of the State. Article 51A was interpreted as a right of the citizen to move the Court for the enforcement of the duty cast on the State.

Supreme Court gradually moved to take a view that under Article 32, the petition would lie for “removing the pollution of water or air if such pollution endangers or impairs the quality of life in derogation of laws.” Two decisions of the Supreme Court, the case of Charan Lal Sahu v. Union of India [AIR 1990 SC 1480 & 717] in which the constitutional validity of the Act passed for Bhopal gas victims was challenged, and the case of Shriram Industries [1986 (2) SCC 176] in which poisonous gas escaped causing serious threat to the life of people living around, seem to indicate that the Apex Court considers freedom from pollution of water or air as essential elements of the “Right to Life”. The Supreme Court continues to entertain petitions under Article 32 on environmental issues and has been internationally appreciated for the directions it issued in many cases, like

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<sup>5</sup> Olga Tellis v. Bombay Municipal Corp. AIR 1986 SC 180.

<sup>6</sup> Attakoya Thangal v. Union of India 1990 (1) KLT 580.

one to control vehicular pollution in Delhi metropolitan city by insisting on the use of CNG fuel, and by others such as directing relocation of polluting industries out of Delhi and tanneries out of Calcutta or Agra. It has also taken up issues like the protection of historical monuments including the Taj Mahal by directing relocation of industries to a safe distance from them. The Supreme Court has also tried to monitor the construction of large dams for all-round development of the region and taking effective measures for maintaining ecology and environment, and also to provide a nearly similar life to the oustees and displaced persons. The direct recourse to citizens and citizens' groups, who have serious concern for ecological balance, to the High Courts under Article 226 and Supreme Court under Article 32 of the Constitution is presently seen as the most effective remedy. The encouragement of Public Interest Litigation on environmental issues by the superior courts has rendered other statutory remedies under the environmental law of less frequent resort.

## **Role of courts**

Sometimes, the court's interference in environmental issues is severely criticised, saying that the court lacks expertise to decide such highly scientific and technical issues. In environmental issues, the courts are faced with competing interest groups. Sometimes, there is an expert's view that a broad development project must be undertaken for common general good while there is opposition to the same by ecologists and human rights activists who highlight the adverse impact of the project on the environment. There are conflicts and competition between private interest and public interest, between the interests of one section of the population and others, between present and future generations, between private cost and social gain. No doubt, the task of the judiciary is delicate and difficult when faced with such conflicting claims involving policy matters and technical expertise. The Court has, therefore, always taken the help of expert committees, human-rights activists and ecologists for resolving disputes. In the course of the litigation of several cases, it had set up committees for study and commissions for enquiry. It is true that the judiciary cannot step into the shoes of either the legislature or the executive. These conflicts of rights, however, do need an independent forum like the judiciary. As has been said by one of the jurists - "it is only in the judicial process that the citizen can be heard above the din of pluralistic, self-interested, majoritarian politics and court-rooms appear comparatively more open to public scrutiny when compared with the secret bargaining of interest group pluralism". Both contending parties on environmental issues seek intervention of the courts as impartial bodies which can take decisions that are "right" rather than "popular". It cannot, therefore, be stated that the judiciary is not well suited to decide conflicts on the environment. The role of the judiciary in a democratic society, thus, cannot be viewed narrowly because the judiciary is also one of the organs in the political process. The judiciary no doubt lacks attributes of the legislature and the executive and can claim no technical or managerial capacity to resolve complicated issues of the environment. But when conflicts come to court between authorities committed to development and groups resisting it on the grounds of threat to their life, the controversy eventually resolves into rival conceptions of a good and worthwhile life. This subject is definitely within the province of the judiciary. Decisions on matters in the public sphere, like logging, housing and infrastructure development, and the protection of biodiversity, engage not only the various environmental ideologies underlying different approaches to "sustainability" but also engage deeply held convictions about "private life" concerning the relative importance of employment, mobility, decent housing and ecologically-rich surroundings to personal development. In the course of resolving this conflict, the court can "combine" the resources of the executive and legislature to guide the detailed implementation of resolutions of environmental conflicts. The pursuit in the court's proceedings is of impartial

resolutions to environmental conflicts rather than “correct” policy decisions. Environmental protection is always a matter of degree inescapably requiring choices as to the appropriate level of environmental protection and the risks which are to be regulated. This is the concept of sustainable development. There are choices necessitating decisions not only about how risk should be regulated, how much protection is enough, which risk should be regulated, how much to spend in controlling any particular risk and about whether the ends served by environmental protection such as health could be pursued more effectively by diverting resources to other uses. Thus, the nature and degree of environmental risk posed by different activities varies. The implementation of environmental rights and duties requires deliberation about the ends which may legitimately be pursued, as much as about the means for attaining them. Beyond the minimum necessary to sustain physical existence, setting the standard of environmental protection involves mediating conflicting visions of what is of value in human life. For resolving this highest issue concerning human life, the judiciary is the proper forum which gets assistance both from the executive and the legislature as well as from the people coming before it with complaints. Ultimately all environmental conflicts revolve around competing concepts of what constitutes a “good and worthwhile” life, and for that the judiciary is the last resort which has to take decisions on the basis of the constitutional philosophy and laws governing the subject.<sup>7,8,9</sup>

The constitutional forum provided by the High Courts and the Supreme Court is frequently resorted to by invoking the new technique of Public Interest Litigation. By contrast, the remedies available in environmental law are resorted to only very rarely. There are hosts of laws on environment. Amongst remedial measures are punitive actions in the Indian Penal Code and the Code of Criminal Procedure, action and injunctions under the Water and Air (Prevention Control Pollution) Acts, and the Environmental (Protection) Act of 1986. Taken together, they provide an extensive and sophisticated system for environmental management. Law of torts can be invoked for injunction and damages.

## **Environmental laws – criticism and suggestions**

These various environmental laws are under criticism because their implementation is inconsistent and haphazard. Many major industries like coal, petroleum, electricity, iron and steel, agro-chemicals, and heavy machines are in the public sector. Pollution Control Boards have seldom prosecuted government nominees on the management boards of such public undertakings. The statistics show that the Central Water Pollution Control Board has achieved convictions of only 2.8% and only under the Air Act. Only in Tamil Nadu has the conviction rate been 60.8%. The other States have not secured any convictions. The critics say that “the risk of penalties is so low that it is more cost effective for industries to pollute than to invest in emission control measures”.

The Air, Water and Environment Acts are not comprehensive enough to cover in great detail the environmental impact of large projects like dams and marine life. Particularly in India, most of the environmental conflicts do not much concern pollution but rather relate to resource degradation including systematic problems of soil erosion, deforestation, declining water tables and the loss of flora and fauna and the consequent subsistence economies. Resorts to the remedies under environmental law are also inhibited by the provisions of Official Secrets Acts. The persons and parties adversely affected by

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<sup>7</sup> Alan Boyle and Michael Anderson. *Human Rights Approaches to Environmental Protection*.

<sup>8</sup> Francois Du Bois. *Social Justice and the Judicial Enforcement of Environmental Rights and Duties*.

<sup>9</sup> Michael R. Anderson. *Individual Rights to Environmental Protection in India*.

industrial use of natural resources have no means of access to the information leading to the undertaking of developmental activities based on natural resources. In environmental law, although great public interest is involved, there are few provisions for public participation. The citizens' groups have no role in setting statutory environmental standards. The "consent" granted under the Act to the industries to pollute are not published. There is no right of access and public enquiry into polluting activities. These are some of the issues which should be addressed by the legislature to allow more and more public participation in environmental issues which affect peoples' life to a great extent. These are some of the shortcomings of the present legislation on the environment. Therefore, more and more people and action groups approach the High Courts and Supreme Court with public interest litigations on environmental issues. So far the courts have responded positively and tried to balance the rights of the conflicting parties.

## **Public Interest Litigation**

When public action groups bring such actions on the environment to court, the litigation being not adversary but being actions-collectives, the traditional judicial process is found wholly inadequate. The petitioner in such cases does not approach for himself but for the collectivistic. As a consequence both the duties of the ideological party and the controlling responsibility of the court become more intense. On the one hand, the party cannot freely "dispose" of the "collective rights" in issue; on the other hand, the judge is responsible for ensuring that the party's procedural behaviour is, and remains throughout the proceedings, that of an "adequate champion" of the public cause. In such public interest litigation on the environment, the court's function is to protect the interest of the party approaching the parties before it as well as the interest of the absent members of that class. The Court has, therefore, to balance the rights and interests of the contending parties particularly when both parties are vying with claims that they are actuated by public interest. Such public interest cases extend their binding effects beyond the sphere of actual litigants and possibly prejudicing persons and a very large section of them who had no opportunity of hearing. The Court has, therefore, to measure not only the petitioner's "seriousness" but also his "adequacy as a representative". It must go into the past history of the petitioners, the internal organization, its funding resources and the statutory objectives of the private group. Otherwise this forum of public interest litigation would open gates for new kind of abuses and tyrannies. Labour unions, political parties, national and trans-national corporations, professional organizations, service organizations and human-rights activists, sometimes can themselves become fearful centres of operation against both their members and third parties whom they have no right to represent. There are instances where public interest litigations have been abused by private groups and associations acting for their own selfish purposes. Sometimes, they are unable to see beyond the interest of the limited groups they represent. This remedy of public interest litigation before the highest courts as class-actions should not be allowed to be used as tools of blackmail or undue resistance.<sup>10</sup>

There is sometimes criticism of the so-called inadequate role of the judiciary in public interest litigation. They say that "while judges undoubtedly try to understand a situation as fully as possible in many cases, they are often remote from the people whose lives are battered and ruined. This handicap of social distance is as real in this field as it is in many other areas of public policy."

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<sup>10</sup> Mauro Cappelletti. *The Judicial Process in Comparative Perspective*, pp. 298, 301-305.

Yet the importance of the judicial route is acknowledged as “one of the important avenues to be pursued.” Judicial activism has played a fruitful role in generating public awareness of, and media interest in, environmental problems and in giving due regard to environmental groups. The value of judicial involvement in environmental matters is great, but the nature of the problem calls for better solutions. Judicial activism on its own cannot ensure environmental protection. A more comprehensive approach is needed, which must also incorporate other ways of giving environmental problems the attention they deserve.

Nobel Prize Winner on Economics, Amritya Sen has the following suggestions to make:

“When it comes to remedying the environmental dangers, it is necessary to consider the different means that can be used to address the problem adequately. There is, for example, some choice between the route of value formation and that of institutional reform. If people were to care spontaneously about the effects of their actions on the environment (and through that, about their effects on others), then the need for institutional reform would be, to that extent, reduced. On the other side, if institutions could be effectively reshaped (for example, through regulations prohibiting the discharge of effluents, or through “green taxes”, or through appropriate changes in property rights), so that environmental effects are better reflected in private costs and benefits, then the necessity for value formation would, to that extent, decrease. To prevent the poisoning of our water, the fouling of our air, and other calamities, we can get help both (1) from value formation that makes us more sensitive to this damage, and (2) from changed institutional arrangements that reduce private incentives to destroy the environment and provide contrary incentives to preserve it.

While value formation and institutional reform can, to some extent, be seen as alternative approaches to the environmental problem, there is an opportunity of drawing simultaneously on both, to pursue those changes that require a different outlook and norm as well as new institutions. Greater public awareness of these issues and more active public interest in seeking workable solutions can themselves help to advance the prospects of a solution.”<sup>11</sup>

It is without doubt true that despite the activist role of the judiciary, a better mechanism needs to be developed for solving environmental conflicts and issues as they are so precious to human life. The judiciary is playing its humble role. Apex Court is final but not infallible. In a democratic society, people’s awareness of environmental interests and their participation in the event of environmental conflicts in a systematic and non-violent manner is the need of the hour. There are few solutions available to the problems of the environment but many more are required to be evolved for their implementation in a systematic and efficient manner.

The shelving of “Silent Valley” Project in Kerala, stopping of limestone quarries in “Doon Valley”, control of vehicular pollution in Delhi, and relocation of polluting industries out of residential areas of cities can be said to be some good achievements of environmentalists in their epic struggle for the defence of the environment. They should inspire the present and the future generations.

Let me conclude with words of Bhagvad Geeta. For maintaining the body in good form for services for the community and self-realization, the Geeta advises TAP, meaning restraint and disciplined use of the body. For maintaining a just social order, Geeta recommends DAN, meaning not donation but equitable distribution of wealth and

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<sup>11</sup> Jean Droze and Amartya Sen. *Indian Development and Participation*, pp. 226–228.

resources to bridge the gap between “haves” and “have-nots”. Affluent people should sacrifice and give to the “deprived and needy”. These two sermons of Geeta are for “individual” growth and achieving “social justice”. For maintaining ecological balance and sustaining nature, Geeta recommends YAGAYA, meaning “To the extent we exploit nature, we should supplement it”. Verse 12 in Chapter 3 of Geeta advises that “only after supplementing the nature’s loss, whatever man receives from nature should be appropriated for personal use”. “Appropriation of gifts of nature without any return to it is nothing but a theft.”

*devanbhavayatanena te deva bhavayantu vah parasparam bhavayantab  
sreyah paramavapsyatha,  
istanbhoganbi vo deva dasyante yajnabhavitab tairdattanapradayaibhyo yo  
bhunkte stena eva sab.*

Let these divine words of God inspire our individual and social activities.

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The Shriram Fertilizer Gas Leak case (M.C. Mehta v. Union of India, 1987 (1) S.C.C. 395) has not been deliberately discussed here because it does not advance the link between environmental degradation and Article 21 as the Oleum Gas that escaped directly affected the lives and health of the victims. The more subtle link between environmental deterioration and life was absent.

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M.C. Mehta v. Union of India, AIR 1987 SC 695.

Article 21 or the right to livelihood in many cases. These cases are: Banawasi Seva Ashram v. State of U.P., (1986) 4 SCC 753; Karajan Jalasay Y.A.S.A.S. Samiti v. State of Gujarat, AIR 1987 SC 532 and Gamin Sewa Sanstha v. State of U.P. 1986 (Supp.) SCC 578.

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In the Delhi gas leak case, several renowned scientists were invited to the court and their opinions helped to lay down one of the most far-reaching rulings on industrial pollution, see Rural Litigation of Entitlement, Kendra v. State of U.P., AIR 1985 SC 652.

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# Obstacles and strategy of environmental law enforcement in Indonesia

*Justice Bambang H Mulyono, District Court of Singaraja, Bali, Indonesia*

Indonesia is an archipelago made up of 17,500 islands, divided into 32 provinces and three special regions. Provinces are further divided into regencies (kabupaten) and cities (kotamadya), each with a mayor and locally elected legislature. Indonesia has a population of approximately 220 million people which makes it the fourth most populous country in the world, with a current annual growth of approximately 1.5%.

Indonesia is still in the process of transition towards democracy and the rule of law. The decentralization process is not yet completed; corruption is still a major threat to the stability of the country and the viability of the reform process; the depletion of the national forests has continued unabated and severe environmental and socio-economic consequences have been detected downstream from the deforestation areas.

The main issues related to environment and sustainable development are as follows:

**Environmental issues.** As the fourth most populous country in the world, Indonesia is a key country in global environmental issues. While the country is endowed with enormous natural resources, its environmental problems are also huge. Forestry, agriculture, fishery/marine environment, and urban development (urban pollution) are the areas most affected by either poor legislation or weak or non-existent law enforcement.

**Forest issues.** High and conflicting stakes in terms of government credibility, the threatened supremacy of law, significant economic interests, environmental degradation and vital interests of local residents mean that Indonesia's forests are managed less sustainably than ever before. The amount of illegal logging is still growing. At present, Indonesia is losing forests at the rate of 1.7 million hectares per year. At this rate within 10–15 years there will be no virgin forest left. This does not include forests already degraded but not yet totally deforested. More timber is exploited illegally than legally.

**Natural resources.** Indonesia has been overexploiting its natural resources base unsustainably. Until 1997 high GDP growth was partly at the expense of the stock of natural wealth in terms of forests, soil, and basic mineral resources. The conservation of the environment and the sustainable exploitation of Indonesia's renewable resources have become a special challenge complicated by the issue of decentralization.

Recently, the Country Strategy has taken into account the following main priorities for the Indonesian government:

- Reinforcing good governance and the rule of law;
- Increasing the capacity of regional governments in a framework of decentralization;

- Alleviating poverty through provision of basic services and increasing employment particularly in rural areas;
- Reducing social unrest.

Indonesia is strengthening its accountability framework, including through the creation of the law implementing agencies. But this effort is yet to have an impact on the fight against widespread corruption. Only a few individuals involved in corruption are being held responsible for their crimes. In 2004, Indonesia was still ranked by Transparency International as the fifth most corrupt country in the world.

## Priorities

The overall priority in Indonesia is to strengthen the rule of law and security and rebuild trust of the general public in the law implementing agencies through improved quality of services in the judicial institutions. The specific objectives are to:

- improve the quality of relations and co-ordination between law implementing agencies;
- improve the capacity of the law implementing agencies;
- improve the quality of services in the courts;
- improve access to justice;
- improve the capacity to fight against trans-national crime.

The government of Indonesia has defined five priorities for the years to come:

- continuation of the democratization process;
- economic reconstruction to allow the rebuilding of infrastructure;
- promoting social harmony and religious tolerance;
- strengthening law enforcement institutions and the fight against corruption;
- guaranteeing national integrity and combating terrorism and trans-national crime.

The role of the judiciary in promoting and implementing the concept of sustainable development is essential. In order to improve law enforcement, cooperative actions among interested parties have been developed. Joint programmes have been established between the State Ministry for Environment, the Attorney General, the Department of Justice and the Police Department. Unfortunately, most criminal cases and civil law suits on the environment fail in courts. For example, criminal cases brought against 20 suspects a few years ago for starting forest fires failed to prove violation of the law. Some other experiences indicate that criminal cases and civil lawsuits on environmental pollution failed to provide a strong public impression on law enforcement. Even though improvement of the law enforcement system has made progress, law enforcement in the field of environment and forestry has not achieved the expected results.

## Monitoring of cases

**Administration.** No region in Indonesia has a properly established environmental law enforcer and the control management has not been effective and systematic so as to give administrative sanction to the offender.

**Civil enforcement.** Of nine civil law cases that were brought to the court, five cases were rejected and two were granted at the first level (District Court) but lost at the Court of Appeal. The two remaining cases were won, but not executable, because the judgment was too general and the order given was not clear enough.

**Criminal enforcement.** Monitoring of 12 criminal cases shows that two cases were dismissed, in six cases the defendants were only given conditional sentences, and in the remaining four cases only three defendants were punished because the fourth one fled Indonesia to go abroad. One of the three was ordered to pay only a fine.

The monitoring above makes it obvious that civil proceedings have not contributed anything to society's rights, while the criminal cases are not having a deterrent effect.

The causes of this lack of success are:

- low level of professional skills amongst the lawyers, society, police, prosecutors, environmental management institutions and the courts;
- no coordination or similarity of perception amongst the law enforcers;
- no long-term systematic planning of law enforcement;
- lack of integrity.

Because of these factors, and because environmental law enforcement is more partial and technical, and needs to be linked, it is necessary to improve the integrated strategy.

### **Specific strategies**

- Integration and coordination in licensing;
- Empowering local and central environmental management bodies;
- "One Roof Enforcement System" for investigators and prosecutors;
- First and second line enforcement;
- "Green bench";
- Compliance programme.

### **General strategy**

- Strong leadership and demonstration of political will from the government of Indonesia;
- Continued and advanced training of the law enforcers, as an effort to build the effectiveness of the judiciary, the prosecutors, the police officers and the institutions of environmental management at the regional and national level;
- Strengthen public participation in governmental policy.

Nowadays, all of the judiciaries in Indonesia are under the Supreme Court. This "one management system" is reforming the judiciary step by step in order to eradicate its weaknesses. This programme includes the following:

- (a) **Training activities and capacity building for the judiciary.** A review of the present training policies is necessary before designing a training programme (including an assessment of the legal framework for training and the exposure of trainees to foreign legal and judicial concepts). The training programmes will not be concentrated at the central government level only, but attention is also given to capacity-building efforts at the level of the regions and districts.
- (b) **Review of laws, regulations and procedures related to the following issues:**
- Recruitment and dismissal procedures for judges, as well as personnel management within the court bodies;
  - Relations between the police, the attorney and the courts;
  - Human rights;
  - Anti-corruption;
  - Commercial law.

Several recent studies on the Indonesian judiciary have shown a general distrust towards the judiciary among the Indonesian population. Respondents to a recent survey have identified corruption as the leading cause of problems facing the justice sector. Other causes identified included a lack of resolution of cases, a lack of professional skills among the staff of legal institutions, excessive government interference and low standards of professional ethics.

In several recent high-profile cases related to corruption and human rights, the justice sector has failed to uphold the law and to meet the expectations of Indonesian civil society. This failure to have satisfactory results in these cases is coupled with the continuation of the old habits of small and daily corruption in most sectors of law enforcement.

## **Improving systems and procedures**

The Supreme Court has embarked on one of the most promising and encouraging reform agendas with the production of four blueprints providing a comprehensive reform of the judiciary. The blueprints were prepared in collaboration with an outside consultant. The implementation of the “one management system” was done by the end of August 2004. This includes the transfer of organizational, administrative and financial judicial power, and the administration of religious and military courts under the Supreme Court. Regarding the environment, strengthening the judicial system will also enable better enforcement of legislation concerning the environment and natural resources. This should in turn contribute to improving living conditions in urban areas and a reduction in conflicts over natural resources in rural areas.

### **One Roof Enforcement System**

The weaknesses of environmental law enforcement are:

- No systematic planning of controlling and law enforcement; a tendency to react and improvise;
- The investigation and prosecution process being led by separate institutions increases the potential for gaps and misunderstandings, as well as poor coordination;

- No prevalence of knowledge and skills to conduct environmental cases, especially on sustainable development;
- Low level of moral integrity amongst law enforcers, threatening their independence and professionalism.

The way to solve this problem is to build a “One Roof Enforcement System” (ORES). In this system environmental law enforcement is performed by inspectors, investigators and prosecutors under “one Roof”, namely the “Roof of the Environment Ministry” at the state level, and the “Roof of the Environment Management Institution” at the region level. The Benefits of ORES are:

- One command and one policy (under one institution), so coordination and synergy among law enforcers will be easier, more effective and efficient;
- Easy to control by the institution or by the public (social control);
- Controlling of integrity is easier, because it is under one institution.

### **Creating a Green bench**

“Green bench” in this context means that the court has adequate knowledge and skills to examine any matters of environment. The process of investigation and prosecution will be unsuccessful in bringing the case to court, if the court does not have a strengthening and empowering authority.

There are three options:

**Certified judges.** The Supreme Court Chief of Justice follows a policy that only judges who have been certified by Environmental Law & Enforcement Trainings, and who achieve a certain standard of quality, can examine environmental cases.

**Special division on environment and natural resources is established at every level of the court (District, High & Supreme Court).** Every Court has a division (committee) with experts who may accompany as *ad hoc judges*. So, the synergy of a career judge and an ad hoc judge in the committee will result in the best legal reasoning and argumentation of law.

**Special courts.** An idea for the future is to establish Environmental and Natural Resources Courts (ENRC) which are a combination of the General Court and the State Administrative Court and must have special procedures to examine environmental cases. The problem here is article 24 paragraph 2 of the Indonesian Constitution which states “Authority of Judiciary is conducted by a Supreme Court and underneath judiciary bodies within the branches of General Courts, Religion Courts, Military Courts and State Administrative Courts.” That means, according to the Constitution, only four judiciary branches exist (General Courts, State Administrative Courts, Religion Courts and Military Courts) so that it is impossible to establish an additional Environmental & Natural Resources Court without an amendment to the Constitution, article 24 paragraph 2.

Out of these three options, the best choice right now is the one of certified judges. Nowadays, alumni of Environmental Law & Enforcement Short Courses have been trained by a cooperative group consisting of the Supreme Court Research & Development, the Indonesian Centre on Environmental Law (ICEL) and the Australian Centre on Environmental Law (ACEL), sponsored by Australian Aid (AUSAID) in an effort to enable the Law Enforcement Institutions to actualize the “Green Bench”. Since 1999 until now,

alumni consist of about 100 prosecutors, 80 policemen, 100 lawyers and personnel from non-governmental organizations, 50 civil servants from local and central government, as well as 621 District Court judges, 154 High Court judges and 11 Supreme Court justices widely spread over the regions and districts in Indonesia.

The prospects of environmental law enforcement in the future depend on the following:

### **Political will and strong leadership**

Indicators for that will be found in detail during identification and appraisal missions related to the:

- Number of better, more coherent and targeted new laws/regulations/administrative regulations which are improving/clarifying the legal framework on enforcement of the environmental law;
- Number of cases brought to court in the pilot District Court; access to court by marginalized population;
- Reports of lessons learned on pilot projects and willingness to replicate the experiences in other courts;
- Number of successful cases in the fight against environmental crimes (including organized crime).

The main risk for the implementation of this integrated strategy on environmental law enforcement is the variable commitment to reform by the Indonesian government and institutions. Therefore, close co-ordination with them is a requirement for the design and implementation of the Strategy.

### **Independent control**

- Strengthening the justice system and the rule of law;
- Conflict prevention and resolution;
- Strengthening the freedom of media and press.

### **Continued and advanced training of the law enforcers**

A commitment to support the long and difficult reform process of the judiciary will respond to the needs of the Indonesian institutions in the field of legal and judicial expertise, in particular by providing capacity building or expertise on the prosecution of environmental offences. Expected results are benefits within the law implementing agencies in Indonesia. The strategic programme will also generate increased public trust in the judicial institutions.

## **Conclusion**

The strategy of improving and increasing environmental law enforcement in Indonesia is as follows:

### **Short-term strategy**

- Data updating of alumni of the Environmental Law & Enforcement Trainings;
- Qualification of certified judges, selection according to time of duty, moving mechanism, continued capacity building, career prospects and incentives;
- Drafting of a Supreme Court Decree concerning certified judges;
- Guidelines on procedures of judges to examine the environmental cases;
- Special division/panel on environment & natural cases.

### **Long-term strategy**

The process leading to the establishment of an Environmental & Natural Resources Court (ENRC) requires three actions:

- Proposal to amend the constitution, article 24 paragraph 2;
- Drafting an act concerning the ENRC;
- Research concerning the location of the ENRC, which should depend on a bioregion (potential cases).



## Part II

# Judges: The final arbiter?



# Why judges are essential to the rule of law and environmental protection

*The Hon. Justice Paul Stein AM QC, former Judge of the NSW Court of Appeal and the NSW Land and Environment Court, Sydney, Australia, and Chair of the IUCN CEL Specialist Group on the Judiciary*

## Why is environmental law important?

It is time to ask some fundamental questions. Why is environmental law, and its enforcement, implementation and development in national courts, of importance? Why do we hear so much talk about sustainable development?

The answer lies in the content of environmental law and sustainable development law and their intimate connection with human rights and individual dignity and with the alleviation of poverty. This connection was recognised by the Global Judges Forum in August 2002 in Johannesburg.

The Johannesburg Principles state:

“We emphasize that the fragile state of the global environment requires the judiciary, as the guardian of the Rule of Law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.”

There can be no argument that environmental law, and sustainable development law in particular, are vibrant and dynamic areas, both internationally and domestically. Judge Weeramantry (of the ICJ) has reminded us that we judges, as custodians of the law, have a major obligation to contribute to its development. Much of sustainable development law is presently making the journey from soft law into hard law. This is happening internationally but also it is occurring in many national legislatures and courts.

Fundamental environmental laws relating to water, air, our soils and energy are critical to narrowing the widening gap between the rich and poor of the world. Development may be seen as the bridge to narrow that gap but it is one that is riddled with dangers and contradictions. We cannot bridge the gap with materials stolen from future generations. Truly sustainable development can only take place in harmony with the environment. Importantly we must not allow sustainable development to be duchessed and bastardized.

## **A role for judges?**

It is in striking the balance between development and the environment that the courts have a role. Of course, this role imposes on judges a significant trust. The balancing of the rights and needs of citizens, present and future, with development, is a delicate one. It is a balance often between powerful interests (private and public) and the voiceless poor. In a way judges are the meat in the sandwich but, difficult as it is, we must not shirk our duty.

When talking to judges about this topic, some of them say to me, “but how can we develop environmental law? What opportunities can we have to adjudicate on environmental disputes?” There is a sense of frustration, even helplessness.

To attempt to answer these questions I will provide but one illustration, emphasising that it is but one of many which could be given.

Eleven years ago I gave a decision in the NSW Land and Environment Court of *Leatch v Director General of National Parks and Wildlife Service* (1993) 81 LGERA 270. It was a third party appeal relating to a local government determining to build a link road through a natural area which contained threatened and endangered species of fauna. In particular, the Yellow Bellied Glider and the Giant Burrowing Frog. To carry this project out required a licence to “take and kill” endangered fauna. The statutory definition of “take and kill” included habitat destruction. The appellant citizen, who had objected to the licence application, called in aid the Precautionary Principle. The respondent decision-maker did not contest the relevance of the principle. Although the precautionary principle (and other core principles of ecologically sustainable development) had not then (1993) been included in the local domestic legislation, I was able to find that it was wholly consistent with the object, scope and purpose of the legislation, which was to protect endangered fauna. This was routine statutory construction. Look for the underlying purpose of the legislation. In the environment, it will be its protection and enhancement.

In the judgment I did my best to interpret the precautionary principle, describing it as a principle of common sense. Applying the principle in the balancing of the relevant factors led to my refusing to grant the licence to the council and upholding the citizen’s appeal.

Recently the precautionary principle has been described by the Court as “a central element in the decision making process” and “not merely a political aspiration”, (*Murrumbidgee Ground-Water Preservation Association v The Minister* [2004] NSWLEC 122 at [178]).

Last November in Canberra a conference was held to mark the 10th anniversary of *Leatch*. The symposium reviewed the startling progress of the precautionary principle over the last ten years.

What emerged from an array of local and international speakers was ten years of judicial consideration and interpretation of the principle. The case of *Leatch* began a process of recognition and acceptance of the principle as a part of Australian domestic law. This was in part because the Precautionary Principle received statutory recognition at all levels of government, federal, state, territory and local, in a wide variety of laws on the environment. This in turn led to judges in courts throughout Australia (and New Zealand) needing to come to grips with the meaning and status of the principle. Indeed, this is happening in jurisdictions all over the world.

The decade has seen courts in all jurisdictions, federal, state and territory, generalist and specialist/administrative, all having to confront cases on the Precautionary Principle. The construction has not always been conforming and some divergences of opinion have emerged. But this is a healthy way to develop the law and appellate courts will continue this process. What the authorities do reveal however is the potential for the Precautionary Principle to become a significant feature in environmental law and policy.

## **Judicial activism?**

This illustration raises the question of judge-made law and what detractors terms “judicial activism.” The phrase is often used in a derogatory sense. We need to face this issue. I recall starkly that it was the very first issue raised for discussion by the judges at the Global Summit in Johannesburg.

When we dispassionately examine this debate about so-called “activist” judges, we find that we have spent a great deal of time fooling ourselves and, perhaps also, the public. The common law in England devised some strange features (I would call them myths) and one of them was the nurturing of a mechanical action of the work of judges. Judges had to find their authority in the text of the law. The theory was that fidelity to the text tended to curb invention and pretensions to unwarranted power. But any analysis of court decisions in England and Australia (indeed the whole of the common law world) demonstrates that there was no such thing as strict legalism. Indeed, strict and complete legalism is neither possible nor is it desirable. It is, as Justice Michael Kirby (of the High Court of Australia) said in the Hamlyn Lectures, “the world of Brigadoon – a place of smoke and mists that never existed as portrayed, except in metaphor and imagination.”

Forgive me for using the context of the Australian Courts but I believe that the story is illustrative, as I have said, of the wider common law world. The Australian High Court under the stewardship of that great jurist and Chief Justice, Sir Owen Dixon, was proudly “excessively legalistic.” However, it needs to be understood that the Dixon Court did not slavishly favour a static unchanging law. Nonetheless, change had to be gradual and principled, based on existing doctrine and not on contemporary values. A reading of important cases like the *Boilermakers* (1956) 94 CLR 254 and the *Communist Party* case (1951) 83 CLR 1 reveal the lack of purity of approach of the Dixon Court and its divergence from strict legalism.

Precedent is fine to follow where the law is certain. But what of precedent when it is demonstrably uncertain (*Cole v Whitfield*) or plainly unjust (*Mabo*) (1992) 175 CLR 1 or where interpretation of the text could rationally go either way? Chief Justice Brennan of the High Court has said that in such cases, the Court is forced to frame a new precedent, but this is not to be equated with an exercise in idiosyncratic policy formulation (*Street v Queensland Bar Association* (1989) 168 CLR 461).

Another problem of complete and strict legalism is its tendency to conceal rather than reveal the true process of judicial reasoning. As former Chief Justices Mason and Brennan have stated very clearly, it can be used as a mask or cloak for undisclosed and unidentified policy values.

In the end it is about choice. As the late Professor Julius Stone said, judges face leeways of choice. On occasions judges will be faced with legitimate choices and when this occurs we cannot shirk the task. If I may again borrow from Weeramantry:

“Those who philosophise on the judicial process have pointed out that [it] is not merely a scientific, fact-finding ... mission, where you proceed by pure logic to an answer which is definitely the right answer. Sociologists and philosophers of the judicial process point out that there are probably many answers to a given problem that can be given within the framework of law and logic. Law and logic by themselves cannot lead you to the necessarily right answer. They may lead you to two, [or more] alternative solutions, and one of the tasks of the judicial function ... is to make a choice between the different alternative results that might equally well be available in terms of logic and the law. ... Cardozo and Holmes, together with many others, have pointed out that there are many factors – sociology, history, custom, the mores of the community – which the judge does use ... in order to make those judgments which would be in the best interests of society.”

Because the utterance is recent, I will let Kirby have the last word. He said:

“[Strict legalism] would be a cruel place of indifference to the fact that judges have choices, that such choices are inherent in the common law system itself and that giving a meaning to uncertain words and phrases, rules and principles is the daily work that judges actually do.”

It is emphatically the role of judges, especially in a common law system, to develop the law by applying principles of law, of equity and fairness, to new situations that constantly arise in today's evolving society. The courts may then seek to adapt the principle to a specific situation, and in so doing build up a body of precedent in the same way as the common law itself developed. Whole new bodies of law can come into existence through this judicial activity, for example administrative law. It is, as many have said before, undoubtedly a high responsibility and judges must be very careful not to overstep the mark. In the developing field of environmental law and sustainability law, we have the opportunity, indeed the obligation, to contribute to its development for the benefit of all of humanity.

By faithfully interpreting the law and being sensitive to the objectives of sustainable development and the ends of social justice, we will be better able to fulfil our role as judges. Upholding the rule of law is not inconsistent with the role of judges to interpret and develop the law, and no area of law is more important than environmental law and sustainable development, because it deals with the highest concerns of humanity.

We recognise that it is an anything but easy task but it is one that we must face with integrity and sensitivity and with the exposition of detailed reasons for all to see and scrutinise.

Good governance is dependant upon accountability of all of its organs to the people. Accountability can be policed by a skilled and independent cadre of judges. Only judges can build a universal respect and adherence to the rule of law. Conversely, if judges fail to act honestly and impartially, then any system of law will implode. A nation cannot effectively trade and prosper if its legal system is non-functioning or corrupt. Environmental degradation is the result if basic environmental laws are not complied with or not enforced by the courts.

## **The enforcement gap**

In terms of environmental law and the impact of humankind on the environment, there is little doubt that today's greatest challenge is for countries to secure more effective

implementation and enforcement of fundamental laws. Almost all nations, including developing ones, have basic environmental protection laws in place, but an enormous gap exists between the letter of the law and what is actually happening on the ground. The gap is the problem. The answers are manifold but include judicial capacity building in environmental law.

Acknowledging the gap, judges have realized the need for comprehensive capacity-building programmes for judicial officers, prosecutors, legal practitioners, NGOs and others engaged in environmental protection and enforcement. The Johannesburg Principles, proclaimed in August 2002 by 132 judges from 62 countries immediately before the World Summit for Sustainable Development (WSSD), emphasised the link between poverty and environmental degradation and the significance of international environmental law at a domestic level. They emphasised the role of the judiciary in contributing to the realization of the goals of Sustainable Development by implementation, development and enforcement of the law.

## **Judicial capacity building**

In order to achieve these goals, the assembled judges stated that a concerted and sustained work programme should be developed urgently, focusing on education, training and dissemination of information, including at a regional and sub-regional level. Much was to be learned from a collaboration of judges within and across regions. Positive benefits would result from the exchange of knowledge, experience and expertise. This collaboration should not only extend across regions but across legal systems, civil and common law, and across languages and culture, political and trading blocks.

UNEP has been instrumental in developing and implementing the programme. It has been assisted in this work by the input and advice of a representative group of judges, led by the Chief Justice of South Africa, The Hon. Arthur Chaskalson. The work of UNEP has been augmented by many partnerships with international organizations, such as IUCN. It has also been supported by many donor states. Indeed, comprehensive judicial capacity building would be quite impossible without donor aid.

Since the WSSD there has been a great deal of follow-up action in the implementation of the Johannesburg Principles. Lal Kurukulasuriya has been instrumental in this and I acknowledge his dedicated enthusiasm for this important work.

Well before the global meeting of judges in Johannesburg in 2002, UNEP sponsored and convened regional symposia on sustainable development law and enforcement for judges. I had the privilege of being a faculty member at Colombo and Manila in 1997 and 1999 respectively. These were high quality symposia that exposed the developing jurisprudence of many nations in South and South East Asia, in particular India, Sri Lanka, Pakistan and The Philippines. Importantly, these symposia enthused judges in less developed countries in the region to increase their awareness, knowledge and training in environmental law and sustainable development.

These were followed by conferences in other parts of the globe, including a meeting of judges of South Pacific Island States in Brisbane in early 2002. UNEP perceived a need for worldwide judicial capacity building and to this end convened the global summit of judges later that year. It was indeed a great success.

Much could be said about the meeting but I will merely make a small number of hopefully pertinent observations. First, although the assembled judges were from

diverse backgrounds and different systems of law, culture, language, and economic development and of varying levels of sophistication of environmental law, they soon found they shared similar problems and aspirations. A spirit of camaraderie quickly developed. What they wanted to see was action to deter further degradation of their environments. They were acutely aware of the link between human health and a healthy environment. They agreed unanimously on the need for more effective implementation and enforcement of environmental law. The judges were also united in calling for a comprehensive programme for judicial training in the enforcement of basic environmental laws.

Spurred by the success of the Johannesburg meeting, IUCN's Commission on Environmental Law (CEL), with the assistance of UNEP, organized a meeting of Western European Judges in London in October 2002, chaired by the Lord Chief Justice Lord Woolf. It issued the London Bridge Statement, which, among other things, established a European Judicial Forum.

In the meantime, IUCN, in association with UNEP, developed an internet-based, on-line judicial Portal for judges worldwide to communicate and exchange judgments. I had the pleasure of launching this initiative in Johannesburg. The portal is undergoing development and the aim is for it to fulfil its undoubted potential within the next few years.

The CEL also formed a Specialist Group on the judiciary to assist in the implementation of IUCN's programme of work.

Also in October 2002 a highly successful symposium of 50 judges from the Arab region was held in Kuwait. This was organized by the Arab Regional Centre for Environmental Law, IUCN, UNEP and the Kuwait Institute for Judicial and Legal Studies.

The impetus was well and truly underway. UNEP called together a smaller ad hoc group of regionally representative judges in Nairobi, immediately prior to its Governing Council meeting in February 2003. The task of the meeting was to assist UNEP in planning how best to design and implement the required judicial capacity-building programme.

The meeting produced an Outcome Statement, details of which are to be found in my report: *Judges Active in Promoting Environmental Law Capacity Building*. An ad hoc advisory group of judges was appointed to assist in the development of the programme. Chief Justice Chaskalson reported to the Governing Council on the progress and outcomes made by the judges. The Council called upon the Executive Director of UNEP to support the initiative.

Since February 2003 the impetus has been maintained and a huge amount of activity has occurred. Further successful conferences were held in Rome and in Lviv, Ukraine, involving significant international partnerships. June 2003 saw a regional meeting for South East Asia in Bangkok. A Latin American meeting took place in Buenos Aires, and an Anglophone meeting for Eastern, Central and West Africa. A regional meeting for the Pacific took place in Auckland, New Zealand in December. Other regional meetings have been held in Africa, the Middle East and in South and North America.

These regional meetings are important on a number of levels. They will help determine regional needs, which obviously differ throughout the world, as well as within regions. While these regional initiatives have been taking place, UNEP has been, with the help of judges and other experts, working on educational and training materials.

An extensive Environmental Law Training Manual is being completed by UNEP with the aid of a group of environmental law academics. A reference book for judges is also being produced. Following discussions in Rome, Judge Weeramantry produced an outline and a group of senior judges are reviewing the manuscript. UNEP is also preparing a handbook on international environmental instruments and a companion handbook on examples of national legislation and its implementation.

Describing this burst of activity is not to detract from the numerous judicial education programmes carried out in many parts of the world by a large number of organizations. There is of course a need to prevent duplication and to explore appropriate joint ventures to maximize the use of scarce resources.

## **Conclusion**

The enforcement gap, to which I have referred earlier, is the *raison d'être* for environmental capacity building. Environmental laws will never be obeyed or enforced unless there exists, at all levels of society, sufficient legal and institutional capacities and a will to protect and enhance the environment. This need extends to elected politicians, to leaders and policy makers, to public officers, to police and prosecutors, to the private legal profession and to civil society. Unless the capacities of all of these groups are expanded to a genuine understanding of the environment and sustainable development, the gap will continue to grow.

Above all, judges have a role to play in the development, upholding and enforcement of the law. For the most part, the law is there. What is required, indeed demanded, is the capacity and the will of all of us to ensure that the Rule of Law prevails and our fragile environment is better protected.

I will conclude with a quotation from Professor Nicholas Robinson, the Chair of the IUCN Commission on Environmental Law:

“In each jurisdiction where Environmental Law is strong and effective, we can see the role of the courts as an essential force. The courts serve a crucial role in ensuring that the systems recommended in Agenda 21 may become widespread. ... Clear articulation of the basic legal principles underlying Environmental Law can guide society in shunning conduct that breaches the strictures of those principles. With the careful delineation of such principles in judicial opinions, the ministries of government can guide the affairs of state accordingly. ... In short, as the courts advance the remedial objectives of Environmental Law, they advance the Rule of Law itself.”



# Is judicial activism a proper role for the courts?

*Vladimir Passos de Freitas, Chief Justice of Federal Court of Appeal, 4th Region, Brazil*

First of all, I would like to thank IUCN for inviting me to this important congress. I am really honoured to address such a high-level audience and to report the present level of development of environmental law in Brazil.

## Introduction

The status of environmental protection in Brazil, although similar to other countries, has some important particularities. First of all, it is a country with 170,000,000 inhabitants and 8,511,965km<sup>2</sup> with different ecosystems. Besides this geographic situation, Brazil has different economic and population regions.

Brazil has a uniform legal system. Only the Federal Government can make criminal and civil laws. Individual states can only enact administrative laws on environmental issues. However, the federal laws are very good and this is a factor of effectiveness. For example, the Public Civil Action statute, allowing the prosecutors to bring suits, extended this right also to the Federal Union, to the states, to the municipalities and to the environmental organizations. This is very important, because in many countries only citizens have legitimacy to bring suits and we know that a person alone can't do much. In short, in spite of its problems, Brazil has good laws and effectiveness in its environmental protection.

In Brazil, the Judiciary Power has administrative and financial autonomy (Constitution, clause 99). We have around 12,000 judges in activity whose admission is through public exams (tests and curriculum vitae). They receive good salaries (between US\$3,000 to US\$6,000). Judges have guarantees: lifelong function and can't be removed from their local of work. There are two kinds of promotion: according to amount of time spent in the function or according to merit. Judiciary and judges are absolutely independent of the other powers.

## Judicial activism and environmental law

In countries where the judicial system is ruled by common law, judicial activism is more common than in countries of the so-called "Roman family", that is, governed by codified law. The history of the North-American Judicial Power records many examples, such as the Supreme Court decision that declared the unconstitutionality of the racial discrimination in public and state schools, as well as in means of transport. In Brazil there is a general concern among judges about the social purpose of the law and it is not rare to find a decision that invokes the principles, based not only on the writing of the legal texts.

Regarding environmental decisions, the Brazilian Judicial Power started to show sensibility to the subject from 1985. Before that, there were isolated decisions, mainly on the practice of crimes against fauna and the preservation of forests. But these were single cases, rarely taken before courts. In cases of water or air pollution, judges used to decide that industrial development inevitably carried with it the sacrifice of nature. During the 60s and the 70s there was no concern about sustainable development.

In the 90s, under the influence of new statutes and the environmental protection dealt with in article 225 of the Federal Constitution of 1988, a new phase begins. It is possible to affirm that in this new phase judges started to perform a more active role, getting involved with the consequences of the facts alleged in environmental actions and interpreting the law focusing on the satisfaction of public interest. Judges left their comfortable status of mere law applicators to evaluate its results, even frequently deciding against the position adopted by the environmental administration organs. The Brazilian Courts have a great number of examples. Let's mention some cases that are good representatives of this new period:

- 1) One of the big problems of environmental law efficiency is that in some countries access to environmental justice is very restricted, so that there are almost no verdicts. In Brazil, NGOs have legitimacy to propose Public Civil Action for environmental protection. The Superior Court of Justice, deciding an appeal, recognised legitimacy to an NGO to bring Public Civil Action in order to prevent the construction of a cemetery near a reservoir, although there was no specific clause about the protection of the environment in the NGO's statutes (STJ, Resp. 31.150/SP, 2nd Chamber, Justice Ari Pargendler, j. 20.05.1996).

Importance: to facilitate access to environmental justice

- 2) The Forestry Code (Statute 4.771/1965, art. 16, n. 4) demands that landowners in rural areas preserve 20% of native vegetation. The Superior Court of Justice rejected the allegation of a landowner who proved to have bought the area without the legal reserve, ordering him to grow new vegetation. In other words, the Judicial Power didn't recognise the alleged acquired right of the owner, who wanted to use the 20% of the property for agriculture (STJ, Resp. 222.349/PR, 1st. Chamber, Justice José Delgado, j. 23.03.2000).
- 3) Federal Justice of Joinville, Santa Catarina state: Public Civil Action was proposed to force a textile industry to install filters to prevent the discharge of pollutants in a river. The industry committed before the environmental authority to take the right steps, but didn't honour the agreement. The Federal Judge inspected the premises and ordered interruption of activities for 30 days. This was a well-founded decision, mentioning the losses for the workers. It was confirmed by the Court of Appeal (Process 2002.72.01.000997-7, 4th Federal Circuit, Joinville, Judge Janaína Cassol, j. 27.08.2002).
- 4) Most Latin American countries don't recognise crimes committed by corporations. In Brazil, since the Environmental Crimes Statute (n. 9.605, 1998), they can be charged. That was the decision in a case of sand extraction, a mineral product, without authorization by the competent environmental organ. The extraction led to degradation of native flora. As a consequence, the legal entity and its director were convicted for crimes under clauses 48 and 55 of Statute 9.605/1998. The legal entity had to pay US\$3,000, to be used for restoring the place. The natural person was convicted to one year of imprisonment, a sanction which replaced community services (Federal Court of Appeal - 4th Circuit, Criminal Appeal 2001.72.04.002225-0/SC, 8th Chamber, Judge Élcio Castro, j. 06.08.2003).

Importance: first conviction of legal entity in Brazil for environmental crime

However, this doesn't mean that everything is perfect in Brazil. We still have some weak points, for example:

- International traffic in specimens of fauna: Sanctions are too light and don't intimidate the criminals. The maximum is one year in prison, with the possibility increasing this by another six months.
- Protection of biodiversity: Due to the difficulties of investigation, it hasn't been proven to be effective. Actually, there are no suits regarding the protection of the biodiversity, because the violations usually occur in the furthest regions (Amazon rain forest, for instance) where inspections are more difficult.
- No habit of claiming for individual indemnification for environmental damages: The Public Civil Action Statute has been showing excellent results, but the amounts resulting from convictions are directed to an Environmental Protection Fund. The ones who have suffered individual damage aren't aware that they can ask for reparation. Only from the year 2000 on, such actions started to be proposed by victims of oil pollution at Baía da Guanabara (Rio de Janeiro state) before the Judicial Power of Rio de Janeiro. However, there are few cases.

## **Courts' specialization**

Besides that, we need specialization in environmental courts. There are already successful Environmental Courts in New Zealand, Australia (New South Wales State) and Sweden. Moreover, there are efficient Administrative Environmental Courts in the United States (at the Environmental Protection Agency) and in Costa Rica.

In Brazil we have Environmental Courts in the Mato Grosso and Amazonas states. The Environmental Court of Mato Grosso, state of the Pantanal region, whose biodiversity is very rich, was created in Cuiabá, capital city, on 26 August 1996. Judges, prosecutors and interdisciplinary staff travel by boats along the rivers of the region and decide the cases on site.

The Environmental Court of Amazonas state was created in Manaus, capital city, in 1999. Its structure and action are similar to Cuiabá, but with great concern for environmental restoration, so that violators are given the opportunity of restoring the environmental damage by means of effective actions. They usually have environmental education lessons and perform environmental protection services instead of being kept in prison.

In the city of Porto Alegre, Rio Grande do Sul state, there is a semi-specialization in criminal environmental law at the 4th Chamber of the State Court of Appeal. As we can see, there are few cases of specialization regarding the environment. However, awareness of the need for specialized judges has increased. The society pushes the Judiciary Power to specialize its courts in Environmental Law, which is likely to occur more frequently in the next years.

## **The environmental administrative management of the judicial power**

The Judiciary is a State Power that performs administrative management of utmost importance. Therefore, environmental issues must be covered in its activities, if only to set an example. In the Federal Court over which I preside, many important steps were taken. I should inform that it is a Court of Appeal with 27 judges and around 1,200 civil servants. Besides that, this Court is in charge of the administration of the 1st instance of Federal Justice at the 4th Circuit, with approximately 300 judges and 4,000 servants more. Some important measures were taken, such as:

- Environmental Law is mandatory in the admission exams for judges. The number of candidates is around 6,000, of which approximately 50 pass.
- Idem at admission exams for civil servants of the Federal Justice in the 4th Circuit; in the exam that took place this year there were around 43,000 candidates.
- Environmental protection measures in the administrative management of the Federal Court of Appeal, 4th Circuit, include:
  - (a) paper: recycling; 20% of the paper is non-chlorinated; printing on both sides of the paper;
  - (b) water: permanent supervision of taps, pipes, etc.;
  - (c) the construction of new buildings for the Federal Justice must be done in such a way as to make use of rain water.
- My Court and UNEP organized an essay contest about “Judiciary Power and Environment”, for Latin American judges. The results will be published in January, and on April 6–9 we will receive the twenty judges classified in a congress in Foz do Iguaçu, state of Paraná, Brazil. It is a way of stimulating judges to study environmental law.

## **Conclusion**

Brazilian judges have been playing an active role in the protection of the environment, using their sensibility in order to decide the cases submitted to them. However, it is crucial that Chief Justices, directors of Judiciary Schools and society in general focus on the need for permanent capacity-building courses and creative attitudes aimed at enhancing the awareness and level of expertise of the Brazilian judges.

## Part III

Where does the broader  
community fit in?



# Public interest environmental litigation and the judiciary: Eastern Europe<sup>12</sup>

*Dr Svitlana Kravchenko,<sup>13</sup> Professor, Lviv National University, Ukraine, and University of Oregon, USA*

## Introduction

Public interest environmental litigation and citizen's enforcement are relatively new concepts for Eastern Europe,<sup>14</sup> but several environmental lawyers have been working to build them. They have the goals of promoting social change and strengthening democracy using law. The concepts were brought from the USA and Western Europe a decade ago and transplanted onto very different soil<sup>15</sup> – that of post-communist reality. Lessons were learned and the seeds sprouted. An important part of this development has been in the field of environmental law. Public interest environmental law organizations are working throughout the region for the benefit of the public, protection of the environment, and citizens' environmental rights, both through citizen enforcement in the courts and through training, education, and law reform.

A decade after the beginning of this new phenomenon in our region, we are still debating what “public interest law” means. For example:

- What kind of cases should we conduct – those involving the rights of a particular unrepresented individual, or primarily strategic ones, which have a value for the broad public interest?
- Should we concentrate on litigation and advocacy as our main directions of activity, or should we also engage in law drafting, organize training, run environmental clinic programmes for students, and participate in international activities?
- How can we best overcome practical obstacles? In particular, how can we fund our work in economies that are still in transition?

For each of these questions we have to look for our own answers, which may prove to be different from the answers that might be given in the West. In the process we are

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<sup>12</sup> Some parts of this article are taken from my previous publication *Citizen Enforcement of Environmental Law in Eastern Europe*. Widener Law Review, Volume X, 2004, Issue 2.

<sup>13</sup> The author is one of the founders and current President of Ecopravo-Lviv, one of the first public interest environmental law organizations (EPL) in the former Soviet Union; Vice-Chair of the UN ECE Aarhus Convention Compliance Committee; and Co-director of the Association of Environmental Law of CEE/NIS.

<sup>14</sup> I use the term “Eastern Europe” to include both the former communist countries of Central Europe and the European countries of the former Soviet Union. The latter have commonly been referred to as the Newly Independent States (NIS) for the past decade, but since September 2002, at the initiative of Ukraine and other countries, use of the term NIS has been discontinued in international bodies. The United Nations Economic Commission for Europe (UN ECE) in Geneva has introduced a new designation for official usage, to cover the region: “Eastern Europe, Caucasus, and Central Asia” (EECCA).

<sup>15</sup> *Pursuing the Public Interest. A Handbook for Legal Professionals and Activists*. Columbia Law School. New York. 2001. P. xix, 9.

gaining experience and helping to shape the legal system in a direction that takes account of the public interest.

## **A brief history of public interest environmental law organizations in Eastern Europe**

Public interest environmental law organizations started to appear in the former communist countries soon after the fall of the Berlin Wall and the subsequent collapse of the Soviet Union. The environmental or green movement was one of the main and progressive waves of democracy that conditioned these dramatic changes in both the Central European countries<sup>16</sup> and what were until recently called the Newly Independent States (NIS).<sup>17</sup> Furthermore, this movement contributed from the start to the building of civil society.

The first public interest environmental law organizations (PIELOs) started in 1992. In that year three organizations were formed: the Environmental Management and Law Association (EMLA) in Hungary,<sup>18</sup> the Center for Environmental Public Advocacy (CEPA) in Slovakia,<sup>19</sup> and the Environmental Law Information Service of the Polish Environmental Law Association (PELA) in 1992.<sup>20</sup> Law students in 1995 started what later became the Ecologicky Pravní Servis (EPS) in the Czech Republic.<sup>21</sup> In Russia the first PIELO was Ecojuris, started in 1993 by Moscow lawyer Vera Mishchenko. She had been trained in the Pacific Environmental Resource Center (PERC) in San Francisco and her work was initially supported by Earth Island Institute.

My own organization, Ecopravo-Lviv, can be dated back to my experiences as the next PERC Fellow in December 1993. At the end of my training at PERC and impressive meetings with public interest organizations and lawyers in the San Francisco Bay area, I made a vow to start an environmental non-governmental organization in Ukraine. Ecopravo-Lviv was founded and registered in March 1994. Similar organizations were organized at the same time by my colleagues in Kyiv and Kharkiv.

With the support of the American Bar Association's Central and Eastern European Law Initiative (ABA CEELI), we opened the Environmental Public Advocacy Center (EPAC) as a project of Ecopravo-Lviv (EPL) in October 1994.<sup>22</sup> It began to bring lawsuits to the courts on behalf of citizens and environmental organizations. Because of its success, after two years of operation in Lviv, similar centers were opened with local lawyers in Kharkiv and Kyiv in Ukraine, in Yerevan (Armenia) and in Chisinau (Moldova). A few years later the ABA CEELI gave financial support to the Armon Center and opened an EPAC in Uzbekistan.

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<sup>16</sup> See John Bonine, *The construction of participatory democracy in Central and Eastern Europe. Human Rights in Natural Resource Development* (Oxford University Press, 2002), pp. 504–546.

<sup>17</sup> See Svitlana Kravchenko, *New laws on public participation in the newly independent states, in Human Rights in Natural Resource Development* (Oxford University Press, 2002), pp. 467–503.

<sup>18</sup> [www.emla.hu/newsite/1\\_2.html#history](http://www.emla.hu/newsite/1_2.html#history)

<sup>19</sup> [www.cepa.sk/](http://www.cepa.sk/) See Bonine, note 3, *supra*.

<sup>20</sup> Bonine, note 3, *supra*. PELA no longer does public interest litigation, however. Since 1999 services to citizens have been one of the aspects of an Environmental Law Center (Centrum Prawa Ekologicznego – CPE). [http://cpe.eko.org.pl/cpe\\_ang.html](http://cpe.eko.org.pl/cpe_ang.html)

<sup>21</sup> Ecologicky Pravní Servis. *Annual Report*. 2001. Brno. 2002 [www.i-eps.cz/php/eps.data/data.down/vz-2001-en.pdf](http://www.i-eps.cz/php/eps.data/data.down/vz-2001-en.pdf)

<sup>22</sup> I was lucky to meet Stephen Stec of the American Bar Association at an International Conference on Environmental Enforcement in St. Petersburg. We decided to start the Environmental Public Advocacy Center (EPAC) as a joint project of ABA CEELI and Ecopravo-Lviv.

During the communist years, suing the government was prohibited, impossible, and even dangerous. In the early years after communism to do so was a leap into the unknown, but an exciting one. Young lawyers of PIELOs are doing it regularly now. However, it continues to need courage and care, knowledge, sound planning, and innovative thinking.

## **Cases for individuals or strategic litigation?**

A prime issue that any public interest environmental law organization in Eastern Europe must face is this: what is more important, to have a few nation-wide cases or many small cases? Merely to serve clients or also to use litigation consciously as a tool of law reform?

Since the beginning at Ecopravo-Lviv we have had a rule to listen to and consult with all clients who knock on the door with environmental concerns. Clients come to our office on a daily basis with their small problems: trees being cut down, or an animal protection NGO reporting cats being killed or dogs suffering from scientific experiments. Our mission is to protect the environment and we believe that we should represent the rights of vulnerable people who have no money to pay a lawyer but who care about the environment. We can also use small cases like these to train our environmental clinic programme students. They can handle a small case, win, and quickly gain confidence in the possibilities of litigation.

But we also know that we can help a larger number of people, protect the environment more and change the legal system with strategic cases. Such cases establish a principle which helps to reform legal thinking, and legal policy. It is commonly understood that the courts in countries with a civil law system, as contrasted to common law, do not formally rely on precedents. But the reality is that in all societies social change moves forward from one example to another. The lawyers at CEPA in Slovakia note the value of “giving priority to the ‘precedent-making’ cases which, when successfully resolved, represent a turning point in the decisions about similar cases all over Slovakia.”<sup>23</sup>

Strategic cases challenge the judicial system to interpret and apply existing legislation in a creative way, sometimes using constitutional and international law provisions as an aid to interpreting existing domestic legislation. Strategic cases help to reform the judicial system, while also promoting social and political changes. They inspire other public interest environmental lawyers to follow the example. Strategic cases also give an image and wide recognition to the organization, which helps to attract more cases and assists in international funding.

However, strategic cases have their disadvantages as well. They are time-consuming. They need a lot of preparation and investigation. They can be handled best with the participation of experienced lawyers, who know domestic and international law and understand social issues related to strategic litigation, but public interest lawyers are often youthful. Sometimes they involve hot political issues, and it may be difficult not to mix legal arguments with political campaigns. Furthermore, it may be more difficult to gain access to the courts for a strategic case.<sup>24</sup> They require courage; they might even be dangerous for lawyers.

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<sup>23</sup> [www.cepa.sk/law/en\\_index.htm](http://www.cepa.sk/law/en_index.htm)

<sup>24</sup> There are various barriers to access to justice that may be more significant in larger cases: standing-to-sue and financial and procedural barriers among them. Article 9 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) is intended to reduce these barriers, but it is not apparent that it has yet begun to do so.

Law reform is an important task, especially in a time of change. The Orange Revolution in Ukraine (November–December 2004) gave us the hope that we might overcome corruption in the government and court system. One of the main directions of the new President of Ukraine and his new government is to fight corruption and to create an independent court system.

In my organization we have decided that, in our present phase of development, we must maintain a mixture of both the small cases that clients bring to us and the strategic cases that can lead to fundamental change. As time goes on, our balance may shift.

## **Problems with strategic litigation in Eastern Europe**

It must be said that people in Eastern Europe do not yet believe strongly in the courts. In the Soviet Union the court system served state interests and safeguarded state rights. Cases on protection of the environment were focused mostly on compensation for damages caused by polluters (state enterprises), or by illegal logging, hunting or fishing. A ruling awarding compensation simply moved money from one state “pocket” to another. It was not very effective because even when money was paid, remedial actions often did not take place. Even where criminal responsibility could be affixed for damage caused by environmental transgressions, penalties were (and still are) small and such cases rare.

As a result of these factors, environmental legislation has not been effective, sanctions and responsibility are weak, and violators are not punished properly. Furthermore, special governmental bodies have long been in charge of the protection of the environment and citizen enforcement is a completely new phenomenon for both, the judicial system and the public. The public is not familiar with the concept of suing either the government or enterprises because the court system has served the interests of the state for decades. Yet public interest cases depend on a client’s interest, awareness and involvement, and these may affect the outcome of the case to a great extent. Their willingness to participate is important, because some legal steps can not be undertaken without the client’s understanding and involvement.<sup>25</sup>

Our organization has learned how difficult strategic litigation can be when clients get “cold feet.” We have spent a great deal of time preparing a case, gathering evidence, and researching legal remedies, only to have the client withdraw from the case or disappear. For example, we had a complaint in the community of the small town Sosnivka, Ukraine, from about 100 mothers of children suffering from fluoride pollution of underground water. The excessive fluoride has caused extensive teeth disease, and later bone diseases – “children’s osteoporosis”. We helped the mothers to register an NGO to represent the interests of many of the children, held meetings with mothers and the Deputy of the Parliament elected by the population of this town, wrote letters to the Cabinet of Ministers and the Ministry of Health, and gathered scientific information in the Ukraine and abroad about the impacts of excessive fluoride on health. We found strong proof of causation between the fluoride levels and coal mining activity. But the case collapsed when the head of the client organization, who had been brave at the beginning, later lost her courage and interest, explaining that her husband worked for the mining company and could lose his job.

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<sup>25</sup> Cf. *Pursuing the public interest. A Handbook for Legal Professional and Activists*. Columbia Law School. New York. 2001. p. 21

It is essential for public interest lawyers to plan carefully for such circumstances. They might consider, for example, bringing such cases in the name of their own environmental law organization in order to avoid such last-minute collapse, or even pursuing some other course of action. It is also possible that a case like this is simply not susceptible to resolution through litigation and that other means are more likely to yield useful results.

Another big problem is our corrupt court system. Our organization has conducted several cases in the court where the law was clearly on our side, but the court decision was not made in our favour. In the Danube Delta case, EPL represented the Council of Kiliysky Region and the Danube Biosphere Reserve (DBR) in the court of Odessa on land issues. The DBR had a permanent usage title on lands of the strictly protected zone of the Reserve, including Bystre Mouth and lands under internal straits and ponds, according to the decision of the Council of Kiliysky Region made on February 2, 2000, based of the Decree of the President of Ukraine (1998) on creation of the DBR. However, a Decree of the President in 2003 withdrew most of the water (internal straits and ponds) from this Wetland of International Importance. Following this, Vilково City challenged the decision of the Council of Kiliysky Region, asking the court to cancel the previous decision and give lands under internal waters back to Vilково City. EPL made the argument that the plaintiff missed the three-year statute of limitation period that itself, according to articles 71 and 80 of Civil Procedural Code, is a basis to deny the suit. However, the court of first instance made a decision in favour of Vilково City Council, and later the Odessa Appellate Court left it without change. By this court decision the DBR lost the status and protection of lands, in addition to the loss of control over internal waters. The Danube Biosphere Reserve and Ramsar Wetland of International Importance are now without internal waters or submerged lands.

When our EPL lawyer went to the judge's office to take documents needed for an appeal, she found the judge in tears. The judge said that the EPL lawyer did a great job, but she could not make a decision in her favour because all the high governmental officials related to the case, had called her and told her how to make her decision.

We have a long tradition of so-called "telephone law" in the Soviet Union, in which high officials of the Communist Party (and more recently, people with power and money) have told judges over the telephone how to make decisions. It is a big task to build an independent court system under such circumstances.

In another EPL case challenging the conclusion of an EIA made by the Ministry of the Environment on the construction of the deep navigation canal through the core zone of the Danube Delta Biosphere Reserve, the court hearing was postponed several times and the EPL lawyer was told that the court could not make a decision until the final results of the Presidential elections. This is a clear indication that the political situation and changes in the government are crucial in strategic cases in the Ukraine.

## Judicial training

For many judges environmental cases are not a priority. One of the reasons is a lack of understanding of environmental issues. Another reason is a lack of knowledge of domestic and international environmental law. Middle-aged and senior generations of judges did not have environmental law in their university curricula. They need special training or “sensitization”.<sup>26</sup>

In the Johannesburg Principles adopted by the Global Judges Symposium on the Role of Law and Sustainable Development<sup>27</sup> in 2002, judges affirmed that “an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law”.<sup>28</sup>

Judges also recognised “the importance of ensuring that environmental law and law in the field of sustainable development feature prominently in academic curricula, legal studies and training at all levels, in particular among judges and others engaged in the judicial process”.<sup>29</sup>

The Governing Council of UNEP in its Decision 22/17(II) called on the Executive Director of UNEP, in partnership with IUCN and other competent organizations, to implement the outcome of the Global Judges Symposium with regard to capacity building of judges and other legal stakeholders in the field of environmental law, within the framework of the UNEP Montevideo Programme III.

UNEP developed a Working Paper and a three-year programme with the objective to achieve more effective implementation, compliance with and enforcement of domestic and international environmental law “through strengthening the capacity of critical groups of actors engaged in this process such as judges, ... public interest litigation groups, civil society groups active in safeguarding environmental rights of people ...”<sup>30</sup>

Several Regional Judges Symposiums took place after the Global Judges Symposium, in collaboration between UNEP and IUCN: in Kuwait – for Arab countries, in London and Rome – for Western Europe, in Lviv – for Eastern Europe.

Ecopravo-Lviv was the host in May 2003 for the East European Judges Symposium “The Role of the Judiciary in Enforcement and Implementation of Environmental Law: A Regional Needs Assessment,” together with Ukraine’s State Judicial Administration and the Academy of Judges of the Ukraine. Chief Justices from the Supreme and Constitutional Courts of 11 countries of Central/Eastern Europe, Caucasus and Central Asia participated in the Symposium. They adopted the Lviv Statement<sup>31</sup> in which they

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<sup>26</sup> During the Expert Meeting “Human Right and the Environment” organized by UNEP and OHCHR in January 2002 the Hon. Justice Bhagwati, former Chief Justice of India, said that “you can not use word “training” for judges. Judges are gods. They know everything. They can be only sensitized”.

<sup>27</sup> The Symposium was held in Johannesburg, South Africa, in parallel with the World Summit on Sustainable Development, with the attendance of 122 senior judges from 60 countries.

<sup>28</sup> Johannesburg Principles. Global Judges Symposium on Sustainable Development and the Role of Law. Johannesburg, South Africa, 18–20 August 2002. Report, Volume I. Publication of the UNEP, 2002.

<sup>29</sup> *Ibid.*

<sup>30</sup> Working Paper for Judges Planning Meeting for the Outcome of the UNEP Global Judges Symposium on Capacity Building. [www.unep.org/dpdl/symposium/Documents/January/WORKING\\_PAPER\\_FINAL\\_draft2.doc](http://www.unep.org/dpdl/symposium/Documents/January/WORKING_PAPER_FINAL_draft2.doc)

<sup>31</sup> [www.iucn.org/themes/law/pdffdocuments/Lviv%20Statement%20FINAL.pdf](http://www.iucn.org/themes/law/pdffdocuments/Lviv%20Statement%20FINAL.pdf)

acknowledged the important role played by citizens and their organizations in bringing cases before the courts, including the need for them to have effective means to access the courts.

The Justices invited IUCN, UNEP and Ecopravo-Lviv to continue to collaborate with judges from the EECCA Region in order to facilitate the co-ordination of future work with judges from the region with broader global and pan European initiatives.

This statement about collaboration between public interest environmental law organizations and the judiciary is in accord with the proposed programme of work to realize the Johannesburg Principles, which includes: “the improvement in the level of public participation in environmental decision-making, access to justice for the settlement of environmental disputes and the defense and enforcement of environmental rights, and public access to relevant information.”

## **Conclusions**

PIELOs organize and host seminars for judges in many countries (Australia, Indonesia, Philippines, Russia, Ukraine, etc.), working together with Supreme Courts and related national and international institutions and inviting top environmental law experts or suggesting their own to bring their knowledge and expertise. They prepare domestic and international environmental law manuals, compendiums of domestic legislation and multinational environmental agreements and other materials. PIELOs keep judges busy, taking violators of environmental law and environmental rights to the court and creating court practice. These efforts may change judges’ attitude toward the importance of environmental cases and defence of citizens’ environmental rights.

Collaboration between the judiciary and public interest environmental law organizations can be very fruitful, making the phenomenon of public environmental litigation less rare and more recognised in Eastern Europe and worldwide.



# The healing of Mother Earth

*Antonio A. Oposa Jr., Philippines*<sup>32</sup>

## Introduction

Let me begin with a little story.

Once upon a time in a faraway land, there lived a King. In the kingdom, the land was rich and life in the rivers and in the seas was plentiful. Wildlife and farm animals – horses, cows and carabaos – were in great abundance and the people were happy.

The King liked to roam his kingdom. But when he travelled, his feet would hurt from the sticks and stones that littered the roads. He struck upon an idea: He ordered his subjects to slaughter all the cattle in the land and use the hide to line the roads.

His subjects dutifully obeyed the royal decree. But after killing off many of their horses, cows and carabaos, the subjects began to see the flies swarm over the rotting meat, the waters of the rivers and the streams were become spoiled with the leachate, and even the air became fouled.

They began to realize that if they killed off all their cattle just for the hide, time would come when they would not have the animals to help them in their farming chores. They began to complain to the King and were almost up in arms. They said that at the rate they were going, there would be no cattle left for them and for their children to eat and to farm with.

It is said that necessity is the mother of invention; if so, then crisis must be the father. Upon seeing the citizenry in near revolt, the Kingdom was in a crisis of governance. As we know, the Chinese character for crisis depicts two other characters: danger and opportunity. Seeing the danger, the King also saw the opportunity. He stood up from his throne, went out onto the street, pulled out his knife and cut a swathe of leather. With it, he wrapped his feet.

That, my friends, is said to be the story of the first shoe. It may well also be the story of natural resources conservation. We should not use up everything today because there is tomorrow and our children to think about.

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<sup>32</sup> The author is the Philippines' pioneer environmental lawyer. For his contributions to the advancement and enforcement of environmental law, he received The Outstanding Young Man of the Philippines award. For his contributions to international environmental jurisprudence, he has been given the highest United Nations award in the field of environment, the UN Environment Programme (UNEP) Global Roll of Honour. He received his Bachelor of Laws from the University of the Philippines and his Master of Laws from the Harvard Law School where he was the Commencement Speaker of the Graduating Class. Excerpts of this were delivered before the Judges Forum on August 11-13, 2003, Philippine Judicial Academy, Tagaytay City.

## **The species *Homo sapiens sapiens***

But before I proceed, let me ask you all two questions:

Which is the most intelligent animal? Which animal has cleaner sanitary habits, a pig or a man?

The question may appear to be rhetorical at first sight and the answers may be quite obvious. To the first question you have answered – man. To the second question, you have answered – man, of course.

But if we proceeded to ask the next question as to who says so, the answer would also be “man”. Is our claim to intelligence and cleanliness therefore not self-serving?

As you may know, our species is no longer simply called *Homo sapiens* but *Homo sapiens sapiens* (*sapiens* being the Latin word for wise). Our ancestor, the species that walked this earth some 500,000 to 200,000 years ago was known as *Homo sapiens*. It had a brain with an average weight of 1,200 cubic centimetres (cc). From 200,000 years ago to the present, the species has evolved into one that now has an average brain weight of 1,350cc and is presumably more intelligent and doubly wise, hence *Homo sapiens sapiens*. In the next few minutes, you yourselves will have to answer the question of whether we are in fact a wise animal.

## **The four laws of nature**

To provide a backdrop to the discussion, allow me to share with you a few basic laws, not laws passed by man, but the unchangeable laws of Nature.

The water cycle illustrates these laws all too clearly. Water, for example, interconnects everything and anything that lives. From the clouds to the rain to the waters in the rivers and in the aquifers and the waters that flow all the way to the sea, and back again to the clouds, water permeates all life.

Water has to go somewhere. If it is not absorbed by the trees through their roots, it will loosen up the soil and carry the soil as erosion to the rivers, overflow as flood and with the mud known as silt, cover and kill the coral reefs and other marine lives in the coastal areas.

We have cut down our forests and abused nature for so long and thought we could get away with it. But nothing is for free. Sometime or another, we will have to pay and the longer we wait, the higher the price will be. In Cebu, we have deforested our mountains to the ZERO forest cover it is now and thought there was no price to pay, only to find out that our water tables are falling and salt water is intruding into the aquifers. Let us take this example: the chloride (salt) content for water allowable for intake into the human body is only 200 milligrams (mg) per litre. The underground water in Fuente Osmena, a small park in the uptown of the city some 2.5 kilometres (km) away from the coast, contains an astounding 500mg per litre!

Nature will have the last say. In the early 1990s, we were shocked to see the thousands of bodies that littered the streets and the beaches of Ormoc, in a flashflood that lasted for only 20 minutes. I was there 48 hours after the incident and saw all these bodies and thought that there was nothing ruthless, nothing malicious and nothing

brutal in all these deaths and bloated bodies. It was perhaps only Nature's way of making herself heard.

## **The wealth of the Philippines**

We have all heard how rich our country was, repeat WAS. Let us review some of our wealth.

- There are 201 species of mammal; 116 are endemic or unique to the Philippines and therefore found nowhere else in the world.
- Of the 500 known species of corals in the world, the Philippines have 488 of them, 240 of which are likewise endemic and scattered. We are part of the incredibly wealthy Sulu-Celebes Marine Triangle. In fact, in terms of marine wealth, we are known to have the richest coral reefs IN THE WORLD!
- In the mid-1900s, it was estimated that we had about 2.7–3 million hectares (ha) of coral reefs in the country.
- Our seas have six of the seven known varieties of marine turtles.
- We have a coastline of some 18,000km, longer than that of the United States.
- At the turn of the century, we had about 500,000ha of mangrove forests. As you know, mangroves are the breeding grounds and nursery of much of the aquatic life.
- Our tropical forests were once home to the second largest eagle in the world, the Philippine Eagle, a bird with a habitat range of some 5,000ha. What is interesting about this animal is that it is monogamous (a trait that is absent in some of the highest public officials of this country).
- Our forests teem with plant and animal life. In one study conducted on the wealth of our forests, it was revealed that the forest of Mt. Makiling National Park alone, an area of only 4,000ha, contains more species of wooded plants than the entire continent of North America.
- In the 1600s it was estimated that our land area of 30 million hectares contained as much as 27.5 million hectares of forests. As late as 50 years ago, we had about 16 million hectares of tropical virgin forests and our country was world famous for its mahogany.
- We have about 10,000 kinds of plants; about 50% of them are endemic. As you also know, more than 50% of all the medicines now sold in the market originated or are derived from plants.
- We are home to some 556 species of birds, 183 are endemic.
- Of the 77 known migratory birds in the world, 48 of them stop by Cebu's Olango Island, to "refuel" for food on their way to the south from China and Siberia during winter.

Having seen our wealth, let us now examine what we have done to these wondrous gifts of Nature.

- Of the 3 million hectares of coral reefs in our seas barely two generations ago, a study conducted in 1990 revealed that only 5% remains in excellent condition, and the rest are in various states of degradation – caused by dynamite fishing and other destructive fishing methods.

- Our forests, some 16 million hectares, covered more than half of the land area of the country barely 50 years ago. In 1988, with the use of satellite photography, it was determined that only 800,000ha remained of the country's old-growth forests, or less than 3% of our land area.
- This tragedy is reflected in the decline of the population of our national bird, our flagship species, the Philippine Eagle. From a population of some 10,000 or so at the turn of the century, we only have about 30 pairs left in the wild and about 26 individuals in captivity.
- Our mangroves are in no better shape either. Of the 500,000ha we had at the turn of the century, it is now down to only 100,000ha and with only about 20,000 of it old growth.
- Our fish productivity has been reduced by as much as 80–90% because of the abuse we have heaped on our coastal resources. That everything has a price and that ecology and economics link up too closely, this comes back to us in the form of more expensive fish.
- Our wasteful ways are such that the inhabitants of Metro Manila alone discharge about 7,000–8,000 tons of solid waste everyday. Only about 4,000 tons is collected and the rest ... well, since everything has to go somewhere, they end up in the *esteros*, rivers and all over the streets of the Metropolis. But this is not all.
- Metro Manila discharges and dumps into Manila Bay a total of 5 million gallons of raw and untreated sewage every single day, and yet we get our food from the sea, and some from Manila Bay.

After seeing this, which animal has cleaner sanitary habits: a man or a pig? I have yet to see a pig pooh in the source of its food.

## **Why did we let this happen?**

Let us ask ourselves this simple question: If we are so intelligent and have become doubly wise, in fact, the animal who claims to be the most dominant specie on Earth – why did we let this happen? And in a mere wink of the eyelashes of time?

## **A crisis of concern: what can you do?**

Those of you who like to hike up mountains know only too well the anguish of seeing denuded lands and deforested mountains.

Those of you who scuba dive or who go fishing know the meaning of marine resource depletion and the pain of seeing dynamited coral reefs that have become underwater deserts.

Those of you who are ordinary citizens see the dirt that we throw away into the streets, the dead rivers, the polluted seas and the polluted air we breathe.

Passing laws is not the answer. We have more than 100 laws in the statute books relating to the environment. And yet Congress still continues to pass laws, if only to justify its existence. Who was it who said that if “pro” is the opposite of “con”, progress is the opposite of Congress?

Neither is government the answer. Government can take the lead, but the answer lies in each and every one of us. When we do not throw things away from the windows of our cars, we make a contribution to cleanliness; when we report leaking faucets and toilets in the hospital or in the hotels where we work or stay, we help conserve water; when we have our diesel vehicles tuned up regularly so they do not belch smoke in the streets, we help clean up the air or at least prevent it from being dirty; when we bring our own plastic bags to the supermarket, we help to reduce the amount of trash that must be thrown away; when we take time to write to our local leaders to express our concern and urge action on environmental causes, we help mobilize political will.

There are a thousand more things than can be done measured only by the level of common sense. The long and the short of it is, however, that if man is the problem, man must also be the solution. Otherwise, man will himself disprove the very quality which he claims to set him apart from the other animals - that of being wise.

## **Shall we be king?**

As we started with a story, allow me to end with another little story.

Once upon a time in a faraway land, there lived a King. As he was growing old, the King decided to hand the kingdom over to the Prince but wanted to make sure that the Prince was ready to assume the throne.

To prepare him, the King directed the Prince to live in the forest for 6 months so that he may learn the lessons of wise governance. The brash young Prince, of course, found the order ridiculous but since it was the order of the King and his father, had to do it anyway. After six months, the Prince returned and the King then asked him what he had learned from the forest.

The Prince said: "Well, I saw nothing but the trees, suffered the long nights of cold and loneliness and could hardly sleep with the noise of the hooting of the owls at night. In the day, I could hear nothing but the noise of birds, and all throughout, I had to endure the stench of rotting leaves on the forest floor."

The King was disappointed that his son had learned nothing. So he ordered the Prince to live in the forest for one more year. Grudgingly, the son angrily mounted his horse and sped off to the forest once more.

One day, after almost one year of solitude and in the depth of his quietude, the Prince lay down beside a stream and looked at the sky. Watching a shaft of sunlight through the canopy of the forest, the Prince suddenly stood up, quickly mounted his horse and galloped back to the Palace. There, at the King's feet, the Prince humbly knelt and said, "Father, I have learned."

"Father, I have learned from the sight of the wind as it caressed the branches and the leaves and enveloped me with its embrace.

I have listened and watched the flight of the leaves as they glided down their way to the forest floor; there to stay, and in death and decay, become the rich soil that nourishes the plants, that in turn nourishes us.

I have danced with the birds and joined them as they chased one another in the great drama of flirtation, of birth and of life.

I was never lonely even at night, the owl and the crickets always kept me company with their nocturnal symphony.

The birds, lizards, the deer and the boar have all become my friends, I have fed them from my hand in the supreme gesture of oneness.

Once, I even saw a young monkey fall and hurt himself. I picked him up, took care of him, nursed him back to health, and thereafter returned him to his mother. Since then, both have become my friends and frequent companions.

Father, these and more I have learned from the forest.”

Pleased with the achievement of his son, the King pulled out his writing quill and on a parchment paper wrote a royal proclamation. With the stroke of a pen, he decreed that the forest shall forever be protected, and that forever, the animals and the plants shall be declared as the friends of the citizenry, and that the forest be kept in its original state as monument to his son — the new King.

## **Healers, heal thy mother**

For all of humanity’s pretensions to wisdom, the physical evidence shown this past century reveals otherwise. Like the prince at mid-story, we do not yet appear to be ready to assume the throne of the most dominant species on Earth. When given the power of our minds, we have done nothing but misuse and abuse the very resources which make our life possible. Our great Father - He who created the Earth and the Universe - has made us His Trustees and Stewards. But what have we done? The unquestionable physical evidence clearly proves that we have violated that trust and have criminally misappropriated the things entrusted to us.

It will only be when we have learned to lie still beside the stream and listen to the gurgle of its waters, to look at the wind and feel the pleasures of its embrace, to respect the Earth and learn that as Ralph Waldo Emerson said, “We are but a part and parcel of all things”, that we can begin to take our rightful place in the world of plants and animals. It will only be when we are able to delight at the sight of a bird in flight, to watch the heavens and humbly realize that we are but a puny and insignificant part of Creation, then and only then will we be ready to participate in, and partake of, the great extravagance of life. Then and only then will we truly deserve to be called *Homo sapiens sapiens*. Then and only then can we lawyers become more relevant to human society at large, and Law, as a thinking profession, make our little contribution to humanity’s role as the thinking part of Nature.

*Maraming Salamat po at mabubay po kayong labat.*

## Part IV

# The ethics of judging



# The ethics of judging

*Rt Hon. Lord Justice Carnwath CVO*

*“We will sell to no man, nor deny or defer to any man, justice or right” (Magna Carta 1215)*

*“I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will” (Judicial oath: Promissory Oaths Act 1868 s 4)*

## Background

In August 2002 some 120 senior judges from around 60 countries met at the invitation of the United Nations Environment Programme (UNEP) for a Global Judges Symposium. This took place in Johannesburg on the eve of the World Summit on Sustainable Development. At the end of the meeting the judges adopted the so-called “Johannesburg principles on the role of law and sustainable development”. It contained the following statement:

“We affirm that an independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with and the implementation and enforcement of international and national environmental law.”

It called for a programme of work including:

“The improvement of the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law, such as judges, prosecutors, legislators and others to carry out their functions on a well-informed basis equipped with the necessary skills, information and material.”

That call to action was taken up by the governing council of UNEP in its session in Nairobi in February 2003, following which UNEP has undertaken an extensive programme of work, in conjunction with other governmental and non-governmental agencies, not least IUCN (as evidenced by this important gathering).<sup>33</sup>

Underlying this project to my mind are four fundamental beliefs: first, that the task of safeguarding the environment for present and future generations, while providing an acceptable standard of life, is probably the greatest challenge we face in the 21st century; secondly, that time is running out; thirdly, that the principles which should guide our response to that challenge (sustainable development, precautionary principle, public trusteeship) form a shared pool of knowledge and experience, which is now recognised

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<sup>33</sup> See *Judicial Protection of the Environment: at Home and Abroad* JEL Vol 16 No 3 (2004) p 315, for a description of my own involvement in this work, both through UNEP and the newly formed “EUFJE” (European Union Forum of Judges for the Environment).

in one form or another by most of the legal systems of the world; and fourthly, that judges at all levels, national and international, are uniquely placed, as decision makers and opinion formers, to put those principles into practice. Politicians come and go, and the political agenda changes with them, but as judges we have a longer-term responsibility.

We must also increasingly recognise that this responsibility is a shared one. Lord Woolf himself has been one of the foremost ambassadors of this message. At the Commonwealth Law Conference in Melbourne last year he said:

“It is my contention that all judges in every jurisdiction are, by the way they undertake their responsibilities, contributing to the quality of justice internationally. Today no country is cocooned from its neighbours. Human beings do not live in hermetically-sealed containers. While we remain citizens of our individual nations, what happens in any part of the globe can affect us all.”

There he was addressing common law judges, but he repeated the same message in May this year to a meeting of the Chief Justices of Arab countries under the UNEP programme:

“... it is my firm belief that the judiciary of different jurisdictions have an immense amount to learn from each other. Our legal systems may differ. They may fall on one side or the other of the divide between the common law and civil law systems or they may be a mixture of both systems or even unrelated to either of those systems. Yet, the problems with which they are confronted today are still very similar. They are: How to ensure that all sections of the public can obtain access to justice from our courts? How to deal with ever mounting caseloads? How to protect the public from increasing crime? How to deal with terrorist offences and in particular, in the case of such offences, how to balance the rights of the individual against the need of the state to protect the public from terrorist attacks? How to ensure the independence of the judiciary, and finally how to protect the environment, the critically important subject of this conference?”

He has also emphasised that the shared responsibility carried with it shared dangers. I quote again from his Melbourne speech:

“We not only have a global economy, we are part of a global society. As SARS has dramatically demonstrated, the health of any nation can be at risk if an infection afflicts any other nation. The same can be true of justice and the observance of the rule of law. The process may be slower, the rate of contagion not so high, but the spread of infection from one legal system to another is likely to be unstoppable unless a cure for the disease is found ...

... it is not only out of self-interest that we feel outraged when we see the system of justice being traduced within another member of the Commonwealth ... the way in which the rule of law is administered by a judge in one jurisdiction either contributes to, or detracts from, the observance of the rule of law generally.”

It is appropriate therefore that at this conference we are giving special attention to the quality of justice, and the standards of judicial conduct which are essential to achieve it. In this paper I propose to review briefly some of the recent codes of guidance on judicial conduct, and then to relate it to some particular problems in the field of environmental law.

## Codes of conduct and the Bangalore principles

In the United Kingdom, the formulation of codes of conduct for judges is relatively new. Sir Stephen Sedley gave an explanation in a recent paper:

“Certainly, since the Act of Settlement of 1700 which guaranteed the tenure of the judges of our higher courts subject only to a resolution of both houses of Parliament demanding their removal (something which has never so far happened), there has been a general public acceptance that British judges, whatever else they are, are incorruptible. King Edward III in the 14th century had sought to put his judges beyond the reach of bribery by raising their salaries and paying (as government does to this day) for summer robes trimmed with silk and winter robes trimmed with ermine. The judges’ standing was reinforced during the 18th century by a deliberate elevation of their social status, and in the early 19th century by setting their salaries at a level so high that they did not have to be increased again until 1953 ...”<sup>34</sup>

Now, however, we have our own “Guide to Judicial Conduct for England and Wales”,<sup>35</sup> published a few weeks ago, with an introduction by Lord Woolf. The Guide draws on work in other Commonwealth countries, including the Canadian Judicial Council’s Ethical Principles for Judges (1998), the Guide to Judicial Conduct published for the Council of Chief Justices of Australia (2002) and the Code of Conduct for Judicial Officers of the Federal Republic of Nigeria. It quotes the important words of Mr Justice Thomas in his formative study “Judicial Ethics in Australia” (1988):

“We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not some day depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations.”<sup>36</sup>

Perhaps even more important, in the international context, are the so-called Bangalore Principles of Judicial Conduct. They arose from a United Nations initiative with the participation of Dato’ Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers. A draft code of judicial conduct was prepared by a group comprising senior judges from Commonwealth countries. This was discussed at several conferences attended by judges of both common law and civil law systems and has also been considered by the Consultative Council of European Judges. Revised principles were adopted in November 2002 following a round-table meeting of Chief Justices held at the Peace Palace, The Hague, and were endorsed at the 59th session of the UN Human Rights commission at Geneva in April 2003.

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<sup>34</sup> “Judicial Ethics in England”: Paper for “Colloque sur la deontologie des magistrates” (Paris, December 2002). In the past, bribery even at the highest level was not unknown. Sir Francis Bacon (Lord Chancellor 1618–21) is alleged to have defended himself against charges of bias: “I usually accept bribes from both sides so that tainted money can never influence my decision”.

<sup>35</sup> Prepared by a working party under Lord Justice Pill.

<sup>36</sup> 2nd ed. (1997) p.9.

The principles are succinctly stated as six “values”: independence; impartiality; integrity; propriety; equality; competence and diligence. Each “value” is supplemented by a statement of the “principle” and a series of points relevant to its “application”. Inevitably they overlap. Thus the “principle” of independence is stated thus:

“Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.”

The first point of “application” is:

“A judge shall exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.”

That brief statement might be thought to cover all six values. But of course it is not the theory, but the practical implementation which is all-important. Accordingly, the Bangalore statement requires all national judiciaries to adopt “effective measures ... to provide mechanisms to implement these principles.”

Sadly, in some parts of the world basic judicial independence cannot be taken for granted. There may be a widespread perception, whether or not well-founded, amongst the population that their judicial officers are corrupt. The perception of corruption can be as damaging as corruption itself. In some countries, judges may still be both appointed and expected to do the executive’s will in sensitive matters. Some countries lack a tradition of separation of powers or independence. Some experience and even tolerate wide-spread corruption in official circles, from which it is hard for judges to remain immune. In others, the independence and integrity of judges is undermined by low pay and a continuing shortage of resources and facilities, bringing with it the familiar temptations of corruption and bribery. There has been increasing international awareness that sustainable and equitable economic development are closely linked with the existence of “a legal and judicial system which functions equitably, transparently, and honestly”.<sup>37</sup>

Within the Commonwealth, the Limassol Colloquium<sup>38</sup> in June 2002 on Combating Judicial Corruption highlighted the problem, and the possible solutions. The conclusions from this meeting were a number of practical recommendations (a summary is attached as an appendix to this paper). Those conclusions in turn were debated and endorsed at later CMJA Conferences in London and Malawi. A model training programme based on the recommendations has been drawn up and is being used at training programmes in different parts of the Commonwealth (including the East Caribbean, Mauritius, Zanzibar and Uganda).

However, corruption, actual or perceived, is only the most extreme form of the issues which the Bangalore principles are designed to address. Bias, actual or apparent, is a problem even in countries with a well-established tradition of judicial independence. The judge must not only be unbiased in fact, but must be seen to be unbiased. A

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<sup>37</sup> James Wolfensohn, President of the World Bank (quoted by Lord Woolf, in the Melbourne speech, see above).

<sup>38</sup> The Colloquium was organized by the Commonwealth Secretariat and the Commonwealth Magistrates and Judges’ Association. There were 33 judicial officers, including nine Chief Justices (or their equivalent), and all other ranks of judicial officer were represented., supported by a judicial trainer from the excellent Pacific Judicial Education Project, and the judicial ombudsman from Papua New Guinea. 24 Commonwealth jurisdictions were represented ranging in size from Kiribati to Canada.

dramatic example of this principle in the English courts was *R. v. Bow Street Magistrate ex p. Pinochet* [2000] 1 AC 119. The House of Lords, sitting as the supreme appellate court, set aside its own previous decision, which had authorized the extradition of the former Chilean head of state on torture charges. The background was that the human rights body, Amnesty International (“AI”), had been allowed to appear as a party to the first hearing, in support of the case for extradition. Lord Hoffmann, who had participated in that decision, had failed to disclose the fact that he was a director of AI’s wholly owned charitable subsidiary. There was no suggestion of actual bias, nor of course of any financial interest. Indeed, on one view, Amnesty’s charitable objectives in the field of human rights would be ones which most independent judges would espouse. However, this indirect involvement with a party to the litigation was an “interest” sufficient to require his disqualification.<sup>39</sup>

The limits are illustrated by another recent English judgment, this time of the Court of Appeal, in *Locabail (UK) Ltd v Bayfield* [2000] QB 451. This considered five separate cases raising different facts. In one a part-time judge, who also practised as a member of a firm of solicitors, had, during a trial, learned that his firm was indirectly involved in a case before him. A partner was acting against the former husband of a party, who was in the proceedings before him seeking to establish an equity claim to property to defeat her former husband’s creditors. The Court decided that this did not invalidate the proceedings. It regarded the connection as irrelevant on any reasonable view, and it was satisfied that the solicitor had made proper pre-trial enquiries to check whether his firm had any relevant connection.

In another case, by contrast, it was held that the line had been crossed. A barrister, sitting as a deputy-judge in a personal injuries case, decided for the claimant. The defendant then became aware of a series of articles in the professional press in which he had expressed views in trenchant terms on earlier cases in favour of the claimants, and critical of the defendants and their insurers.<sup>40</sup> It was held that, while extra-curricular comment in articles was not incompatible with the judicial role, the intemperate tone of the comments in this case might have led a fair-minded observer to suspect bias.<sup>41</sup>

Even within the common law system there may be differing views as to what is acceptable. For example, there is a significant difference of opinion within the common law world as to the propriety of judges undertaking at the request of government any public inquiry or report which is not strictly confined to matters of law. Judges from civil law systems, where free movement between adjudication and government is normal, may be surprised by this; but while Australian judges have decided that it is improper, and the American Bar Association’s Canons of Judicial Conduct say the same, senior English and Scottish judges have in recent decades conducted, generally with distinction, a variety of inquiries into public scandals or debacles. The objections to such activity are the counterpart of the arguments in favour. Judges can bring a sense of objectivity to questions which have become entangled in partisanship; but, in so doing, they may risk (at least in the eye of the public) becoming entangled themselves. The debate continues.

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<sup>39</sup> The appeal was reheard by a different panel of seven law-lords, who reached the same decision, albeit on narrower grounds.

<sup>40</sup> For example, in one he had accused the defence team of lacking compassion and perception, and in another he had listed lessons for plaintiffs’ lawyers including “we should not allow ourselves to be deterred by intimidatory tactics by defendants”

<sup>41</sup> See also *Davidson v Scottish Ministers* [2004] UKHL 34, where the House of Lords held that a judge, who as a government minister had played a leading role in promoting a particular aspect of a Bill in Parliament, should not have sat on a case in which that aspect was directly in issue.

In any event, none of this suggests that judges should live like hermits.<sup>42</sup> They should avoid the example of Lord Kenyon (Chief Justice of the Kings Bench 1788–1802) of whom it was said that he “was unacquainted with every portion of human knowledge except the corner of jurisprudence which he professionally cultivated.”<sup>43</sup> Judges enjoy the same rights and freedoms as other citizens, and are free with discretion to engage in the extra-professional activities of their choice. They should not be isolated from the societies in which they live. The judicial system can only function properly if judges are in touch with reality.

## Judicial independence and the environment

So far I have been addressing this important subject in general terms, as was required by the title of this session. However, I would not wish to end without saying something with reference to environmental law, which is the central theme of this conference. It hardly needs saying that the pressures and temptations in this field are perhaps stronger than in any other.<sup>44</sup> The potential financial gains from persuading judges to override environmental protections in the interests of commercial gain are all too obvious, as indeed may be the political pressures to do so. Judicial independence and courage may be tested almost to breaking point.

Fortunately there are many examples of such courage in action. The interventions of the India Supreme Court in the field of environmental law are well known. But it is not alone. In the Eppawela case from Sri Lanka, a government proposal to lease a phosphate mine to US company for 30 years conflicted with principles of sustainable development and had not been subject to adequate environmental assessment. The Sri Lankan Supreme Court intervened and in doing so emphasised the importance of public access to environmental information and drew on the policies of the European Commission and the Rio Declaration to provide back-up to the fundamental rights guaranteed by the constitution. In the Oposa case, the Supreme Court of the Philippines confirmed the right of a group of Philippino children to bring an action on their own behalf and on behalf of future generations complaining of the excessive timber-felling operations that were permitted by the Department of Environment. Their right to do so was based on the right to a “balanced and healthy ecology” incorporated in the 1987 constitution of the Philippines. In each case it is not difficult to imagine the political and economic pressures which the judges were confronting.<sup>45</sup>

However, we need to recognise that in the context of environmental law we face a special problem. Judges are required to be impartial. But how can we be impartial about the future of our environment – an issue in which all human beings have an interest? Happily, I think, we have now reached the stage where the principles of sustainable development are part of the common currency of all responsible citizens everywhere.

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<sup>42</sup> We should also not forget that judges are also consumers, and can lead by example. For example, the HL judiciary has a “green management framework” which has enabled it to make significant savings in the use of paper and electricity: see their Judiciary Environment Report 2003–4 on [www.judiciary.gov.hk](http://www.judiciary.gov.hk)

<sup>43</sup> Lord Campbell, *Lives of the Chief Justices* (quoted in David Pannick, *Judges*, OUP 1988 p 37).

<sup>44</sup> There may be subtle pressures even at the more mundane level of judicial training. In the USA, there has been considerable controversy recently about judges being offered environmental law seminars in attractive locations, at the expense of bodies allegedly funded by commercial interests. There is even a web-site devoted to the subject: [www.tripsforjudges.org](http://www.tripsforjudges.org)

<sup>45</sup> The pressures, and opportunities for abuse, may be even greater in jurisdictions in which judges are subject to election: see *Changing the Rules by Changing the Players: the Environmental Issue in State Judicial Elections* (study by the Georgetown Environmental Law and Policy Institute: [www.law.georgetown.edu/gelpi/sjselect/](http://www.law.georgetown.edu/gelpi/sjselect/)).

We do not show partiality by treating them as underlying principles for all our decision-making in the environmental field. But they must be applied within the constraints of our own legal systems. There is always a tension between judicial creativity and judicial conservatism. Our first duty is to the law, as it is. But as early as the 14th century Chief Justice Shareshull insisted: “No precedent is of such force as that which is right”.<sup>46</sup>

These are problems throughout the law. But in the field of environmental law the challenge is particularly pressing:

“Judicial lawmaking in general raises questions of democratic legitimacy. And judicial lawmaking in the field of environmental law raises additional questions about the technical expertise of courts, their ability to decide broad questions of social policy in the context of individual cases, and their ability to assess the broader systematic effects of their decisions, particularly in so-called polycentric cases, that is, cases where everything is interconnected.”<sup>47</sup>

So, there is the challenge. How can we use our judicial skills, within the proper confines of our own legal systems, and with due regard to our responsibilities as judges, to give practical effect to the fundamental international principles on which the future of our world depends? It is only by sharing our experiences, and learning from them that we can begin to find the answers. I am very grateful to the organizers of this conference for helping to show the way.

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<sup>46</sup> YB19 Edw. III, 376.

<sup>47</sup> Anderson and Galizzi, *International Environmental Law in National Courts* BIICL 2002, at p.7. Elsewhere they express “surprise” at the willingness of courts to refer to norms of international law without explaining their legal basis in national law. For example, they mention the Indian Supreme Court’s decision in *Indian Council for Environment Legal Action v Union of India* (1996) 3 SCC 215, where, when endorsing the polluter pays principle, the Court appeared to rely on an article of a treaty (Article 130r(3) of the Treaty of Rome), to which India was not a party. The book is a valuable comparative study of the treatment of international principles in the courts of 12 jurisdictions (including the EU, USA and India).



# Appendix – the Limassol conclusions

Recommendations of the Colloquium for judicial education on issues relating to corruption and judicial integrity.

1. All judicial officers should be given training on anti-corruption issues and on the promotion of professionalism and integrity both on appointment and at regular intervals during their tenure.
2. Such training shall include:
  - (i) the promotion of awareness of the guidelines of judicial behaviour applicable in the judicial officer's jurisdiction and the consequence of any breaches of those guidelines;
  - (ii) the promotion of the Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence and awareness of the tensions that arise between judicial independence and judicial accountability;
  - (iii) the training of judicial mentors;
  - (iv) the promotion of systems of mentoring for newly appointed judicial officers. Where possible such mentors should be of similar judicial rank;
  - (v) the writing of judgements;
  - (vi) the management of time, in particular with a view to ensuring reserved judgements are handed down with the minimum delay;
  - (vii) the handling of relations between the judicial officer, members of the general public, and local organizations, including members of the legal profession;
  - (viii) where possible and appropriate, the use of information technology and computers;
  - (ix) where they exercise a judicial role, the training of traditional leaders in ethical and anti-corruption issues;
  - (x) the consideration of differences between ethical issues and criminality;
  - (xi) the relationship of the judicial officer with members of the court staff;
  - (xii) awareness of the disguised nature of corrupt approaches and the broader effect of corrupt activity both on the judiciary as a body and upon society generally;
  - (xiii) where they exist, an awareness of agreed procedures for reporting corrupt approaches and information relating to corrupt activities, together the disciplinary consequences of a failure to follow those procedures.

3. The planning and running of such judicial training programmes should be the responsibility of judicial officers under the direction of a senior judge and should include contributions from judicial officers of all levels.
4. Time should be made available for preparation and attendance of judicial officers at training programmes.
5. For the promotion of collegiality amongst members of the Bench, it is considered best practice for such training to be carried out in groups of judicial officers of differing ranks.
6. It is the recommendation of the Colloquium that training programmes in this area comprise a significant element of group discussion of practical problems.

# Addendum

*Rt Hon. the Lord Woolf, Lord Chief Justice of England and Wales*

I am very sorry that I am unable to attend the IUCN Conference in Bangkok on Environmental Law. I know the Conference will be of the greatest importance in assisting to develop the appropriate use of the law in the protection of the environment. Having read Robert Carnwath's paper "The Ethics of Judging", I am able to give it my unqualified endorsement. In drawing attention to the Bangalore principles, the first of the six "values" that he mentions is "independence". That it should be mentioned as the first "value" is necessary. However, the other "values" are also individually and collectively equally fundamental. Independence of the judiciary is distinct from the other "values", apart possibly from equality, because the observance of independence is not dependent upon the individual judge. This is because there are two kinds of judicial independence. There is the institutional independence of the judiciary as a whole and the individual independence of a particular judge. The achievement of institutional independence is not in the gift of an individual judge or the judiciary collectively. But, judges can, by the quality of their conduct, influence the other arms of Government to provide the independence which is required.

In most of the developed world, the protection of the independence of the judiciary is linked to the need for there to be a separation of powers between the different arms of Government. Separation of powers has not historically been part of the United Kingdom constitutional scene. In practice, this has not impacted upon the independence of our judiciary. However, the constitutional reforms which are taking place now are likely to mean that the separation of powers will become more a part of our constitutional arrangements, though this will not be entrenched in a written constitution. These constitutional changes should improve the independence of our judiciary, though fortunately that independence is not dependent upon the changes.

Whether the standards set by the other "values" are met, is dependent upon each individual judge. It is critical that they adhere to them. If they do not do so, not only will this undermine confidence in the judiciary, it is likely to affect their independence as well. Governments will only tolerate the independence of the judiciary, if the judiciary themselves maintain proper standards. It is therefore critical that every judge should always be aware of the "values" and do his or her best to adhere to them. It is part of their individual responsibility as a judge always to maintain the highest standards of conduct. Even if our responsibilities may not be the same in every jurisdiction, what is required of us should be known and there can be no excuse for a judge not doing his or her best to comply with the relevant standards. Complying with those standards will enhance the public's confidence in the judiciary and the judiciary's reputation. A high reputation and a high degree of confidence will make it more difficult for those who wish to interfere with the judiciary's independence to do so. Each judge in each jurisdiction must seek to set an example to his or her colleagues of what being a judge involves.



# The need for recognition of environmental justice issues by the World Conservation Union

*Justice Kalyan Shrestha*

It is a great pleasure, and privilege for me to have this opportunity to address this august gathering of eminent justices and environmental legal academia of the world on the eve of the World Conservation Congress of IUCN - The World Conservation Union. I would like to thank the organizers for giving me this opportunity. I would also like to congratulate the IUCN Environmental Law Programme for separately holding this programme to deal with many serious and important issues relating to environmental law and justice.

Before going into detail, let me pay a heartfelt tribute to IUCN for its past collaboration with the Judges' Society, Nepal, which included interactive programmes for the judges of Nepal in order to inform and sensitize them on environmental issues in general and environment law in particular. Many important issues such as environmental law and justice, conservation of biological diversity, management of natural resources and people's participation in environmental decision making were discussed in the programmes, which were instrumental in vouchsafing their understanding of the environmental law which later would be reflected in their profession. Before that, there had been no attempts to organize programmes for judges on the issue, neither by the judiciary itself, nor by the government and the civil society organizations. That was the landmark event, and afterwards the process was joined in by some public-spirited organizations like Pro Public and Forum for Justice, which have been organizing some training programmes for the judges. Ironically, IUCN Nepal has not run any programmes for judges in recent times. I feel strongly that IUCN should continue to support the judges' programme on environmental law and justice, and harness their judicial capability. I believe judges hold important positions in the society, and hence can make a difference not only in the private life of the people but also in terms of the protection and conservation of the environment. Since environment is no longer limited to a national boundary, and hence not essentially a private law issue, the judicial community has every reason to be involved and further the cause of environmental conservation, good for the people of the present and future generations.

But the irony has been that the judicial contribution to the promotion of environmental justice has not been as succinct and tangible as it should have been. I believe judges have yet to develop a precise understanding of the concept of environmental justice. Protecting the environment without looking at the people affected in the management of the environment, often creates more problems than solutions. Most of the judicial decisions in many jurisdictions have been on the protectionist line creating more obligations for the poor people than helping them. I would like to see the justice issue from the perspective of the people, both as resource keepers and users. To me, environmental justice is not just the application of environmental protection law by the judiciary in a given case. If the environment is isolated from the calling needs of the people, and the protection of the resources becomes the ultimate interest in the bid to the

implementation of environmental law, then neither protection will be effective, nor will people feel anything good about it. The human aspect of the environmental management scheme should never be undermined.

The roles of human beings in environmental management are manifold. They are the threats to the resources as well as the resource keepers and beneficiaries. And finding equity for them in perfect harmony with their responsibilities towards nature and the human community should be the thriving philosophy to guide environmental justice issues. Seen from this perspective, if I may submit so, I would like to request IUCN to revise the name of the programme from Environmental Law Programme to 'Environmental Justice Programme' because I believe, 'Law' sometimes may not reflect the justice concerns of the people. Environmental issues, in order to be more relevant to the well-being of humankind, must be responsive to the human aspect. Environment as an issue has to be equally good for naturalists as well as development proponents. Sometimes parochial environment laws have to be changed to make them more justice-oriented, and programmes will be required to do so. It needs to be realized that sometimes environmental laws do not promote environmental justice and equity in the society. Environmental justice has to be seen in a broader social justice perspective with due emphasis on the protection of human rights and sustainable development.

I would like to call upon the judicial fraternity to see and understand the environmental law from the human perspective. Our understanding of laws, our approaches to implement them, and the evaluation of the relevance of our services will be ultimately judged by that. We have rendered many important judgements in the past in cases involving environmental issues, yet we may not have been concerned whether our people have experienced anything good from them or whether their quality of life is qualitatively affected by them. We, as judges, must take this Congress as an opportunity to examine ourselves as to our roles and relevance to our contemporary society. So much time has already been spent on tirelessly arguing about our need for independence and impartiality for our judicial institution. We have been expecting and jealously guarding our respect from the people. But have we ever questioned how worthy of respect we are from the perspective of our delivery of services? I believe, this is a time to review our own roles and make it appropriate according to the needs and aspirations of the people. If respect for judges has to come from society, then our social accountability cannot be overemphasised. We might have interpreted the laws according to our own perceptions and philosophy about the law instead of considering the social context and realities of the society. There are chances that we might have written our biased perceptions in our judgements instead of what the people needed from our services most. In such situations, we would not be seen as impartial and independent.

We have to admit that our erstwhile blindfold image sitting in the ivory tower is no longer tenable amidst the challenges of the 21st century. I am tired of appreciating the judicial roles and values characterized by impartiality and independence. Now is the time to resurrect those values at the service of the needy and the helpless, to whom I believe, our services have to be consecrated. Our sense of impartiality should be nourished by the facts of the hard realities of the people, and our sense of independence should be enlightened from within by our own capacity to recognise those realities and act accordingly. Often, I wonder that judges and the judicial services rendered by them are better appreciated by the poor people than by the rich people. Poor people respect the judgments and abide by them whereas powerful, rich and elite people try to influence the judgments rather than abiding by them. But experience shows that the concerns of the elites and people from the higher echelon of society would be more readily accommodated in the judicial responses than the concerns of the poor. Whether we would like to be seen from the perspective of the poor, it is often a problem. I believe it is imperative for judges to

have the right kind of understanding of the social context of the laws which they are called upon to administer. Environmental justice education should be there from that philosophy.

To date, 1.2 billion are living in abject poverty on less than US\$1 a day – 65% in Asia and 24% in Africa. Worldwide, close to 3 billion people, half of the world's population, live on less than US\$2 a day. Everywhere, the worst affected are children, women and old people. More than 800 million people suffer from hunger and malnutrition. Global poverty is shockingly deep and widespread.<sup>48</sup> I believe poverty is one of the causes and consequences of environmental degradation, which means comprehensive violations of human rights. If we, as judges, are not concerned about the environmental issues that have reduced the poor to such a state of affairs, and if we try to see the legal issues from a narrow private right spectrum and miss the public justice in broad daylight, then I believe, justice is comprehensively denied to our people. I feel ashamed if we even after that, expect one-sided respect from our people to whom justice has been denied. Environmental justice, to my mind, must accommodate the interest of all, more sensibly the interest of the commoners, who dwell in the environmental sites, and account for the management and exploitation of the resources. Their present and the future can by no means be ignored. I hope our concern over this issue should help in rebuilding the confidence of the people in the judicial institutions to find them effective in airing their causes, with fruitful consequences. For this reason, I see this event with great hope.

I understand there is a great inter-relation between environment, human rights and development, however, not at the expense of the other. Courts have a critical role to maintain a delicate balance between them and contribute to each component for the larger interest of the human community. Law is often utilized for its instrumentalist role. But seen from the perspective of globalization that has engendered liberalization of market forces which affects the fate of relatively marginalized communities, some liberalization of the market forces to better ensure the safety and well-being of the community as part of the public mission of environmental justice may also be worthwhile to put in operation. What is economically good may not be equally good for the community and the environment. So, some innovative framework may be devised so that globalization and development processes do not go contrary to the social and human good of the community.

In this type of forum, I feel I am duty-bound to join the campaign led by Mrs Pirro of the International Court for the Environment Foundation, an NGO, of Italy to set up an International Environmental Court. As it is so obvious, environmental issues create concerns across the border. Thus, certain mechanisms will have to be developed so that the international community can fix up some sort of international accountability on the course of their activities from within a particular country.

This morning I was watching a BBC television programme describing the recent trend of insufficient accumulation glaciers on Mount Everest. Though initially this may seem to be a national problem, ultimately Nepal is neither responsible for this change nor the only country to face the consequences of it. This august gathering does, of course, understand the implication of having less glaciers and faster melting of the ice in the Himalayas. What will happen if there is no snow on the mountain? Shall we still blame Nepal for that? This question often haunts me. It is largely the irresponsible overuse of resources and mishandling of the situation by other countries, particularly the developed countries, which have culminated in the terrible environmental degradation of the present magnitude. I am looking forward to the day when the international forum will hold accountable the actors

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<sup>48</sup> JF Richard, *High Noon, Twenty Global Problems and Twenty Years to solve them*. Basic Books; a member of the Persens Book Group, p. 90-91.

concerned and suggest restitution and other remedies to the affected countries and their people.

As regards the position of the Nepali Judiciary in the protection of environmental law and the promotion of environmental justice, the courts have been instrumental in the development of the environmental protection law itself. The Environmental Protection Act of Nepal was promulgated at the instance of the judicial directive of the Supreme Court to do so. The Constitution of the Kingdom of Nepal has entrusted the Supreme Court with immense responsibilities to protect the fundamental, legal and public rights of the people of Nepal. Hence public interest issues can be directly brought before the extra-ordinary jurisdiction of the Supreme Court, without requiring an encounter with the *locus standi* issue. There is already a variety of cases relating to environmental issues that are decided positively to the credit of the Supreme Court. In Yogi Narnarinath *et al.* vs. Prime Minister Girija Prasad Koirala *et al.*, even the hitherto nonjusticiable right created under the directives principles and the policies of the state are given effect by the Supreme Court directing the government to abide by the mandate of the Constitution and to live up to expectations. The contributions have ranged widely from pollution control to heritage protection, quality control and conservation of the resources through to invoking principles like public trust doctrine, environmental fairness and intergenerational equity which formed part of the international environmental legal instruments. There were, and yes there are some problems regarding the implementation of the environmental decisions made by the courts. Often the government seemed to take the pretext that they did not have enough resources to implement them. Of course, in the present context of massive domestic conflict, most of our resources are being spent on security measures rather than on the implementation of judicial decisions and the protection of environmental resources. The judiciary has developed a separate cell to oversee the implementation of the decisions but to not much avail. The impact of the conflict has furthermore deepened the environmental degradation causing much more injustice to the poor people, whose very health and livelihood opportunities are being threatened. The role of the judiciary at this critical juncture happens to be more complicated and challenging. At this point in time, the judiciary needs support in its capacity-building process to fully appreciate its responsibilities as well as to commit itself with high morale and motivation to the service of the people.

Before I conclude, I must admit that the judicial contribution to the promotion of environmental justice and equity has not been as significant as it should have been. We must go a little beyond our classical limitation to find effective remedies for our people and better ways of managing the environmental resources. Nature cannot be fully submerged at the hand of some private hand at the expense of the public interest and the protection needs of the nature itself. So a new way of thinking to promote environmental justice is appreciated. A new partnership amongst the Judicial fraternity and legal academia is imperative to give central stage to the well-being of humankind right from the recognition of their right to participation at all levels of decision making, including the formulation, enactment and implementation of the laws and policies. The future world should be able to see the general people more as environmental sovereign than as political sovereign in the present form, the exercise of which has been mostly carried away by forces other than the real stakeholders.

Part V

No resources, no justice?



# The need for judicial capacity building

*Prof. Dr L. Lavrysen, Judge - Court of Arbitration (Constitutional Court), Belgium*

The theme of this session is the question “Is there a need for judicial capacity building in environmental law?” I think this question can only receive a positive answer. The need is obvious and that for several reasons.

In the first place, environmental law is a complex and relatively new branch of law. The complexity has to do with the broad range of problems that must be addressed by environmental policy. There are indeed no simple solutions for very complex problems. The complexity has also to do with the development of environmental law on the different levels of government. Besides the ever-increasing corpus of international environmental law, regional environmental law also exists in some regions, like in the European Union. In federal states we have often federal and state environmental law and sometimes all this is completed by local regulations. Furthermore the process of development of environmental law has not ended, but is ongoing on all the afore-mentioned levels of government.

In the second place, environmental law, especially that part of environmental law that is intended to prevent and combat environmental pollution, is in some respects highly technical, as use is made of physical and chemical standards. Science and technology play an important role, as do economical and social factors.

Finally, except for some younger judges in some countries, most of the judges were not introduced to environmental law during their legal studies. Nevertheless, some of them will be confronted with environmental cases, be it sporadically or on a more regular basis, depending on the court system they have, ie if there is broad or narrow access to justice and if the possibilities to introduce environmental cases that are offered by the legal system are intensively used or not. Judges may be confronted with complex environmental cases and have to deal sometimes with highly specialized lawyers representing some parties, especially when big corporations are involved in such cases.

The need for capacity building of judges in environmental law can thus not be denied.

There is a need for initial training for most, if not all judges that can be confronted with environmental cases, so that they have a global overview of the basic principles of environmental law and the common legal mechanisms for environmental protection. That initial training must help them to situate the individual case they have to judge in a broader context of environmental policy and law.

There is also a need for continuing training for those judges who handle environmental cases on a regular basis. For them it is important to see how colleagues in their own country or elsewhere judge similar cases, so that they can learn from that, and so that in the end a common approach emerges worldwide. The constant evolution of environmental law is another reason why continuing training is a necessity.

The need for capacity building is present in both developed and developing countries. Of course, the need will be different from one country to another. In some of the developing countries judges may have no access at all to the basic materials to work with, such as the basic international treaties and the basic policy documents and declarations of principles. I believe that the UNEP programme for the development of a *Judicial Handbook on Environmental Law*, of a reader that comprises all basic legal materials and a collection of the most leading environmental cases, can fill this gap. Provided that this material is made available in languages that can be understood by those judges and that the material reaches them effectively, an important step will have been taken. It can constitute the basis for setting up initial training programmes in different parts of the world.

I think all efforts must be coordinated to set up those training programmes. UNEP seems the best placed actor to take a continuing lead with these programmes.

# The need for judicial capacity building on environmental law

*The Honorable Adel Omar Sberif, Deputy Chief Justice, Supreme Constitutional Court of Egypt*

Ladies and Gentlemen:

I am grateful for the opportunity to address this conference on the important theme of the need for judicial capacity building with regard to environmental law. In my speech, I will address the current situation, our priorities and future targets.

Today, the world continues to witness the development of environmental law. This legal development has progressed over the last three decades or so along with the increasing world awareness of the environment and the need to protect it, which has flourished since the Stockholm Conference in 1972, which sent a message to the world to respect the right to a healthy environment as a basic human right.

To the extent that this dynamic environmental movement has flourished, it is in large part due to growing judicial activism in the field of environmental law and sustainable development. Judiciaries throughout the world have carried the considerable burden of this development at both national and international levels. Recent analytical studies carried out by UNEP, IUCN and other concerned organizations and institutions show us that courts of law in many countries have demonstrated through their judgments and pronouncements remarkable concern for the promotion of environmental law.

Arab judiciaries are not alien to these developments on environmental law. Today, because of the growing international awareness of the environment, most national judiciaries, including judiciaries of Arab countries, have become more involved in this new branch of law. Their efforts include not only the application of existing legal texts, but also the exercise of a more proactive role in applying valid legislation.

When it comes to the enforcement of environmental law, I do not like to be pessimistic, but the reality is that in almost every part of the world, national and international laws on the environment are not being effectively enforced. UNEP studies have shown that this negative phenomenon is widely regarded as a principal cause of alarmingly high levels of pollution, environmental degradation, uncontrolled waste generation and disposal, and unsustainable, even wasteful, use of natural resources. These problems in turn cause serious environmental, social and economic consequences at national, regional and global levels.

As judges, legal scholars and practitioners in the field of the environment, we must recognise that this failure to apply environmental laws is caused in large part by a deficiency in our understanding of the environment and environmental law.

As judges, legal scholars and practitioners in the field of the environment, we must recognise the urgent need to strengthen the capacities of judges, prosecutors, legislators, and all persons who play a critical national role in the implementation, development and enforcement of environmental laws. By strengthening the capacities of legal

professionals, we can promote the goals of sustainable development through the application of the rule of law and the democratic process.

For many judges, the notion of additional training sounds burdensome and unnecessary, perhaps because of the high demands on their time, which leaves little room for additional activities.

But judicial training on matters of the environment is not simply an extracurricular activity. The current situation has shown us that old methods are insufficient to address new environmental concerns. The legal solutions to environmental problems are complex, and the cases are characterized by a high degree of technical detail. Therefore, as judges, legal scholars and practitioners, we should not hesitate to admit the importance of continuing education, training and specialized knowledge. Accordingly, we must also recognise that specific problems demand specific knowledge. Without knowledge of the law and the specific problems addressed by it, we cannot hope to achieve any meaningful application of the law.

Today, the increase in environmental challenges to our communities demands that judiciaries, as the guardians of the rule of law, stay well informed of environmental law. Only by staying informed may they boldly and fearlessly enforce national and international standards. In recent years, we have seen widespread recognition of this sentiment, accompanied by many calls for the capacity building of judges with regard to environmental law.

The increasing development of environmental law at the international level continually imposes duties on national judiciaries, in both Arab countries and elsewhere, to observe and become aware of the progressive developments this evolving branch of law has produced and continues to produce for the welfare of human beings and the international community.

In the past few years, there has been a rapid creation and evolution of multilateral environmental agreements, national constitutions and statutes concerning the protection of the environment. These developments require the courts to continually interpret and apply new legal instruments in keeping with the principles of sustainable development.

In addition, there is an urgent need for an improvement in public access to and sharing of relevant information, public participation in environmental decision-making, and access to justice for the settlement of environmental disputes. The fulfilment of these needs depends to a great extent on the existence of an independent, learned judiciary capable of handling environmental disputes.

In the Arab region, we are now convinced that our main target should be the improvement of the capacity of those involved in the process of promoting, implementing and developing environmental law. We should also seek to improve public access to relevant information, public participation in environmental decision-making, and public access to justice for the settlement of environmental disputes.

In the Arab region, there has been a growing movement toward sub-regional, regional and global collaboration among national judiciaries, with a focus on benefiting from each other's knowledge, experience and expertise.

In May 2004, judges from the Arab world gathered in Cairo to discuss the role of judicial cooperation in solving environmental problems. At the end of November, these judges will meet again to formally accept the statute that establishes the Union of Arab Supreme Court for the Protection of the Environment.

The creation of the judges' union, which will ensure long-term cooperation, marks an important recognition: that we cannot solve environmental problems by passing a single

law or exchanging ideas at a single conference. These issues demand constant attention, and our institutions must respond accordingly.

As we move forward, we should give serious consideration to well-drafted proposals to strengthen the capacity building of judges, prosecutors, legislators and others in order to help judiciaries to carry out their functions on a well-informed basis. In addition, appropriate funds should be made available to facilitate the implementation and regulation of environmental law by concerned judiciaries. Governments of concerned Arab countries seem to be supportive to their judiciaries in this regard, and it is hopeful that the region will keep moving ahead toward developing the capacity building of judges and other legal stakeholders in order to arrive at a better enforcement of environmental law.









