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SACEP / UNEP / NORAD Publication Series on Environmental Law and Policy No.4

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**SACEP / UNEP / NORAD**

**REPORT OF THE REGIONAL SYMPOSIUM ON  
THE ROLE OF THE JUDICIARY IN  
PROMOTING THE RULE OF LAW IN THE  
AREA OF SUSTAINABLE DEVELOPMENT**

**Colombo, Sri Lanka  
4-6 July, 1997**

**Published by:**  
**South Asia Co-operative Environment Programme (SACEP) and**  
**United Nations Environment Programme (UNEP)**  
**with financial support from**  
**The Norwegian Agency for Development Co-operation (NORAD)**



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**Editors**

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*Director, Environmental Law and Institutions Centre, UNEP*

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# Table of Contents

Introduction.....	iii
List of Participants.....	vii
Agenda.....	xiii

## I. INAUGURATION

Address by Mr. Hussain Shihab, Director, SACEP.....	1
Address by Hon. Nandimitra Ekanayake - Minister of Forestry & Environment, Sri Lanka.....	5
Address by H. E. Ove Christian Danbolt - Head of Mission of The Royal Norwegian Embassy.....	9
Address by Mr. Donald Kaniaru Director, Environmental Law Centre/UNEP, on Behalf of Ms. Elizabeth Dowdeswell, Under Secretary General of the United Nations and Executive Director of UNEP.....	11
Address by Hon. G. L. Peiris, Minister of Justice, Constitutional Affairs, Ethnic Affairs & National Integration, Sri Lanka.....	13
Inaugural Address by Chief Guest, Hon. K. B. Ratnayake Speaker of The House of Parliament, Sri Lanka.....	21
Keynote Address by H. E. Judge Christopher G. Weeramantry Vice-President of The International Court of Justice.....	25
Vote of Thanks by Mr. Prasantha Dias Abeyegunawardene, Deputy Director/Programmes, SACEP.....	39

## II. OPENING SESSION

“The Role of Law in Making Development More Sustainable” – <i>Professor Mohan Munasinghe</i> .....	47
---	----

### Country Presentations

Bangladesh -Hon. Mr. Justice A. T. M. Afzal.....	61
India - Hon. Mr. Justice B. N. Kirpal.....	73
Maldives - Hon. Mr. Abdullahi Majid.....	79

Nepal - <i>Hon. Mr. Justice Trilok Pratap Rana</i> .....	87
Pakistan - <i>Hon. Mr. Justice Raja Afrasiab</i> .....	99
Sri Lanka - <i>Hon. Mr. Justice Mark Fernando</i> .....	105

### **III. NEW DIRECTIONS IN THE PREVENTION AND RESOLUTION OF ENVIRONMENTAL DISPUTES**

“The Experience of a Specialist Environmental Court”	
- <i>Hon. Mr. Justice Paul Stein</i> .....	143
“New Directions: The Prevention and Resolution of Environmental Disputes”	
- <i>Hon. Mr. Justice B. N. Kirpal</i> .....	161
“The Environmental Appeal Tribunal of Mauritius”	
- <i>Hon. Mme. D. Beesoondoyal</i> .....	171
“Principles of Environmental Justice: A Foundation for Dispute Prevention and Resolution”	
- <i>Professor Nicholas A. Robinson</i> .....	181

### **IV. CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL AND NATIONAL LAW IN THE FIELD OF SUSTAINABLE DEVELOPMENT**

“The Challenge for the Judiciary in the Application of General Principles of Environmental Law”	
- <i>Mr. Donald Kaniaru</i> .....	197
“Contemporary Developments in National Laws in the Area of Sustainable Development with Special Reference to Asia”	
- <i>Hon. Sarath Silva</i> .....	215

### **V. CLOSING SESSION**

Closing Remarks - <i>Hon Mr. Justice A. R. B. Amerasinghe</i> .....	223
Closing Address - <i>H.E. Judge Christopher G. Weeramantry</i> .....	229



## **INTRODUCTION**

The Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development was convened jointly by the South Asia Co-operative Environment Programme (SACEP) and the United Nations Environment Programme (UNEP) with funding from the Royal Norwegian Government through NORAD, and was held in Colombo, Sri Lanka from 4-6 July, 1997. This important initiative was undertaken by the two organisations under the on-going Joint SACEP/UNEP/NORAD Project on Environmental Law in South Asia.

The Symposium brought together superior court judges from countries in South Asia to examine contemporary developments in the field of environmental law - both international and national - exchange views on experiences in their respective jurisdictions relating to the progressive development of this new and rapidly growing branch of law, and to find ways and means of strengthening judicial co-operation in the region.

The Vice-President of the International Court of Justice, H.E. Judge Christopher G. Weeramantry served as the Moderator of the Symposium while Hon. Mr. Justice Ranjith Amerasinghe, Judge of the Supreme Court of Sri Lanka served as its Secretary General. Hon. Mr. Justice P.N. Bhagwati, the former Chief Justice of India, who served as the Advisor to UNEP and SACEP in the organisation of the Symposium, was unfortunately unable to attend as he was taken ill on the eve of the Symposium.

Among those who presented papers at the Symposium were: the Chief Justice of Bangladesh, Hon. Mr. Justice A.T.M.Afzal; the Chief Justice of Nepal Hon. Mr. Justice Trilok Pratap Rana; Hon. Justice B. N. Kirpal, Judge of the Supreme Court of India; Hon. Mr. Justice Raja Afrasiab Judge of the Supreme Court of Pakistan; Hon. Mr. Justice Mark Fernando, Judge of the Supreme Court of Sri Lanka; Hon. Sarath N. Silva, Attorney General of Sri Lanka; Hon. Abdullahi Majeed, Deputy Minister of Planning, Human Resources and Environment of the Maldives; Hon. Mr. Justice Paul Stein, Judge of the Court of Appeal, New South Wales, Australia and former Judge of the Land and Environmental Court of NSW; Hon. Mme. D. Beesoondoyal, Chair, Environmental Appeal Tribunal of Mauritius; Mr. Donald Kaniaru, Director of UNEP's Environmental Law Centre with his colleague Professor Charles Okidi; Professor Nicholas A. Robinson, Chair, IUCN Commission on Environmental Law; and Prof. Mohan Munasinghe, Senior Adviser on Sustainable Development at the World Bank.

The Symposium recommended a series of actions referred to below, designed to facilitate and encourage the judiciaries in the region to take cognisance of the growing body of judicial decisions and formulations - both within and outside

the region- on environment related issues, especially in regard to balancing environmental and developmental considerations in judicial decision making. UNEP and SACEP with financial assistance from NORAD are currently implementing these recommendations under the Joint SACEP/UNEP/NORAD Project on Environmental Law in South Asia.

Following the ceremonial inauguration, the heads of country delegations presented country papers which outlined the current status of legal and institutional arrangements for environmental management and for integrating environmental considerations in executive decision making, and also discussed the reasoning behind important judicial decisions in the area of environment and development in their respective jurisdictions. This was followed by a detailed consideration of two themes: New directions in the prevention and resolution of environmental disputes, and, Contemporary developments in international and national environmental law.

The following are among the important legal issues that were discussed at the Symposium against the backdrop of judgements of superior courts of the region in recent environment related cases: Incorporation of the principle of sustainable development, the polluter pays principle, the precautionary principle, and the principle of continuous mandamus in the corpus of international and national law; invocation of the extraordinary jurisdiction of the Supreme Court in environmental matters; public participation, including substantive and procedural matters relating to public interest litigation; the *erga omnes* character of environmental matters and the problem of applying *inter partes* procedures in environmental dispute resolution; limits of the concepts of "aggrieved person" and "locus standi" in regard to environmental damage; inter-generational and intra-generational equity; court commissions to ascertain facts and an authoritative assessment of the scientific and technical aspects of environment and development issues; interpretation of constitutional rights including right to life and right to a healthy environment; public's right to information; obligation for continuous environmental impact assessment; application of the public trust doctrine in regard to natural resources and the environment; corporate responsibility and liability; approaches to judicial reasoning in environment related matters including the importance of traditional values and ideas, and the importance of promoting public awareness and environmental education at secondary and tertiary levels.

These discussions were predicated on the recognition of the responsibility of the judiciary to mould emerging principles of law with a view to giving these a sense of coherence and direction, while always acting within the framework of legislation and law and without trespassing on the spheres of the legislative and executive branches of government.

The Symposium further considered the experience of countries in the region in regard to the legislative and institutional approaches to promoting environmental

management and the integration of environment and development in decision making, including collective approaches to standard setting, incentive mechanisms to promote voluntary compliance, and expanding the scope of public participation, including citizen suits. Following presentations on the Australian and Mauritius experience in alternative dispute resolution mechanisms in the environment field, the Symposium discussed new ways of environmental dispute resolution which placed greater emphasis on prevention and avoidance of disputes than on the adversarial dispute resolution mechanisms which are currently in force in almost all the South Asian countries.

Following the recommendations of the Symposium, UNEP and SACEP have published *The Compendium of Summaries of Judicial Decisions in Environment Related Cases*, which provides an overview of the thrust of judicial decisions especially in South Asian countries on environment and development issues. As Judge Weeramantry has said in the Foreword to the *Compendium*, "This volume, hopefully the precursor of others to follow, will be a useful guide to all the judiciaries of the region in the discharge of the heavy responsibilities that will increasingly devolve upon them in the environmental area. It is to be hoped it will foster international Judicial dialogue in the region, inspire the judiciary with new enthusiasm, and provide an overarching vision of what collective thought and action can achieve in an area of such momentous importance to the human future. It will help in building up the necessary judicial initiatives to meet these problems which are without precedent in the long annals of the law."

Other recommendations of the Symposium included the publication in 1998 of the full texts of the judgements referred to in the *Compendium*, to be followed from 1999 by an annual UNEP/SACEP Asia-Pacific Environmental Law Report, publication of a compendium of texts of selected national environmental legislation of South Asian countries, and the publication in 1999, of a revised updated edition of the 1997 SACEP/UNEP/NORAD South Asia Handbook of Treaties and Other Legal Instruments in the Field of Environment. It has also been resolved to convene such judicial meetings once every two or three years. Work is currently underway on the other publications, as well as the development of a SACEP/UNEP Computerized Environmental Law Server for South Asia, which will be accessible on Internet in early 1998.

Donald Kaniaru

Lal Kurukulasuriya

Prasantha Dias Abeyegunawardene

Chad Martino

Editors

## **LIST OF PARTICIPANTS**

### **BANGLADESH**

**Hon. Justice A. T .M. Afzal**  
Chief Justice of Bangladesh

**Mr. Zahurul Islam**  
District & Sessions Judge  
Chittagong

**Mr. A. K .M. Fazlur Rahman**  
District & Sessions Judge  
Pirojpur

### **BHUTAN**

**Mr. S. Khandu**  
Lawyer

**Mr. S. Lhundup**  
Lawyer

### **INDIA**

**Hon. Mr. Justice B. N. Kirpal**  
Judge of the Supreme Court of India

**Hon. Mr. Justice A. Q. Parray**  
Judge, Jammu & Kashmir High Court,

**Mr. Vishwanath Anand**  
Secretary  
Ministry of Environment & Forests,

## **MALDIVES**

**Hon. Mr. Abdullahi Majeed**

Deputy Minister of Planning, Human Resources &  
Environment,

**Skh. Hussain Rasheed Yoosuf**

Director General Judicial Affairs  
Ministry of Justice,

**Uz. Ahmed Mohamed**

Deputy Director Legal Affairs  
Ministry of Justice,

**Uz. Husnu Suood**

State Attorney.  
Office of the Attorney General

## **NEPAL**

**Hon. Mr. Justice Trilok Pratap Rana**

Chief Justice of Nepal,

**Mr. M.D. Batta**

Registrar  
Supreme Court of Nepal

**Mr. T.M. Sakya**

Secretary  
Ministry of Law and Justice

## **PAKISTAN**

**Hon. Mr. Justice Raja Afrasiab**  
Judge of the Supreme Court of Pakistan

**Hon. Mr. Karamat Nazir Bhandhari**  
Judge,  
Lahore High Court

**Hon. Mr. Justice Jawaid Nawaz Khan Gandapur**  
Judge,  
Peshawar High Court

**Hon. Mr. Abdul Salam Khawar**  
Sessions Judge, Member Inspection Team

## **SRI LANKA**

**Hon Mr. Justice Mark D .H. Fernando**  
Judge of the Supreme Court

**Hon Mr. Justice C ,V. Wigneswaran**  
Judge of the Court of Appeal,

**Hon Mr. Justice J. A. N. de Silva**  
Judge of the Court of Appeal,

**Hon. P. Wijeyaratne**  
Judge of the High Court – Colombo

**Mr. R. A. N. G. Amaratunga**  
Judge of the High Court

**Mr. Lalanath de Silva**  
Attorney-at-Law

**SRI LANKA - OBSERVERS**

**Hon. P. H. K. Kulatillaka**

Judge of the High Court - High Court,

**Hon. A.M. Somawansa**

Judge of the High Court

**Hon. D. Kitulgoda**

District Judge

**Hon. M.G. Wijetunga**

Magistrate Colombo Fort,

**Hon. S. J.W. Ambepitiya**

District Judge

**Hon. Rohini Perera**

District Judge

**Hon. S. V. P. M. Nanayakkara**

Chief Magistrate - Colombo

**Hon. W. C. Pushpamali**

Magistrate

**Hon. N. S. Rajapakse**

Magistrate

**Hon. P. Ranasinghe**

Magistrate - Negombo

## **RESOURCE PERSONS**

**H. E. Hon. Mr. Justice C.G. Weeramantry**  
Vice-President,  
International Court of Justice

**Hon. Mr. Justice A. R.B. Amerasinghe**  
Judge of the Supreme Court of Sri Lanka  
Supreme Court

**Prof. Mohan Munasinghe**  
Senior Adviser – Sustainable Development  
and  
Distinguished Visiting Professor  
Colombo University

**Rt. Hon. Justice Paul Stein AM**  
Judge of the Court of Appeal – New South Wales,  
Court of Appeal,

**Hon. Mme. D. Beesoondoyal**  
Chair,  
Environmental Appeal Tribunal of Mauritius

**Prof. Nicholas Robinson**  
Chair IUCN Commission on Environmental Law

**Mr. Donald Kaniaru,**  
Director  
Environmental Law Institutions Programme  
Activity Centre (ELI/PAC)  
United Nations Environment Programme (UNEP)

**Mr. Lal Kurukulasuriya**  
Chief  
Regional Environmental Law Programme  
UNEP Regional Office for Asia and the Pacific

**Mr. Hussain Shihab**  
Director  
South Asia Co-operative Environment Programme



**Mr. Prasantha Dias Abeyegunawardene**

Deputy Director Programmes

South Asia Co-operative Environment Programme

**Mr. Praduymna Kumar Kotta**

Project Manager

SACEP Environmental & Natural Resources

Information Centre (SENRIC)

**Mr. K .H. J. Wijayadasa**

Consultant

South Asia Co-operative Environment Programme

## **AGENDA**

### **PROGRAMME FOR THE CEREMONIAL INAUGURATION**

**FRIDAY 4<sup>TH</sup> JULY 1997**

- |           |  |
|-----------|--|
| 16.30 Hrs | Participants & Guests take their seats   |
| 16.50 Hrs | Arrival of Chief Guest Hon. K.B.Ratnayake, Speaker of the Parliament of Sri Lanka.<br><br>Inauguration with Lighting of Lamp<br>National Anthem  |
| 17.00 Hrs | Welcome Address by Mr. Hussain Shihab, Director, South Asia Co-operative Environment Programme (SACEP)   |
| 17.10 Hrs | Address by Chairperson Hon. Nandimithra Ekanayake,<br>Minister of Forestry & Environment   |
| 17.25 Hrs | Address by Mr Ove Christian Danbolt<br>Chief of Mission, The Royal Norwegian Embassy   |
| 17.35 Hrs | Address by Mr. Donald Kaniaru, Director, Environmental Law Centre, UNEP, on behalf of Ms. Elizabeth Dowdeswell, Under Secretary General of the United Nations Executive Director of UNEP |
| 17.45 Hrs | Address by Hon. G.L. Peiris,<br>Minister of Justice and Constitutional Affairs, Ethnic Affairs and National Integration  |
| 18.15 Hrs | Keynote Address by H.E. Judge Christopher W. Weeramantry,  |

Vice-President of the International Court of Justice  
(ICJ)

- 18.45 Hrs      Address by the Chief Guest, Hon. K.B.Ratnayake,  
Speaker of the Parliament of Sri Lanka
- 19.00 Hrs      Vote of Thanks by Mr. Prasantha Dias  
Abeyegunawardene,  
Deputy Director Programmes, SACEP

**SATURDAY 5<sup>th</sup> & SUNDAY 6<sup>th</sup> JULY**  
**SUBSTANTIVE SESSIONS (CLOSED SESSIONS)**

*The Moderator of the Symposium, His Excellency Judge Christopher G.  
Weeramantry will chair all Substantive Sessions.*

*The Secretary General of the Symposium, Hon. Mr. Justice A.R.B.  
Amerasinghe, will serve as Rapporteur General.*

**SATURDAY 5<sup>th</sup> July**  
**MORNING SESSION**

(09.00 - 12.30 Hrs)

Introductory Remarks by Hon Mr. Justice A.R.B. Amerasinghe  
*Judge of the Supreme Court of Sri Lanka & Secretary General of  
the Symposium*

"The Role of Law in Making Development More Sustainable"  
by Prof. Mohan Munasinghe  
Senior Adviser – Sustainable Development  
The World Bank

**COUNTRY PRESENTATIONS BY HEADS OF DELEGATIONS  
ON THE ROLE OF THE JUDICIARY (IN THEIR RESPECTIVE  
COUNTRIES) IN PROMOTING THE RULE OF LAW IN THE  
AREA OF ENVIRONMENT**

- Bangladesh
- India
- Pakistan
- Sri Lanka
- Maldives
- Nepal

Discussion

*Summing up by the Moderator His Excellency Judge Christopher  
G. Weeramantry*

12.30 - 15.00 Hrs LUNCH

**AFTERNOON SESSION**

(15.00 - 18.00 Hrs)

**NEW DIRECTIONS IN THE PREVENTION AND RESOLUTION  
OF ENVIRONMENTAL DISPUTES**

Presentations by:

- Hon. Mr. Justice B. N. Kirpal  
Judge, Supreme Court of India
- Hon. Justice Paul Stein, Judge of the Court of Appeal, New South  
Wales, Australia and former Judge of the Land and  
Environmental Court of NSW.
- Mme. D. Beesoondoyal,  
Chair, Environmental Appeal Tribunal of Mauritius
- Professor Nicholas A. Robinson,  
Chair, IUCN Commission on Environmental Law

Discussion

*Summing up by the Moderator His Excellency Judge Christopher G. Weeramantry*

**SUNDAY 6<sup>th</sup> JULY**  
**MORNING SESSION**  
**(09.00 - 13.15 Hrs)**

**CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL  
AND NATIONAL LAW IN THE FIELD OF SUSTAINABLE  
DEVELOPMENT**

Presentations by:

- Hon. Sarath N. Silva  
Attorney General of Sri Lanka
- Mr. Donald Kaniaru  
Acting Director, Environmental Law and Institutions Centre,  
UNEP

**CLOSING SESSION**

**MEASURES FOR CONTINUING JUDICIAL CO-OPERATION  
ON ENVIRONMENTAL LAW IN SOUTH ASIA**

Address by Hon. Mr. Justice A. R. B. Amerasinghe  
Judge of the Supreme Court of Sri Lanka & Secretary General of  
the Symposium

Address by H.E. Judge Christopher G. Weeramantry

## **I. INAUGURATION**

**WELCOME ADDRESS BY MR. HUSSAIN SHIHAB**

**DIRECTOR, SOUTH ASIA CO-OPERATIVE ENVIRONMENT  
PROGRAMME (SACEP)  
COLOMBO, SRI LANKA**

Hon. Mr. Justice A.R.B. Amerasinghe, Mr Nandimithra Ekanayake, Minister of Forestry and Environment, Government of Sri Lanka, Hon. K. B. Ratnayake, Speaker of Parliament, Sri Lanka, Hon. Ministers, Your Excellencies, Hon. Chief Justices and Judges, H. E. Judge Christopher Weeramantry, Vice-President, International Court of Justice, Mr. Donald Kaniaru, Director of the UNEP Environmental Law Programme, distinguished guests, ladies and gentlemen.

It is indeed a singular honour and privilege for me to welcome each and every one of you to the ceremonial inauguration of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, which is organized in collaboration with UNEP within the joint UNEP/SACEP/NORAD Project in Environmental Law and Policy in South Asia.

We are extremely fortunate to have with us today such a distinguished gathering of legal luminaries from within and outside the SACEP member countries, including the Vice-President of the International Court of Justice, three Chief Justices, several senior Judges of the Supreme Courts and other superior courts and decision makers at the highest level of Government on matters relating to environment and development. Your decision to participate in the Symposium, despite your busy and onerous court schedule and other engagements, amply demonstrates the great importance that you have attached to this initiative and augurs well for its success. A more auspicious launching, we could not have hoped for.

I would like to take this occasion to welcome and thank H. E. Mr Ove Christian Danbolt, Head of Mission of The Royal Norwegian Embassy in Colombo for his country's role in this very important project. Clearly without the very extensive support that the Government of Norway have provided to developing and implementing environment and development programmes in the SACEP Region, we would not have been able to be here this evening. Your Excellency, I have no doubt that you and your Government will feel vindicated in the faith and confidence that you have reposed in the South Asia Cooperative Environment Programme to deliver well thought out and needs-responsive programmes in the field of environment and development in the countries of South Asia.

In doing so, we have struck an enduring partnership with the United Nations Environment Programme (UNEP) which has tremendous expertise and experience in the field of environmental law, unparalleled within the United Nations system. I would be failing in my duty if I did not thank the Executive Director of UNEP, Ms. Elizabeth Dowdeswell, for the key role that she has played in forming this partnership.

I should like to take this opportunity to inform this august and distinguished gathering of the origins of South Asia Co-operative Environment Programme, and the role it has played in galvanizing and catalyzing regional cooperation in the area of the environment. The idea of a regional environmental organization for South Asia was conceived at a high level Ministerial Meeting of South Asian countries in February 1981. Within a year, this idea was translated into reality, and SACEP was established and became a legal entity on the 7th of January, 1982. SACEP owes its origins to the United Nations Environment Programme (UNEP) which is considered its "Godfather". So it is no wonder that the two organizations have built such a close bond of friendship and mutual support, which has greatly benefitted the countries of South Asia.

In today's context of scarce human and financial resources, international organizations cannot afford to engage in wasteful duplication of efforts. Partnerships, in which comparative advantages of different organizations are pooled to deliver needs-responsive and result-oriented programmes, are the only way to maximize impacts of international technical assistance. This initiative is as good an example as any of such fruitful collaboration. SACEP was a response of the Governments of countries in South Asia to a widely felt need for a regional organization to promote and support the protection of the natural and human environment and to promote judicious use of environmental resources. During its 15 years of existence SACEP has carried out many important projects and programmes in the field of environmental management in South Asia. It has grown in stature and has acquired the recognition and respect of Governments, international organizations and donor community as the principal inter-governmental implementing organization in the field of environmental management in the South Asia region. Among its main achievements has been the bringing to South Asia of, what has been considered by many, the jewel of the crown of UNEP's achievements, the Regional Seas Programme. This programme was formally adopted at a meeting of plenipotentiaries of concerned member countries on 24 March 1995, in New Dehli. SACEP was designated as the Secretariat for the implementation of the South Asian Action Plan. Under this Action Plan, several activities of far reaching significance are being implemented. They include the implementation of the Global Programme of Action in the area of land based sources of marine pollution, development of training manuals for regional training for the management of protected areas and coral island eco-systems, finalization of an oil pollution contingency plan, and activities in the field of integrated coastal zone management.



In 1994, SACEP received funding through a technical assistance grant from the Asian Development Bank and UNEP's Environmental Assessment Programme for Asia and the Pacific (UNEP-EAPAP) and set up a Geographical Information System (GIS) unit, known as SACEP's Environmental and Natural Resource Information Center (SENRIC) to complement UNEP-EAP's activities in South Asia. This center is housed within the SACEP Secretariat in Colombo. We have also just begun a Regional Information Service on Environmental Law. SACEP has also been active in capacity building; environmental impact assessment; education and awareness; floral and faunal bio-diversity; and forests.

Environmental law is the latest of SACEP's programmes which are being carried out in close collaboration with UNEP. This is indeed a crucial area of our overall programme because, at national levels, environmental laws and regulations constitute the principal instrument of translating environmental and developmental policies conceived in the context of sustainable development, into action. It is often the legal development process itself that serves as the first occasion for developing an appropriate policy framework through a consultative and participatory process. At the international level, of course, environmental law is the mechanism by which global and regional consensus is forged on ways of addressing international environmental concerns. For SACEP, it is gratifying that most of our activities are bearing fruit, and that the member countries have begun to realize the tangible benefits of these cooperative efforts. A characteristic feature of SACEP's programme is its reliance on national and regional expertise complemented, where necessary, by expertise from outside the region. The present Symposium clearly bears out this philosophy and approach.

I do not intend to say more than to once again, take this opportunity to welcome all of you on behalf of SACEP, UNEP, NORAD and the Ministry of Forestry and Environment of Sri Lanka the joint organizers of this Symposium, and to wish your deliberations every success,

Thank you.

**ADDRESS BY HON. NANDIMITRA EKANAYAKE**

**MINISTER OF FORESTRY & ENVIRONMENT, SRI LANKA**

Hon. Speaker of the House of Parliament, Hon. Minister of Justice and Constitutional Affairs, the Representative of the Executive Director of UNEP, Director of SACEP, H. E. the Ambassador of Norway, distinguished participants and guests.

It gives me great pleasure to welcome you to the Inauguration of the Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development. I am happy that the Hon. Speaker of the Parliament of Sri Lanka, Hon. K. B. Ratnayake is here to represent the Prime Minister of Sri Lanka, the Hon. Sirimavo Bandaranaike, who, unfortunately was unable to come to inaugurate this Symposium due to unavoidable circumstances. During the three terms of office she has served as the Prime Minister of Sri Lanka, first in 1960 as the first woman Prime Minister in the world, then in 1970 and now again in the Government of Her Excellency Chandrika Kumaratunga, she has given inspiring leadership to pursuing a path of development that safeguards our national values, national heritage and national environment. Her diplomatic skills and her contribution to the Non-aligned Movement have been internationally recognized. Negotiations with the then Prime Minister of India, Shrimathi Indira Gandhi, particularly the Katchativu Agreement not only showed her diplomatic skills to the world, but also heralded a new era of settlement of disputes through friendly cooperation and mutual understanding, in the South Asian region.

The Hon. Speaker of the Parliament of Sri Lanka is a rare statesman who has proved himself to be an efficient and effective politician, an efficient administrator and a remarkable person. His experience in his youth as a captain of the team in the field of cricket may be one of the reasons for his success as the Speaker of our Parliament. I thank you for being here today despite your many commitments.

This Symposium is both important and timely for all South Asian countries. During the last four decades the courts of law in the countries of South Asia have given support and direction to pursuing a path of sustainable development. The objective of this Symposium is to review the judicial actions and set up a network among judges and lawyers in the South Asian countries to share their experiences and exchange information on matters relating to environmental law concerns. Such interaction will promote sustainable development in our countries. The countries in our region represented at this Symposium have common problems. Poverty alleviation, generation of employment, increase in population, are some of the challenges faced by our Governments. We have no option but to strive hard to achieve higher rates of growth as fast as possible to

solve these socio-economic problems. In trying to achieve this higher rate of growth, we will be placing greater stress on the environment. Our natural resources are limited and they must be used sustainably to maintain the growth we achieve. The responsibility of protecting the environment for the use of future generations also lies on our shoulders. Therefore, the impact of our economic activities on the environment must be taken into account in decision making at national, provincial and local levels to minimise environmental damage. It is in our interest to strike a balance between environmental management and development. Protecting the environment is a great responsibility. All actors in society need to be conscious of this collective responsibility which requires collective action. It is therefore crucial for those interested in the task of managing the environment to put in place the conditions and opportunities for collective societal action to protect the environment.

In a society driven by market forces and profit margin, it may be difficult to mobilize every individual or economic agent to discharge these collective responsibilities for protecting the environment. In such a situation the judiciary plays a crucial role in promoting sustainable development through the judicial process. Sustainable development does not mean less development: But development within the carrying capacity of this planet. It does not mean the scuttling of development activities. To achieve such balanced development we need to take appropriate actions in the early stage of implementation of projects to minimise the negative environmental impacts and to maximize the positive development impacts. This requires ingenuity and creativity on the part of all decision-makers to select the best option that meets the imperative of social and economic advancement and environment protection. This is the challenge to administrators, developers, the community and the judiciary. Sharing of experiences among judges and the lawyers in countries in the SAARC region can help to strengthen the contribution of the judiciary towards sustainable development. It is inevitable that conflicts of interest will arise among the general public and agents involved in economic activities and social development as we advance along the path to sustainable development. In resolving these conflicts it is necessary to build effective partnerships among stakeholders. The judiciary can play an important role in building this collective partnership to achieve sustainable development.

This Symposium will also promote regional cooperation in the area of environmental management. I congratulate SACEP and UNEP for this initiative. I should also like to thank the Government of Norway for providing the funds that have made it possible to hold this Symposium. The presence of the Chief Justices of Bangladesh, Nepal and Sri Lanka, as well as high ranking judges and jurists from other South Asian countries is in itself ample proof of the importance of this initiative and its necessity for galvanizing the efforts of judges and lawyers in the area of environmental law. I am happy that two distinguished persons in the legal field, H. E. Judge Christopher Weeramantry of Sri Lanka, Vice-President of the International Court of Justice, and Hon. Justice

P. Baghwati, former Chief Justice from India, have agreed to contribute towards this Symposium.

In conclusion, I would also like to thank those who helped to organize this symposium and extend a warm welcome to the delegates from abroad. I wish you every success in your deliberations.

Thank you.

**ADDRESS BY H. E. OVE CHRISTIAN DANBOLT**

**HEAD OF MISSION OF THE ROYAL NORWEGIAN EMBASSY**

Hon. Speaker of the House, Hon. Ministers, Excellencies, Ladies and Gentlemen.

I am pleased to address you on behalf of the Government of Norway. As you may well know, Norway has over the years taken a keen interest in environmental matters, specially related to development. Our former Prime Minister for a decade, Mrs. Gru Harlem Brundtland, is also known for her role as a leader of a special commission in her name, the Brundtland Commission, which laid the basis for international endeavours in the environmental field.

Personally, it is a special pleasure to address this Symposium as a former Permanent Representative to UNEP, the United Nations Environmental Programme in Nairobi. This Symposium is, as you have seen on the invitation card and which has been repeated by the former speakers, a joint endeavour of SACEP itself as the organizer, of UNEP for the environmental substance, and NORAD for the Government of Norway, as the financier.

In this audience there should be no doubt about the importance of the rule of law in all sectors of the society, including the environmental field. There is generally a need to have rules to abide by, which apply equally to all. Regarding environment, such rules should protect the environment against human greed - the greed often emanating from the authorities of power or the wealthy, either companies or individuals- and the need of poor people to strive to survive. The forests, the rivers, the waterfront as well as the urban habitat - they all need legal protection. Without such protection and the cumulative loss of one tree after the other, it is possible to wake up one day in the desert, even in a country like Sri Lanka. I have been told that forests which used to cover about half of the surface of this lovely country now cover less than a quarter -i.e., only 50% of what it used to be. Parts of India have changed from thick forests to drought torn areas. To avoid such problems in the future you need political will and laws to abide by. This relates first of all to situations inside countries, but also to relations between countries regarding natural resources like water, which will become increasingly scarce and thus more and more important for the future of mankind.

It is of great importance that members of the judiciary, from many countries in this region are gathered for substantial discussions regarding the prevention and resolution of environmental disputes as well as discussions regarding disputes in national and international law in the field of sustainable development. In deliberating and making environmental law, it is however, also imperative to look into how these laws can be effectively implemented in practical life. One objective of the symposium is to establish a regional network of judges and lawyers of the region for the efficient and expeditious dissemination of legal

information on environment and development. With so many high level representatives of the judiciary in the countries of the region present at this symposium, this objective of establishing such a network seems to be well within reach.

A seminar specifically related to environmental law also took place in Oslo, Norway a couple of years ago, showing an ongoing concern of my Government relating to environmental issues. I hope the deliberations at this forum will make a useful contribution to the further development of national and regional environmental law in this region in general, and in each of the participating countries.

Thank you.

**ADDRESS BY MR. DONALD KANIARU**

**DIRECTOR, ENVIRONMENTAL LAW CENTRE/UNEP,  
ON BEHALF OF  
MS. ELIZABETH DOWDESWELL, UNDER SECRETARY GENERAL  
OF THE UNITED NATIONS AND EXECUTIVE DIRECTOR OF UNEP**

Mr. Chairman, Speaker of Parliament, Hon. Ministers, The Rt. Hon. the President of the International Court of Justice, Excellencies, Ambassadors and Representatives of the Diplomatic Corps, Chief Justices, Judges, Distinguished Jurists, my Co-Sponsors namely, the Head of the Mission of Norway, and the Director of SACEP, distinguished guests, ladies and gentlemen.

Ms. Elizabeth Dowdeswell, United Nations Under-Secretary-General and Executive Director of UNEP, as sponsor of this august assembly, was, owing to other commitments, unable to be present in person during this occasion, which she had looked so much forward to, as well as paying an official visit to this beautiful and hospitable country. In her absence, she has requested that I read the following address, which I do herewith.

An occasion like this is unique and of fundamental importance on the long road of the international community in vindicating environmental concerns and strengthening the endeavours for safeguarding the environment by all stakeholders in different fora, including the judiciary.

We consider the judiciary a crucial partner, because, as an influential sector of our respective societies, the judiciary has a singular role to play as arbiters in the balancing act between the interests we, the present generation value and cherish and the interest to be sustained for the benefit of many unable to speak for themselves either because they are not yet born, or because of many constraints placed on their way by both procedural and substantive laws, or in view of inhibiting poverty or other socio-economic factors. In this regard, the judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a healthy and secure environment.

For us at UNEP, this is the second time we have been able to bring together judges and other members of the judiciary and the first time we did this in Mombasa, Kenya, for judges from South Africa, Kenya, Uganda, Tanzania, Mozambique, São Tome and Principe, Burkina Faso, and Mauritania. We were so encouraged that in this second event, we are convinced we are on the right track. We therefore deeply appreciate the presence of Chief Justices and senior judges from the SACEP region, as well as the Vice-President of the International Court of Justice and Judges and Jurists from other parts of the world to enrich the deliberations and exchange of information during the Symposium.

In efforts to strengthen the environmental role at global, regional and national levels, the United Nations Environment Programme, since its inception approximately 25 years ago, has been pivotal in laying foundations of international environmental law in this young and rapidly expanding branch of public international law. While the past years have focussed on the development of environmental law, it is equally critical that our next phase focuses on its consolidation and application at national level. In this latter task of application, the judiciary is a vital cog without which no real progress can be made.

At this gathering we are sowing seeds across nations on fertile minds to sprout in the vitality of safeguarding our common environment for present and future generations.

I wish you every success in your present and future endeavours.

Thank you



**ADDRESS BY HON. G. L. PEIRIS,**

**MINISTER OF JUSTICE, CONSTITUTIONAL AFFAIRS, ETHNIC  
AFFAIRS & NATIONAL INTEGRATION, SRI LANKA**

The Hon. K. B. Ratnayake, Speaker of the Parliament of Sri Lanka, my colleague the Hon. Nandimithra Ekanayake, Minister of Forestry and Environment, Your Lordship, the Chief Justice of Sri Lanka, other Chief Justices, Hon. Judges, Your Excellency the Vice-President of the International Court of Justice, Hon. Justice A. R. B. Amerasinghe, Secretary General of this Symposium, Your Excellencies, Distinguished Guests, Secretaries to Ministries, ladies and gentlemen.

I think the topic you are addressing this afternoon is of indisputable relevance in the setting of current priorities of this part of the world. The theme that you have chosen as the subject of your deliberations, is the role of the Judiciary in promoting the rule of law in the context of sustainable development. The focus of your discussions is quite predictably and quite naturally the environment and ways and means of preserving the integrity and the robust health of the environment while not sacrificing the imperatives of economic development. I think the entire core of this problem relates to a delicate balancing of competing interests that present problems with which the law is familiar in many of its diverse manifestations. As was pointed out in previous talks this afternoon, the environment is something of inestimable value which we must hand down to posterity.

The environment impinges crucially upon the quality of life. It is an integral part of the heritage of mankind. At the same time it is necessary to enhance the standards of living of many people, particularly in the Third World if we are to guarantee the stability and tranquility of social and political institutions. We have to encourage and promote industrial and entrepreneurial activity. A certain degree of pollution is inevitable. It is a part of the cost that we have to bear to achieve economic development upon which our populations depend. It is therefore not a question of identifying the primacy of these competing interests. It is not a question of accepting one group of interests to the exclusion of the other. It is not a question of establishing which is the preponderant interest, which is the ancillary interest or which is the subsidiary interest. I do not think that that is a pragmatic approach to the problem. On the contrary, the task of the courts is to reconcile these competing interests to achieve a perceptive and sensitive equilibrium. To see how best we can bring these things together in a blend, in an amalgam with optimal satisfaction from the standpoint of public policy in general. That, I think, is the crux of social engineering with which courts in all jurisdictions are familiar. That, I think, ought to be the point of departure in your deliberations. How do you achieve this balance? To protect the integrity of the environment, how do you prevent the discharge of industrial effluent into rivers and streams? How do you ensure the integrity of the environment, the purity of the oceans and the atmosphere, and at

the same time facilitate that degree of economic development without which society itself would crumble and disintegrate.? Now, I think some of the judgements of the Supreme Court of India are most helpful and refreshing in this regard. It has been pointed out on numerous occasions by the Supreme Court of India that you do have to find practical strategies, and you have to identify a *modus vivendi* for reconciling what appear to be conflicting interests. This problem arose in a crisp form when a complaint was made to the Supreme Court of India with regard to the pollution of the waters of the Ganges.

The complaint was made that factories in the vicinity of the Ganges were polluting the waters of the River Ganges which also, of course, has a deep religious significance to the Hindus, and that the courts must close down these factories in order to guarantee the integrity of the environment. On the other hand, it was argued on behalf of the owners of the tanneries, who were the defendants in this litigation, that if the Supreme Court of India took this action, the inevitable consequence would be unemployment on an unacceptable scale. People would be thrown out of work when tanneries closed . There would be poverty. There would be deprivation, and all this would contribute in significant measure to social unrest that would threaten to tear asunder the very fabric of Indian society. This was the countervailing argument that was adduced before the Supreme Court of India by the owners of the tanneries. The Supreme Court of India adopted what I think is a very practical approach. They said the factories must be compelled to adopt certain measures that would progressively diminish the degree of pollution, and acknowledged that this cannot be done overnight because if you order these factories to adopt these measures immediately, the cost would be prohibitive. It would mean that these factories would not be able to produce goods or offer services which are viable or competitive in the prevailing economic climate. The factories would collapse inexorably. On the other hand, if you were to give them a certain timeframe □ if you were to prioritize remedial measures which are thought to be necessary. Where do you begin? What are the most urgent measures which have to be adopted immediately? The court would undertake an approximate costing of the preliminary and urgent measures that are required, and the court will then design a timeframe within which the remaining measures have to be carried out in order to achieve the objectives that are desired by the petitioners. So that is the way imaginatively, creatively and pragmatically to reconcile the competing interests pertaining to the environment on the one hand, and economic development on the other.

I think the Indian case could be presented as an example of the approach that has to be adopted to achieve the objectives that lie at the very core of the theme that you are seeking to address in your deliberations this afternoon. Having made that point, Mr. Chairman, I would like with your permission, to address some broader aspects of this subject which you have set yourselves to reflect upon. It seems to me that if one is in earnest about strengthening and invigorating the role of the judiciary, with regard to buttressing and fortifying the rule of law in the context of sustainable development, one has also to be pre-occupied with the stability, the

durability, and the strength of political and social institutions. I think that is of particular significance in this part of the world. I think there has to be a certain empathy, a certain understanding, by the different organs of Government, the Executive on the one hand and the Judiciary on the other, to environmental issues. How do you promote the Rule of Law in the context of Sustainable Development in a country such as ours since we have very happily chosen Colombo as the venue of your deliberations.

Let us for a moment survey the national scene at the present time and let us endeavour to ask ourselves how these goals and objectives are best achieved in the context of Sri Lankan realities and circumstances at the present time. We have on the one hand to guarantee the security of the community. This means that if there is a threat from a violent group of persons, that has to be overcome by use of force, and the facilities and forces that are required to achieve that objective have to be made available to the armed forces by the State. This is the case even if military expenditure is in the region of 6% of the country's gross domestic product and almost 25% of the nation's recurrent expenditure. So that is a primary part of Government expenditures in Sri Lanka. While incurring that obligation there are other things that also need to be done by the State. The State has to promote economic activity. The State has to raise the levels of economic development. It has to achieve economic growth. It has to be concerned about macro economic fundamentals. It has to be concerned about exchange rates and inflation. It also has to guarantee the stability of society by ensuring that the vulnerable segments of the community are looked after. That is not presently the case - this country has lived through the vicissitudes and upheavals of 2 insurrections during the last 25 years. This was the consequence of serious disenchantment among the youth of our land. We have to therefore address ourselves to questions relating to rural poverty through a poverty alleviation programme. We have to set apart sufficient resources to spend on health, education and programmes for vocational training. The State also has to be sure that entrepreneurs have access to capital at affordable rates of interest, so that they can hold their heads high and compete with others in the open market. So it is an amalgam of all these factors that constitute public policy in a country such as Sri Lanka in the midst of the turbulent conditions that we encounter today.

What does this mean? This means that the resources are scarce and the concept of distributive justice, to my mind, goes to the very root of the problem that you are addressing in your deliberations, The Rule of Law, Sustainable Development, and the Role of the Judiciary. At the heart of all this is the concept of distributive justice. There are more people seeking employment than you have jobs available. There are more people seeking positions in universities and educational institutions than you have places available, there are more people competing for resources than the resources would allow in terms of complete satisfaction. So you have to determine priorities. You have to establish criteria to ascertain entitlement to benefits on an equitable basis. Who is to receive satisfaction? Who is to be disappointed? Somebody has to be disappointed in the present context. But you

must engender in society the feeling that although somebody has been deprived, it has not been done on an unjust basis. That, I think goes to the heart of the role of the judiciary in the kind of situation that prevails in Sri Lanka today. How do you do this? There must be judicial creativity and imagination. You have to evolve certain remedies that would enable the courts to control executive discretion. You cannot leave it all in the hands of the Executive. When the Executive decides that these benefits are to be conferred upon this segment of society and benefits are withheld from another segment of society, the courts would have to satisfy themselves that the criteria which have been used are intrinsically just and equitable. This means that you have to evolve certain remedies and mechanisms that promote the regulation of discretion in a fair and equitable way. That, I think, is very necessary if we are to achieve the goal of sustainable development in the conditions of paucity that presently prevail in most parts of the Third World. Now that is a fact. However, I think it is necessary to determine the limits of judicial activism in this area. I think that is a very interesting, if not controversial theme, which I think ought to be addressed in some shape or form in your symposium. The State through the Executive would make certain decisions with regard to the allocation of resources. For example, who is to get a job, who is to get a transfer, who is to get a promotion, who is to get a grant or loan at a reduced or concessionary rate of interest, or a place in a school or university. These are all by their very nature justiciable matters. Where does the role of the judiciary end and what is the line of demarcation one is to establish between the executive and the judiciary. It is a very delicate situation.

Now there are some situations undoubtedly in which I believe the courts have gone too far. In an article which I published in the *Cambridge Law Journal* in 1987 called "Wensbury Unreasonableness: the Expanding Canvas" I argued that the courts were going much too far. I was not referring to the courts of Sri Lanka. I was referring to the courts of the entire Commonwealth. Now take for example the situation in the famous case known as the Gaelic Case where the question was, is it right or wrong for a medical practitioner to give contraceptive treatment to a girl below the age of 17 years without the consent of the mother. Now, the Minister in charge of the matter had made a decision taking into account the policy considerations which he thought were applicable. Now should it be open to the courts to interfere in a matter like this? Now take the Leicester Football Case which involved the Springboks. Is it right or wrong for a Football Society in the United Kingdom to accept an invitation from the Apartheid Regime in South Africa to visit Johannesburg and to participate in a match there? The British Government -the Executive- would make a certain decision. Should that be open to review by the Judiciary? Now in these matters if the Judiciary were to put itself in the shoes of the Executive and if the Judiciary were to say if I had to make a decision I would make a different decision. The Minister has considered all the relevant facts - he has come to a decision which appears to him to be reasonable. But the Court disagrees with the decision of the Minister. In those circumstances is it right for the Court to substitute its own discretion for that of the Minister. Now that was the crisp problem that arose in some of those cases. Now I argued

strongly in that article in the *Cambridge Law Journal*, that in these areas the courts were traversing- they were going beyond the borders of their jurisdiction- and they were encroaching upon the domain of the Executive. The Executive is at all times accountable to the elected legislature and these are matters in respect of which responsibilities should be allocated to the Executive and it is wrong for the courts to arrogate to themselves discretion with regard to these matters.

Three years later, Professor Sir William Wade, one of the authorities on administrative law and I participated together in the 9th Commonwealth Law Conference in Auckland, New Zealand. On that occasion Professor Sir William Wade referred to that article and he strongly endorsed that point of view. He said these are areas in which the courts should not interfere. Now happily the English courts have subsequently reversed themselves. There is a celebrated decision by Lord Diplock in the House of Lords. Lord Diplock, towards the end of his life and towards the end of his career, recognized that the English courts had gone too far in this regard. What had been enthusiastically hailed as the renaissance, or the modern renaissance of English Administrative Law, seemed to Lord Diplock, in his closing years, to be lacking in balance. And Lord Diplock in his famous speech, which he made in the House of Lords some years before his death, made the point that in circumstances such as these the courts should interfere only in one of three specific situations.

The first is transgression of *vires* - that is excess of jurisdiction on the part of the subordinate tribunal. The second involves the failure of the rules of natural justice or procedural fairness where there had been a failure on the part of a Minister or other authority or body to act fairly. The third ground identified by Lord Diplock was patent irrationality, in other words, the rubric of "Wensbury Unreasonableness". Outside those categories, Lord Diplock insisted that the courts should not have a role to play with regard to the exercise of discretion in the kinds of situations which were identified a few moments ago. Obviously, everybody in society cannot be satisfied. There has to be an application of distributive justice. According to whose standard? Like the Chancellor's Foot, these conditions vary from individual to individual. Whose view, whose values, whose ideas should prevail in that situation and in those circumstances. Lord Diplock, agreeing with Sir William Wade, in his later years, said that that should belong to the domain of the Executive rather than of the Judiciary. I think that is rather important.

The Supreme Court of India on one occasion considered whether train fares were too high. Say, a train was running from Allahabad to Delhi. Their argument was that this was the State monopoly and the Indian Railway was making an unconscionable profit. The Court actually sat down to work out what the cost was. What would be a reasonable profit margin? And how much would the passenger be made to pay per mile? With profound respect, the court is ill-equipped to perform such a function. It does not have the expertise, it does not have the resources, it does not have the personnel to work out what a passenger pays by train per mile between Delhi and Allahabad.

Similarly, the Supreme Court of Manitoba had to consider whether milk prices by a statutory authority in Canada were too high. If the courts are going to enter into areas such as this, do you have a result that is satisfying from the point of view of public policy? If one is interested in the rule of law in sustainable development, then I think, one has to demarcate the respective frontiers of operation of the judicial and the executive organs of Government. And especially in this part of the world, I think that is the burning issue and it is something that requires the attention of the legal and judicial minds that are gathered here together in Colombo for this symposium.

Now I would like to add some general observations about the approach of the present Government of Sri Lanka to these matters. We believe in the Judiciary. We have great faith in the Judiciary. It is our desire to expand the *vires* of the Judiciary. It is not my mere assertion that you have to take seriously. For the first time since Independence, the Government of Sri Lanka is preparing a new Constitution that contains the principle that even after a law is enacted by the Parliament of the country that law can be struck down by the Supreme Court on the ground that that law is incompatible with fundamental rights that are enshrined in the Constitution of the country.

That right is not currently available. Once the Speaker of Parliament certifies the bill into law, that bill is impregnable, it is invulnerable, it cannot be challenged on any ground whatsoever. It is there, it is sacrosanct and cannot be assailed or challenged in any way. The challenge has to be mounted during the Bill stage. When the Bill becomes an Act it acquires the attribute of invulnerability. Now that is a sacrosanct principle - and I would say there is a sharp division of opinion with regard to this matter. Reference was made by my colleague, Hon. Nandimitra Ekanayake to the Prime Minister, the Hon. Sirimavo Bandaranaike. The Hon. Sirimavo Bandaranaike, as my colleague pointed out, was Prime Minister from 1960 - 1965 and then again from 1970 - 1977. During her second administration, a new Constitution was promulgated and brought into existence. That is the first Republican Constitution of 1972. The Minister of Constitutional Affairs then was one of the ablest lawyers that lived in this country - the late Dr. Colvin R. de Silva. Dr. Colvin R. de Silva as Minister of Constitutional Affairs, firmly and steadfastly refused to recognize the principle of judicial review in respect of legislation after it had been enacted. Dr. Colvin R. de Silva said it is profoundly wrong to entrust this function to the judiciary. You cannot have eleven people in the Supreme Court overturning laws which have been made by the representatives of the people in Parliament. And he said in all conscience he cannot be party to any move to confer such jurisdiction upon the Supreme Court. The present Government does not accept that view. We are happy to give that power to the Supreme Court. So there is a contrast there between the attitude of the Minister of Constitutional Affairs in 1972 and the attitude of the present Government of H. E. Chandrika Kumaratunga. We are giving that power to the Supreme Court. We do think it is right and proper that the Supreme Court should be the final arbiter in deciding whether Parliament

itself has contravened the limits that are defined in the Constitution itself. That is the litmus test, that is the acid test. Otherwise you can talk as much as you like on fundamental rights, but if Parliament can override the boundaries of jurisdiction with impunity in such a land, in fact there are no fundamental rights. We believe that is the case and that is why we are prepared to entrust this jurisdiction to the Supreme Court.

Also, there is this which I would like to point out to the luminaries who have come from other parts of Asia, in particular. This Government at its highest levels is content to present to the courts a grievance that the leaders of the Government have. If any member of the Government, from the President downwards believes that he or she has been wronged, the Government has gone to the courts and placed the grievance at the hands of the courts - the Government has sought a remedy from the courts. That is a dramatic departure from patterns of behaviour which were associated previously with repositories of Executive authority. So our Government, from the President downwards, come to court to ask for a remedy from the court. In addition, members of the Government at its highest levels have not at any time resorted to the levers of executive power to prevent actions from being brought against them. They have been happy to defend themselves in court. That has to be understood. However we are grappling with various problems to which, I think, reference has to be made. I think there are certain limits within which fundamental rights jurisdiction, for example, needs to be exercised. Let us take a matter like transfers of police officers. A police officer is transferred from A to B when a war is raging, the validity of that transfer can be challenged in a court of law. The transfer can be set aside. There are situations where the courts have ordered at certain times that a person should be sent back to a particular station. This of course is well within the jurisdiction of the court, but here we have a very critical problem involving the proper balance to be struck between the judicial function and the executive function. So I think these are matters which should engage our minds as we address the theme of our conference which is the Role of the Judiciary in Promoting the Rule of Law in the Context of Sustainable Development.

I would like to make one final observation- not only are we giving the Supreme Court the power to declare null and void legislation reportedly passed by Parliament which is incompatible with fundamental rights enshrined in the Constitution, but we are also prepared to submit the existing corpus of law to the scrutiny of the Supreme Court- for the court to decide whether existing laws are incompatible with fundamental rights that are entrenched in the Constitution. However, there would have to be some limit to that principle, because just as much as the application and enforcement of fundamental rights is important, you have also to address the problems of settled expectations. People have entered into transactions with some expectations. Therefore, if somewhere down the road the Supreme Court were to overturn a transaction whose validity had been taken for granted by the relevant parties over a long period of time, there would be deleterious consequences from the standpoint of public policy. So you would have

to determine a certain timeframe within which that challenge can be mounted. But certainly the present Government of Sri Lanka in its new Constitution will incorporate the principle that even after the Speaker certifies a Bill into law, it can be challenged in a court of law if it is inconsistent with fundamental rights. So I think these different aspects of the problem, the separation of powers, which was so persuasively articulated by the French Philosopher Montesquieu contain contemporary applications of the separation of powers, its consequences, its corollaries, and its repercussion in modern society.

I would conclude with the observation that the central theme here is the balancing of competing interests, divergences, clashes which are part and parcel of life. You have that in any community. Law acknowledges the existence of those conflicts. If those conflicts did not exist in society, law would be redundant and superfluous. This was pointed out by St. Augustine in his famous work *Civitas Dei* written several centuries ago. It is because of the potential for human conflict that the institution of the law becomes necessary. As long as there is human conflict, there is a need for law. Marx and Engels, with all due respect, were wrong in saying that with the rise in the urban proletariat the administration of the control of men through the mechanism of the law would be a thing of the past. That has been a Utopian dream -it has not been achieved. As long as there is human conflict there is a need for law. That means that the law must grapple with these divergences and these disparities. That is an exercise in social engineering. That is the heart of the problem with regard to exercising the competing interests on the environment on the one hand and economic development on the other.

So that, Mr. Chairman, My Lords, is the approach which I would very respectfully commend to this distinguished group of judges, academics and professionals as they embark upon their deliberations. On behalf of the Government of Sri Lanka I would like to wish your deliberations all success- I hope you will have some time to enjoy our country, the warmth of its people, the vibrancy of its traditions, the scenic beauty of the Island. I hope that you will carry with you some memories of the unique attributes of our country and thank you very much for the honour that you have conferred upon me by inviting me to share these brief thoughts with you.

Thank you.



**INAUGURAL ADDRESS BY CHIEF GUEST,  
HON. K. B. RATNAYAKE**

**SPEAKER OF THE HOUSE OF PARLIAMENT, SRI LANKA**

Hon. Nandimitra Ekanayake, Minister of Forestry & Environment, Hon. G. L. Peiris, Minister of Justice, Constitutional Affairs, Ethnic Affairs and National Integration, Hon. Ministers, Deputy Ministers, Hon. Chief Justices and other Judges, Hon. Christopher Weeramantry, Vice-President of the International Court of Justice, distinguished participants, ladies & gentlemen.

It is with much pleasure that I accepted the invitation extended to me by Madam Sirimavo R. D. Bandaranaike, Prime Minister of Sri Lanka, to inaugurate on her behalf, this very important and timely Symposium. The Hon. Prime Minister regrets very much her inability to be present with you today and has asked me to express to you all her warm greetings and best wishes for a very successful Symposium.

It is widely recognized that the Judges in South Asian countries have done much to shed light on and give meaning to the concept of sustainable development. They have led the way in demonstrating a sensitivity to issues of environment and development. The presence here today of several Chief Justices and Judges of the Supreme Courts and other Superior Courts of the seven South Asian countries, as well as very senior Superior Court Judges from other countries and the Vice-President of the World Court, His Excellency Judge Christopher Weeramantry, is demonstrative of the importance they all attach to matters relating to environment and development. The fact that this Symposium is being held immediately after the Special Sessions of the United Nations General Assembly which was convened to assess the implementation of the decisions taken at the Earth Summit held five years ago, gives added momentum to this occasion.

Sustainable Development is all about development that is just and fair. One of the pre-occupations of our time has been to bridge the ever increasing gap between the rich and poor nations of the world. Many significant steps have been initiated at global and regional levels to facilitate the realization of this goal. The modest but significant progress that so far has been made through international cooperation for realizing this goal, for example, within the United Nations, within the Non-Alignment Movement, and in our own region through the South Asian Association for Regional Cooperation, needs to be pursued with renewed vigour, consolidated and further advanced.

The formidable task that the world faces at it enters the new millennium is to accelerate progress towards this end. This must be done having regard to the priority needs and concerns of all countries whilst at the same time giving

special consideration towards the developmental concerns of developing countries. Over 150 Heads of State and Government at the Earth Summit held at Rio de Janeiro 5 years ago, agreed that eradicating poverty, decreasing the disparities in standards of living, and responding adequately to the needs of the majority of the people of the world in the developing countries are indispensable requirements for sustainable development.

*Agenda 21*, the blueprint for action to promote the goals of sustainable development agreed at Rio, expressly recognizes that a substantial flow of new and additional resources to developing countries would be required, in order to cover the incremental cost for the actions they have to undertake to deal with global environmental problems and to accelerate sustainable development. It also expressly confirmed that no nation can achieve this on its own, and declared "but together we can- in a global partnership for sustainable development." What is needed today is a strong bias for action on a scale that would allow the realization of the promise of Rio.

Our countries in South Asia need to accelerate economic growth to create opportunities for our people to realize their aspirations. We cannot wait. This is without doubt the primary imperative of Governments in the region. For example, roads, hospitals, schools and other infrastructure must be built; energy supplies must be augmented to power the wheels of industry that generates employment and exports, and to meet the ever-increasing energy requirements of the people, land must be cultivated with increasing productivity with the judicious application of modern techniques and methods.

The real challenge facing our countries is to do so in a way that would not only protect the physical environment, but equally important, nurture and preserve our social, cultural and aesthetic environment and values.

This is a precious legacy that has been bequeathed to us through successive generations from the dawn of our civilization which we hold in trust for the future generations also to enjoy. We need, of course, to adapt to the changing forces of time in order to take our rightful place in our ever-changing world order. But we must not fail to make every effort to do so without causing irreversible or significant harm to our physical environment or eroding our national values and cultural and religious roots.

Sri Lanka, as well as other South Asian countries, are heirs to a rich legacy of pursuing development within a framework deeply rooted in their own cultural ethos which is sustainable. In ancient Sri Lanka, the village was dominated by the temple (*dagaba*), the tank (*wewa*) and the paddy fields (*ketha*). Historians have recorded that as a traditional peasant society, they had an agriculture geared to minimise risk rather than to maximise yields. In order to guard against the upheavals of drought, pests, floods and similar disasters, farmers planted a wide variety of different strains of the same crops. This was, of course, with a view

to ensuring sustainable agriculture. Protection of highland forests also played a vital role in ensuring sustainability of agriculture in Sri Lanka's dry zone.

The rapid increase in population, especially in the second half of this century, and the need to keep pace with global developments in science, technology and communication have created social pressures which have led to responses that have seriously affected the environment in which we live. One of the most difficult challenges of our time is to find a way for our people to enjoy the fruits of development and realize their own aspirations, without denying to those who come after us- the future generations- the enjoyment of their rights to those same resources.

Over the next two days, you will deliberate over the way in which law and, in particular, the judiciary, contributes to the realization of these goals. Achieving the goals of national development hand in hand with protection of the environment is the joint responsibility of all sections of the society and the judiciary's role is a particularly onerous one.

I am certain that your deliberations will contribute significantly to strengthening cooperation among the judiciaries of countries in South Asia in addressing the issues of environment and development. I wish your deliberations success and have much pleasure in officially inaugurating the Symposium.

Thank you.

**KEYNOTE ADDRESS BY  
H. E. JUDGE CHRISTOPHER G. WEERAMANTRY**

**VICE-PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE**

**Sustainable Development: An Ancient Concept Recently Revived**

Hon. Speaker, Hon. Ministers, distinguished Chief Justices and Judges, Your Excellencies and distinguished participants.

I am delighted to be able to address this Conference which considers three aspects of vital importance to our region, the topic of sustainable development, the interlinkage of this concept with the concept of the rule of law, and the role of the Judiciary in achieving this. The Judiciary of the entire region is represented with great distinction at this symposium and I congratulate the organisers for their vision in linking these three themes at this very high level. I am sure there will be numerous spin-off benefits from this conference because there will be many important new ideas and perspectives which will be the subject of very careful consideration in the next two days.

Sustainable development must be achieved through law, and the judges being such an important part of the legal establishment must necessarily be involved in this - and sensitively involved. This is currently one of the vibrant topics in the development of law both domestic and international and I might say that the topic of environment law is one of those topics which is probably least developed in the whole gamut of legal topics that come up before the courts. In international law that is even more so. It is one of the least developed areas of international law. Domestic law will be richly discussed at this forum but I would also like to make some observations on the international law aspects of the topic that is before you.

There is a belief on the part of many that the notion of environmental law is "soft" law and that the concept of sustainable development is an even softer law. There is a strong belief that these are only aspirational, and not really law properly so called - and hence that courts would not concern themselves with these areas. One of my objectives will be to show that environmental law and the concept of sustainable development are both substantive parts of law in a very real sense - law which the Courts must endeavour to administer in the same way as law they consider to be "hard" and established law.

In the first place, what is sustainable development? It represents, as the Minister has so eloquently said, a delicate balancing of competing interests. It represents the balance between the concept of development and the concept of environmental protection. The concept of development is a human right. There is no room any longer for denying it this legal status. The concept of environmental protection is likewise a very important foundation of various

human rights such as the right to life, the right to an adequate standard of living and the right to health.

Now why do I say that these rights are part of international law? International Law arises initially from the realm of aspirations. All its principles are formulations of aspirations. This formulated idea gradually hardens into concrete law. Take the Universal Declaration of Human Rights. It started with the formulation of a series of aspirations. But as time went on these aspirations became firmer, they crystallised, they became part of accepted International Law and in that way they injected themselves into domestic law and even became hard domestic law. So the same applies in the case of environmental law. It starts in the realm of the aspirational but as time progresses and its importance becomes clearer it becomes more and more a part of the established legal order and in that way it infuses itself into the established domestic legal order.

The General Assembly Declaration on the Right to Development 1986 categorically stated that the right to development is an inalienable human right. This document contains a very concrete formulation of the principle that the right to development is no longer merely aspirational but is an inalienable human right. A series of international conferences, treaties, declarations, and many other activities have confirmed this statement. The principle that it is an inalienable human right has strengthened and consolidated itself in the corpus of International Law.

The Rio Declaration of 1992 states in Principle 3 that the right to development must be fulfilled so as to equitably meet development and the environmental needs of present and future generations. The need for balance is here emphasised - it must serve development and at the same time not sacrifice environment needs. The notion of sustainable development has gathered much strength from a variety of international declarations, conventions, and academic writings. The Brundtland Commission to which the Ambassador of Norway referred, describes it as development which meets the needs of the present without compromising the ability of future generations to meet their own needs.

The concept of sustainable development is a new concept which is fast gathering momentum and has now become part of accepted International Law. A principle becomes absorbed into International Law in a variety of ways. Among these are its acceptance in treaties, and in international practice. There is now a sufficient body of treaties, declarations and recognitions in international practice for sustainable development to be accepted as a recognised legal concept. Principles 4, 5, 7, 8, 10, 28, 20 and 21 of the Rio Declaration, all formulated this principle of sustainable development. The Global Conference on the Sustainable Development of Small Island States 1994, the Copenhagen World Summit on Social Development, 1995, and a whole host of declarations which probably are numbered by the dozen likewise recognises it. The North America Free Trade Agreement, the Convention on Biological Diversity, the Treaty of the European

Union, the Convention to Combat Desertification - all of these speak of the concept of sustainable development. International financial institutions such as the World Bank, the Asian Development Bank, and the Multilateral Investment Guarantee Agency all accept the concept of sustainable development, and State practice rounds this edifice so to speak by the recognition of the concept in practical terms by States in their practical ordering of their affairs. For example, the Dublin Declaration on the Environmental Imperatives of the European Community in 1990 spoke in specific terms of the principle of sustainable development as being one of the objectives of the European Community. Therefore, the recognition of the concept of sustainable development is world wide.

The concept is not merely of concern to the developing world. It is accepted even as a criterion of State conduct by the developed world as well. So it is truly a global concept.

How do we achieve this through law? There are a number of impediments in traditional legal systems to the acceptance of some important human rights and humanitarian concepts. I will now enumerate a few of them which are pertinent to this field.

There is a concept that is very strongly entrenched in modern law that only the living generation have rights under the law. Most of our current legal systems, be they the Common Law systems or the Civil Law systems, concentrate exclusively on the rights of those who are living here and now.

They are the only bearers of rights in our modern legal systems. That is indeed a very limited view. It does not accord with the philosophies that traditional wisdom has bequeathed to us. Those philosophies teach us that there is a duty on the present generation to look beyond itself to those who are to come after us as well as to look back at the past and respect those who went before us. This is very beautifully expressed in the traditional African concept which Bishop Tutu has referred to in his sermons - that the human community consists of three elements - those who went before us, those who are with us here and now, and those who are yet to come. All three together constitute the human community and if you lose sight of any one of those component parts of the trinity you then get a lopsided view of the human endeavour. That is a very important tradition which I believe we must weave into our environmental law and I may have something to say about that later.

Another rather narrow attitude of modern law is to hold that it is only human beings that have any recognisable rights. No other creatures which inhabit this planet which is our common home have any rights at all which are recognised by modern legal systems. That was not the case in traditional law. Especially in our part of the world there was a very deep understanding of the rights of other living creatures to this planet which we all share. In the traditions of this country there

were very strong items of State conduct which showed a recognition of this principle. The establishment by our kings of hospitals for animals showed that there was a strong understanding that human duties are not concentrated on human beings alone, and that one must, in devising a legal system, think a little beyond the confined vision that human beings are the only creatures that mattered on this planet.

Yet another rather narrow approach of modern law is to concentrate almost exclusively on the rights of individuals. There is a great stress on individualism as though only individuals have rights. However, traditional societies flourished not only on the basis of individual rights but also on the basis of group rights. The group was very important and as one knows even from the history of Europe that the group, whether it be the guild or the manor or the parish, was very important to the life of every individual. There were groups to which every individual belonged and through which the individual felt secure and protected. If you destroy the group, to quote Edmund Burke in his description of the French Revolution, and wipe the State clean of the traditional group organisations, you leave the individual naked and alone to face the might of an all encompassing State. The individual, once he is broken away from the group, has to sink or swim on his own. Ancient society, in contrast to modern society, recognised that the group had rights. The village had rights. The church or temple had rights. The guild had rights. The manor community had rights. Those important rights were lost sight of through the concentration on individualism which occurred after the European Revolutions.

As a matter of fact, when the Indian Constitution was established, Mahatma Gandhi strove hard to obtain some recognition of group rights - but he was not successful in the face of the strength of Western concepts of individualism which provided the basic background thinking for many Indian lawyers themselves.

Then again modern law thinks in terms of rights rather than duties. The entire emphasis seems to be on rights, whereas traditional legal systems heavily accentuated duties. Every individual had duties towards his or her group, every villager had duties towards the village. The ancient irrigation system of this country could not have been maintained in all its complexity if the members of each village did not have duties of maintenance and repair in regard to the village tank and the local irrigation channels.

And then, when we come to consider some of the concepts of modern legal systems we get into deeper waters still. Concepts such as absolute freedom of contract, and absolute ownership of property, have been environmentally devastating.

Take the idea of absolute freedom of contract. A mining company makes a contract with the owner of land or with the Government and proceeds to mine the land. It has its rights under the contract and proceeds to use those rights to the

absolute limit to which they can be stretched, irrespective of what happens to the land. The notion of responsibilities that go with those rights is unknown. That is one of the causes of the environmental devastation we see all over the world today. The concept of absolute ownership likewise tells you that if you own an item of property, you have the absolute right to do with it what you will. The same concept is extended to land and you can treat land, if you are its owner, in the same way that you can treat movable property. The owner of movable property can destroy it if he so pleases. Likewise, the owner of land can mine it to destruction, bury noxious waste in it, fell primeval forests and reduce it to wasteland. He can do what he will, for he is the absolute owner. Modern law with its concept of individual ownership permits this. Traditional law would not have tolerated such treatment of land. That is one of the factors that have led to environmental problems on the present enormous scale.

Some time ago I was Chairman of the Nauru Commission of Inquiry which looked into the question of phosphate mining in Nauru. In consequence of that mining there was not even an inch of top soil left in the mined out areas and the land was devastated and reduced to a moonscape which was unfit for any form of human activity. That is because of the idea that if you have certain rights you can use them to the full without regard to the traditional ways in which land was respected and protected.

So there is much guidance that can be gained from traditional wisdom which in these respects surpasses the rather limited vision of modern legal systems. I wish to say a few words about this aspect, which constitutes the main theme of my address - that modern law, rich though it may be, is neglecting an important and fertile source of nourishment when it neglects the traditional wisdom of humanity. In environmental matters, the traditional wisdom of humanity can teach us how we can live in harmony with our environment without destroying it in the manner resulting from the pursuit of legal concepts to the limit of their logic, without applying also the restraining influence of the traditional wisdom of the human family.

Now, perhaps, I should say a word in relation to the International Court. The International Court derives its jurisdiction from the Charter of the United Nations and from the Statute of the Court. Most of the cases we have are disputes between two States, because we have no jurisdiction to hear disputes between individuals. In disputes between States, matters of an environmental nature are sometimes brought before the Court. Currently we have an environmental case between two States in relation to the damming of a river and the environmental consequences that arise as a result. Two States can have two rival views in relation to environmental consequences and they can come before that court in



that way.<sup>1</sup> Another way in which an environmental matter can come before the Court for a very detailed evaluation of the law involved is through the mechanism of Advisory Opinions. One of the areas of our jurisdiction is Advisory Opinions, and certain agencies such as the General Assembly, the Security Council and also certain other recognised bodies such as the World Health Organization can ask the Court for a legal opinion on a question of law. They formulate the question of law and ask the Court to render an opinion on the law relating to that matter. We recently had before us two matters that came from the World Health Organization and from the General Assembly asking for an expression of the Court's views on the legality of nuclear weapons. This of course involved very important environmental considerations. So in that way environmental matters can come before the court.

At a procedural level I should state that the Court is giving its very serious concern to environmental matters and has constituted an Environmental Chamber consisting of seven Judges who are specially interested in environment, to deal with environmental matters should the parties so desire.

The next observation I wish to make about International Law, which has pertinence to the subject of your seminar, is that the old International Law, if I may so term it (that is the International Law that prevailed until the end of World War II) was based upon individualism. It was based upon the individual sovereignty of the different States that are members of the world community. But today's International Law is not so much an individualistic International Law but a socially oriented International Law. One of the pressures that has forced this recognition is the pressure of environmental needs, because with ozone depletion, global warming, extinction of species and so forth, we have a whole catalogue of possible damage not merely to individual States but to the world at large. Environmental damage does not respect national boundaries. Pollution does not recognise the doctrine of state sovereignty and end at the boundaries of a nation state. Pollution proceeds beyond that and if we are to fight pollution we have to do that as a global community and not as a series of separate and individual States asserting their sovereign rights.

In the past we could have functioned internationally on the basis of co-existence. We tolerated the existence of the other State as a necessity of life. The other State was there and we had to co-exist with it whether we liked it or not. We reconciled ourselves to that situation and international law worked out rules for co-existence with those States. We have now passed out of the era of co-existence into the era of cooperation and not merely passive cooperation but active cooperation because if we are to save our global inheritance we have to do so actively. We need for this purpose to avoid dependance on ideas of

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<sup>1</sup>This case, between Hungary and Slovakia, has since been decided by the Court - see Judgement of 24 September 1997. See, also, the Separate Opinion of Judge Weeramantry which deals in detail with some of these issues.

sovereignty and the desire of each State to claim complete dominion over everything going on within its borders. We need to surrender some part of that sovereignty to the rest of the world and to accept common guidance by the global community. Hence, because the environment knows no territorial boundaries we have to live as a cooperative group of States - at any rate so far as environmental law is concerned.

Likewise, our vision must extend not only to States beyond national frontiers but it must extend in time beyond generational frontiers. We have to cast our vision beyond the present generation and look forward into the future. When we deal with environmental law we are in the realm of future generations. What we are handling are the rights not only of ourselves but of generations to come. I remember vividly that in one of the environmental cases that was argued before us, Counsel appearing for one of the parties argued that if Stone Age man had inflicted on the environment the damage which we are inflicting upon it now, we would still be living with the damage that Stone Age man had inflicted on the environment. Now it is the same with us. What we do now will affect future generations even more remote from us in the future than Stone Age man is remote from us in the past. What would we be saying of Stone Age man if he had polluted the planet in the way we are now polluting the planet for our posterity? We would have blamed him for his lack of a sense of responsibility, a lack of moral sense and lack of civilised behaviour. All those arguments could be hurled against us by posterity if we do not take on our responsibilities now. So, what the so - called uncivilised people of the Stone Age did not do - for they gave us an unpolluted planet - we, this 'civilised' generation are doing to our descendants. Is that proper?

Another concept which has worked itself into international law is the concept called the *erga omnes* concept, i.e. the concept of an obligation owed towards all the world. Now, disputes between two parties are disputes *inter partes*, i.e. disputes between individual parties. There are two parties who come before a Judge and the Judge's task is to determine between those individual parties which party should succeed. But environmental issues are not merely *inter partes*, but may also affect other parties apart from those before the Court. So the Judge, whether domestically or internationally, has to have his eye also on the impact of the Court's decision on the community. Although procedurally it is a matter between the two parties, in substance it is a matter which affects the world. It affects the rights of others outside the limited frame of the parties to the dispute. So the *erga omnes* doctrine which is now being developed in International Environmental Law is something that domestic judges will have to take note of as well.

Another factor to be considered is that the forces of technology are advancing at a rate of galloping growth. This is true of almost any kind of technology. Take computer technology or whatever technology you may think of. The rate of its advance is almost uncontrollable. But the rate of the advance of the law that tries

to keep that technology in check is extremely slow. So, while the technology is galloping ahead, the law is lagging far behind and the gap between technology and law is widening all the time. Our ability therefore to control any technology through law is thus growing weaker day by day. This is a very important phenomenon which all judges are called upon to consider today; and I draw the attention of the judges of the SAARC region to this phenomenon which concerns their region even more particularly than most others, because much of the technology we use is not of home growth but comes to us from outside. We must as far as possible assist in achieving legal control over that technology to ensure that it serves the interests of our people and not some foreign interest that operates from afar.

We must marshal all our resources to this task. Our region is very rich in a particular resource - the resource of traditional wisdom - and we as lawyers must see how we can best tap into that reservoir of wisdom. It is going to be very important to us in the future and I wish to point out that when we think on those lines we will see the force of the argument that we are neglecting our richest resource of wisdom if we do not look back on tradition. The human family has learnt to live in harmony with the environment for thousands of years and has achieved this in a very successful manner. If we fail to look to the past for its traditional wisdom in facing our environmental problems, we may be depriving ourselves of one of our richest resources. When we think in terms of formal law and "civilised" legal systems, we rather superciliously deny ourselves of this very important source of wisdom. Let me illustrate this from the Aboriginal people of Australia. The Australian Aborigines, the historians tell us, have to their credit one of the greatest achievements that any human race can claim. They were able to maintain a stable life style, for 60,000 years, on the world's most inhospitable continent. Reflect on what this means. The great civilisations we think of as being very ancient - say the civilisation of ancient Egypt, or the Indus Valley civilisation, were not much more than 6000 years old. Multiply that 10 times and the Aboriginal people have maintained a stable life style on this inhospitable continent with great success for that period of time. It is a period of time that makes the mind boggle. Is there not some wisdom we can gather from them?

If you look at their traditions you will find that they are impregnated with their love and respect for nature. They loved and revered the land. Why cannot we adopt some of that wisdom in our modern law rather than superciliously scoff at it and say the Aboriginal people did not have a legal system? What can we gather from Aboriginal wisdom? If you look at Aboriginal paintings you will find there is great emphasis on Mother Earth. All human beings are linked to Mother Earth by an umbilical cord. Their paintings convey the idea that nature is always regarded as the source of nourishment, Mother Earth must be protected, Mother Nature must be respected, Mother Earth must even be revered.

There is also the feeling that land has a vitality of its own. Land lives and grows with the people. If the land withers and dies so also do the people, because the

health of a community is dependent on the health of the land and the health of the land is lost unless you pay due regard and reverence to that land and look after it as you would look after a living thing.

They had mature ideas about conservation. They were very wise. You would all have heard of the Aboriginal "walk about". The Aboriginal "walk about" embodies the idea that if you have lived off a particular piece of land you should go elsewhere on a circuit of three or four years and come back to that land after giving the land time to regenerate itself. So the Aboriginal "walk about" was a method of conservation of the environment due to their wisdom gathered over thousands of years. They know that you could use land only up to a certain point without depriving it of its ability to regenerate itself and to sustain the population dependent on it.

Another piece of aboriginal wisdom was to try to get from every species the maximum advantage you could. Fauna and flora were comparatively meager on the continent, but every species of plant and animal was used to maximum advantage. Nothing was discarded.

Now those are all items of wisdom modern law can gather from Aboriginal culture which is one of many cultures you can draw from for the purpose of enriching the environmental law of the future. From what I have said of Aboriginal custom you will see that there are many principles ingrained in it which we can with great profit build into modern international law - the principle of conservation of resources, the principle of making the optimum use of whatever is available, the principle of giving land time to regenerate, and the principle of treating land with respect.

Let us look now at the traditions of the Pacific. When I was working on the Nauru Commission we researched the customs relating to land of the various islands in the Pacific. I came across the evidence given by a Solomon Islander to a Land Reform Commission in the Solomon Islands. His evidence was to the effect that Pacific islanders did not treat land like an article of merchandise as the westerners treat land - an article which, once you have purchased it you can do with it what you will. Land has to be treated with reverence and respect and its "owners" are obliged to use it in a manner that is respectful to the rights of future generations.

I also recall from a conversation that occurred when I was a visiting Professor in the University of Papua New Guinea. In Port Moresby there were pockets of land within the city (which is the capital city and quite built-up) which were not developed. One day in the common room the conversation turned to the reason why these lands were left undeveloped and they turned out to be land belonging to various family groups. One of the young lecturers in the Law Faculty was a family member of one of those groups and therefore one of the co-owners of this valuable piece of undeveloped land in the heart of the

capital. Somebody said to him 'do you realise you are sitting on a gold mine. Has it ever struck you that if you sold this land you would have a fortune?' This produced an outburst from the lecturer who said "Do you not understand our traditions in this country. This land belonged to our ancestors and belongs to our posterity, How can you suggest that I have the right to sell it ? I have to respect the rights of those who have to come after me."

Such are the traditions of those countries which we can weave into the fabric of modern international law by developing the concept of trusteeship for future generations.

I pass now to the Amerindian traditions which we read of in modern books on environmental law. A letter of the Cherokee Chief to the President of the United States is often referred to in these books. I refer you to the book on environmental law by Professor Lakshman Guruswamy and Mr. Geoffrey Palmer, the former Prime Minister of New Zealand. This famous letter is reproduced in this book, and I quote from it. Apparently, the President of the United States had sought to buy some land belonging to the Cherokee tribe and the chief of this tribe wrote this letter to the President saying "how can you suggest that I sell this land. It is like asking me to sell you a part of the sky or a part of the flowing rivers. Every part of the earth is sacred to my people, every part of the earth is of the red man, every shining pine needle, every sandy shore, every mist, every humming insect is holy in the memory of my people and one portion of land to you is the same as the next and the Earth is not your brother but your enemy and when you have conquered it you move on but we treat Earth as a mother and brother and the earth and sky are not things to be bought and sold like sheep or bright beads . These are entities that have a living life of their own. The community respects it because that is the source from which the community gathers nourishment." So those are some of the traditions that are very important in this field and I think that modern International Law can draw upon such traditions under many heads of International Law.

International Law must draw upon the principles of different civilisations. In my contention, this is not done adequately. We must do that to a greater degree in the future by drawing upon these thousands of years of wisdom in building up the concept of the common heritage of mankind. That is vital in the context of our ever-shrinking planet which is the common home of everybody. Whatever the forces may be that are resulting in our narrow view of law - be they monetarism or individualism - they are drawing us away from our cultural traditions. It is very important that we restore the links, for otherwise international law will grow further away from the people and the planet it is intended to serve. This is very important if we are to develop the international law of the future in a truly global sense.

Our present attitudes are partly due to the views of the positivistic school of jurisprudence. Particularly in the last century the Austinian School which was one of the leading positivistic schools at that time, taught that a customary rule is not worthy of the name of law unless it is written and proceeds from the will of the Sovereign and has a specific sanction or punishment to enforce it. Otherwise, it was not worthy of the name of a law and the entirety of such a system was not a legal system. The 19th Century lawyers both national and international were somewhat arrogant and dismissed with contempt the wisdom of all the traditional systems of law that they encountered in the world. But throughout the world there were traditional systems of law - law that may not be accompanied by sanctions in an Austinian sense or proceed from an identifiable sovereign in an Austinian sense. Yet they were law none the less. Modern research such as that of Malinowski in the Trobriand Islands and various research studies such as A.N. Allott's *New Essays in African Law*, M. Gluckman's *African Traditional Law in Historical Perspective*, T.O. Elias' *The Nature of African Customary Law* and many others are revealing the richness of those traditional systems so that we now have available to us the ability to treat those systems as legal systems. They were very rich in relation to environmental norms and therefore systems that we must treat with respect and try to draw upon in building up the environmental law of the future.

Now that I have said something about the legal systems of different regions, I will come to our own region. There is in our region an infinite amount of richness which we can draw upon when we try to build up environmental law. This is a matter of particular importance to judges. We must not ignore the traditions of our part of the world.

Thousands of years ago the *Ramayana* and *Mahabharatha* enshrined the highest form of respect for the environment. You will recall that in the *Ramayana* and in the *Mahabharatha*, there is reference to what is described as a hyper-destructive weapon, that is, a weapon that could ravage the entire countryside of the enemy. The question arose whether that weapon could be used in war and when there was a question of the use of that weapon it was said to those who might have used it, "you cannot use this in war without consulting the sages of the law." When the sages of the law were consulted they said, "this weapon goes far beyond the purposes of war. Even though your object is to overcome your enemy you dare not lay waste his countryside. You have no right to do that." Culturally, South Asia has a strong heritage of respect for the environment.

The teachings of Buddhism go even further, for they require a compassion for all living things even to the extent of recognising the rights of animals to freedom from fear. The sermon of the Arahata Mahinda to King Devanampiyatissa at the time when Buddhism was brought to this country spoke in terms of these rights. The concept of freedom from fear is an advanced human rights concept. Yet more than 2000 years ago the king was

told, "Remember that these animals are also as much inhabitants of this island as you are". The king was also told that he was only a trustee of this land, and not the owner of it. Trusteeship is one of the basic principles of modern environmental law. Yet, it was anticipated over two thousand years ago. This basic concept of environmental law is thus deeply ingrained in our traditions having been incorporated in the very first sermon that was preached at the time when Buddhism was brought into this country.

I want to complete this reference to our strong cultural tradition by talking of the way in which the ancients combined the notion of development and environmental protection in a manner which is today described as "sustainable development." Sustainable development, as we saw at the outset, is the combination of the idea of development and the idea of the protection of the environment. In that particular aspect, the civilisation of this country was extremely rich, for there was deeply ingrained within it the idea of protection of the environment. The idea that animals had to be protected was so well respected that there were sanctuaries for animals, dating back to the time of King Devanampiyatissa in the third century B.C.. Wild life sanctuaries thus established more than 2000 years ago continued to be preserved throughout this period. There was also the idea that forests must be preserved - there is the notion in traditional law of *thahanan kelle* - of forests where felling of timber is prohibited. The forests were preserved because they attract the rain and the rain feeds the mountain streams which feed the river system, which in turn feeds the irrigation system. So there were vast tracts of land which by royal decree were absolutely protected from felling.

Then again, there was the notion of optimal use of resources - to the last drop so to speak. There was the famous edict of one of our great kings which said that "no drop of water should flow into the sea without first serving the interests of man." King Parakrama Bahu was in fact articulating one of the central principles of the concept of development.

From a practical point of view the environmental damage that might have been done by irrigation works was looked after because the ancient engineers had their answer to the question of silting. Because silting interferes with river systems, silting is a great environmental danger. The ancient engineers invented the *bisokotuwa*. This was a way in which silt was collected and there were also erosion control tanks for the protection of the environment. Then again, there were tanks for wild life - they were called forest tanks. The forest tank was built for the benefit of the wild life of the forest for it enabled animals to get water from those tanks without coming into the protected areas and disturbing the crops. There was also the customary law which prohibited the construction of permanent buildings on prime agricultural lands. There is also a lesson for modern development law when we consider the purpose of this wonderful system of tanks. Our ancient chronicle, the *Mahawansa* says "this irrigation system was undertaken for the benefit of the country and out of

compassion for all living creatures." What better formulation can there be of the concept of development, which is meant not for economic gain but for improving the lot and increasing the happiness of all?

This concept was worked out and given practical effect in this country in a superlative manner - probably to a greater extent both in magnitude and in detail than perhaps anywhere else in the world. There is a recent book which I think those interested in the environment should look at - a book by Goldsmith and Gilliard, *Social and Environmental Effects of Large Dams*. It contains a very important chapter on the Ancient Irrigation System of Sri Lanka which refers to the fact that Sri Lanka is covered with a network of thousands of man made lakes and ponds. Arthur Clarke, the great futurist who lives in this country, in an article in the National Geographic Magazine says that it provides a text book example of many modern dilemmas, including the dilemma of striking a balance between development and the environment. In his book, *The View from Serendib*, he says, "Before the Christian era, a series of tremendous irrigation works transformed the island's dry zone into what might have been a fertile paradise. Some of the artificial lakes created are kilometres in circumference and there are thousands of these tanks linked by intricate networks of canals."

These enormous irrigation works - some of them enclosing an area of water which might run to areas of up to 10 square miles had retaining structures sometimes several miles long and 50 feet high. The Sea of Parakrama for example has a retaining bund which is 8½ miles long. These enormous structures were linked to 25,000 to 35,000 small tanks. We call them tanks here after the Portuguese word *tanque* which means a reservoir. These 25,000 - 35,000 small tanks were linked by hundreds of miles of canals to these enormous reservoirs. We see from all this that the rulers of that age were extremely concerned with what today we call development. As development projects go, some of these are larger than many modern development projects. While they were aimed at development, at the same time they combined development with the protection of the environment. They did not neglect one or the other, but pursued both and they struck a happy balance between the two concepts in a manner which has lasted for centuries.

That is precisely the concept which this conference is trying to address. How do you strike a balance between development and environment?

Let us not neglect examples from the past both in this country and other civilisations of the world from which we can derive enormous benefits. Let us not lose sight of the fact that in European civilisation as well there was a great love of nature and this was lost sight of during the industrial revolution. When Wordsworth, for example, rhapsodised on the beauty of nature, he was speaking not only for himself but was reflecting the prevalent ethos in those societies before the industrial revolution. Likewise, Thoreau in America and



Tolstoy in Russia, whose writings are instinct with this love for nature, were reflecting the traditions of their countries.

Thus respect for the environment is a part of the common culture of humanity. We are looking for a formula which will reconcile development and protection of the environment. We must work out that formula using all the wisdom we can find - and one of the messages I will leave with this Conference is this: "Please do not neglect the traditional wisdom of the many rich cultures of our region that we can draw upon for the purpose of developing this very very important area of future International Law." Thank you.

**VOTE OF THANKS BY  
MR. PRASANTHA DIAS ABEYEGUNAWARDENE  
DEPUTY DIRECTOR/PROGRAMMES, SACEP**

Mr. Chairman, Hon. Nandimitra Ekanayake, Minister of Forestry & Environment, Hon. K. B. Ratnayake, Speaker of Parliament of Sri Lanka, Hon. Ministers, Your Excellencies, Hon. Chief Justices and other Judges, H. E. Judge Christopher Weeramantry, Vice-President, International Court of Justice, distinguished guests, ladies and gentlemen.

It is indeed a great honour and privilege for me to propose a vote of thanks on behalf of the joint organizers of the symposium, the South Asia Co-operative Environment Programme, and the United Nations Environment Programme, to thank all those who have graced the inauguration of this symposium and to all those who have made it possible to organize this unique and ground-breaking event. However, before I perform this very special and pleasant task of formally proposing the Vote of Thanks, I feel it is opportune to delve into the history of the overall SACEP, UNEP, NORAD Environmental Law Project.

In the formative years of the South Asia Co-operative Environment Programme, SACEP, UNEP and UNDP missions visited the member countries to ascertain the needs of the member countries in the field of the environment. Environmental legislation was one item which figured very high in the countries' priority lists, and UNDP subsequently funded a project for the SACEP countries in the area of environmental legislation. Funding was provided for each member country to undertake a review of their national environmental legislation. A regional workshop was held in January 1987 in New Delhi to consolidate the national reports and to consider this subject from a regional viewpoint. Recommendations were made for certain follow-up action. These ideas which lay dormant for about 6 years was the topic of discussion in Nairobi over a typical Sri Lankan dinner in December 1993. Mr. Lal Kurukulasuriya, then Chief of UNEP's global capacity building programme in the field of environmental law, assured SACEP that he would mobilize resources to conduct a regional workshop on the areas identified in New Delhi. Today we see the inauguration of a very important phase of an odyssey that began in New Delhi in December 1996, when in collaboration with UNEP, SACEP held a workshop for strengthening legal and institutional regimes for environmental management in the context of sustainable development. The participants were unequivocal in their plea for continued assistance to mobilize national resources across the sectoral boundaries for both Governmental and non-Governmental institutions, and for reinforcing existing regimes to meet the new challenges in sustainable development. They asked for the assistance of SACEP, UNEP, and

international organizations to make this possible. With this mandate, SACEP approached the Royal Norwegian Embassy in Colombo who very readily recognized the relevance and importance of such an initiative and included this activity for funding under the programme package of NORAD. Thus SACEP is responding to a need of South Asian member countries through a result oriented programme.

I feel it is also necessary for me to give a brief run down of a few things which I feel to be relevant and which form the backdrop to this important occasion. Having been associated with SACEP for the last 14 years, I wish in my Vote of Thanks to initially place on record and to recognize all those whom I consider were instrumental in bringing this co-operative programme to South Asia. I would like to especially thank the Governments of the countries of South Asia for having so courageously come forward in 1981 to set up the South Asia Co-operative Environment Programme to be the nerve centre for environmental activity to the South Asian Region. Much water has flowed under the bridges since SACEP became a legal entity in 1982, and today it has grown in stature and is now recognized internationally as the lead regional body for environmental activity in South Asia. Confirmation of this fact is that now the SACEP Secretariat is also functioning as the Secretariat for the South Asian Regional Seas Programme which is a part of UNEP's global programme, which many consider to be UNEP's crowning jewel. So to the leaders of South Asia, we are certainly very grateful for their wisdom and far-sightedness.

In this context today, I wish to place on record the efforts of the first Director of SACEP, Dr. Leslie Herath. It was he who guided this institution from its infancy and through many a storm. The first Environment Legislation Workshop was held under his chairmanship and now, after ten years, I am sure, Dr. Herath, you are a very happy man today, as the project you nurtured is now reaping a very bountiful harvest.

We are also particularly happy that we have today with us the first Chairman of the SACEP Consultative Committee, Mr. K. H. J. Wijayadasa. Mr. Wijayadasa along with Dr. Herath was intimately associated with this project from its very inception in 1983. It was Mr. Wijayadasa who did the initial review of the Sri Lanka environmental legislation and his report of this effort is a much referred to document when it comes to the study of environmental legislation in Sri Lanka.

May I be permitted to bring to the notice of a very significant factor which I feel should be addressed by all concerned in the implementation of priority projects. What I am referring to is the gestation period of projects. Take for example this project. It has taken almost fifteen years since its formulation to get down to actual implementation. This I feel is very unsatisfactory. Priorities, especially in the case of environmental projects, could change overnight, as such, international agencies and funding agencies should ensure that the gestation period of projects should be kept to the bare minimum in order to ensure

effectiveness. This is a plea on behalf of all implementing agencies. As far as I know, this is the first time that a symposium of judicial cooperation in the area of environment and development is being held at this very highest level in South Asia. For this, we owe a deep debt of gratitude to the Royal Norwegian Government and the Royal Norwegian Embassy in Sri Lanka for their faith and confidence in the efforts being made by the countries in South East Asia to pursue a path of sustainable development and for underwriting this initiative to reinforce such forces. This is of course not surprising having regard to the fact that it was to the Prime Minister of Norway, Mrs. Gru Harlem Brundtland who gave inspiring leadership to the international movement which led to the Earth Summit in Rio de Janeiro in 1992, which in turn, gave legitimacy to the concept of sustainable development. History will mark the Brundtland Report as a major landmark in the progress of mankind.

A new chapter in the history of the South Asia Co-operative Environment Programme was opened in 1994, when for the first time SACEP entered into collaboration with a bilateral donor agency, namely NORAD, for the implementation of two approved priority projects. They were the "Assessment of Faunal Biodiversity in the Countries of South Asia" and the "Cooperation in Environmental Training: Proposal for Capacity Building in the South Asian Region."

NORAD is also assisting SACEP in the publishing of the seminar proceedings of the SACEP/UNEP Environmental Management Seminar, containing the seminar papers, country case studies and seminar proceedings, entitled "Harmonising Environment and Development in South Asia." Their generous gesture in providing the necessary funds to meet the entire cost of the printing and their positive approach, has ensured a lasting contribution to the South Asian Region. To NORAD, on behalf of the SACEP member countries and the Secretariat, a very big thank you.

To the Hon. Chief Justices and other Judges and representatives of South Asian countries, who have graciously accepted our invitation to participate in this symposium and share their values and visions and expertise and experience, we extend a very warm welcome to you all and wish the deliberations of this symposium every success. The outcome of the symposium will be firmly rooted in your collective wisdom and vision. We are also indeed very fortunate that this symposium has attracted the participation of the Chief Justices of Bangladesh and Nepal, and the Senior Judges of the Supreme Courts and other courts of the region. We assure you that we will spare no pains to facilitate your deliberations and make your stay in Sri Lanka a pleasant and memorable one. We will miss the presence of the Chief Justice of India, Hon. Mr. Justice Varma, who at the last moment was unable to participate due to pressing commitments of the Supreme Court of India.

To the Chairman, Hon. Nandimitra Ekanayake, Minister of Forestry and Environment, and the Secretary to his Ministry, Mr. K. A. S. Gunasekara, we owe much for their whole-hearted support and cooperation for this initiative. Your guidance and advice for this programme and your honoured presence here today, Hon. Minister, is indeed a reflection of your commitment to ensuring a safe environment for generations to come. Thank you once again for honouring us with your presence and for your thoughtful words of wisdom, which is certainly food for thought. We are much encouraged by your support and look forward to cooperating with you in developing needs-responsive programmes which offer opportunities for realizing enduring results.

On behalf of all the participants, I would like to thank Hon. K. B. Ratnayake, Speaker of Sri Lanka's Parliament, for having kindly accepted the invitation to be our Chief Guest at the inauguration. It is indeed auspicious that we have the Head of Sri Lanka's legislature to launch this important regional initiative. Thank you Sir, for giving your valuable time and being with us today.

There are so many to whom we owe deep appreciation and thanks for making this symposium possible - neither time nor the occasion permit me to mention them all. I cannot of course refrain from referring to two of them who have made a significant contribution to giving focus and direction to this effort. I refer to H. E. Judge Christopher Weeramantry, Vice-President of the International Court of Justice and Hon. Mr. Justice A. R. B. Amerasinghe, Judge of the Supreme Court of Sri Lanka, who has very kindly accepted our invitation to serve as Secretary-General of the symposium. Your vision, your hopes and your expectations are etched in every facet of this initiative. We thank you for your invaluable advice, guidance and encouragement.

The former Chief Justice of India, Hon. Mr. Justice P. N. Baghwati was to be with us today. However, unfortunately, due to a health problem he cannot be present. We will certainly miss his wise judgment and wish him a speedy recovery.

In connection with this project, I would be failing in my duty if I did not on behalf of SACEP, place on record our deep appreciation to UNEP and especially to Mr. Donald Kaniaru, Director of UNEP's Environmental Law and Institutions Programme Activity Centre, Nairobi, and to Mr. Lal Kurukulasuriya, Chief of the Regional Environmental Law Programme of UNEP, Regional Office for Asia/Pacific, for their invaluable contribution in fulfilling the objectives and aspirations of this project. I would also especially like to thank Mr. Kaniaru for his sustained support to this and other activities which constitute the backbone of SACEP/UNEP collaboration in the field of environmental law. He is present here today, not only in his capacity as Head of the UNEP Environmental Law Programme, but also as special representative of the Executive Director of UNEP, Ms Elizabeth Dowdeswell. Mr. Lal Kurukulasuriya could be considered to be the pioneer of this project, and SACEP countries and Sri Lanka in

particular are fortunate that Mr. Kurukulasuriya is at the helm of UNEP's Environmental Law Programme for Asia and the Pacific. He has within a short space of 16 months mobilized resources to launch many programmes in the field of environmental legislation by which this region will benefit immensely. To the members of the press and other publicity media present today, on behalf of SACEP, I wish to thank you for your presence here today. Your role is a very vital one, as creating awareness is probably the most powerful tool we have in combating environmental degradation. Thank you for joining hands in spreading the message to save our planet, Earth.

As Deputy Director of Programmes of SACEP, this programme comes under my purview. My task has been made much lighter by the cooperation extended to me by the rest of the small but efficient SACEP staff. To my, Director Mr. Hussain Shihab, who has given new momentum to the organization, by strengthening both the programme of work and partnership with member Governments and United Nations and other agencies in delivering programmes of practical value and impact to the countries in the region. We owe you a special debt of gratitude. The administrative matters pertaining to this project were in the capable hands of our Deputy Director of Administration, Marlene Pereira. To you, very many thanks. To Kumar Kotta, the Project Manager of SENRIC, thank you for professionally handling the collection, storage and dissemination of information of this symposium, SACEP is indeed indebted to you. Knowing the magnitude and dimensions of this project, SACEP had to recruit a Project Manager to handle the day to day affairs of running this project. I do not think we could have made a better choice than Pradeep, who certainly took a major share of work load off my shoulders - thank you very much Pradeep. A very special words of thanks to Chandima for very diligently handling the secretarial affairs including the efficient filing system. To Augusta and Dilani, many thanks for your efforts in assisting the so-called minor, but the most important, details leading to the preparation of this symposium. To the liaison officers of the Country Delegations, Lakmali, Samanthi, Dulith, Mahendra, and Bimsara many thanks. I trust this baptism will stand you in good stead in your future legal career.

We also take this opportunity to thank the General Manager and staff of the Trans Asia Hotel for being very accommodating hosts. They have ensured that every one of us is given special attention and have played a significant role in ensuring the success of this symposium. When we have such high level participation from our neighboring States, it is of prime importance that we ensure the safety and security of our visitors. This has been very effectively and professionally handled by the Ministerial Security Division of the Sri Lanka Police under the able direction of Mr. D. M. T. Dissanayake, Senior Superintendent of Police, Mr. Sarath Jayasuriya, Director/Ministerial Security Division and Assistant Superintendent of Police Badiudin Samsudeen. To them, on behalf of all of us, very many thanks.

Last but not least to all our special invitees present here today. I thank you most sincerely for being with us. The fact that you thought it fit to attend this inauguration is indeed an indicator of your concern for the environment. It has also been a great source of encouragement to us. If I have inadvertently failed to recognize anybody who contributed towards this symposium, *mea culpa, mea maxima culpa*. I take this opportunity to wish this deliberation at this symposium every success and in conclusion may I take this opportunity on behalf of my Director, Mr. Hussain Shihab to invite each and every one of you to join us for a reception.

Thank you.

## **II. OPENING SESSION**



## THE ROLE OF LAW IN MAKING DEVELOPMENT MORE SUSTAINABLE

PROFESSOR MOHAN MUNASINGHE<sup>2</sup>  
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WORLD BANK

### 1. Introduction

It is indeed a great privilege, to address such a distinguished gathering. I would particularly like to thank the organizers, SACEP, UNEP and NORAD, for inviting me to this path breaking event -- certainly the first of its kind in the region. Environmental law is fast becoming one of the cutting edge areas contributing to the pursuit of sustainable development (*Kurukulasuriya 1996*).

I approach my task with mixed feelings. First, the excellent presentations that were made earlier have clarified the subject in a way that makes my presentation easier to make. However, I also speak with some trepidation, because I may not be able to match the eloquence of those who have preceded me.

The degradation of the environment has emerged as a major recent worldwide concern. Decision makers are seeking more pro-actively designed projects and policies that will help anticipate and minimize environmental harm. As the 21st century approaches, we are beginning to explore the concept of sustainable development, an approach that promises continuing improvements in the present quality of life at a lower intensity of resource use -- thereby leaving behind for future generations an undiminished or even enhanced stock of natural resources and other assets (*WCED 1987, Munasinghe 1993*).

The environmental assets that we seek to protect provide three main types of services to human society, and the consequences of their degradation must be incorporated into legal and economic decision making process. First, it has been known for centuries that the natural resource base provides essential raw materials and inputs (both renewable like forests and depletable like minerals) which support human activities. Second, the environment serves

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as a sink to absorb and recycle (often at little or no cost to society) the waste products of economic activity. Finally, there has been increasing recognition, particularly in the last two decades, that the environment provides many other generalized services ranging from simple amenities to irreplaceable life support functions (e.g., stabilization of the global climate or filtering out of harmful ultraviolet rays by the stratospheric ozone layer).

## **2. The Economic, Social And Environmental Dimensions Of Sustainable Development**

Let me begin by further exploring the meaning of sustainable development, which several of the previous speakers also sought to define. The word development captures the search for an improved quality of life for human beings. "Sustainability" refers to the persistence, viability and resilience of ecological and social systems, over their "normal" life span. Sustainable development implies a set of measures or actions adopted to achieve improvements in human well-being on a continuing basis. Indeed, not all activities that improve human welfare can be considered sustainable. Development-oriented human activities have to be assessed in relation to their impact on the sustainability of bio-geophysical and social systems, across wide geographic areas and over long periods of time. Those that meet the criteria of sustainable development, are measures that can be *sustained* over time.

The concept of sustainable development which emerged in the 1980s draws heavily on the experience of several decades of development efforts. Historically, the development of the industrialized world focused on production. Not surprisingly, therefore, the model followed by the developing nations in the 1950s and the 1960s was output and growth dominated, based mainly on the concepts of economic efficiency. By the early 1970s the large and growing numbers of poor in the developing world, and the inadequacy of "trickle-down" benefits to these groups, led to greater efforts to directly improve income distribution. The development paradigm shifted towards equitable growth, where social (distributional) objectives, especially poverty alleviation, were recognized as distinct from and as important as economic efficiency.

Protection of the environment has now become the third major objective of development. By the early 1980s, a large body of evidence had accumulated that environmental degradation was a major barrier to development. The concept of sustainable development has, therefore, evolved to encompass three major points of view: economic, social and ecological, as shown in Figure 1 (*Munasinghe 1993*).

The *economic* approach to sustainability is based on the Hicks-Lindahl concept of the maximum flow of income that could be generated while at least maintaining the stock of assets (or capital) which yield these

benefits (Solow 1986, Maler 1990). There is an underlying concept of optimality and economic efficiency applied to the use of scarce resources. Problems of interpretation arise in identifying the kinds of capital to be maintained (e.g., manufactured, natural, and human capital) and their substitutability, as well as in valuing these assets, particularly ecological resources. The issues of uncertainty, irreversibility and catastrophic collapse pose additional difficulties (Pearce and Turner 1990).

The *social* concept of sustainability is people-oriented, and seeks to maintain the stability of social and cultural systems, including the reduction of destructive conflicts (Munasinghe and McNeely 1994). Intra-generational equity (especially elimination of poverty), is an important aspect of this approach (Dasgupta 1993). Preservation of cultural diversity across the globe, and the better use of knowledge concerning sustainable practices embedded in less dominant cultures, are desirable (Hanna and Munasinghe, 1995a, 1995b). Modern society would need to encourage and incorporate pluralism and grass-roots participation into a more effective decision making framework for socially sustainable development.

The *ecological* view of sustainable development focuses on the stability of biological and physical systems (Munasinghe and Shearer 1995). Of particular importance is the viability of subsystems that are critical to the global stability of the overall ecosystem. Protection of biological diversity is a key aspect. Furthermore, "natural" systems may be interpreted broadly to include man-made environments like cities. The emphasis is on preserving the resilience and dynamic ability of such systems to adapt to change, rather than conservation of some "ideal" static state.

Reconciling these various concepts and operationalizing them as a means to achieve sustainable development is a formidable task, since all three elements of sustainable development must be given balanced consideration. The interfaces among the three approaches are also important. In the figure, the economic and social elements interact to give rise to issues such as intra-generational equity (income distribution) and targeted relief for the poor. The economic-environmental interface has yielded new ideas on valuation and internalization of environmental impacts. Finally, the social-environmental linkage has led to renewed interest in areas like intergenerational equity (rights of future generations) and popular participation.

The law definitely has a key role to play in facilitating and enhancing all three aspects of sustainable development. From the economic viewpoint, we live in a period of increasing globalisation and dominance of market based forces, based on the assumption that competition is good -- that somehow, it will lead to more efficient production of goods and services. However, it is also obvious that competition pursued to excess often leads to conflict, sometimes even armed conflict over scarce resources. It is in this context that the rule of law becomes

particularly important, in order to maintain competition at a healthy level. The law helps establish regulations and procedures which govern human activity and limit the damage that excessive greed might inflict on the social fabric. This leads us to the social dimension of sustainable development, where the law plays a crucial role in facilitating governance and protecting and balancing the rights of individuals, communities, and institutions. The law reinforces basic social norms of conduct and provides the glue that binds society together. Finally, the ecological perspective is strengthened by laws and regulations which prevent disastrous depletion of natural resources and excessive pollution of air, land and water.

### **3. Restructuring Growth For Greater Sustainability**

One key aspect to keep in mind is the fact that growth is a major objective of almost all developing countries -- especially the poorest ones. If we look at South Asia, poised on the threshold of greatness, this promise cannot be fulfilled unless economic growth is sustained into the long term. We in the SAARC region need to ensure that our endowment of natural resources, passed on to us by generations long gone by, are not taken for granted and squandered. If valuable resources such as air, forests, soil, and water are not protected, development is unlikely to be sustainable -- not just for a few years, but for many decades. Furthermore, on the social side, it is imperative to reduce poverty, create employment, improve human skills and strengthen our institutions.

Next, let us examine the alternative growth paths available to us, and the role of law in choosing options. Figure 2 shows how the socioeconomic subsystem (solid rectangle) has always been embedded in a broader ecological system (large oval). National economies are inextricably linked to, and dependent on natural resources -- for instance, the shirt that I wear, the car that transported you from the airport to the hotel, and other goods and services are in fact derived from natural resources inputs that originate from the larger ecological system. We extract oil from the ground and timber from trees, and we freely use water and air. At the same time, we have continued to expel polluting waste into the environment, quite liberally. The broken line in the figure symbolically shows that in many cases, the scale of human activity has increased to the point where it is now impinging on the underlying ecosystem. This is evident today, if we consider that forests are disappearing, water resources are being polluted, soils are being degraded, and even the global atmosphere is under threat (see below). Consequently, the critical question involves how we contain or manage this problem?

There is a traditional view that is causing confusion, certainly among leaders (especially finance ministers) around the world. They assume that concern for the environment is not necessarily good for economic activity. So the conventional wisdom holds that it is not possible to have economic growth and a good environment at the same time, because environment and economic growth are mutually incompatible goals. However, the rule of law could help to encourage a more modern viewpoint, that growth and environment are indeed

complements. The underlying assumption is that it is possible to devise so-called “win-win” policies which lead to economic as well as environmental gains. As illustrated earlier in Figure 2, the traditional approach to development would certainly lead to a situation where, the economic system, would impinge upon the boundaries of the ecosystem in a damaging manner. On the other hand, Figure 3 summarizes the modern approach which would allow us to have the same level of prosperity without severely damaging the environment. In this case, the oval outer curve is matched by an oval inner curve -- where economic activities have been restructured in a way that is least harmful to the environment. The rule of law has a key role to play in restructuring growth in this desirable manner, by “rounding” the corners of the economic rectangle.

What then are the specific interventions that might help us to make the crucial change in mindset, whereby instead of focusing on the magnitude of growth, we emphasize the structure of growth. Policies which promote environment-friendly technologies that use natural resource inputs more frugally and efficiently, and reduce polluting emissions, are important. The correct blend of market forces and regulatory safeguards are required. The information technology revolution will facilitate desirable restructuring by making modern economies more services oriented, and shifting activities away from highly polluting and highly material intensive manufacturing. Many of these elements are captured rather aptly in Figure 4 which shows the so-called environmental kuznets curve (EKC). There has been considerable debate recently whether the level of environmental degradation and per capita income (conventionally measured) might obey the inverted-U shaped relationship (ADBCE) shown in the figure ( see for example, *Arrow et al. 1995*).

The EKC hypothesis is intuitively appealing. Thus, at the low levels of per capita income associated with pre-industrial and agricultural economies, one might expect rather pristine environmental conditions relatively unaffected by economic activities at the subsistence level. As development and industrialization progressed, the increasing use of natural resources and emission of pollutants, less efficient and relatively “dirty” technologies, high priority given to increases in material output, and disregard for or ignorance of the environmental consequences of growth, would have all contributed to increasing environmental damage. In the final post-industrial stage, cleaner technologies and a shift to information and service based activities, the growing ability and willingness to pay for a better environment, improved internalization of environmental externalities, and greater financial surpluses that could be used to pay for a more pre-emptive approach to environmental protection, might be expected to result in reduced environmental degradation.

A major motivation for more systematically examining the basis for the EKC phenomenon is the search for environmentally sustainable development paths. The extent to which decision-makers ought to devote their limited time and resources towards designing and implementing policies for

sound environmental management, could well depend on the extent to which the driving forces underlying the EKC are susceptible to such policies. In other words, if environmental damage is a structurally determined and inevitable results of growth, then attempts to avoid such damage in the early stages of development might be futile. In contrast, we argue that the developing countries could learn from the past experiences of the industrialized world, by adopting measures which would permit them to “tunnel” through the EKC (as shown in Figure 4) -- preferably under the safe limit beyond which at least some types of environmental damage (like biodiversity loss) could become irreversible (*Munasinghe 1995*). They could thereby avoid the peak of environmental degradation (at B in the figure) associated with a conventional development path (like ADBEC), which merely mimicked the evolution of the market economies. Thus, the emphasis is on identifying policies that will help delink environmental degradation and development, by changing the structure of economic growth. Thus, environmental harm will be reduced along the development path DE. Environmental laws and regulations will play an important part in such a transition.

#### **4. The Role of the Law**

How does the rule of law contribute specifically towards addressing these issues? We note that economic analysis, as it is now carried out, attempts primarily to assess the monetary costs and benefits of any activity. For example, if a road is built there are wide-ranging benefits and costs. Now, if the analysis is carried out purely in monetary terms, we might be misled because so-called “externalities” would be neglected -- that is, impacts on environmental systems and on society which cannot be readily captured in monetary units (see below). Therefore, it is very important in making such decisions, to maintain a balance between the economic or monetary aspects, and other considerations which involve the ecological and social dimensions. It is the law which can provide such a balance among these sometimes conflicting objectives.

In fact, there are some very illustrative examples from the recent rulings of South Asian courts. Thus, in the case of *Mohiuddin Farooque vs. Bangladesh* (1996), the key issue which emerged was whether the fundamental right to life also included the protection of environment, the ecological balance and pollution. In another ruling, *Rural Litigation and Entitlement Kendra vs. State of Uttar Pradesh* (1988), where the court looked at the balance between the tapping of minerals for development on the one hand, and the preservation of the environment on the other. Furthermore, in the case of *Chhetriya Pardushan Mukti Sangharsh Samiti vs. State of Uttar Pradesh* (1990), the Supreme Court ruled that every citizen has a fundamental right to the enjoyment of quality of life, including of course, the quality of the environment.

Another very important area, where the rule of law has a role to play is in the interface between economics and traditional financial analysis -- where so

called environmental externalities often give rise to socially undesirable behavior. An externality is defined as the cost (or benefit) imposed on one individual by the actions of another, for which the latter does not pay (or receive) compensation. Consider a chemical plant which discharges unregulated pollutants into a river. Households that use the river water downstream are likely to suffer adverse health impacts. They may be unaware of the cause or unable to influence the polluter's behavior. In any case, the industry is able to realize a larger profit by avoiding the costs of treating its waste products, while the downstream water users bear the costs of ill health. This is a typical negative externality where the actions of Party A inflict damages on Party B without any economic repercussions or penalties. Perhaps due to lack of scientific knowledge and/or apathy, connections are rarely made between the two events. However, once the linkage is known, together with clear scientific evidence, the rule of law can come in to play.

In the environmental context, a number of useful guidelines have emerged, including the polluter pays principle, the victim is recompensed principle, and the precautionary principle. Under the polluter pays principle, the source of pollution or environmental damage bears direct liability for this harm, and will be penalized or charged accordingly. A closely related rule requires that any fines or charges collected from the polluter must be used first to adequately recompense the victim of the damage, wherever possible. One reason for the emergence of this principle is the fact that pollution taxes, fines and the like that are levied for damage caused to the environment are collected by the general exchequer, and rarely made available to victims. However, unless such payments are used to offset the pain and the discomfort of those who have suffered directly, the application of justice is incomplete.

Finally, the precautionary principle comes into play when the results of some course of action might be quite uncertain, but potentially disastrous. In such cases, some precautionary steps must be taken (akin to taking out an insurance policy against a hazard like fire), depending on the acceptable level of risk. This approach has been used to deal with global warming, where aversion to risk interacts with the uncertainty associated with potentially irreversible and catastrophic climate change impacts (for details, see *Jepma and Munasinghe, 1998*). More specifically Article 3.3 of the United Nations Framework Convention on Climate Change (UNFCCC) states that the Parties to the UNFCCC (i.e., member countries) should: "..... take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost effective so as to ensure global benefits at the lowest possible cost ....."

Thus, there is an important role for the legal system in arbitrating not only among individuals, but also among countries. For example, trans-boundary

pollution problems are growing steadily, where emissions from one country cause damage to the air or water quality in another nation. Both in the case of bilateral interactions between two countries and multilateral linkages among many nations, increasingly complex issues and scientific and economic data need to be analyzed and judged fairly. In the case of climate change, the Intergovernmental Panel on Climate Change (IPCC) -- a UN body of leading experts on the subject has agreed that countries need to seriously address climate change issues. However, there are very great scientific, technical, and socioeconomic uncertainties. Other key issues like intra-generational equity (among those living today) and intergenerational equity (between generations) further complicate the analysis. Any response strategy will require unprecedented cooperation involving every country and every human being -- since we are all stakeholders. Once again the law will be significantly challenged to find mechanisms, institutions, rules, regulations and other measures to bring about collaboration on a planetary scale over long periods of time.

## **5. Concluding Remarks**

Countries in the Asian region share an ancient and common heritage which has given rise to value systems, modes of social conduct, and relationships with nature, that could be used to good advantage by the rule of law, in promoting sustainable development.

First, with respect to economic growth, the Asian approach has effectively combined market forces with self-restraint that limits destructive competition. Recent experience has thrown up a number of examples in the region that harmoniously combine traditional and modern (technology-based) practices.

Second, on the social side, Asian values place great emphasis on the family as a unit, and on community relations. Furthermore, social decision making in the region has traditionally relied on consensus rather than confrontation. There are many practical examples of consultative and participatory approaches, especially in rural communities. Governance is often informal rather than formal, and disagreements tend to be settled through discussion rather than legal action. Pragmatism, often based on traditional values, has held its own against ideological approaches often introduced from outside.

Third, with regard to the environmental dimension, the ancient spiritual and religious roots of the region have emphasised harmonious co-existence with nature rather than dominance over the earth. The high population densities and frequent scarcities of natural resources have encouraged a frugal and sustainable lifestyle. Although high levels of consumption and consumerism have emerged among urban groups who mimic western lifestyles, the bulk of the population who are still rural-based tend to



focus on meeting needs rather than artificially created wants. The legal system has a key role to play in restoring and reinforcing those values that promote sustainability.

Let me draw a few conclusions. First, the rule of law must take a much broader view based on the requirements of sustainable development, to maintain the balance among the economic, environmental and social dimensions. Second, the legal system needs to contend with a much wider geographical scope, because environmental impacts are often far removed spatially from the original cause. Third, the law must cover a much longer temporal span as well, since we must consider not only the rights of the living, but also those of future generations -- not merely over years or decades but sometimes even centuries, as we saw in the case of global warming.

Once again, I am very pleased to have participated in this distinguished gathering and would like to thank you for the patient hearing you have given me. I strongly endorse three very promising items for follow-up action which have already emerged in the discussions -- (a) the launching of a new South Asian Environmental Law periodical which will cover all aspects of court rulings dealing with the environment; (b) the compilation of Environmental Acts, Laws and Statutes in the region, as an up-to-date reference source for lawmakers and practitioners; and (c) the networking and linking-up of the Supreme Courts of South Asian countries through the internet. Let me conclude by wishing you well in your continuing deliberations on this very important topic.

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Figure 1:

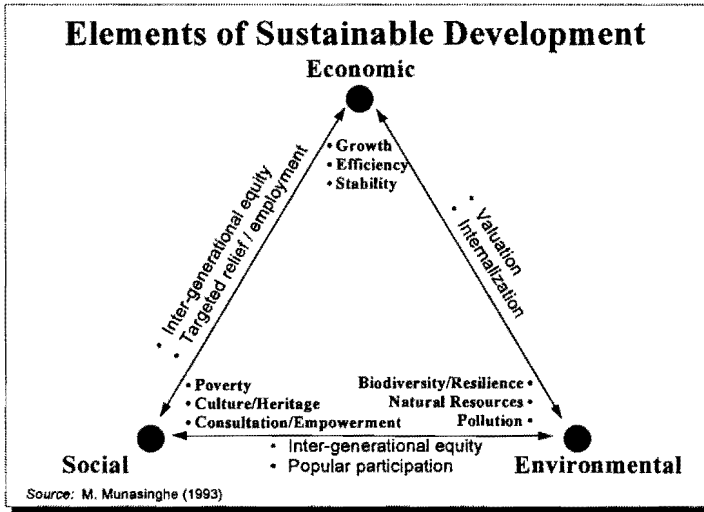


Figure 2:

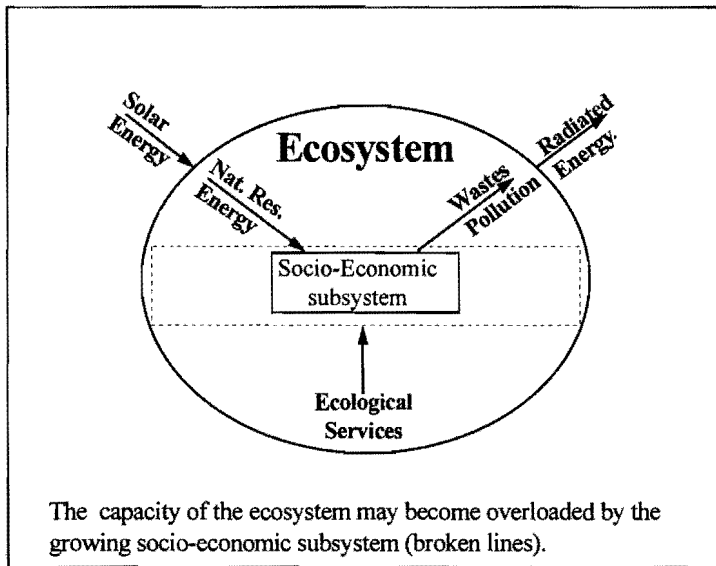
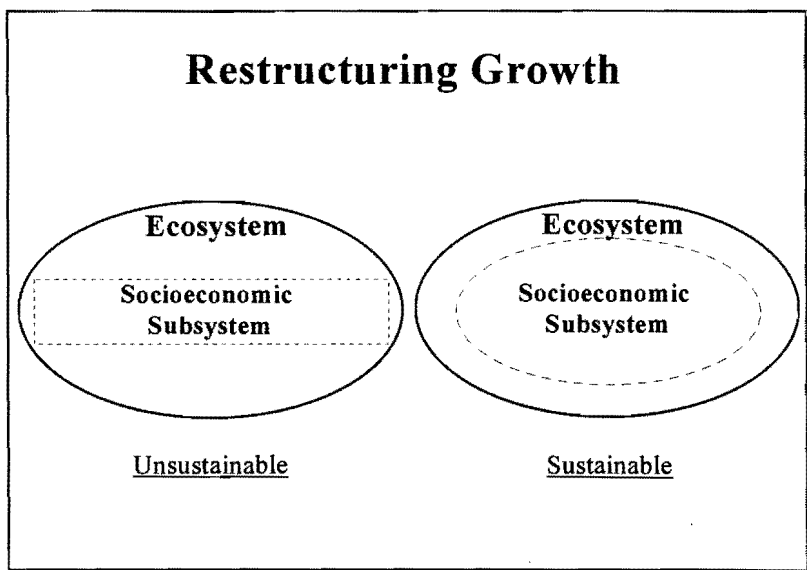
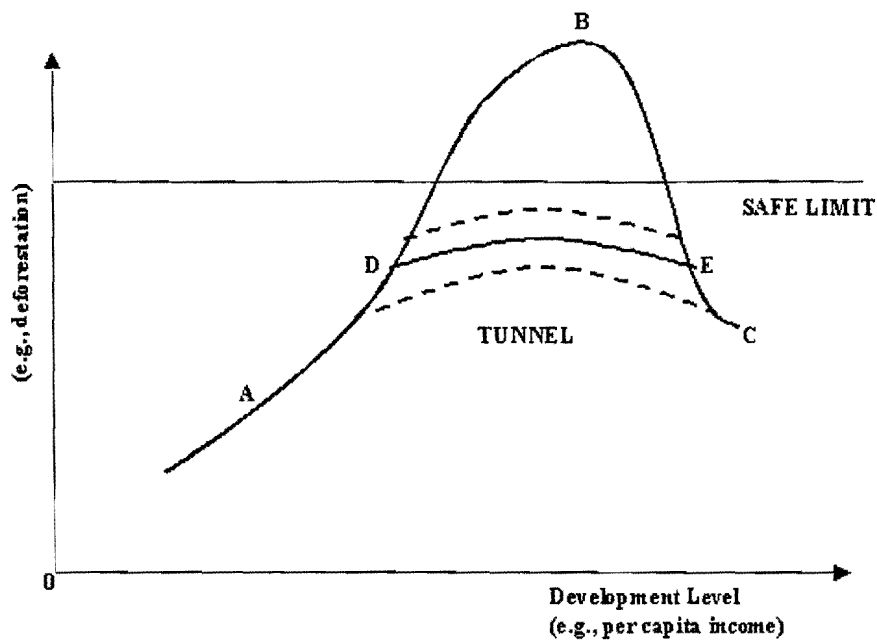


Figure 3:



**Figure 4. Tunneling through the Environmental Kuznets Curve using Sustainable Strategies**



Source: Munasinghe (1995)

**COUNTRY PRESENTATION - BANGLADESH**

**HON. MR. JUSTICE A.T.M. AFZAL  
CHIEF JUSTICE OF BANGLADESH**

**I. Introduction**

I would like to begin by thanking my hosts and the sponsors of this Symposium on the Role of the Judiciary in Promoting Rule of Law in the Area of Sustainable Development, now being held in the beautiful city of Colombo, my "Yarrow Unvisited" for so long, for inviting me here and for giving me the opportunity to present the Country Statement for Bangladesh.

The shared notions which we wish for the linkages between the rule of law and sustainable development will be reflected in newer light and perspective on the basis of individual experience and collective wisdom. We have a great deal to share with each other, given our common commitment to the rule of law and aspirations for sustainable development in our respective societies.

In this paper I have tried briefly to highlight the concepts of sustainable development, environment, rule of law and the institutional framework as they now operate in Bangladesh and the limitations with which the Courts are faced in meeting the new challenges. Due to time constraints, it may not be possible for me to present the whole text and I will have to skip some parts of it, but I am sure this paper will be made available to you in due course. I have to inform my brothers and sisters of the SACEP Region that Bangladesh Judiciary is aware of the problems of sustainable development and is facing its assigned role on the basis of shared experience.

**II. Sustainable Development, Environment, Rule of Law & the Institutional Framework**

**A. Development**

The 1986 Declaration of the Right to Development of the General Assembly stated in its Preamble that

"development is a comprehensive, economic, social, cultural and political process which aims at the constant improvement of the well being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."

This approach has been emphatically expressed in UNDP's 1990 Human Development Report where human development was defined as a process enlarging people's choices for the present and future. WHO have also conceptualized a notion of sustainable development, aimed at meeting the needs of the present, without forfeiting or compromising the ability of future generations to meet their needs. As a result, the question of inter-generational equity along with intra-generational equity further complicates the rule of law and the role of the judiciary. The task today is to pass on the environmental resources to future generations along with a sustainable system of development vis-à-vis environmental order.

The laws of Bangladesh do not define development, although our 1972 Constitution, in the Preamble, aims at promoting development in more than one way for various broader sectors and target groups as fundamental principles of state policy. There are certain laws namely, the Acquisition and Requisition of Immovable Property Ordinance 1982, the Court (Ad Interim Order) Act, 1989, which attribute special legal status and protection to development and anything related to it. However, there is no legal definition or guideline to assert what is, and what is not development. The lack of a definition may put arbitrary decision making authority into the hands of the Government and its various agencies. The freedom of the Executive to decide unilaterally what is development may aggravate environmental injuries in the absence of mandatory standards on environmental quality or legislative sanctions and guidelines for Environmental Impact Assessment (EIA).

## **B. Environment**

To be candid, it is perhaps easier to define what is not covered by the definition of "environment" than what it encompasses. Environment was defined in Section 2 (b) of the 1977 Environment Pollution Control Ordinance, which has been replaced since then by an Act, as the "surroundings consisting of air, water, soil, food and shelter which can support and influence the growth of life of an individual, a group of individuals, including all kinds of flora and fauna." The same spirit has been re-iterated in the Environment Conservation Act 1995 which is the present law in Bangladesh. The definition is, of course, too concise especially for legislative and judicial application. This brevity has promoted either virtual inaction or too wide a discretion in deciding what comes under the purview for an action affecting both juridical understanding and scope of application. The definition needs to be refined to make it at least capable of:

1. Identifying its dimension on other sectoral laws
2. Indicating legal responsibility and liability
3. Determining compatibility of legal remedies
4. Bringing in an effective institutional management regime



### **C. Rule of Law**

In the Preamble of our Constitution it has been said that it shall be a fundamental aim of the State to realise through democratic process the aim of a socialist society free from exploitation. A society in which the rule of law of fundamental human rights and freedom; equality and justice; political and economic and social; will be secure for every citizen.

The most common meaning attributed to the concept of the Rule of Law includes:

- the power exercised by public agencies must have a legitimate foundation. (which is again open to controversy in martial law regimes), and must be based on authority conferred by law; and
- that the law should conform to certain minimum standards against abuse, namely, that the law should treat all equally and unfair discrimination should not be sanctioned by law, and one should not be condemned unheard but after trial by an impartial body with fair procedures and so forth.

### **D. The Environmental Regulatory Framework**

According to a recent study, there are about 182 laws which have a bearing on environment in Bangladesh. However, most of these laws remain unenforced due to too many legislative and institutional failures such as lack of rules, identification of institutions responsible for enforcement, absence of statutory environmental quality standards, lack of legal education and awareness.

In 1989, the Ministry of Environment and Forest was created under which there is a Department of Environment with overall responsibility to implement the Environment Conservation Act 1995.

A National Environment Policy has been adopted in 1992 which provides sectoral policy guidelines in combating and promoting environmental matters. The section on law states as follows:

4.1 Amend all laws and regulations related to protection of environment, conservation of natural resources, and control of environmental pollution and degradation with a view to present day's need.

4.2 Frame new laws in all sectors necessary to control activities concerning environmental pollution and degradation.

4.3 Ensure proper implementation of all relevant laws/regulations and create a widespread public awareness in this regard.

4.4 Ratify all concerned international laws/conventions/protocols which Bangladesh considers ratifiable and amend/modify existing national laws/conventions/protocols.

The objects of the policy are being implemented in phases: Although the pace is slow and foreign aided projects are changing the laws with little substantial progress. In some areas the parent law needs change, while in other areas the institutions are not really responsive and by-laws have not been formulated.

Last year, the Environment Management Action Plan was prepared by the Government to draw up investment projects. The National Conservation Strategy was submitted in 1992 and is awaiting Government approval.

Bangladesh has ratified a large number of international instruments relating to environment and sustainable development. Most of these multi-lateral conventions remain unimplemented and, as such, outside the scope of judicial intervention.

In the case of *Dr. Mohiuddin Farooque v. Bangladesh and others* (Bangladesh Legal Decisions (BLD), 1997, p.1), the Appellate Division of the Supreme Court reflected upon the commitments to international environmental instruments by Bangladesh and its emerging legal implications for human survival. In another case, the High Court Division of the Supreme Court has permitted a writ petition filed by minors relying on the Convention on the Rights of the Child, (1989) (ratified by Bangladesh) to bring back children trafficked to the U.A.E. who are being engaged as camel jockeys. (Writ Petition No. 278 *Issa N. Farooque v. Bangladesh*) The matter is pending further hearing.

In Bangladesh, there are differences between policy, strategy etc. and law. Article 152 of the Constitution defines law as "any Act, ordinance, order, rule, regulation, by-law, notification or other legal instrument, or any custom or usage, having the force of law in Bangladesh." It has been made clear repeatedly that any statement or formulation of policies or strategies may have mandatory impact on the acts of Government of Bangladesh agencies but cannot be judicially enforced. Hence, no person aggrieved can challenge violation of a policy directive in a court of law. Policy directives are not enforceable as such. Similarly, the Fundamental Principles of State Policy described in Part II of the Constitution are not enforceable but remain as a guide to work and interpretation of law and the Constitution.

At the same time, we remain equally mindful that the same provision in the Constitution mandates that the principles of state policy, which reflect the economic, social and cultural rights recognised by the Universal Declaration of Human Rights "shall be applied by the State in the making of laws, shall be a guide to interpretation of the Constitution and of other laws of Bangladesh and shall form the basis of the work of the State and its citizens."

Policy adoption usually makes people at the higher levels aware, but at the field level, its message may not be received. Policy may bring changes in managing resources to the extent and level that could be effectively controlled by the higher echelon of the sectoral agency.

There are two cases that might be relevant on this point. In one case, the Appellate Division of the Supreme Court said that where there is no law, in its widest definition, policy can be taken as the guiding norm for enforcement (*Sharping MSS Ltd. v. Bangladesh and others* (7 BLD (AD) 106)). In the other case, the Court took notice of a policy violation on the ground that the relevant Act stated that the authority created under the law would implement the policy adopted from time to time. In the latter case, it was possible to show that the authority has violated policy.

#### **E. Externality of Development and the Judiciary**

Externality of development is crucial in integrating environment and sustainable development as a pre-condition in determining the feasibility of a development project. This is done by foreign consultants. If any project fails despite the consulting firm's expertise, can the courts of the recipient countries exercise jurisdiction? If not, then where would the accountability and liability stand for the victims of adverse consequences.

There is another aspect of externality where a development project cannot be sustainable because of the consequences of actions or omissions beyond the periphery of national jurisdiction. This is an odious aspect for Bangladesh in that it may deny justice to those affected by such acts. These are the areas of shared natural resources, natural and man made disasters, consequences arising out of refugee issues, etc.

#### **F. Right to Development in Bangladesh Constitution**

The Constitution of Bangladesh does not enshrine the right to development as a fundamental right of the individual, group of individuals or a community. However, the State may make special provisions in favour of women or children or for the advancement of any backward section of citizens - This is Article 28.4 of our Constitution. The Article reflects the right of the State to make special provisions, although backward sections and groups cannot ask for development as an enforceable right.

The Fundamental Principles of State Policies stipulated in Part II of the Constitution spell out certain aims of the State in promoting development. They form the basis of every law and guide its interpretation. They also guide the work of the State and citizens. Important among them is Article 15 which provides for

the fundamental responsibility of the State to attain, through planned economic growth, the constant increase of productive forces and improvement in the material and cultural standards of living of the people, to be secured for every citizen. Planned growth is bound to include sustainability as human knowledge expands onto new horizons.

### **G. The Right to a Healthy Environment**

The Constitution of Bangladesh does not explicitly provide for the right to a healthy environment as a fundamental right. Article 31 however states that “every citizen has a right to protection from action detrimental to life, liberty, body, reputation or property unless these are taken in accordance with law”. Article 32 states, “no person should be deprived of right or personal liberty save in accordance with law”. These two articles together incorporate a fundamental right to life. The next question is whether the right to live includes the right to an environment capable of supporting the growth of meaningful existence of life, or a right to a healthy environment.

In two recent cases to which I have referred, this question has been dealt with in a positive fashion. In *Dr. Mohiuddin Farooque v. Bangladesh and others*, the Court reiterated Bangladesh’s commitment “in the context of engaging concern for the conservation of environment irrespective of the locality where it is threatened. This judgement states that “Articles 31 and 32 of our Constitution protect life as a fundamental right. It encompasses in its ambit the protection and preservation of its environment, ecological balance free from pollution of air and water, sanitation without which life can hardly be enjoyed. Any act or omission contrary thereto will be in violation of this same right to life.” (Choudhury, J. para. 101)

The High Court Division, in the case of *Dr. Mohiuddin Farooque v. Bangladesh and others* (48 DLR 1996, p.438) stated that the right to life includes the right to fresh air and water and a situation beyond animal existence in which one can expect normal longevity of life.

Hence, it appears that the right to a healthy environment has now become a fundamental right, which puts an additional responsibility upon the judiciary to ensure that the Rule of Law is guaranteed in cases where the sustainability of a proposed development project is questionable.

### **III. Judicial Intervention to Establish Rule of Law in Cases of Development to Make it Sustainable**

Should all the programmes that a Government incorporates in its Annual Development Programme be termed as development per se? Who would

determine whether a programme is a development programme or not when disputes arise and questions are raised challenging the environmental costs or sustainability and breach of public laws. Can a pilot project of an experimental nature to find the viability and feasibility of a project or programme be considered a development programme if it were to produce huge ecological costs?

If these private ventures affect the environment, then both the individual owner and also the Government that allowed or had the authority to regulate the location and nature of the undertaking would be equally liable. This seems to have already happened in many countries where private owners as well as the Government have been sued for damages. In the case of a private development programme, the zeal for maximum profiteering of an investment is present for which statutory bodies are empowered to regulate the limits of greed. Unfortunately, on the one hand, these bodies often fail or lack the capacity to regulate, and on the other, the development programmes of the public sector undertaken by these statutory authorities are the primary sources of environmental and ecological controversy which seemingly continues without public accountability. The impacts of many projects have endangered rather than improved life and the environment. Moreover, the impact of many projects will be felt for a long time, and not all future impacts will be necessarily positive.

Development projects are undertaken either on public properties or by acquiring private properties by the State in exercise of its eminent domain authority. On public properties, the local people exercise various statutory and traditional rights. The life styles and professions of the users of private resources are considered as an integral part of private resource use (Farooque, 1993). For example, the farmers draw water from public water bodies to irrigate their agricultural fields for domestic uses. In a riparian community, for natural reasons, specific fluvial interests develop as traditional family occupations, e.g., fisherman, boatmen, etc. Hence, any development project that affects the regime and removes some of the prevailing natural opportunities through physical changes also moulds the interests. As a result, development projects undertaken for the "public good" become an expropriation of local private interests which call for the rule of law as an essential substantive protection.

Since development programmes are undertaken by sectorally compartmentalised public agencies, the activities of any one of the key sectors have a major impact on the others because neither the institutional linkages nor the co-ordination mechanisms exist or operate (Government of Bangladesh, 1991). However, it is difficult for the judiciary to intervene in such matters.

Ensuring the sustainability of development from the rule of law perspective requires an institutionalised approach to repair existing injuries and to avoid or minimise future adverse impacts, including precautionary measures. Such integration needs to be addressed through the development of an ongoing mechanism and appropriate framework by enhancing the role of the judiciary.

A good law can become oppressive in the hands of a bad institution or vice versa. It is worth noting that many sectoral laws explicitly contain provisions to inform local people about projects and to both invite and resolve objections raised. For example, the 1927 Forest Act requires the inquiry and settlement of all private claims when restrictions are to be imposed when the status of a public forest is changed through re-classifying it as a reserved or protected forest. The 1920 Agricultural and Sanitary Improvement Act and the 1952 Embankment and Drainage Act explicitly guarantee the rights of local populations and interest holding parties in proposed project areas to examine and raise objections to the project being considered. Furthermore, neither legal rights nor interests can be extinguished without appropriate compensation. Many of the adverse local social and environmental impacts could be avoided or minimised if the procedures of law were followed. Some laws contain inter-sectoral restrictions on development projects which are neither followed nor enforced. An example of this is the Conservation of Fish Act, 1950 which provides, in its schedule, a long list of rivers and their segments where no water control measures can be undertaken, so that natural spawning and feeding grounds of fish remain undisturbed. These examples prove that it is a tragedy when public agencies flout their own laws and then chase people for violating the law to justify the failures of their so-called development projects. In such situations, judicial review of administrative action would be effective in upholding the rule of law.

Legal mechanisms and the role of the judiciary have proven to be a very effective process in any advocacy or activism. It has been successfully used in many countries, such as India (Sangal, 1992). In most cases on environment, the judiciary, due to its own limitation, may not respond in the way an activist would like. However, such attempts create awareness that marks the making or remoulding of values in society.

#### **IV. Remedies for Victims of Environmental Injuries Induced by Development**

Traditional environmental legislation empowers relevant Government agencies to take action in matters concerning environmental injuries. But what action can a private party take or what would be the remedy for the people if a development project induced or has the potential to induce adverse environmental impacts causing violation of private rights and interests?

The Bangladesh Constitution states that no one can be denied the right to life and property except in accordance with law and if those rights are taken away, compensation must be paid. The laws that regulate a development programme in a particular sector usually allow objections to be raised and provide for compensation of all rights and interests affected by relevant projects. Therefore, the people who are adversely affected have the right to ask for compensation. Those properties which are not acquired by the Government, but which are

rendered virtually unusable through adverse effects must be treated as implied acquisitions. Then, as per the prevailing law, a claim based on injuries arising out of development project induced environment impacts could be compensated or redressed as consideration for the damage. Compensation might do justice to the victim but the question of damage to resources remain unanswered. In many cases the injury may be irreparable or require a long time from which to recover.

If the process for raising objections under sectoral laws cannot be availed (in most cases these opportunities are not given), a private person may lodge a civil litigation against the development project. Many such litigations have been contested in Bangladesh, although mostly against land acquisition and not in the case of projects likely to have adverse environmental impacts. However, such proceedings are possible under the law, although assembling the necessary evidence to prove anticipated damages would be a difficult task.

The right to protect one's life and property is a fundamental right under the Constitution, which is enforceable as a prerogative and through extraordinary jurisdictions of the High Court Division called the writ jurisdiction (Article 102). However, the Court cannot issue an interim order if it is likely to have the effect of "prejudicing or interfering with any measure designed to implement any development programme, or any development work", unless the Attorney General has been given notice and a hearing is held and unless the Court is satisfied that the interim order would not prejudice the programme (Article 102(4)). Moreover, sub-Article (3) states that the High Court Division has no power to exercise the prerogative to enforce fundamental rights on property if the property is acquired by the State through an Act of Parliament.

One popular method in addressing issues relating to sustainable development and environment is the initiation of what has been known as public interest litigation which is again categorised according to their nature as social action or class action litigation or citizen suits. In the field of environmental jurisprudence they are also called Public Interest Environmental Litigation. The highest courts of many countries have evolved the emerging environmental jurisprudence. The question of *locus standi* or standing is often an important issue in such litigation.

In the case of *Kazi Moklesur Rahman* (26 DLR (SC) 44), the Supreme Court granted him standing although he was not a resident of the enclaves acceded to India under the 1973 treaty. On two occasions, the question of the standing of the Bangladesh Environmental Lawyers Association (BELA) was kept open: *Dr Mohiuddin Farooque v. The Election Commission and others* (47 DLR 235) and *Dr. Mohiuddin Farooque v. Bangladesh and others* (Writ Petition No. 891 of 1994). The second case relates to 903 polluting industries and factories where the High Court Division of the Supreme Court issued a *rule nisi* in the nature of mandamus.

However, in *Dr. Mohiuddin Farooque v. Bangladesh and others* (Writ Petition No. 998 of 1994), in which the legality of an experimental structural project of the Flood Action Plan of Bangladesh was challenged, the High Court Division initially rejected the Petition on the ground that the Petitioner in that case was an organisation, the Bangladesh Environmental Lawyers Association, and that they had no standing. The Petitioner referred a Leave Petition to the Appellate Division where the Court granted leave to decide the *locus standi* in the category of public litigation. In this same case, a fresh petition was filed by a local resident of the project whose land had been acquired for the project. The High Court issued a *rule nisi* on the respondents to show the legality and public interest in terms of the project. It was held that the *locus standi* in so far as it concerns public wrong or public injury or the invasion of fundamental rights of an indeterminate number of people, any member of the public being a citizen suffering the common injury or common invasion in common with others, or any citizen or indigenous association as distinguished from a local component of a foreign organisation as espousing that particular cause as the person aggrieved has the right to invoke what you call the judicial review jurisdiction under Article 102 of the Constitution.

Both of the cases on the Flood Action Plan are now being heard by the High Court Division. In fact, writ jurisdiction has been exercised on some other cases where development schemes in derogation of law and environmental requirements have been questioned. In the case of *Sharif N. Ambia v. Bangladesh and others* (W.P. No. 937 of 1995), the High Court Division, after issuing a show cause, granted an *ad interim* injunction on the construction of a 10 storey market, in violation of the Dhaka Master Plan, which was causing environmental obstruction to its neighbourhood. The matter is now pending for hearing. In the *Farooque* case (W.P. No. 948 of 1997) the High Court Division has issued a *rule nisi* upon the Government challenging the legality of a deviation from the Master Plan of a newly developed model town in Dhaka, and granted an *ad interim* order to stop the filling up of the lake located there.

## V. REMARKS

To ensure sustainable development, the courts have to rely on statutes. As such, the necessary by-laws and environmental quality standards need to be put into place immediately in Bangladesh.

Citizen suits must be encouraged as the role of the judiciary can be undermined if a vigilant civil society does not play the role of a watch dog.

It is essential that the decisions of the highest courts of the SAARC region be shared on a regular basis. The Law Reports and the decisions should be made available to all the superior courts of the region.



More reference should be made to one another's cases since our socio-economic realities are similar. Only in this process could a coherent regional jurisprudence on environment be developed. This is more crucial since activities in one part of the region frequently affects others.

It is also proposed that in the near future, citizens of a victim country of a development project originating in another country would qualify for redress in the latter country's courts.

There is an absence of effective legislative control over development to make these activities environmentally sound. To fight this "juggernaut", to borrow the words of Al Gore (1993) there is no lack of courage, imagination or skill for the resistance fighters. But the task is enormous, it is simply that they are up against nothing less than the current logic of world civilisation. However, our mandatory regulatory regime is a pre-condition that needs to be enforced and monitored by everyone - public and private individuals and the civil society. When development is defined in terms of expanding people's choices, people must be the centre of such activity with effective authority to decide and choose.

The judicial process can play an effective role in integrating environmental and ecological consequences and in making development sustainable, both in terms of rights and duties. To do that the expansion of the concept of the "person aggrieved" or standing is crucial to make up the spirit of the emerging human values so strongly realised and advocated by the new generation of activists. A lot can be achieved by using the legal mechanism and Bangladesh Courts are ready to make their own contribution on that behalf.

The epidemic of violence in our societies, the erosion of moral values, the cancerous growth of corruption - all of these pose threats to the proper and effective functioning of our constitutional order and maintenance of the rule of law.

At the same time globalisation of the world economy, the development of information technology, the emergence of new forms of intellectual property and the range of new types of financial and commercial transactions present challenges to our judicial institutions which are called upon to adjudicate and apply and enforce law in new areas, who share the common problem of inadequacy of resources to cope with the tasks with which we are entrusted. A need for resources which would enable us to strengthen the institutions with increasing numbers and quality of our judges with better training is pressing.

Before concluding, I would like to report with all humility, a part of the 1996 Country Report on Human Practices in Bangladesh prepared by the US Department of State which says:

“The Judiciary of Bangladesh displays a high degree of independence as mandated by the Constitution, specially at the higher levels. The Judiciary often rules against the Government in criminal, civil and even politically controversial cases”

Thank you very much ladies and gentlemen for your patience.

**COUNTRY PRESENTATION - INDIA**

**HON. MR. JUSTICE B.N. KIRPAL  
JUDGE OF THE SUPREME COURT OF INDIA**

Mr. Justice Weeramantry, Mr. Justice Amerasinghe, ladies and gentlemen. On behalf of the Indian Delegation, I would like to take this opportunity to thank our hosts, the Sri Lankan Government, SACEP and UNEP for the very warm hospitality they have extended to us and for making our stay a very comfortable one. I would also like to apologize for the fact that our Chief Justice who was very keen to come to attend this Conference, unfortunately could not make it because of the pressing demands at home. In view of the fact that our sessions commence on Monday, and if he had come he would not have been able to be present on the opening day. The Country Paper is really divided into two portions. The first one, which I am presenting this morning is titled "The Role of the Judiciary in promoting the Rule of Law in the Area of Environment" and the second part is titled "Dealing with the New Directions, the Prevention and Resolution of Environmental Disputes" which will be presented in the afternoon session.

**PART I. THE ROLE OF THE JUDICIARY IN PROMOTING THE RULE  
OF LAW IN THE AREA OF ENVIRONMENT**

I intend to give a brief overview of the important role which is being played by the Indian Judiciary in the area of environmental law. We have in India a comprehensive body of laws, which have been framed with a view to protect all the facets of environment without, in any way, hindering economic growth. While adhering to, and complying with, the legal provisions relating to environmental protection, healthy development can be sustained. On the other hand, violation of the law can only lead to pollution and environmental degradation. Until very recently, environment protection laws were regarded as ornamental, meant to be admired, but not used. The hapless public had to bear the brunt. The spreading of pollution over a long period of time has led to the raising of a new type of litigation relating to environmental disputes. Before examining the role of our judiciary in dealing with such matters, it is important to examine the nature of environmental disputes. Environmental dispute is a term as rich in ambiguity as the world itself. Its range extends from a simple bilateral action, a nuisance, to the most mammoth litigation. The first query that arises, therefore, is what is so special about environmental disputes? That is to say, how are such disputes different from the normal conflicts presenting themselves before the courts and other authorities? An answer to this question will lead one to possible solutions which are responsive to special features of these types of disputes. Immediately, at least three features spring to mind.

First, there is the possible variation in the scale of disputes, even viewed within the same effectual matrix as mentioned above. The same facts can give rise to one or a thousand or more petitioners, all complaining of the loss of the same amenities.

Secondly there is the problem of unrepresented interests. This problem is faced within most polycentric litigation. This concept can be explained by employing the metaphor of the spider's web as used by Lon Fuller in his seminal work in Administrative Law. Just as the spider's web is a complex structure where different portions of the web are inter-connected in a myriad of ways, environmental problems link seemingly diverse issues in several ways. When one pulls on a particular portion of the web it has an impact on other portions of the web to an extent which might not bear any relationship to the distance from the site of disturbance. In other words, the effects of different parts of the web cannot be protected to any great degree of certainty. Similarly, ruling on a particular issue in an environmental dispute might have an impact in an apparently unconnected area of the economy. The way litigation works such interests can rarely be accommodated in even non-adversarial processes. The issue, in other words, is not merely one of adversarial vs. inquisitorial type procedures, but it is also a reflection of the inherent complexity of issues involved and also the competence of the people concerned with making such decisions. Related to this is also the problem of the lack of hard data or empirical evidence.

And finally, there is the problem of the kind of conflicts of interest that environmental disputes engender. The environment brings out most acutely the tensions inherent in most constitutionally guaranteed rights between individual entitlements and their distributional implications. There is a seeming conflict between the demands of an individual to a, broadly speaking, healthy environment and the right of some people to economic development at the cost of environment. Of necessity, the right is couched in individualistic terms. Yet to ignore these collective aspects is to ignore the spirit and substance of the right. The problem is thus not one of insurmountabilities - that is, comparing incomparables in the form of pitting individuals rights against collective rights - but is one of balance between two different collective rights. But a problem it nevertheless is.

These issues among others, while not being peculiar to environmental disputes, do occur uniquely in such combinations in these fields. Thus the authorities faced with such disputes, potential or actual, have to forge new techniques to deal with them. The cautious march ahead has to be imbued with a sense of vision and purpose so as to take a holistic perception of the issues at hand. Piecemeal solutions only delay the problems and make it more difficult to eventually deal with them.

Keeping in mind the aforesaid complex nature of environmental disputes, the Supreme Court and the High Courts of India where these disputes are raised, have

exercised jurisdiction and passed orders ensuring curing, repairing and preventing of ecological damage. This has been achieved by superior courts entertaining writ petitions by way of public interest litigation. Public interest litigation is in the nature of a class action brought about by filing a writ petition with a view to protect ecology, prevent pollution and bring benefit to the victim by having the court award damages in appropriate cases. The orthodox rule that the petitioner must have a personal interest in order to have a *locus standi* to file a writ petition has been eliminated. Individual environmentalists, non-Governmental organizations and others have been filing writ petitions relating to different types of polluting industries as well as for the law enforcement and implementation of the provisions of the environmental Acts.

With a view to a 'cure', the courts have had to decide questions of fact and law in order to ascertain whether there has been any infraction of law which has resulted in urban pollution and who is responsible for the same. In interpreting legal provisions in the event of their being any ambiguity, the balance tilts in favour of environmental protection. When the courts are satisfied that pollution has been caused, appropriate orders are passed requiring the polluter not only to stop polluting, but in an effort to cure, the authorities administering the Environment Protection Act are directed to exercise jurisdiction which can lead to disconnecting water and electricity.

Whenever damage has been caused, the courts have, by applying the "Polluter Pays Principle" passed appropriate orders resulting in the polluter either repairing the damage or paying for the same. To give an example, some industrial units which were manufacturing chemicals in the State of Gujarat, had discharged effluent without any treatment. This had resulted in causing extensive damage to the sub-soil water as well as to the fertility and consequential yield of agricultural produce in a number of neighbouring villages. With a view to repair the damage which had been caused, some of which was irreversible, the Gujarat High Court in *Pravinbhai J. Patel v. State of Gujarat*, (1995 (II) GLR 1210) while directing the offending units to stop polluting, also ordered the polluting units to contribute 1% of their turnover to be spent for the development of the affected villages.

Yet another type of order that had been passed was that which may be regarded as preventive in nature. Where it is reasonably anticipated that the carrying on or starting of an activity is likely to cause pollution, orders were passed enjoining the carrying on of the same. Even where the permission had been given under the Municipal Law but will still adversely affect environment, the courts have not hesitated in staying the grant of such permission. This is because the Supreme Court had developed the right to a healthy environment by inducting the fundamental right to life guaranteed by Article 21 of the Constitution. Therefore, any infraction of a fundamental right even by order under an Act is quashed and environment degradation is prevented.

To further the concern that the environment not be degraded, the Supreme Court has sometimes assumed a sort of advisory role. In pursuance of its own directive role to the authorities to anticipate and eliminate the cause of environmental degradation, the Supreme Court in the Case of *M.C Mehta v. Union of India*, ruled that environmental education should be compulsory. In a country belonging to a region where universal education is a seeming chimera it is becoming almost trite to blame the lack of education as a root of most problems. Yet one cannot deny that this triteness holds more than a mere glimmer of truth. Education as to the causes of environment degradation and to the state of the environment can go a great distance in preventing such disputes from arising. As the Supreme Court said in that case:

“having grave doubts with regard to the consequences of pollution of water and air and the need for preventing and improving the natural environment which is considered to be one of the fundamental duties of the Constitution, we are of the view that it is the duty of the Central Government to direct all educational institutions throughout India to at least teach for one hour in a week lessons relating to the protection and improvement of the natural environment in the first 10 classes. The Central Government shall get books written for the said purpose and distribute them to the educational institutions free of cost. Training of teachers who introduce the subjects by short term courses for such training shall also be considered.”

It is, however, unfortunate to note that not enough seems to have been done in consequence of this decision.

Jurisprudence in the field of environmental law is fast developing in India with the Supreme Court taking the lead. Legal concepts and decisions developed by judges and jurists in other parts of the world are examined and applied. There can be no better example of this than by referring to the recent decision in the Supreme Court in the case of *M.C. Mehta v. Kamal Nath* (1997 (1) SCC 388) where the courts have held that the “Public Trust Doctrine” is part of Indian Law. I perhaps cannot do better than to repeat the words of the Court in this regard, and I quote :

“The ancient Roman Empire developed a legal theory known as the doctrine of Public Trust. It was founded on the ideas that certain common properties such as rivers, sea shores, forests and air were held by the Government in trusteeship for the free and uninhibited use of the general public.”

“In our contemporary concern for the environment there is a very close conceptual relationship to this legal doctrine. The Public Trust Doctrine primarily rests on the principle that certain resources have such a great importance to the public as a whole that it would be wholly

unjustifiable to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of their status in life. Our legal system based on the English Common Law includes the Public Trust Doctrine as part of its Jurisprudence. The State is a trustee of all natural resources which are by nature meant for public use and enjoyment. The State as trustee has a legal duty to protect the natural resources”

Another recent development is the tendency of the courts to encourage a sort of specialisation in the field of environmental disputes. In the *Vellore Citizen's Welfare Forum* case, the Supreme Court observed that the High Court of Tamil Nadu will be better placed to ensure that the orders of the Supreme Court were faithfully implemented. Consequently, a request was made to the Chief Justice of Tamil Nadu to constitute a special “Green Bench.” These benches developed an expertise in the area, and are therefore better able to effectively deal with the problems that arise. In fact, as the Court observed in *Vellore Citizen's* case, such benches already exist in various High Courts across the country. This institution of special benches becomes all the more necessary, given the fact that environmental disputes raise questions of ever increasing complexity, questions to which a generalistic judge might consequently find harder to find answer. This development will ensure that justice is done not only to the environment but also to the people affected by the degradation and also to the alleged polluter. The environment is not the property of the people - the Government is holding it in trust for the people. But the environment is the property of no one. Truly speaking, no generation can be said to own the environment. Each generation holds it in trust for future generations. Consequently, the task of preventing the degradation falls not only on the powers that be, but falls on all of us collectively.

It might be fitting to note as a parting point that the Constitution of India recognizes this as a fact. Article 51 A(g), the basis of many a judgement is actually called “fundamental duty”. It says that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have a compassion for living creatures. This duty, while not being enforceable directly against any citizen, nevertheless, holds more than a mere exhortation. At the very best, it requires the State to set up such conditions as would enable the common citizen to do her or his duty. Ultimately, the environment can be protected only with the combined effort of all, including the judiciary.

This is the least which we can do for the coming generations.

**COUNTRY PRESENTATION - MALDIVES**

**HON. ABDULLAHI MAJID  
DEPUTY MINISTER OF PLANNING, HUMAN RESOURCES AND  
ENVIRONMENT**

Your Lordships, the Lords, Chief Justices, Judges, Excellencies, Secretary-General of the Symposium, Director of SACEP, Director of the Environmental Law Center of UNEP, distinguished guests, ladies and gentlemen.

I think I will be failing in my duty if I do not start by thanking my very gracious hosts on behalf of my delegation and myself, for the very generous hospitality accorded to us since our arrival. I also like to salute the efforts of SACEP under the very able leadership of Mr Hussain Shihab, its Director, for organizing this very important and crucial symposium where three disciplines have been brought together for the first time.

The Holy Koran of the Muslims teaches us that we, the inhabitants of the earth, do not possess the earth rather we hold it in trust for future generations. Sustainable development is a way of good governance being pursued by all States and Governments with the support and assistance of the UN system. Three factors have to be considered to achieve sustainable development - social, economic and environmental. Therefore we cannot discard any one of these three factors - what we have to do is to try to balance these and to live in harmony with these three factors, whilst we pursue our development goals.

Let me turn to my Country Paper - which is entitled 'Recent Legislative Measures in Maldives Towards Strengthening the Legal and Institutional Framework for Promoting the Environmental Management'. This paper has been compiled by Mr. Husnu Al-Suood a State Attorney and a member of the Law Commission of Maldives and by the Ministry of Planning Human Resources and Environment.

The environment of Maldives is comprised of a delicate and complex series of eco-systems that are unique to the tropical world. Maldives has a rich biodiversity and the coral reef eco-system is one of the most productive eco-systems with linkages ranging from microscopic plankton to giant sperm whale.

The Maldives is very vulnerable to environmental degradation. Small may be beautiful, but small is also vulnerable and I think this has also illustrated what some of the maps or transparencies we have seen earlier in the day failed to show about the Maldives - it is so small. It is only 298 square kilometres of land with a population of about 250,000. So, naturally, we do not feature very prominently in international maps. Nevertheless, our plight to global warming



and its associated sea level rise is very evident and we are one of those countries with very much to lose from this phenomenon. But we are not the polluter who caused this damage which is beyond our control. You can imagine this very tiny 19 atoll group which is only about 4 feet above sea level in the vast Indian Ocean subject to the vagaries of the sea

As a result of the increase in the population and improvement in the standard of living, the generation of waste has increased considerably in Male and in the Maldives. Dumping untreated waste has resulted in the depletion of marine population and contamination of ground water.

Another problem we have is the sewage of densely populated islands. We have poor sewage disposal resulting in the contamination of ground water which led to major outbreaks of cholera and shigella in 1978 and 1982.

I think failure to address these problems will rapidly negate all our efforts to achieve sustainable development. It is recognized that it will require major societal changes and radical restructuring of institutions and management practices, to find solutions for these problems. Law is believed to be the most effective means for effecting sustainable development. Reviews of the existing laws and regulations must be undertaken to respond to the challenges inherent in the integration of environment and development.

## **LAWS AND REGULATIONS**

The Government of the Maldives has taken a number of measures to strengthen the legal and institutional framework for promoting sustainable development. To this end, the Government has laid the necessary legal foundations for environmental management by repealing some obsolete laws and by codifying new concepts.

### **a) Law on the Protection and Preservation of the Environment (Law No. 4/93)**

The main legislative instrument for the protection of the environment in the Maldives is the Law on the Protection and Preservation of the Environment (Law No. 4/93). The purpose of this law is set out in its preamble which states that the natural environment and its resources are part of a national heritage that needs to be protected and preserved for the benefit of future generations. Further, it is stated that the protection and preservation of the country's land and water resources, flora and fauna, beaches, reefs, lagoons and all natural habitats are important for the sustainable development of the country.

Law No. 4/93 established a framework upon which regulations and policies can be developed to protect and preserve the natural environment and resources for the benefit of future generations.

This law requires all Government agencies to provide necessary guidelines and advice on environmental protection in accordance with the prevailing local conditions. This means that the concerned Government authorities will issue guidelines on the protection of the environment only to the extent permitted by its economic resources.

This law also states that the Ministry of Planning, Human Resources and Environment shall identify and designate protected areas and natural reserves within its territory. It requires the Ministry to promulgate rules and regulations regarding the designated protected areas and natural reserves.

Section 5 of the law states that it is mandatory to submit an Environmental Impact Assessment (EIA) to the Ministry of Planning, Human Resources and Environment before implementing any developing project that may have a potential impact on the environment. Under section 6, the Ministry has the power and authority to terminate any project that has any detrimental impact on the environment. The law makes it clear that any project so terminated shall receive no compensation.

Section 7 prohibits the disposal of waste, oil and poisonous substances which have harmful effects on the environment. Section 8 expressly prohibits the disposal of hazardous and nuclear waste anywhere within the territory of the Republic of the Maldives. The transboundary movement of such hazardous wastes through the territory of the Maldives is allowed only if prior permission is obtained from the Ministry of Transport and Communication.

The law also gives the Ministry of Planning, Human Resources and Environment sufficient power to enforce its provisions. The law empowers the Ministry to impose heavy fines and reserves to the Government the right to claim compensation for any damage caused by any environmentally detrimental activities.

#### **b) Law on Fisheries (Law No. 5/87)**

This law contains several provisions that are designed for promoting sustainable management of the fishery resources within internal waters, territorial waters and the exclusive economic zone (sections 6, 7, 8). It also contains provisions which enable the Ministry of Fisheries and Agriculture to declare marine species as endangered species and to ban the exploitation of such species or to set a moratorium thereto. Section 10 of the law empowers the Ministry of Fisheries and Agriculture to declare a marine area as a protected area and to make

regulations for the utilization of such areas. This law also provides for severe punishments in the event of any breach of this law.

In exercising the powers conferred upon it by this law, the Ministry of Fisheries and Agriculture has designated some marine protected areas and has banned the removal and export of several endangered species. Regulations have been promulgated under this law to deal with the over exploitation of fisheries resources and to address the consequences of fisheries diversification, intensification and interactions with other resource users.

**c) Law on Wrecks (Law No. 7/96)**

This law states that if a vessel runs aground, the owner of the vessel should do everything within his power to minimize any damage resulting therefrom. Any deliberate, negligent or accidental discharge of any substance harmful to the environment will draw the largest fine under any Maldivian law. This fine is imposed on the owners of vessels even if such a discharge is the result of negligence. Moreover, the Government has the right to claim damages for environmental loss and any costs incurred, irrespective of any clean up efforts by the owner of the vessel.

However, it is important to note that no proper guidelines are in place to assess damage caused to the environment and to calculate damages. This is because the Maldivian judiciary lacks appropriate environmental training and because there is no system of law reporting.

**d) Law relating to Coral Mining (Law No. 77/78)**

Coral rock is the main material used for most construction purposes in the Maldives. As a result of wide-spread coral mining, concerns over the sustainability of the reefs have been raised. Since coral reefs are vital as a habitat for bait fish and to the island structure itself, the Government of the Maldives has taken several measures to combat uncontrolled mining activities.

The Law Relating to Coral Mining, enacted by Parliament in 1978, provides the Ministry of Fisheries and Agriculture and the Ministry of Atolls Administration with the mandate to regulate coral mining. Some of these regulations include:

- a) Mining cannot be carried out on island house reefs
- b) Mining cannot be carried out on atoll rim reefs and common bait fishing reefs
- c) Applications must be submitted to atoll offices by anyone needing corals to build any structure and permission needs to be granted by the Atoll office before any mining can be carried out.

- d) The island office is required to estimate the quantity of corals required for the applied construction work and, hence, should ensure that only the required amount is granted.
- e) Every island is required to keep a log book of the amount of corals mined.

The Ministry of Fisheries and Agriculture has been working for sometime to formulate comprehensive coral mining regulations and more stringent controls are expected to be introduced.

#### **e) Tourism and Environmental Law**

Tourism has been the most vibrant sector of the Maldivian economy. Our tourism industry is entirely dependent on marine resources. Maldives is sold as a destination which can offer excellent diving spots, shallow lagoons for water sports and swimming, and clean white sand beaches for relaxation and sun bathing. These environments are a product of, and dependent on the coral reefs. Thus, in order to ensure a sustainable and environmentally friendly development of the tourism industry, the Ministry of Tourism has promulgated several rules and regulations. These regulations deal with the construction and development of tourist resorts, and with sanitary garbage disposal in the resorts. The operators and owners of these resorts are liable to pay heavy penalties in the event of any activities on the resort which are detrimental to the environment.

### **INSTITUTIONAL STRUCTURE**

Under the existing Government institutional framework, the key authorities involved in the protection of the environment are the National Commission for the Protection of the Environment, the Ministry of Planning, Human Resources and Environment, the Ministry of Fisheries and Agriculture, the Ministry of Tourism, the Ministry of Construction and Public Works and the Ministry of Atolls Administration.

The environment sector was formally recognized as an entity within the Government in 1984 with the creation of an environmental affairs division in the Ministry of Home Affairs and Social Services. In late 1988, environment was given elevated status, being combined with the former Ministry of Planning and Development to form a new Ministry of Planning and Environment. The rationale for this move was that environmental considerations needed to be fully and efficiently integrated into development planning. In the Government reorganization in 1993, the Ministry was given the additional responsibility of human resource development, and was renamed the Ministry of Planning, Human Resources and Environment, thus reflecting the Government's commitment to sustainable human development.

The Ministry of Planning Human Resources and Environment is responsible for developing all aspects of environment policy and enforcement under the

Environmental Protection and Preservation Act, 1993. The Ministry also acts as the secretariat for the National Commission for the Protection of the Environment. The Environment Section within this Ministry deals with all issues of the environment, including global environmental issues. It administers and coordinates with other Government offices, advises on environmental aspects and undertakes programs to raise public awareness on environmental issues. Environment Section also acts as the focal point for both national and international activities. The Environment Research Unit of the Ministry is charged with assembling the necessary environmental information required for planning and management.

The National Commission for the Protection of the Environment (NCPE), which was appointed by the President in 1989, advises the Ministry of Planning, Human Resources and Environment on issues related to the responsibilities stated above. The mandate of the NCPE include: involvement in assessment, planning and implementation of activities of the Maldives that affect the environment, and activities to protect the environment, advising on addressing environmental problems and ensuring that an environmental protection component is included in development projects. The NCPE consists of officials from various Government offices and the President of the NCPE is the Minister of Planning, Human Resources and Environment.

## **INTERNATIONAL COOPERATION**

The Maldives has been at the forefront of international development in the field of environment. His Excellency President Maumoon Abdul Gayoom has been instrumental in bringing the issue of climate change to the global political agenda. He raised the concerns of small island nations at the United Nations General Assembly, the Commonwealth Summit and at various other international and regional fora.

In 1989, the Maldives hosted a ministerial level meeting of small island states concerned with sea level rise. This meeting led to the formation of the Small Island Group which eventually at the Second World Climate Conference became the Alliance of Small Island States (AOSIS). The alliance of 36 of the world's smallest states, in just a few years, has helped to secure a treaty to combat the greenhouse effect, become a force of its own in the United Nations, and brought about the Barbados Conference.

During the preparations for the Earth Summit in Rio de Janeiro in 1992, the Maldives played a prominent role in modifying the language of *Agenda 21* to ensure that the particular concerns of small island states were taken into consideration. In addition to participating in internationally high profile activities, the Maldives continues within the limits of its finance and manpower, to play a small but important role in various on-going international programmes and activities.

Maldives is party to several international conventions including:

- *United Nations Framework Convention on Climate Change*
- *United Nations Convention on the Law of the Sea*
- *Convention on Biological Diversity*
- *Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal*
- *Montreal Protocol on Substances that Deplete the Ozone Layer*
- *Vienna Convention on the Protection of the Ozone Layer*
- *International Convention for the Prevention of Pollution of the Sea by Oil*

Maldives also has signed the South Asian Seas Programme of Action under the UNEP Regional Seas Programme initiative.

However, there are some conventions of international significance that the Maldives has not yet ratified. These include

- *Convention on International Trade in Endangered Species of Wild Fauna and Flora*
- *Convention on the Conservation of Migratory Species of Wild Animals*

### **Acknowledgement**

It is acknowledged that a large part of this paper is derived from *Environmental Changes in the Maldives: Current Issues for Management* presented to the Workshop on Integrated Reef Resource Management held from 16-20 March 1996 in Male, Maldives by Mohammed Chill and Siam Said.

**COUNTRY PRESENTATION - NEPAL**

**HON. MR. JUSTICE TRILOK PRATAP RANA  
CHIEF JUSTICE OF THE SUPREME COURT OF NEPAL**

**INTRODUCTION**

In Nepal, like in other countries of the world, alarm over the protection of environment has been loudly sounded over the past years. Concern over the deteriorating environmental situation of Nepal has been expressed in various quarters of the country. The internal environmental situation of the country as well as the concern of the international community have invited the legislative, administrative and judicial organs of Nepal as well as non-Governmental organizations (both national and international) and citizens of Nepal to give serious thought to mitigate and regulate the problems for achieving sustainable development.

So far as the role of the judiciary is concerned, the Nepalese judiciary has recently shown serious concern and has urged the Government/authorities etc. not only to enforce law and protect the environment but also to enact an Environment Act. While recognizing the traditional Nepalese values of environmental protection and rule of law in the area of sustainable development, the Nepalese Courts have also given effect to many international environmental treaties with a view to strengthen unity, cooperation and global partnership in the protection and improvement of environment.

Before discussing judicial decisions of Nepal at length in this regard, an attempt is being made in the following paragraphs to make a general survey of the related problems, international environmental treaties /conventions and Nepalese policies and legal framework.

**ENVIRONMENTAL PROBLEMS**

The main environmental problems of Nepal are concerned with basic needs. Poverty and under development, population pressure, lack of food, education and good sanitation etc. are matters of serious concern and threat to Nepal affecting greatly the protection and improvement of environment. In the rural areas, there are environmental problems related to mismanagement of land use, soil erosion, deforestation, depletion of bio-diversity, landslides, floods, deterioration in soil fertility etc. Soil losses from erosion ranges from 5 to 200 mt. per hectare per year depending on the land. Their causative factors are steep slope cultivation, use of marginal land, overgrazing, forest fires, nutrient deficiency etc. In the urban areas, Nepal faces environmental problems related to sanitation, solid waste disposal, sewerage and vehicle pollution on a large scale.

Besides, Nepal is equally concerned about many other environmental problems, such as, nuclear war or weapons of mass destruction, global warming, climate change, green house effect, depletion of ozone layer, acid rain, desertification, and over exploitation of natural resources.

## **INTERNATIONAL TREATIES/CONVENTIONS**

Nepal is a party to the following environment related international instruments in its bid to achieve sustainable development. These texts came into force for Nepal on the dates stated within the brackets as given below:

- i. The Vienna Convention for the Protection of the Ozone Layer, 1985 (July 6, 1996).
- ii. The Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 ( July 6, 1996).
- iii. Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted at the Second Meeting of the Parties in London on 29 June 1990 (July 6, 1996).
- iv. United Nations Framework Convention on Climate Change, 1992 (May 2, 1994).
- v. United Nations Convention on Biological Diversity, 1992 (November 23, 1994).
- vi. Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972 ( Sept. 20, 1978).
- vii. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994 (Sept. 11, 1996).
- viii. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989 (Aug. 15, 1996).
- ix. Plant Protection Agreement for the South East Asia and Pacific Region 1956 (as amended in 1967, 1979 and 1983), (Aug. 12, 1965).
- x. Convention on the High Seas 1958 (Jan. 27, 1963).
- xi. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, 1963, (Oct. 7, 1964) .



- xii. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space Including the Moon and Other Celestial Bodies, 1967 (Nov. 22, 1967).
- xiii. Convention on Wetlands of International Importance Especially as Water Fowl Habitat 1971 (April 17, 1988).
- xiv. Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea Bed and Ocean Floor and in the Subsoil thereof, 1971 (May 18, 1972).
- xv. Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (Sept., 16, 1975).
- xvi. UN Convention on the Law of the Sea 1982 (Dec. 10, 1982).
- xvii. Convention on the Prohibition on the Development, Production and Stock Piling of Bacteriological ( Biological) and Toxic Weapons and on Their Destruction 1972.

Besides the above Conventions, Nepal, being a member of SAARC, has also participated and supported most of the meetings, programmes and efforts of this regional organization of South Asia.

## **ENVIRONMENTAL POLICIES OF NEPAL**

Nepal has so far formulated and is giving effect to the following environmental policies:

1. The National Conservation Strategy for Nepal endorsed by His Majesty's Government of Nepal in 1988 was a result of World Conservation Strategy, 1980. The conservation spectrum emphasized by this strategy are wise use, protection, preservation and restoration. In the process of implementing the above strategy, following guidelines have been brought into existence- National Environmental Impact Assessment (EIA) Guidelines 1993 - Industry sector EIA Guidelines, 1996. - Forestry sector EIA Guidelines 1995.

2. The Nepal Environmental Policy and Action Plan (NEPAP) has been prepared in response to UNCED 1992 with the objectives of sustainable management of resources, managing population growth, health and alleviate poverty, safeguarding national heritage, mitigating adverse environmental impact from urban, industrial and infrastructure developments, instituting supporting measures in areas of legislation, institutions, education and public resources.

### 3. Forestry Master Plan 1988 and Revised Forestry Master Plan 1989.

4. Eighth Five Year Plan 1992-1997 is going to be replaced by ninth five year plan which will, it is hoped, contain more detailed provisions in regard to environmental protection.

5. Industrial Policy 1992. This policy states that a license is required for establishment, expansion and modernization of industrial enterprises related to defense, public health and environment. With regard to pollution, it provides that a separate unit will be established in the Ministry of Industry to formulate policies, guidelines and standards to check and minimize the adverse effects of industrial pollution.

## ENVIRONMENTAL LEGISLATION IN NEPAL

### Historical Development

In the legal history of Nepal, we find that Nepalese society in the ancient, medieval and modern periods has directly or indirectly paid attention to environmental protection. During these periods, environment was culturally, religiously and socially protected. Human tradition and values were to give respect to all God's creations. In fact, most of the Hindu religious texts, such as *veda* and different *dharma shastras* had extensive provisions in this area which greatly influenced legal development and practices of Nepal up to the present day. If we mention, as an example, some of those environmental provisions, we find that, the *Kirali* (an early ruling dynasty) made rules for keeping their villages clean and prohibiting waste. The *Lichhavis* (an ancient ruling dynasty) made legal provisions for State irrigation schemes. In the medieval period, *Malla* Kings during 13th to 18th centuries, enriched and developed culture and arts. But King Jayasthiti Malla formulated rules relating to canal and land use, land classification and land measurement in the 14th century.

From the beginning of the 18th century most of the forest was brought under strict protection. During the *Shah* period, King Ram Shah gave more attention to formulating rules and edicts (*'Thiti*) in regard to various aspects of environmental protection. He formulated rules and edicts on grazing lands, protected forests, afforestation, roads, control of soil erosion, water and irrigation, in the early seventeenth century. In the beginning of the modern period, King Prithvi Narayan Shah also issued several rules relating to environmental protection. He issued several circulars to control deforestation. Local people were given the responsibility to protect and manage Government forests. Destroying the objects of cultural importance was considered a civil wrong. During the Rana regime, the Civil Code was promulgated in 1853, consisting of provisions related to land use, cleaning of streets, forestry management and so on. The Forest Inspection Office was established in 1934 and continued until 1956.

With the establishment of multiparty system firstly in 1951 (2007 B.S), planned development started in the country. From the third five year plan, the Government began to formulate various policies for the protection and preservation of environment. Along with this, Constitutional and other legal provisions came into existence with some provisions dealing with environmental protection.

### Existing Environmental Legislation

At the national level, it was only in 1990, after the promulgation of the new Constitution of the Kingdom of Nepal that some concerns were expressed over the protection of the environment in the Constitution. Clause 4 of Article 26 of the Constitution provides:

"The State shall give priority to the protection of the environment and also to the prevention of its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanliness and the State shall also make arrangements for the special protection of the rare wildlife, the forests and the vegetation"

Until recently, environmental legislation in Nepal had been piecemeal and there was no single basic law governing the issues of environment. Very recently, the Parliament of Nepal has passed an Environment Protection Act, 1997 which may be termed as the basic law of environment. The preamble speaks of the objectives of the Act, which *inter alia*, recognizes that sustainable development can be achieved through the interlinkage between economic development and protection of the environment. Even though the Act is yet to come into force, it serves as an umbrella Act on matters relating to protection of the environment. The Act is a kind of framework legislation which has left to regulations to be made under the Act, to regulate environmental thresholds. It is reported that the necessary work is underway for framing the Regulations.

The main characteristics of the Environment Protection Act may be described as follows

1. The Act requires prescribed types of projects to be subject to preliminary Environmental Auditing and Environmental Impact Assessment.
2. The proposal may be implemented once it is approved by the concerned agency or the Ministry of Environment which is required to consider comments and recommendations, if any, that are received from the concerned experts and the general public.
3. The Act imposes an obligation on all the concerned not to cause significant adverse effect on the environment and not to cause pollution in a manner that

would cause a hazard to the life and health of the general public or in a manner that would be against the prescribed standards.

4. The Act provides for the establishment of an Environment Protection Fund consisting of funds received from His Majesty's Government, foreign Governments and International Organizations and other sources.

5. The Act empowers His Majesty's Government to grant additional incentives and facilities to industries, which have "positive effects" on the environment.

6. The Act provides for compensation to the victims of pollution. According to the Act, a victim will be provided "reasonable amount of compensation" and sets out the manner in which compensation is to be decided by the prescribed authority. The Act provides that any decision regarding compensation may be challenged in the prescribed Court of Appeals

Despite the enactment of a framework type of Environment Protection Act, environment related matters are still regulated by a number of sectoral laws. Many important areas of environmental concern are covered by such legislation. Besides the Constitution of the Kingdom of Nepal 1990 and the Environment Protection Act, 1997, these sectoral legislative mechanisms that are in place in Nepal which are more or less related with the protection of the environment are as follows:

Aquatic Animals Protection Act, 1960

Decentralization Act, 1982 and Decentralization (Working Procedure) Rules, 1982.

District Development Act, 1991 Explosives Act, 1961

Foods Act, 1966

Forests Act, 1992 and Forests Regulation, 1992. Industrial Enterprises Act, 1992

Jhora (Newly Cultivated) Area Land Act, 1971.

Kathmandu Valley Development Authority Act, 1988 ( yet to come into force)

King Mahendra Nature Conservation Fund Act, 1982.

Mines and Minerals Act, 1985

Mountaineering Rules., 1979

Municipalities Act, 1991

National Parks and Wildlife Conservation Act, 1973

Nepal Drinking Water Corporation Act, 1989.

Nepal Petroleum Act, 1983 and Petroleum Regulation, 1984.

Pasture Lands Nationalization Act, 1974.

Pesticides Act, 1991.

Plants Protection Act, 1972.

Private Forest Nationalization Act, 1956.

Road Traffic Act, 1964.

Soil and Watershed Conservation Act, 1982.

Solid Waste Management and Resource Mobilization Act, 1987.

Tourism Act, 1978.

Town Development Act, 1988.

Vehicles and Transportation Management Act, 1993.

Village Development Committee Act, 1991.

Water Resources Act, 1992.

With the establishment of the Ministry of Population and Environment in 1995, the situation has improved as there is now a central agency to co-ordinate matters of environmental protection. However, the following agencies still continue to be responsible for regulating environmental issues in their concerned fields: The Committee on the Protection of the Environment of Parliament, Ministry of Population and Environment, Environment Protection Council Ministry of Industries, Ministry of Forests and Soil Conservation, Ministry of Housing and Physical Planning, Ministry of Defense (Surveillance of National Parks), Ministry of Labour, Ministry of Home Affairs (Police), Ministry of Water Resources, Water and Energy Commission Secretariat, National Planning Commission, King Mahendra Nature Conservation Trust and Solid Waste Management Resources Mobilization Center.

## Role of the Judiciary

In the field of environmental litigation, there is no clear provision for the establishment of Environmental Court or Tribunal to deal with environmental cases in Nepal. At present, environmental cases could be brought before the ordinary Courts.

Under the Environment Protection Act, 1997, environmental cases could be filed before the "Prescribed Authority" which will be designated by the rules formulated under the Act. However, in the absence of such rules and enforcement of the Act, no such Authority has been determined. Consequently, filing a case before such "Authority" is not possible now.

So far as cases under different sectoral legislation are concerned, there are different "Prescribed Authorities" to deal with the cases. Some legislation empowers District Court, other Acts empowers different bodies and authorities to hear the cases. It is a matter of satisfaction that these Courts and authorities are also gradually giving more attention on environmental values in their judgments. In fact, with the growing recognition of environmental protection by world community, Nepalese Courts and authorities are playing their role very positively in protecting and improving the environment. In the area of land, forest, trust (*Guthi*), ancient monuments etc., the Courts and authorities have rendered valuable judgments. Since an appeal to the Supreme Court is available against decisions of these Courts and authorities, some of these cases have come up to the Supreme Court and have been finally resolved by the Appellate (earlier Regional) Courts.

However, no pollution or other significant environmental cases have come before an ordinary Court or prescribed authorities in Nepal. It is hoped that, with the enforcement of Environment Protection Act 1997 and formulation of different rules under the Act, pollution and other such cases will be directly heard and decided by the prescribed authorities.

The Supreme Court of Nepal has been entertaining environment related cases under its extraordinary jurisdiction, more specifically, on the ground of 'Public Interest Litigation' under Article 88 of the Constitution of the Kingdom of Nepal 1990. There are no other effective legal means of adjudication so far as the issues involving the questions of the environment are concerned. Petitioners, in such cases, have the tendency of invoking the 'Public Interest Litigation' provision of the Constitution and making request for the issuance of appropriate writ petitions.

In recent times, there are 3 leading environment related cases in which the Supreme Court has exercised its extraordinary jurisdiction. In the case of *Gopal Siwakoti and others vs. His Majesty's Government and others*, the writ petitioners invoked the 'public interest litigation' clause of Article 88 of the Constitution and

prayed for the issuance of appropriate writ petition to make available to them all the documents and statistics concerning the *Arun - III* Hydropower Project proposed to be built in Sankhuwasabha District of Nepal. The writ petitioners were of the view that since this project had a direct bearing on the environment of that district it was a matter of public interest, and were therefore entitled to ask for all the documents from the Government on the ground of right to information conferred by the Constitution. The writ petitioners were of the opinion that implementation of the project would lead to environmental degradation of the area and thereby would be a hindrance to sustainable development of the country.

The respondents had argued that the plea of the petitioners was vague in as much as they had been unable to specify the particular kind of documents they were asking for. The respondents were of the view that the writ petitioners were already provided with some documents concerning the Project. Moreover, various public programmes were conducted to create awareness among the general public about the project and as such the claims of the petitioner were baseless.

The Supreme Court came to the conclusion that the writ petitioner, as Nepali citizen, had the *locus standi* in this case as the project had environmental implications, and therefore came within the purview of public interest litigation. As to the demand of the writ petitioner to make available to them all the documents concerning the project, the Court held that the demand was too vague and therefore directed the concerned authorities of the Government to furnish the writ petitioner with the documents if the latter comes forward with specific demands.

In the case of *Surya Prasad Dhungel, Chairman of the Board of Directors of the Leader's Inc. vs. Godavari Marble Industries Pvt. Ltd and others*, the Writ petitioner pleaded that the Godavari Marble Industries Pvt. Ltd. is causing environmental pollution to the area and has threatened the life of the people and as such demanded that the right to life of the people of that area be safeguarded by issuing necessary writs. As in the earlier case, the writ petitioner had resorted to the help of the Supreme Court invoking the public interest litigation clause of the Constitution. The Supreme Court, upon hearing the arguments of both the parties, agreed with the demand of the writ petitioner that he had the *locus standi*. The Court went to the extent of saying that as it is one of the policies of the State as envisaged in the Constitution under the 'Directive Principles and Policies of the State' that the State shall give priority to the protection of the environment and also to the prevention of further damage to the environment due to physical development activities, the writ petitioner had the *locus standi* in this case.

The Court gave directives to the industry to "employ effective means" to protect the environment of the area and also directed His Majesty's Government to take

necessary measures towards the enactment of the necessary laws and enforce the Mines and Minerals Act, 1985

In *Yogi Narhari Nath and others v.. the Rt. Honourable Prime Minister Girija Prasad Koirala and Ministry of Education, Culture and Social Welfare and others*, the writ petitioners had filed a petition on the ground of 'public interest litigation' clause of Article 88 of the Constitution' and prayed for the annulment of the act of the Government to provide about 42 *bighas* of land to the International Society for Medical Education to build a College of Medical Science in *Devghat* area of Chitwan District. The writ petitioner argued that the land, provided to the Medical College, under a 49 year lease agreement, is culturally very rich and clearing of forests for the construction of the College could lead to deforestation and the dolphins in the Naryani river could become extinct by the clearing of forests. In this context, the writ petitioner had, while invoking the Constitutional obligation of the State to protect the environment, the rare wildlife and the vegetation, demanded that the act of the Government be declared void.

The respondents in the instant case pleaded that the Medical College was going to be established for the purpose of producing required manpower in the country and providing medical facilities to the people of the area by constructing a 100-bed hospital and that the plea of the writ petitioner could not be held valid only on the ground of environmental protection. Moreover, the land was leased for 49 years and under the agreement the International Society for Medical Education was required not to clear the forest of the area. It was further pointed out that the writ petitioner had no meaningful relation with the subject of the issue in question and as such had no *locus standi* to bring an action against the respondents.

The Supreme Court held that the writ petitioner had *locus standi* to file a writ petition on the ground of public interest litigation and that the Government appeared to have violated the provisions also of the Forests Act which stipulate that the Government may, for the purpose of launching any national priority project and in cases where there is no other alternative grant permission to utilize any forest on conditions that the project should not produce "significant effect" on the environment. However, in the instant case, there were other options left to the Government. The Medical College could have been established in another area. It was not absolutely necessary for the Government to provide the very land which has had religious and cultural value as well as environmental importance. The Court further held that the environment of that area would be degraded even by cutting the bushes of the area and it is not necessary that big trees have to be cut for causing environmental degradation of the area. It went to the extent of saying that the act of the Government was arbitrary and its decision to provide the land to the International Society for Medical College was declared void by the writ of *certiorari*.



## **CONCLUSION**

The Judiciary of Nepal, in particular the Supreme Court of Nepal, has been a catalyst in promoting the Rule of Law in the area of sustainable development, despite limited legislative mechanisms and enforcement. The Judiciary of Nepal has been very cautious in promoting the concept of sustainable development. It has interpreted the laws of the country in a manner that would translate into reality the concept of sustainable development. Moreover, it has, from time to time, issued directives to the Government requiring them to take measures towards the enactment of appropriate legislation and the effective enforcement of laws, in the area of sustainable development.

**COUNTRY PRESENTATION - PAKISTAN**

**HON. MR. JUSTICE RAJA AFRASIAB  
JUDGE OF THE SUPREME COURT OF PAKISTAN**

Human kind, animal kind, plants and micro-organisms, are inextricably linked to and dependent upon the environment. Their very existence and survival depends on a balanced eco-system in the universe. It is, therefore, incumbent upon us, the human kind who make the maximum use and enjoyment of the bounties of nature, to ponder over the issue and devise ways and means of preserving the environment, for our very salvation depends on it.

Development must not be wasteful or result in resource degradation. Natural resources are a bounty of nature and should be utilised in a gainful but careful manner. Nearly one and a half centuries ago, a wise Indian Chief, when approached by a white Chief for the sale of his land responded:

“How can you buy or sell the sky, the warmth of the land; the idea is strange to us. If you do not own the freshness of the air and the sparkle of the water, how can you buy them.

This we know, the earth does not belong to man; man belongs to the earth. This we know, all things are connected like the blood which unites one family. All things are connected.

Whatever befalls the earth befalls the sons of earth. Man did not weave the web of life; he is merely a strand in it. Whatever he does to the web, he does to himself.”

This profound, learned and sagacious statement indeed summarises the philosophy of environmental protection and provides pearls of wisdom for humankind.

All too often, economic growth and environmental degradation have gone hand in hand. Indiscriminate industrial growth in the developed world results in considerable degradation of the environment. Industrial effluent, waste and vehicular emissions results in atmospheric pollution which in turn leads to pollution of water and soil. It was only recently that countries began to realise the harmful consequences of their developmental activities. Recognition of this fact has been perhaps one of the most difficult but important achievements of mankind. The U.N. Conference of Human Environment in 1972 in Stockholm, had a major impact on making humanity realise this common concern and that the international community should take steps to preserve and protect the environment. The member countries were also asked to pass necessary legislation and to adopt administrative measures for its effective

enforcement. Pakistan has actively pursued the cause of environmental protection and has become a party to several international declarations, agreements and conventions on the subject. It signed and ratified the U.N. Framework Convention on Climate Change. It has also ratified the Convention on Biological Diversity. It participated in the 1992 Conference at Rio De Janeiro and played an effective role in preparing and finalising the guidelines for adoption by the member countries.

The Successive Constitutions of Pakistan contained provisions for environmental protection and resource conservation. The 1973 Constitution mentioned Environmental Pollution and Ecology as a subject in the Concurrent Legislative List, meaning that both the Federal and Provincial Governments may initiate legislation for those purposes.

Several laws exist for the protection of the environment. Some of these laws are federal in character and the remainder are provincial. The most important laws on the subject are the Canal and Drainage Act 1873; The Explosives Act 1884; The Ports Act 1908; The Forest Act 1927; The W.P. Goats (Restriction) Ordinance 1959; The Fisheries Ordinance 1961; The Punjab Wildlife (Protection, Conservation and Management) Act 1964; The Firewood and Charcoal (Restriction) Act 1964; Motor Vehicles Ordinance 1965; The W.P. Regulation and Control of Loudspeaker and Sound Amplifier Ordinance 1965; The Agricultural Pesticide Ordinance 1971; The Antiquities Act 1975; etc.

Also, the Pakistan Penal Code of 1861 which is a general criminal law, contains specific provisions on the subject. Under the crime of mischief, it prohibits the killing or maiming of animals and prohibits the damaging of rivers, roads, bridges and works of irrigation and drainage. It also prohibits the firing of explosive substances with the intent to cause damage. (Sections 426-436)

Under the crime of public nuisance, the Penal Code prohibits acts of negligence which spread infectious diseases. It also prohibits the disobedience of quarantine rules; adulteration of food, drink or drugs; and making the atmosphere noxious to health.

Provincial laws empower local institutions to prepare and implement schemes for the prevention of air, water and land pollution. These institutions also have the necessary powers to enforce and implement relevant environmental laws.

In 1983, the Federal Government promulgated the Environmental Protection Ordinance. This was indeed a reforming and consolidating law. The gaps, loopholes and inconsistencies of previous environmental statutes were addressed and resolved. However, as soon as this new legislation came into operation, some difficulties were experienced. The enforcement mechanism for the new ordinance was somewhat weak, particularly at the provincial level.

This led to a review process which aimed to make the law more comprehensive and fully effective. The Government initiated a consultative process involving the relevant Government departments, the provincial Governments, NGO's and the private sector for the purpose of evolving consensus on a new draft law. Borrowing the provisions of the 1983 Ordinance, a draft was prepared and circulated for public commentary. Seminars and discussion were organised wherein there was much public participation, and finally a consensus was reached on the draft. Later, the caretaker Government of 1997 promulgated this draft through an ordinance called the Pakistan Environmental Protection Ordinance 1997 which came into force on February 11 1997. The ordinance was placed before the National Assembly and then referred to the Standing Committee which approved it. It is now pending before Parliament.

The Ordinance is fairly comprehensive in scope and extent. It provides for the protection, conservation, rehabilitation and improvement of the environment and contains concrete plans for the prevention and control of pollution and for the promotion of sustainable development in Pakistan. The salient features of the Ordinance are as follows:

1. The Ordinance covers air, water, soil, marine and noise pollution including pollution caused by vehicles.
2. The Ordinance provides for fixing the National Environment Quality Standards (NEQS) and their strict enforcement. In case of default, the Government is empowered to levy a pollution charge.
3. The Government is empowered to issue environmental protection orders so as to effectively deal with and respond to the actual or potential violation of the law leading to environmental degradation.
4. The law provides for Environmental Impact Assessment (EIA) of various projects being launched in the country including the construction of roads, buildings, factories or other installations, or any alteration, expansion or repair of the same, or mineral prospecting or mining or quarrying, etc. No project may be launched without an EIA being carried out and safeguards are provided to the effect that the proposed project will not pollute the environment.
5. **The import of hazardous waste into the country has been banned and the transport of hazardous substances and dangerous chemicals or toxic material or explosive substances are regulated through licenses under prescribed rules and procedure.**

6. To ensure compliance of the NEQS, the law provides for appropriate mechanisms, including the installation of devices so as to control the pollution caused by motor vehicles.
7. A high level body called the Pakistan Environmental Protection Council has been constituted to formulate policy and provide guidelines for enforcing the law. It is headed by the Prime Minister and is composed of the Chief Ministers of the Provinces, relevant Ministers of the Federal and Provincial Governments, representatives of trade, commerce and industry and members of the academic community.
8. For effective implementation of the provisions of the Ordinance, the Pakistan Environmental Protection Agency has been constituted. This Agency is responsible for enforcing policy and implementing the provisions of the law.
9. The Ordinance also provides for Environmental Tribunals which are to have exclusive jurisdiction to try serious violations of the Ordinance. It also provides for the appointment of Magistrates to try minor offences. Appeals against an order/judgement of a magistrate lies before the Tribunal and those against the Tribunal lie before the High Court. Stringent punishments, through heavy fines and imprisonment, have been prescribed.
10. The Ordinance also empowers the Federal Government to make rules for the implementation of international environmental agreements and conventions to which Pakistan is a party.

The Judiciary of Pakistan has played a positive role in preventing the degradation of the environment and in controlling pollution. Besides exercising their ordinary jurisdiction, the superior courts have also exercised extraordinary jurisdiction conferred by the Constitution. Such jurisdiction is available to the High Courts and Supreme Court under Articles 184(3) and 199 of the Constitution. The superior courts have taken up and decided several cases under this jurisdiction. These courts have also tackled many cases of public interest on the subject. Such jurisdiction was exercised through the filing of regular petitions or receipt of complaints through letters from concerned citizens or social activists. Many times the courts initiated *suo moto* action. In the process, the courts passed important orders and landmark judgements on environmental issues. They issued appropriate directions to the concerned Government.

Most of the cases pertaining to the environment were decided on the basis of Article 9 of the Constitution which provides for, *inter alia*, the right to life.

In the case of *Shehla Zia v. WAPDA* (PLD 1994 SC 693), the Supreme Court expanded and enlarged the scope of the right to life, and held that life does not simply mean animal life or vegetative existence. It stated that the word "life" is significant as it covers all facets and aspects of human existence. The court went on to observe that life includes such amenities and facilities to which a person born in a free society is entitled. The Court concluded that the installation or construction of a grid station or transmission line in the vicinity of a populated area may expose the residents to the hazards of electro-magnetic fields and is therefore violative of Article 9 of the Constitution.

In another case (PLD 1994 SC 102) The Supreme Court took *suo moto* notice of a news report to the effect that certain businessmen were purchasing land in the coastal area of Balochistan to use for the dumping of hazardous nuclear and industrial waste. The Court asked for a report on the matter from the Provincial Government. It turned out that there was no substance in the report. The Court nevertheless issued directions to the Government that no person shall be allotted land for the dumping of nuclear or industrial waste. The Court further directed that the Government should submit a list of persons to whom land in the coastal area of Balochistan has already been allotted. It further ordered that a condition must be inserted in the agreement of allotment to the effect that the land should not be used for the dumping of nuclear or industrial waste. Furthermore, a similar undertaking was to be obtained from the allottee of the land in the coastal area.

In another human rights case (1996 SCMR 543), the Supreme Court directed the Provincial Government of Sind to take effective measures with regard to eliminating the pollution caused by vehicles. The Court ordered that all vehicles, whether privately owned or publicly owned, should be inspected regularly. The Court directed that motorcycles and auto-rickshaws must not be allowed to operate without silencers. The Court also ordered a ban on the use of pressure horns and multi-tone horns.

In the case of *General Secretary, W.P. Salt Miners Labour Union v. Director, Industries and Mineral Development, Government of the Punjab* (1994 SCMR 2061), the Supreme Court expressed the view that the provisions of clean and unpolluted drinking water is a fundamental right enshrined in Article 9 of the Constitution. Any effort or activity which deprives the citizen of this right is violative of the Constitution. The Court therefore prohibited further mining in the area as it may contaminate the water reservoir used as drinking water by the residents. The Court went on to elaborate that the Constitution provides for the right to life and ensures the dignity of man. The Court further stated that it will not hesitate to stop the functioning of a factory which creates pollution and environmental degradation.

As a result of the court's observations and judgements, together with appropriate directions and instructions issued to the Government and public authorities, remedial actions and measures were undertaken. These included the shifting of hazardous and dangerous machinery and installations away from residential areas, inspecting premises to ensure compliance with the law, and controlling pollution and degradation of the environment. The pronouncements also served an important purpose in arousing public opinion and bringing about public awareness on the issue of protecting and preserving the environment. As a result, many cases are presently pending before the Supreme Court in its original jurisdiction for safeguarding the environment.

**COUNTRY PRESENTATION - SRI LANKA<sup>3</sup>**

**HON. MR. JUSTICE MARK FERNANDO  
JUDGE OF THE SUPREME COURT OF SRI LANKA**

Sri Lanka's environmental law is a curious mixture of civil law and common law principles derived from Roman-Dutch and English law, statute law, juristic writings and judge-made law. As a result, there is a multiplicity of jurisdictions and institutions in the environmental arena. In turn, this leads to weak enforcement, lack of co-ordination and inefficiency.

The Judiciary on the other hand has shown a keen interest in the development of environmental law. The minor judiciary in particular has taken an active (and in some cases an activist) role in developing environmental law, especially by expanding the scope of public nuisance law. Recent Court of Appeal and Supreme Court judgements have extended *locus standi* to environmental Non-Governmental Organisations (NGOs) to sue for writs in the public interest and have not hesitated to hold Government institutions accountable for their environmental and developmental decisions.

Another trend that should be noted is the interpolation of a new level of provincial Government after the thirteenth amendment to the Constitution in 1987. The constitutional amendment introduced a new level of institutions between the central Government and local Governments. Provincial Governments also have legislative and executive power over environmental matters<sup>4</sup>. This area of the law is in flux and it is near impossible to predict with any certainty how legal issues in this area would be resolved.

The enactment of the National Environmental Act in 1980<sup>5</sup> and its amendment in 1988 (NEA) has brought two important regulatory tools into the regulator's hands. These are Environmental Impact Assessment (EIA) procedures and

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<sup>3</sup>Prepared by Lalanath de Silva, LL.M, Attorney-at-Law, Counsel to the Sri Lanka Judicial Delegation

<sup>4</sup>At least one Provincial Council has exercised its powers in the area of environmental protection under the concurrent list of subjects set out in the 13th amendment to the Constitution. The North Western Provincial Council adopted the North Western Provincial Environmental Statute and several other Provincial Councils have drafted such statutes. With a view to preventing the proliferation of statutes at variance with the NEA, the Ministry of Forests and Environment has established a Committee, consisting of Provincial Council representatives and other Government officials to draft a model statute on the environment. This effort is funded and supported by UNEP.

<sup>5</sup>The National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988.



Environmental Pollution Licensing (EPL). These regulatory tools govern almost all aspects of development.

Among the new initiatives, is the transparent and participatory processes adopted by the Government to draft a new National Environmental Protection Act (draft NEPA) and a new draft Forest Conservation Act. The drafting of NEPA was supported by the United National Environment Programme (UNEP). Both these laws are in draft form and the draft NEPA is before a Cabinet subcommittee. The draft NEPA is a comprehensive draft law which updates existing legislation and introduces many new concepts including the "polluter pays" principle, environmental tribunals, enforceable rights to a healthy environment, administrative penalties, green marking etc. The new draft forest law contains provisions for tenure agreements between communities and the Government to be registered and re-orientes the classification and regulation of forests in keeping with modern trends.

## 1. OVERVIEW OF INSTITUTIONAL FRAMEWORK

Environmental law in Sri Lanka has evolved in piecemeal fashion over the years. As a result responsibility for environmental protection is shared by a number of institutions on both the local and national levels. At the local level, local authorities and the police have from the earliest times been engaged in environmental planning, protection and dispute resolution. These local authorities are armed with powers to abate nuisances. In addition, local authorities also perform zoning, public health and numerous other duties involving the built environment and solid waste collection and disposal.

At the national level, authority for environmental matters is divided among a variety of different departments, commissions, and agencies. The lack of co-ordination among these various authorities has inhibited the development of a coherent and effective environmental strategy in Sri Lanka. Recent efforts, however, to improve co-operation hold promise for improved environmental management. The Forest Department<sup>6</sup>, headed by a Conservator, is perhaps the oldest Government agency responsible for the management of the national forest estate. The Department of Wildlife Conservation, established in the early 1950s, is responsible for management of approximately 10% of the nation's land area, constituted as parks and reserves. It also has a mandate for the protection of endangered species.

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<sup>6</sup>The exact date on which the Forest Department was established is uncertain. Nihal Karunaratne, in *"Forest Conservation in Sri Lanka"*, 1987, (page 88), having examined the question states that the Department was established in the middle of 1887.

New institutions for environmental management were not established until the 1980s. The Central Environmental Authority (CEA), the apex environmental agency, was established by the National Environmental Act (NEA) in 1980<sup>7</sup>. Its functions include environmental standard setting, pollution control and environmental planning including EIA. In the early 1990s a Cabinet Ministry for the Environment was established and has since functioned as the national environmental planning and policy-making body.

In 1981, the Coast Conservation Act<sup>8</sup> established the Coast Conservation Department with primary responsibility for prevention of coastal erosion and management of the coastal zone. The Fisheries Department is another agency with a long history and oversees the management of both inland and marine fisheries resources. It currently operates under the Fisheries Act of 1996<sup>9</sup>. Marine pollution falls within the purview of the Marine Pollution Prevention Authority (MPPA) established by the Marine Pollution Prevention Act of 1981<sup>10</sup>.

Approximately 80% of the land area of Sri Lanka is titled to the State. The management and disposal of these lands is in the hands of the Land Commissioner's Department and the Land Reform Commission. These functions are performed under a number of laws which are discussed more fully below. The Geological Survey and Mines Bureau is responsible for controlling mining activities.

The powers and functions of many of these and other institutions overlap with one another in the area of environmental management. The need for co-ordination amongst these agencies has become a compelling necessity. The Ministry of Environment, the CEA and other agencies have established ad hoc co-ordinating mechanisms. However, there is no permanent statutory co-ordinating mechanism as yet. The only overarching law is the NEA which deals with pollution control and EIA.

## 2. CONSTITUTIONAL PROVISIONS

The Constitution of Sri Lanka contains several provisions, relating to the environment. For example, Article 27(14) of the Constitution of Sri Lanka states that it is the duty of the State "to protect, preserve and improve the environment for the benefit of the community". In addition, Article 28 (f) of the Constitution makes it a "fundamental duty" of every person to "protect nature and conserve

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<sup>7</sup>Section 2 of the NEA

<sup>8</sup>The Coast Conservation Act No. 57 of 1981 as amended by Act No. 64 of 1988.

<sup>9</sup>The Fisheries Act No. 02 of 1996.

<sup>10</sup>Act No. 59 of 1981.

its riches". These provisions, however, are not set out in the chapter on fundamental rights: they are to be found in the chapter entitled "Directive Principles of State Policy and Fundamental Duties" and are not enforceable in a court of law since the Constitution specifically states so<sup>11</sup>.

Although the constitution contains an enforceable charter of fundamental rights, it does not contain an express right to a healthy environment, nor, an express right to life. Nevertheless, environmental disputes involving mining and quarrying have reached the Supreme Court on the basis that they involved the violation of other declared fundamental rights including the freedom from cruel, inhuman and degrading treatment, the right to equality, the right to choose one's residence and the right to carry on a lawful occupation<sup>12</sup>. Most of these cases have been settled out of Court. There is however, currently pending litigation in the Supreme Court which has a potential for setting a precedent, inferring the right to life and a right to a healthful environment<sup>13</sup>.

### 3. GENERAL ENVIRONMENTAL LAW AND POLICIES

The key environmental law is the National Environmental Act (NEA)<sup>14</sup> which introduced both EIA and EPL procedures. Apart from this Act, there are many other sectoral statutes that deal with specific areas of resources or developmental activity.

The National Conservation Strategy was adopted in December 1988. Following the Strategy a National Environmental Action Plan (NEAP) was adopted in 1991. NEAP is presently under revision. Certain actions from NEAP have been identified and developed into the Environmental Action 1 Project (EA1P) which has been funded by the World Bank beginning in 1997. The EA1P seeks to assist the Government of Sri Lanka by strengthening the Ministry of Forests and Environment and the Central Environmental Authority. The project also creates a Community Environmental Improvement Facility (CEIF) through which the Ministry of Forests and Environment can make grants to community environmental initiatives. There is also a component on land and agriculture where new experiments on soil conservation and environmentally better land use practices in critical watersheds will be piloted.

There have been several efforts to draft a comprehensive National Environmental Policy without success. However, a National Policy on Industry and Environment was issued in 1996 with the participation of three relevant

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<sup>11</sup> Article 29 of the Constitution states that " The provisions of this Chapter do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal".

<sup>12</sup> See for example the cases of *Environmental Foundation Ltd v. AG et al.* 1 SAELR 17.

<sup>13</sup> *Harinda et al v. Ceylon Electricity Board et al* Fundamental Rights Application No. 323/97.

<sup>14</sup> *Supra*

Ministries. The Coastal Zone Management Plan of 1990 (under revision since 1996) contains policy statements regarding the coastal zone. In the area of forestry, a National Forest Policy was adopted in 1996 and a new Forestry Master Plan, adopted in 1995. The drafting of a Biodiversity Action Plan is now underway and is due to be completed in 1997/1998. Policy statements relating to public lands, fisheries, air and water may be found scattered in numerous documents and decisions. These are not well known or understood, nor consistently applied. In most cases these plans and policies are administrative initiatives which do not necessarily have legal authority. In a few cases, such as the Coastal Zone Management Plan and the Colombo Development Plan, the documents have legal effect since they are authorised and given legal effect through an Act<sup>15</sup>.

#### 4. PUBLIC PARTICIPATION

4.1. There is no law which generally requires the notification of potentially affected parties prior to the making of developmental decisions. However, developmental decisions which affect the rights of particular citizens may attract the common law principles of natural justice. The administrative law applicable in Sri Lanka is the same as that applicable in England and the prerogative writs of certiorari, mandamus, prohibition and *quo warranto* are available in Sri Lanka through the High Courts and the Court of Appeal. These principles would in many cases require notification and the granting of an opportunity of being heard.

Developmental decisions such as the compulsory acquisition of private land<sup>16</sup> would be in this category. Less obvious instances may include the granting of Environmental Protection Licenses (EPL)<sup>17</sup> for the discharge of waste, and the approval of land use incompatible with zoning. In the latter situation, public notifications are not made in practice. However, decisions rendered by the Secretary to the Ministry of Environment on EPL appeals have made it clear that neighbourhood objections must be heard in considering EPL applications.<sup>18</sup>

A number of statutes however, specifically provide for public participation. For example, the Town and Country Planning Ordinance<sup>19</sup> requires public notification and subsequent hearings on draft zoning plans. The Coast Conservation Act<sup>20</sup> requires public notification and hearings on permit applications for development activity within the coastal zone where an EIA has

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<sup>15</sup>For example the Coastal Zone Management Plan is authorized under the Coast Conservation Act (supra) and the City of Colombo Development Plan is authorized under the Urban Development Authority Act No. 2 of 1980.

<sup>16</sup>Under the Land Acquisition Act (Cap. 460).

<sup>17</sup>Under Section 23A of the NEA

<sup>18</sup>See the Appeal under Section 23 E of the NEA by E.M.S. Niyaz, 2 SAELR 1.

<sup>19</sup>(Cap. 269), Section 27

<sup>20</sup>Supra

been required. Notification periods range from 30 to 60 days and are usually published in the Government Gazette<sup>21</sup>.

4.2. Elaborate provisions are contained in the NEA for the notification and participation of the public in project design and approval<sup>22</sup>. Every EIA or Initial Environmental Examination (IEE) in respect of listed projects is required to be made public through notifications in the press and the Gazette for 30 days<sup>23</sup>. A public hearing thereafter is optional. The public has a right of access to the EIA and IEE documents.

Similar provisions apply under the Coast Conservation Act<sup>24</sup> for major development projects for which an EIA has been requested. Guidelines issued by the CEA encourage the involvement of the public at the earliest stages of the project design including the scoping stage<sup>25</sup>. In practice however, this has not happened. As yet the EIA process is an addition at the end of the developmental decision-making process. Industry it seems, has yet not sufficiently appreciated the need to begin the process early. The public have rights to compulsory notification only at the latter stage of the process. At the early stages, involvement of the public is at the discretion of the Project Approving Agency (PAA)<sup>26</sup>. Cases have been brought before the courts in respect of disputes involving the interpretation of EIA regulations but these cases have so far been settled out of court.

4.3. There is no clear legal provision for public participation in implementation, monitoring, compliance and enforcement. Efforts to include public involvement in these areas by way of permit conditions have been extremely limited. Affected members of the public, however, are increasingly accessing the legal system for enforcing compliance with environmental laws, and approvals and permit conditions. Public interest groups have successfully litigated non-disclosure and issues of bias through the use of writs and constitutional provisions regarding fundamental rights<sup>27</sup>. Administrative decisions made by the Secretary to the Ministry in charge of the subject of environment in appeals under the NEA have also recognised the right of the neighbourhood to make representations when the CEA is considering EPL applications<sup>28</sup>.

## 5. ENVIRONMENTAL IMPACT ASSESSMENT (EIA)

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<sup>21</sup>Section 16 of the Coast Conservation Act (supra).

<sup>22</sup>Chapter IV C of the NEA.

<sup>23</sup>Section 23BB(3) of the NEA.

<sup>24</sup>Section 16.

<sup>25</sup>Clause 2.2 of "Guidance for implementing the environmental impact assessment process" published by the CEA, 1993.

<sup>26</sup>Clause 4.1 of the CEA guidelines (note 22 supra).

<sup>27</sup>See the case of *Environmental Foundation Ltd. v. the Secretary to the Ministry of Transport and Highways et.al.* Court of Appeal writ application No. 549/94.

<sup>28</sup>See the *Appeal of E.M.S. Niyaz under Sec. 23E of the NEA* 2 SAELR 1.

5.1. Currently, three laws impose EIA obligations: the NEA, the Coast Conservation Act No. 57 of 1981 (CCA), and the Fauna and Flora Protection Ordinance (Cap. 469) as amended by Act No. 49 of 1993.

A number of Ministries and other Government agencies have been designated under the NEA as Project Approving Agencies (PAA) with authority over the conduct of the EIA process<sup>29</sup>. For the purposes of the Coast Conservation Act (CCA), the Director of Coast Conservation exercises EIA authority<sup>30</sup>. For the purposes of the Fauna and Flora Protection Ordinance, the Director of Wildlife conservation exercises EIA authority<sup>31</sup>.

5.2. Under the NEA and regulations made thereunder<sup>32</sup>, an EIA or IEE is required for every listed project referred to as "Prescribed Projects". There are currently some 52 projects listed by generic description, magnitude and location. Among these are river basin development and irrigation projects, construction of hydroelectric power stations exceeding 50 MW, thermal power plants exceeding 25 MW, hotel projects of over 99 rooms or resorts of more than 40 hectares, projects involving the involuntary resettlement of more than 100 families, port developments, construction of highways of more than 10 km etc.

Under the CCA, the Director of Coast Conservation has the discretion to require an EIA with respect to permit applications for development activities within the coastal zone. The current Coastal Zone Management Plan<sup>33</sup> states that the Director will call for an EIA when such activities may have potentially significant impacts on the coastal zone.

Under the Fauna and Flora Protection Ordinance, an IEE or EIA is required for carrying out a development activity of any description within a distance of one mile from the boundary of any National Reserve declared under the Ordinance. The procedure applicable for the conduct of the EIA however, is the same as under the NEA.

5.3. An IEE is defined<sup>34</sup> as a written report where possible environmental impacts of the projects are assessed, with a view to deciding whether or not the impacts are significant. The purpose of an IEE is to decide whether or not an EIA is required.

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<sup>29</sup>See the Gazette Extra-ordinary dated 24.06.93 No. 772/22 as amended by Gazette Extra-ordinary No. 859/14 dated 23.02.95

<sup>30</sup>section 16 of the CCA.

<sup>31</sup>Section 9A of the Ordinance (Cap 469) as amended by Act No. 49 of 1993

<sup>32</sup>Regulations are contained in Gazette Extraordinary No 772/22 dated 24.06.23.

<sup>33</sup>The current Plan adopted in 1990 received Cabinet approval as required by the CCA but was not Gazetted. Further to this there was a 1995 revision that was finalised and submitted to the Cabinet but not Gazetted yet

<sup>34</sup>Section 33 of the NEA

The contents of an ETA<sup>35</sup> include:

- (i) predicted environmental impacts;
- (ii) description of avoidable and unavoidable adverse environmental impacts;
- (iii) description of alternatives to the project less harmful to the environment;
- (iv) reasons why such alternatives were rejected;
- (v) an environmental cost-benefit analysis, if prepared.

5.4. The decision making process under all three laws is similar<sup>36</sup>. The process begins with the developer lodging a Preliminary Information (PI) with the relevant agency. The agency conducts a 'scoping' and issues a TOR for an EIA/IEE. The developer then hires consultants, produces an EIA/IEE and submits it to the agency. If the agency considers the EIA adequate, the agency publishes notices in the press and the Gazette opening the EIA/IEE for public comment for 30 days. Under the CCA, the EIA is also referred to the Coast Conservation Advisory Council for comment during a 60 day period. Comments received are forwarded to the developer for response, after which the agency makes a decision to approve or disapprove of the project. Approval is usually conditional. The developer has a right of appeal to the Secretary of the Ministry in charge of the subject of Environment (for EIAs under the NEA) and to the Secretary of the Ministry of Fisheries and Aquatic Resources (for EIA's under the CCA). It is unclear whether there is any right of appeal against decisions made under the Fauna and Flora Protection Ordinance.

5.5. Under all three laws, a 'scoping' is conducted by the lead agency to determine the issues that ought to be addressed in an EIA/IEE<sup>37</sup>. The developer, related agencies and affected parties may be invited to the 'scoping'. The 'scoping' usually determines whether an EIA or IEE is required, forms the basis for issuing Terms of Reference (TOR) to the developer, and defines the scope of the EIA/IEE.

5.6. Post-decision-monitoring is a duty of the PAA. However the power to enforce approval conditions is with the CEA in respect of decisions made under the NEA<sup>38</sup>. The CEA has delegated this power of enforcement to some of the PAAs. Post-decision-monitoring, however, is less than satisfactory.

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<sup>35</sup>Ibid

<sup>36</sup>The process is set out in the EIA Regulations.

<sup>37</sup>Regulation 6(ii) of the EIA regulations

<sup>38</sup>Section 24B of the NEA.

5.7. Since the EIA regulations were Gazetted in 1993, a number of cases involving their interpretation have reached the Court of Appeal and Supreme Court. Even prior to the EIA regulations being Gazetted, the Supreme Court in *Amarasinghe v. AG et al*<sup>39</sup> drew attention to the availability of provisions in the NEA<sup>40</sup> empowering the CEA to subject development projects to environmental assessments. The Court observed that when the regulations were Gazetted, statutory provisions for public participation would be available.

In a recent case<sup>41</sup> which was filed after the EIA regulations, the question arose as to whether it was adequate to make the EIA report available to the public in the English language alone. The Court granted leave to proceed for violation of language rights guaranteed by the Constitution. The case was later settled with the PAA agreeing to make the EIA report available in Sinhala and Tamil as well. In *Environmental Foundation Ltd. v. the Secretary Ministry of Transport and Highways et al.*<sup>42</sup> the question was whether a PAA that demonstrated an overt interest in the project under review, was disqualified by reason of bias from functioning as the PAA under the EIA regulations. The Petitioner, a non-Governmental organisation, had applied to the Court of Appeal for a writ of prohibition. After the Court issued notice on the Respondents, the case was settled with the PAA being changed and the CEA being appointed as the new PAA.

Yet another development that merits mention is the enactment of emergency regulations under the Public Security Ordinance by the Government which declared that four environment related laws "shall be of no force of effect, in so far as they relate to the generation of power and energy"<sup>43</sup>. The regulation was enacted by the Government during a electrical power crisis caused by drought conditions resulting in the depletion of water levels in the hydro-reservoirs. This regulation has been impugned in fundamental rights proceedings pending before the Supreme Court<sup>44</sup>. If this regulation is valid, then electricity and power generation projects would be exempted from the operation of the NEA, and three other environment related laws. In the result, EIA regulations, EPL regulations and environmental standards established under the NEA would not apply to such projects nor would zoning and planning regulations under the Urban Development Authority Law.

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<sup>39</sup>371 SAE LR 17; 1993 (1) SLR 376.

<sup>40</sup>Section 10(h) of the NEA.

<sup>41</sup>Supreme Court Fundamental Rights Case No. 413/93.

<sup>42</sup>Court of Appeal Writ Application No. 549/94

<sup>43</sup>Emergency regulations under Section 5 of the Public Security Ordinance (Cap 40) published in Gazette Extraordinary No. 966/11 dated 12th March, 1997. The regulations apply to the NEA, the Urban Development Authority Law No. 41 of 1978, The Nuisance Ordinance (Cap. 230) and Chapter IX of the Criminal Procedure Code Act No. 15 of 1979 dealing with the abatement of Public Nuisances.

<sup>44</sup>Supra footnote 11.



## 6. ENVIRONMENTAL PROTECTION LICENSING (EPL)

6.1. Environmental Protection Licensing (EPL) is another important regulatory tool introduced by Act No. 56 of 1988 to the NEA. The NEA states that "No person shall discharge, deposit or emit waste into the environment which will cause pollution except under the authority of a license issued by the [Central Environmental] Authority and in accordance with such standards and other criteria as may be prescribed under this Act"<sup>45</sup>.

6.2. The regulations necessary to implement these provisions were Gazetted in February 1990 and became effective from the 1st of July 1990<sup>46</sup>. These regulations set down the procedure for applications for EPLs, the manner in which such applications should be assessed, and the criteria that should be applied in granting or refusing an EPL. The regulations also establish discharge standards for effluent into inland surface waters, onto land for irrigation purposes, and into marine coastal areas. The regulations further establish tolerance limits for effluent from textiles, tanning and rubber industries.

6.3. The terms "waste" and "pollution" are defined in the NEA and raise difficult questions of science<sup>47</sup>. For instance, "waste" is defined as "liquid...discharged...into the environment in such volume, consistency or manner as to cause an alteration of the environment". This definition requires evidence that the liquid waste being discharged will cause an alteration of the environment.

6.4. Standards fixed under the NEA take into account a number of factors including the nature of the effluent, human health, impact on other living organisms, technology available for pollution control and cost benefits of such controls. Generally speaking, standards are a compromise between these competing factors. They may not be adequate protection in certain contexts while in others they may provide ample safeguards.

## 7. PROTECTION OF THE ATMOSPHERE

7.1. The primary responsibility for air quality is with the CEA. The Board of Investment (BOI) has limited authority for air quality within Industrial Promotion Zones. The Board of Investment has been established by law for the purpose of promoting foreign investment in the country. For this purpose it has power to establish Industrial Promotion Zones over which it has wide ranging powers including the provision of infrastructure and environmental pollution control. The BOI has also power to grant tax and other investment incentives to

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<sup>45</sup>Section 23 A of the NEA

<sup>46</sup>National Environmental (Protection and Quality) Regulations No. 1 of 1990 published in Gazette Extraordinary No. 595/16 dated 2nd February 1990.

<sup>47</sup>Section 33 of NEA.

foreign investors. Local authorities also have limited powers to abate nuisances relating to air pollution.

7.2. The Ministry in charge of the subject of environment is responsible for establishing air quality standards. The Ministry has established ambient air quality standards for the country<sup>48</sup>. There are interim stationery source emission standards which are currently applied by the CEA whenever an Environmental Protection License (EPL) is granted to stationary sources. EPLs are not issued in respect of mobile sources. There are draft stationary and mobile source emission standards which are in the process of being finalised.

7.3. Stationary sources which emit waste into the atmosphere are required to obtain an EPL from the CEA or other delegated local authorities. These include both existing and new sources. Emission of air pollutants into the atmosphere without a valid EPL is illegal<sup>49</sup>.

7.4. Although Section 23 A of the NEA as currently worded requires mobile sources emitting pollutants into the atmosphere to obtain an EPL, no such EPL has ever been issued. There are draft emission and smoke standards for vehicles. Smoke standards have been established under the Motor Traffic Act<sup>50</sup> and the Police have been equipped with smoke meters; however, enforcement is far from satisfactory. The new standards will be implemented through periodic checks on motor vehicles and certification of air pollution levels through authorised garages.

7.5. Both civil and criminal liabilities attach to air pollution. Air pollution not covered by an EPL is an offence punishable with fine or imprisonment<sup>51</sup>. Compensation for damage caused by air pollution is recoverable in a civil suit. However, enforcement of criminal liability is almost non-existent due to lack of trained personnel and lack of testing facilities. Enforcement through the use of nuisance laws, however, are popular and effective<sup>52</sup>.

## 8. PROTECTION AND MANAGEMENT OF WATER RESOURCES

8.1. There are several institutions having authority for water resources. The Water Resources Board has general responsibilities for the assessment,

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<sup>48</sup>Standards contained in Gazette Extraordinary No. 850/4 dated 20.12.94.

<sup>49</sup>Section 23 A read with Section 31 of the NEA.

<sup>50</sup>Standards published in Gazette Extraordinary No. 817/6 of 03 May 1994

<sup>51</sup>Section 23 A of the NEA read with Section 31. Also Section 23 K of the NEA.

<sup>52</sup>The most popular procedure is that found in sections 98 et seq., of the Criminal Procedure Code Act No. 15 of 1979.

protection and development of water resources<sup>53</sup>. The Water Supply and Drainage Board has responsibilities for the supply of water for drinking and industrial uses<sup>54</sup>. The Irrigation Department is responsible for the construction, maintenance, operation and development of minor and major irrigation tanks, canals and schemes<sup>55</sup>. The Mahaweli Authority has wide powers in respect of the management of the Mahaweli river system and water resources within the Mahaweli development area<sup>56</sup>.

The Mahaweli is Sri Lanka's longest river and has become the principal source for irrigation and hydropower development. The Mahaweli Authority was established two decades ago for the purpose of undertaking the rational development and management of the river basin which is defined as the Mahaweli Development Area. Since then some 4 major hydropower dams and reservoirs have been built and large extents of land irrigated. Large numbers of people have been settled in areas opened to agriculture by the Mahaweli Scheme. Responsibility for water quality is with the CEA and local authorities and other agencies, to which this responsibility has been delegated. Additionally, there are numerous other agencies performing special or limited functions with respect to identified water bodies, rivers or watersheds. As a result there is more confusion about agency functions duties and powers. The Government has established an ad-hoc National Water Council at the Ministry of Planning. New legislation is currently being drafted to overcome these difficulties.

8.2. The Ministry in charge of the subject of environment is responsible for establishing both water discharge standards as well as ambient water quality standards. Discharge standards have been established for inland surface water and marine coastal areas<sup>57</sup>. Industry specific discharge standards have been established for rubber factories, textile industries, and tanning industries for discharge into inland surface water. There are also standards for industrial effluents discharged on land for irrigation purposes<sup>58</sup>. There are currently no ambient water quality standards.

8.3. Point sources discharging waste as defined in the NEA into the aquatic environment or onto land must have an EPL<sup>59</sup>.

Generally, an EPL may be obtained from the CEA, however the power to issue EPLs for 19 minor industries has been delegated by the CEA to the local

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<sup>53</sup> Act No 29 of 1964

<sup>54</sup> Act No. 2 of 1974

<sup>55</sup> The Irrigation Ordinance (Cap. 312).

<sup>56</sup> The Mahaweli Authority Act No. 23 of 1979.

<sup>57</sup> Standards found in Gazette Extraordinary No. 595/16 of 2.2.90.

<sup>58</sup> Ibid. Industrial effluents meeting these standards may be used for irrigating crops and plantations

<sup>59</sup> Section 23A of the NEA and the regulations contained in the Gazette Extraordinary No. 595/16 of 2.2.90 (hereinafter called the EPL regulations).

authorities. EPLs are subject to a set of general conditions and case specific conditions. Existing point sources may be allowed to exceed discharge standards for a limited period, on condition that they implement a time-bound programme of pollution control. An EPL is renewable annually. Failure to comply with EPL conditions may subject the facility to sanctions<sup>60</sup>.

8.4. There is no clear legal basis for the control of non-point sources. There are laws dealing with use and applications of pesticides and fertilisers (see item 10 below). Non-point source pollution, however, may be assessed in projects subject to the EIA process and could always become the subject of nuisance abatement procedures.

8.5. The Water Supply and Drainage Board and Water Resources Board are responsible for the provision of drinking water. Water supply schemes and pipe borne water are only found in the major urban centres. The majority of people obtain drinking water from wells (ground water) or from streams and irrigation channels. The law provides for the protection of reservoirs established for the purpose of water supply. While discharge standards could be enforced against point sources polluting streams and irrigation channels, no such enforcement is possible against the most serious problem of non-point source pollution.

8.6. There is no clear regime for the protection of ground water. Even the common law does not provide adequate protection for ground water supply. There appears to be a lacuna in the law.

8.7. Common law principles regulate to some extent, water allocation and user conflicts. However, this does not appear to be an efficient way to deal with water quantity. There are provisions in the State Land Ordinance requiring a permit from the District/Divisional Secretary for the withdrawal of water for non domestic purposes from public streams and public lakes<sup>61</sup>. This provision, however, is not enforced. The Irrigation Department controls the quantity and usage of irrigation water under an elaborate system of decision making and operational controls under that Ordinance.

8.8. Until recently the only law available for the protection of fresh water ecosystems was contained in the Fauna and Flora Protection Ordinance. Such bodies of water could be declared a National Reserve or Sanctuary, giving it a protected status<sup>62</sup>. Recent legislation has expanded the authority available to protect water resources. The recent Fisheries and Aquatic Resources Act (1996) provides for establishment of Fisheries Reserves<sup>63</sup>. The Forest Ordinance allows

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<sup>60</sup>Sections 31 of the NEA and EPL regulation 14.

<sup>61</sup>Section 77 of the State Lands Ordinance (Cap. 454).

<sup>62</sup>Gazetted declarations are required under Sections 2 of the Fauna and Flora Protection Ordinance

<sup>63</sup>Section 36 of the Fisheries Act No. 02 of 1996.

for the establishment of conservation of forests which extends to mangroves on state lands<sup>64</sup>. The protection of such reserves vary from law to law ranging from the protection of wildlife to the withdrawal of water.

8.9. In most cases violation of legal requirements relating to water pollution carry penalties<sup>65</sup>. There is also common law liability for compensation in damages for pollution and loss of water quality and quantity. There are also numerous agencies exercising special or limited powers over defined water bodies. For instance, the Wildlife Department has power over water bodies within national parks and the Ports Authority has power over water bodies connected to harbours.

## 9. PROTECTION OF OCEANS AND COASTAL AREAS

9.1. The Coast Conservation Act of 1981 places the administration, control, custody and management of the coastal zone in the hands of the State<sup>66</sup>. The Coast Conservation Department is the agency with authority over the Coastal Zone. The coastal zone is the area lying within 300 metres landwards of the mean high water line and the area within 2 kilometres seawards of the mean low water line. In the case of water bodies connected to the sea, the landward boundary extends 2 kilometres from the natural entrance points<sup>67</sup>.

The Marine Pollution Prevention Authority (MPPA) was established by the Marine Pollution Prevention Act in 1981<sup>68</sup>. The purpose of this Act is to give effect to the several international conventions on marine pollution and civil and criminal liability to which Sri Lanka has become a party<sup>69</sup>. The MPPA was inactive until 1995. Since then it has commenced a programme of work to implement the Act.

This includes regulations and surveillance. The MPPA has authority over Sri Lankan waters which includes the territorial sea, contiguous zone, the exclusive economic zone, the continental shelf and pollution prevention zone as defined in the Maritime Zone Law.<sup>70</sup>

The Fisheries Department exercises authority over fisheries resources in Sri Lankan waters and for this purpose exercises powers under the Fisheries and Aquatic Resources Act No. 2 of 1996.

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<sup>64</sup>Section 3 and 3A of the Forest Ordinance (Cap. 451)

<sup>65</sup>Section 23 A of the NEA read with Section 31. Also special penalties are provided in Section 23 H of the NEA for pollution of inland waters, and Section 23 V provides penalties for discharging oil; into; into and water

<sup>66</sup>Section 2 of the CCA.

<sup>67</sup>Section 42 of the CCA.

<sup>68</sup>Act No. 59 of 1981.

<sup>69</sup>See item 9.3. below

<sup>70</sup>Law No. 22 of 1976.

9.2. The law requires a Coastal Zone Management Plan (CZMP) to be prepared following a transparent participatory process.<sup>71</sup> Such a plan was prepared and made operative in 1990 and, as required by law, is in the process of being revised (1995). The plan, among other things, sets out guidelines with respect to the development activities in coastal zone.

Development activity in the coastal zone requires a permit from the Director of the Coast Conservation Department<sup>72</sup>. Any activity likely to alter the physical nature of the coastal zone is treated as "development activity"<sup>73</sup>. However, certain activities described in the CZMP, including fishing, do not require a permit.

Regulations further specify activities which do not need a permit<sup>74</sup>. A permit will be granted only if it is consistent with the CZMP and does not have adverse effects on the stability, productivity and environmental quality of the coastal zone<sup>75</sup>.

The Director of Coast Conservation retains discretion to call for an EIA before permit applications are considered (for the EIA process see item 5 above)<sup>76</sup>. The Director of Coast Conservation has also wide powers to demolish unauthorised buildings and structures<sup>77</sup>. The exercise of these powers has resulted in challenges in courts from time to time<sup>78</sup>.

9.3. The Marine Pollution Prevention Act of 1981 gives effect to the following five International Conventions<sup>79</sup>:

1. the International Convention on the Prevention of Pollution of the Sea by Oil 1954, as amended;
2. the International Convention on Civil Liability for Oil Pollution Damage, 1969;

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<sup>71</sup>Section 12 of the CCA.

<sup>72</sup>Section 14 of the CCA.

<sup>73</sup>Section 42 of the CCA

<sup>74</sup>Regulations contained in Gazette Extraordinary No. 260/22 of 2.9.83.

<sup>75</sup>Section 15 of the CCA

<sup>76</sup>Section 16 of the CCA.

<sup>77</sup>Section 31 of the CCA.

<sup>78</sup>See the cases of *L. Escale Pvt. Ltd., V. Dir. CCD and Secy. Ministry of Fisheries & Aquatic Resources* 3 SAELR 3 and order dated 25.07.96 in Galle High Court Revision application No. HCR 79/95 *G.M. de Silva v. Director CCD and Hon. AG.*

<sup>79</sup>Section 17 of the Marine Pollution Prevention Authority Act No 39 of 1981

3. the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage , 1971;

4. the International Convention relating to Intervention on the High Seas in Case of Oil Pollution Casualties, 1969; and

5. the International Convention for the Prevention of Pollution from Ships, 1973 and the Protocol of 1978.

The Act provides for compulsory insurance of vessels carrying more than 2000 metric tons of oil in Sri Lanka waters<sup>80</sup>. Civil liability is limited to 7,210/- rupees for each metric ton of the vessels tonnage with respect to any one incident. The maximum limit of liability is an aggregate of 750 million rupees. Criminal liability for dumping oil carries a maximum penalty of 1 million rupees, as does the offence of pollution. The law also deals with preventive measures, reception facilities and maritime casualties<sup>81</sup>.

9.4. Enforcement of coastal zone law might be regarded as reasonably effective considering the short history of the active Coast Conservation Department. The MPPA has become active albeit recently. The Fisheries Department has a longer history of enforcement and is reasonably active. Its functions include the prevention of illegal fishing, the allocation of fisheries resources, the resolution of fisheries disputes and the assessment and management of fisheries resources.

9.5. Sri Lanka is a party to the Law of the Sea Convention<sup>82</sup> and exercises jurisdiction over the territorial sea, continental shelf, the exclusive economic zone and the contiguous zone in keeping with the definitions laid down in that convention.

## 10. CHEMICAL SUBSTANCES & PRODUCTS

10.1. There is no comprehensive law that governs the import, export, manufacture, use, sale and disposal of chemical substances and products. Instead there are a number of statutes that govern different chemicals and compounds. As a result there are also a number of institutions with authority over different chemicals and substances. One of the negative features of this legislative approach is that there are a number of toxic or hazardous chemicals and substances that are not subject to any regime with respect to importation, exportation, sale, advertisement etc. Disposal of all substances by way of waste is, however, covered by the EPL provisions of the NEA. The establishment of

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<sup>80</sup>Section 9 of the MPPA.

<sup>81</sup>Sections 3, 13, 15 of the MPPA.

<sup>82</sup>United Nations Conventions on the Law of the Sea; acceded to by Sri Lanka on 10th December 1982

chemical plants exceeding specified capacity is required to go through the EIA process.

The Food Act of 1980<sup>83</sup> established a Food Authority and a Food Advisory Council which have authority over the importation, production, consumption, sale, advertisement, etc. of food. The Cosmetics, Devices and Drugs Act of 1980<sup>84</sup> controls these substances and authority is vested in a Director of Health and a Cosmetics, Devices and Drugs Technical Advisory Committee. The Explosives Ordinance<sup>85</sup> controls explosives and substances of a like kind. The Poisons, Opium & Dangerous Drugs Ordinance<sup>86</sup> controls listed poisons and drugs. Pesticide formulations are governed by the Control of Pesticides Act 1980<sup>87</sup> and the Act is administered by a Registrar of Pesticides. There is a similar Act governing Fertiliser (1961).<sup>88</sup>

General Government policy regarding the import and export of chemicals and substances are to be found in the regulations made under the control of Imports & Exports Act<sup>89</sup>. A number of substances and chemicals are subject to tariffs and duties as well as to permit procedures. This Act is enforced by the Customs Department and the Controller of Imports and Exports.

10.2. The production of cigarettes and its impact on human health has given rise to a number of cases in the United States and the rest of the developed world. There appears to be a gradual extension of the liability of tobacco companies in respect of human health impacts where adequate warnings have not been given on the product to potential consumers. There also appears to be a trend to recognise the liability of employers who allow employees to smoke at the work place thus endangering the health of other employees who may become unwilling passive smokers. The multimillion-dollar settlement arrived at recently in the USA in such a case, is an indication that even tobacco companies are recognising the existence of such liability. A recent action filed in a Sri Lankan District Court by a lung cancer patient against a leading tobacco company shows that increasing attention is being given to this issue.

10.3. Apart from the above statutes there is no law specifically governing the manufacture of new chemicals or substances. The formulation of new pesticides would require a permit from the Registrar of Pesticides.

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<sup>83</sup>Act No. 26 of 1980.

<sup>84</sup>Act No. 27 of 1980.

<sup>85</sup>The Explosives Ordinance (Cap. 140).

<sup>86</sup>(Cap. 549) (218)

<sup>87</sup>Act No. 33 of 1980.

<sup>88</sup>Act No. 21 of 1961.

<sup>89</sup>Cap (236)



10.4. The manufacture, import and distribution as well as storage and transport of named or Gazetted substances are covered under the above statutes. For instance, import, labeling, formulation, transport, storage and sale of pesticides is governed and controlled by the Pesticides Act. Similar provisions apply to food, drugs, etc. as well as to explosives. However, there is no general law governing these matters with respect to new or unlisted chemicals and substances.

10.5. Consumer protection is provided by the Consumer Protection Act<sup>90</sup> which has special provisions covering labeling, advertisement, packaging, sale, distribution etc. of the above listed substances. The Consumer Credit Act<sup>91</sup> specifically deals with hire-purchase agreements and protects consumers who take goods on such agreements. Other specific Acts such as the Food Act requires standards to be complied with and consumers are entitled to information with respect to declarations on labels, etc.

10.6. Enforcement of these statutes are with the institution having authority. Local authorities enforce food regulations and consumer protection regulations through Public Health Inspectors and Food Inspectors. Enforcement may not be very strong, but is nevertheless visible. The enforcement of the Pesticide Act has been hampered by the lack of staff at the Registrar's office. Consumers affected by products are entitled to sue for damages through normal common law delict (tort) actions. Liability regimes are similar to those applicable in other common law countries.

## 11. WASTE MANAGEMENT

11.1. There are three key agencies responsible for waste management. They are the CEA, the Board of Investment (BOI) and the relevant local authorities. Responsibility for licensing waste disposal and the enforcement of environmental standards is with the CEA<sup>92</sup>. The control and management of waste within industrial promotion zones is with the BOI<sup>93</sup>. The scavenging and disposal of solid waste and general sanitation is the responsibility of the relevant local authority. Major urban centres are governed by Municipal Councils, smaller centres by Urban Councils, and, village and rural areas by Pradeshiya Sabhas.

11.2. Responsibility for the collection and disposal of household and non-hazardous solid waste, is with the local authority. There are elaborate legal provisions in the Local Government Acts with respect to this matter. Local

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<sup>90</sup>Act No. 1 of 1979 as amended by Act No. 37 of 1980

<sup>91</sup>Act No. 29 of 1982.

<sup>92</sup>Under the provisions of the NEA.

<sup>93</sup>Under section 20 A of the Greater Colombo Economic Commission Law No. 4 of 1978 as amended by Act No. 49 of 1992.

authorities are expected to establish dumps/landfills and provide for scavenging services. Dumps are required to be authorised by a license issued under the NEA by the CEA<sup>94</sup>. This requirement is however, not enforced. Solid waste disposal sites exceeding 100 tons per day require approval under the EIA process<sup>95</sup>.

11.3. Hazardous Waste is regulated through a set of regulations adopted in 1996 by the Ministry of Environment under the NEA<sup>96</sup>. The regulations provide for generators and importers to report on the quantity, chemical make up etc. of hazardous waste. Collection, storage, transport, disposal, recovery and recycling of hazardous waste requires a license. Licenses could be a single or multiple operation license. The regulations provides for safety signs, the training of personnel, emergency response and public access to hazardous waste information. The regulations also provide for absolute liability<sup>97</sup> in the event of accidents, and for compulsory public liability insurance. The regulations, though in force, have not yet been enforced by CEA. The regulations are currently being revised.

Sri Lanka is a party to the Basel Convention on the control of Transboundary Movement of Hazardous Wastes and their Disposal (1989)<sup>98</sup>. In keeping with its obligations, regulations have been Gazetted under the Control of Imports and Exports Act requiring import-export permits for hazardous waste. Such a permit would be issued following Prior Informed Consent principles and an examination of the application by the CEA. While the export-import regulations follow the Basel convention definition of Hazardous Waste, the internal regulation is limited to a smaller list of hazardous wastes.

11.4. Radioactive waste is specially dealt with under the Atomic Energy Authority Law<sup>99</sup>. The Atomic Energy Authority regulates all imports and exports of radioactive substances including wastes. It also regulates disposal of such substances and waste, and the use of such substances. Sri Lanka generally does not permit the importation of radioactive waste and has no nuclear power plants or major nuclear devices. Radioactive substances are only used for beneficial purposes such as in medical diagnosis and treatment, agricultural assessments and for teaching, and in laboratory conditions.

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<sup>94</sup>Sections 23A and 23N of the NEA.

<sup>95</sup>Item 18 of Part I of the EIA regulations.

<sup>96</sup>Regulations contained in Gazette Extraordinary No.924/13 of 23.05.96.

<sup>97</sup>The concept of "absolute liability" (i.e. liability that does not admit of exceptions or defences) is distinct and separate from strict liability as expounded in the English case of *Rylands v. Fletcher* (1868) L.R. 3 H.L. 330; The concept was first stated by the Indian Supreme Court in the case of *M.C. Mehta v. Union of India*. 1987 AIR (SC) 952; 1987 AIR (SC) 965; 1987 AIR (SC) 982; 1987 AIR (SC) 1086.

<sup>98</sup>Sri Lanka acceded to this convention on 22.08.92.

<sup>99</sup>Act No. 19 of 1969.

## 12. PROPERTY RIGHTS AND ENVIRONMENT

12.1. Broadly speaking, land in Sri Lanka is divided into private and State lands. With respect to private property there is no system of title registration. However, deeds relating to land may be registered at the Land Registry. Such registration confers priority for land transactions supported by consideration.

State Lands may be disposed of by the President of the Republic by way of grant or lease and by other public officers such as the Land Commissioner and the Divisional Secretaries acting under the provisions of the State Lands Ordinance<sup>100</sup> or the Land Development Ordinance<sup>101</sup>.

12.2. Private property may be acquired by purchase, exchange, gift, inheritance or prescription. State property may be acquired by grant under the provisions of one of the above laws. The State also has power to compulsorily acquire private land on the payment of compensation calculated at market value under the provisions of the Land Acquisition Act.<sup>102</sup>

12.3. Common/Community Property Rights have, for the most part disappeared. There are however, cases in which such rights have been asserted on the basis of customary rights but almost always denied by the Courts (during colonial times).<sup>103</sup> There is a move to recognise the rights of communities to manage forest resources.<sup>104</sup> However, apart from the area of forestry and some experiments done under the Shared Control of Resources (SCOR) - a project of the USAID, there is no trend to re-invent communal property rights. In fact, the trend is in the opposite direction to recognise and expand the right of private ownership of land and other resources. There are also scattered provisions in laws, including the Land Settlement Ordinance<sup>105</sup>, which allow the recognition of certain common property rights.

## 13. LAND USE PLANNING AND MANAGEMENT

13.1. Land use planning is an area which is highly politicised and has met with little success. There are three institutions charged with this responsibility. The

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<sup>100</sup>(Cap. 454).

<sup>101</sup>(Cap. 464).

<sup>102</sup>(Cap. 460).

<sup>103</sup>See the cases of *Fernando et al v. Fernando et al* 22 NLR 260; *Baba Appu v. Aberan et al* 8 NLR 160; *Rowel Mudliyar v. Pieris et al* 1 NLR 81; *Fernando v. Fernando et al* 42 NLR 279.

<sup>104</sup>The draft Forest Conservation Act (1997) has been made public by the Ministry of Forests and Environment in June 1997. The draft Act contains provisions for the negotiation, conclusion and registration of "tenure" agreements relating to state lands. Such tenure agreements may contain provisions relating to common property rights or joint management regimes (i.e. state and community).

<sup>105</sup>See the proviso to section 10 of the Land Settlement Ordinance (Cap. 464).

Town and Country Planning Department functions under the Town and Country Planning Ordinance<sup>106</sup>. The Urban Development Authority acts under the Urban Development Authority Law of 1978<sup>107</sup>. Finally, local authorities have limited land use planning and zoning powers.

13.2. The Town and Country Planning Ordinance provides for the declaration of planning areas. It empowers the Town and Country Planning department to embark on land use planning and zoning.<sup>108</sup> The process stipulated is highly participatory and transparent. Several areas of the country have been planned in this manner but the plans are not enforced.

The Urban Development Authority has power to engage in the preparation of development plans for areas declared as urban development areas under the relevant Act.<sup>109</sup> Although several areas have been so declared, the UDA has prepared a development plan only for the city of Colombo. This plan is operative and is enforced to a reasonable degree. The law requires development within Colombo to be covered by a development permit from the UDA. Such a permit will only be issued if the development conforms to the zoning in the plan and the conditions and criteria specified in the plan.

13.3. Zoning, when legal and effective, does limit the use of private land. The Town and Country Planning Ordinance provides for the payment of compensation for injurious affection. "Injurious affection" is a term used to denote losses to property value caused by restrictions on its use or adverse impact upon its potential use. The UDA has power to compulsorily acquire private land when the same is required under the Act for development purposes.<sup>110</sup> Compensation is payable on the basis of market value when such acquisitions take place.

13.4. Incentives for conservation of private land are almost non-existent. In fact, incentives are for exploitation of private land. Subsidies are given for short term and medium term crops by way of fertiliser subsidies. Rubber and tea receive similar subsidies.

## 14 ENVIRONMENTAL MANAGEMENT OF PUBLIC LANDS

14.1. Approximately 80% of the land area of the country is titled to the state and is managed through state agencies. Numerous state agencies are involved in the management of state lands. Primary responsibility for disposition of state land is with the Land Commissioner. The Land Commissioner exercises powers under

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<sup>106</sup>( Cap. 269).

<sup>107</sup>Law No. 37 of 1973 as amended by Acts No 4 of 1982 and 44 of 1984.

<sup>108</sup>See section 6 and 38 of the Town & Country Planning Ordinance

<sup>109</sup>Section 8 of the UDA Law.

<sup>110</sup>Section 16 of the UDA Law

the State Lands Ordinance<sup>111</sup>, the Land Development Ordinance<sup>112</sup> and the Land Settlement Ordinance.<sup>113</sup> The powers and functions of the Land Commissioner are exercised through delegates, namely the Divisional Secretaries and District Secretaries.

14.2. During the period 1972 to 1975, the Government implemented Land Reforms.<sup>114</sup> Private ownership of agricultural land was limited to a maximum of 50 acres. Excess land was taken over on the payment of compensation calculated on a statutory formulae. Some of these lands were then distributed to landless people and utilised for other public purposes. Privately owned tea and plantation lands were also vested in two Government corporations. Some of these lands are now managed by private companies although still titled to the State while others have been completely privatised.

The environmental management of public lands has been very sporadic. There are some guidelines issued by the land commissioner on environmental impacts of dispositions and leases but these are not strictly enforced.<sup>115</sup> The EIA regulations however do cover some aspects of public land management.<sup>116</sup> These aspects include the removal of forest cover of more than 1 ha, clearing of land areas exceeding 50 ha, and conversion of wetlands of more than 4 ha. Any of the 52 projects listed in the EIA regulations if located within 100 meters of any forest reserve, or wildlife reserve requires approval under the EIA process, irrespective of its magnitude. Thus a small industrial plant or irrigation project within 100 meters of a forest reserve would require an EIA.

14.3. Protected areas and parks involving public lands are declared under three statutes, namely the Fauna and Flora Protection Ordinance, the Forest Ordinance and the National Heritage Wilderness Areas Act.<sup>117</sup> Protected areas under the Fauna & Flora Protection Ordinance fall into two broad categories:

National Reserves (declared over public lands) and Sanctuaries (declared over public and/or private lands). Forest Reserves and Village Forests may be declared over public lands under the Forest Ordinance. National Heritage Wilderness Areas may be declared over public lands only.

The regime over most of these reserves includes controlled access (via permits), protection of fauna and flora and management of habitat etc. The Wildlife

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<sup>111</sup>(Cap 286)

<sup>112</sup>(cap 300)

<sup>113</sup>(Cap. 299)

<sup>114</sup>This was achieved through the Land Reform Law No. 1 of 1972 as amended by Act No 39 of 1975, 18 of 1986.

<sup>115</sup>See the Land Orders issued by the Land Commissioner, now consolidated in one volume (1985).

<sup>116</sup>EIA regulations, 1993

<sup>117</sup>Act No 3 of 1988.

Department manages all areas under the Fauna and Flora Protection Ordinance while Forest Reserves, Village Forests and Wilderness Areas are managed by the Forest Department.

14.4. Cultural monuments and archaeological sites receive protection under two main statutes: the Antiquities Ordinance<sup>118</sup> administered by the Archaeological Department and the Central Cultural Fund Act.<sup>119</sup> Most archaeological sites and monuments are declared under these laws and receive protection. There are however no laws to protect monuments and building of more recent origin (less than about 150 years old). Sri Lanka is a party to the World Heritage Convention and a number of sites are listed as world cultural and natural heritage sites. A recent proposed amendment to the Antiquities Ordinance will require an archaeological impact assessment in addition to an EIA for development projects impinging on cultural and historic sites.<sup>120</sup>

## 15. CONSERVATION OF BIOLOGICAL DIVERSITY AND WILDLIFE

15.1. Biological diversity falls within the purview of several institutions. The Wildlife Conservation Department and the Forest Department have responsibility for "*in-situ*" conservation of biodiversity. The "*ex-situ*" conservation of biodiversity is covered by both departments in respect of listed species. The current law protects all species of mammals, reptiles and birds other than those listed as unprotected.<sup>121</sup> In the case of amphibians and invertebrates, positive listing is required for protection. Transport of forest produce requires a permit from the Forest Department. Similarly development activity impacting on Forest Reserves, Sanctuaries, Wilderness Areas and National Reserves requires an EIA.<sup>122</sup>

There is currently no legal regime applicable to the protection of intellectual property rights relating to biodiversity or indigenous knowledge concerning the same. Other agencies such as the Agriculture Department and the Plant Genetics Resources Centre have some jurisdiction over plant materials and livestock.

Sri Lanka is a party to the Biodiversity Convention and the focal point for the purposes of the convention is the Ministry in charge of the subject of environment. The Ministry is in the process of preparing a Biodiversity Action Plan (BAP).

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<sup>118</sup>( Cap. 394)

<sup>119</sup>Act No. 57 of 1980.

<sup>120</sup>See item 23.1 below.

<sup>121</sup>See sections 30 and 31 of the Fauna and Flora Protection Ordinance as amended by Act No 49 of 1993.

<sup>122</sup>EIA regulations, 1993 read with Section 9A of the Fauna and Flora (Amendment) Act No. 49 of 1993 and the Regulations published in Gazette Extra-ordinary No. 859/14 dated 23.02.1995.

15.2. Wildlife is protected in situ within national reserves and sanctuaries declared under the Fauna and Flora Protection Ordinance. Species that are protected under the negative and positive lists of the ordinance receive protection "*ex-situ*" as well as "*in-situ*". Entry to reserves require permits while entry into sanctuaries do not. Human intervention within these areas are regulated. Regulation varies from very strict to minimal, depending on the category of reserves. National Reserves could be either Strict Natural Reserves, National Parks, Nature Reserves, Intermediate Zones, Jungle Corridors, Refuges, Buffer Zones, or Marine Refuges.<sup>123</sup> The department of wildlife conservation also administers the provisions of the Convention on the International Trade in Endangered Species (CITES).<sup>124</sup>

15.3. The Fisheries Act of 1996 governs ocean fishery resources. Fishing in Sri Lankan waters is limited to vessels having a license for such purpose. The Act allows the Fisheries Department to regulate the type of fishing vessels, gear and quantum of catch and species. The Act also provides for the declaration of fisheries conservation areas.

## 16. MINING

16.1. Mining falls within the purview of the Geological Survey and Mines Bureau (GSMB). The GSMB was established by the Mines and Minerals Act No. 33 of 1992.

16.2. The ownership of all minerals is vested in the state notwithstanding the ownership of the soil by any person.<sup>125</sup> Mining and exploration for minerals must be licensed under the Act by the GSMB. Mining licenses are issued only to qualified individuals and companies registered to do business in Sri Lanka. Mining is not permitted within Archaeological Reserves and within specified distances of monuments.<sup>126</sup>

New mining licenses are subject to the EIA process if the type and extent of mining is listed under the EIA regulations. Additionally the GSMB has power to stipulate conditions including the taking of deposits and insurance for the protection of the environment. Regulations made by the GSMB under the Act cover a variety of environmental stipulations, criteria and conditions for licensing and operating mines. They also cover the disposal of mine wastes. The Act also deals with the health safety and welfare of miners.

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<sup>123</sup> See sections 6 of the Fauna and Flora Protection Ordinance.

<sup>124</sup> See item 23.1 below.

<sup>125</sup> Section 2 of the Mines and Minerals law

<sup>126</sup> Section 30 of the Mines and Minerals Act No. 33 of 1992.

16.3. The Regulations under the Act as well as the regulations under the NEA dealing with wastes and environmental standards apply to mining wastes. Enforcement in this area is however, weak.

16.4. Reclamation of mines is a major problem in Sri Lanka. Current practice requires the mining enterprise to make a deposit to cover costs of recovery. This deposit however is inadequate for the purpose. Large extent of mined areas, particularly areas mined for clay and sand and gems remain open. A recent study was commissioned by the GSMB and CEA to investigate economic costs and benefits of these deposits.<sup>127</sup> The results identified incentives and disincentives for restoration. The GSMB is currently involved in reforming these practices. The Act does give power to the GSMB to enforce restoration.

16.5. Mining rights on public and private land are subject to licensing by the GSMB and all minerals wherever situated belongs to the state. Royalties are payable in respect of minerals recovered and license fees are required as well. The right to mine particular parcels of public lands may be subject to EIA procedures as well as to lease or permit conditions.

16.6. Individuals affected by mining activities may have recourse to the common law remedies of injunctions and damages. The GSMB also has power to prosecute and recover damages in a civil suit.

Public liability insurance coverage may be available in the case of large mines. Miners have special workmen's compensation packages covering health and occupation injury and a special workmen's compensation commissioner acts to help injured miners recover.

## 17 AGRICULTURE

17.1. Institutions and laws for the protection and development of agriculture are fairly advanced primarily because Sri Lanka is predominantly an agricultural society. The Agrarian Services Department headed by a Commissioner is responsible for the Administration of the Agrarian Services Act 1979.<sup>128</sup> The Agriculture Department headed by a Director is responsible for the administration of a number of laws including the Fertiliser Ordinance, the Control of Pesticides Act, the Soil Conservation Act 1951<sup>129</sup>, Botanic Gardens Ordinance 1928 and the Plant Protection Ordinance.<sup>130</sup> The Department of Animal Production and Health also headed by a Director is responsible for

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<sup>127</sup>The Clay mining study done for the GSMB by Dr. M. Ranasinghe of the University of Moratuwa in October 1995 titled "Feasibility and Environment Impacts of Clay Mining in Sri Lanka: Final Report to the Economy and Environment Programme for South East Asia.

<sup>128</sup>Act No. 58 of 1979

<sup>129</sup>Act No. 25 of 1951 (cap. 279)

<sup>130</sup>(Cap. 276)



nation-wide veterinary services and for the administration of a number of laws including the Diseases of Animals Ordinance and the Animals Act. Overall supervision of these agencies falls under the Ministry of Agriculture and Lands.

17.2. Soil Conservation is covered by the Soil Conservation Ordinance of 1951. The Ordinance was not operative for decades but in the 1980s public agitation resulted in the activation of the law. Since then several areas have been declared as erodible areas under the Ordinance and land owners are required to take specified soil conservation measures. The Ordinance also provides for the compulsory acquisition of erodible lands and for the enactment of regulation in respect of areas and lands declared under the Ordinance.<sup>131</sup> The Ordinance is enforced by the Agriculture Department but enforcement has been weak. Regulations under the Ordinance can cover flood control, pasturing and grazing, soil conservation measures, agricultural practices, draining and cambering. Soil erosion in the hills, due to bad agricultural practices, has become a major environmental problem. Tobacco, tea and potato cultivation are three of the biggest contributors to the problem.

17.3. The discharge of point-source agricultural pollutants is covered by the EPL scheme under the NEA. However, non-point source agricultural pollution is an area that is not dealt with by the existing legal framework. Although there are laws on pesticides and fertiliser there is no law governing run-off, nor are these acts enforced very well in the field. In the result, agricultural run-off is a serious factor in water pollution in Sri Lanka.

17.4. The Control of Pesticides Act 1980 as amended from time to time and the regulations made thereunder govern pesticide imports, formulation, distribution, sale, and use. Pesticide poisoning in Sri Lanka has reached crisis proportions with most suicides a result of pesticide poisoning. Sri Lanka is within the top three countries in suicide levels.

The Registrar of Pesticides, an officer within the Agriculture Ministry is responsible for licensing the formulation of pesticides. The Registrar has been responsive to public appeals for banning the "dirty dozen" and other such pesticides with adverse human and environmental impacts. The problem lies in the lack of qualified staff and laboratory facilities for enforcement.

17.5. Agricultural land, in particular rice paddy lands, receive protection under the Agrarian Services Act. Such lands cannot be converted to other uses without the prior permission of the Commissioner of Agrarian Services. Tenant

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<sup>131</sup> A number of areas have been declared erodible areas under the Act from time to time. For example, see Gazettes Extraordinary No. 10,524 of 8.05.53; No. 12,250 of 16.12.60; No. 1,618 of 19.12.58; No. 11,590 of 21.11.58 and No. 523/21 of 16.09.88. However, no regulations have been Gazetted under the Act though recommended to the relevant Minister by the Director of Agriculture.

cultivators also receive protection and may not be evicted from their paddy lands without a proper order from the Commissioner. There are elaborate hearing and appeal procedures for eviction, termination of tenancy, collection of rents and for action regarding non-cultivation. Other specific statutes also deal with protection for rubber, coconut, and tea lands..

## 18 FOREST AND FOREST MANAGEMENT

18.1. The Forest Department is the main institution having authority over forestry. Other agencies - such as the Mahaweli Authority, the Wildlife Conservation Department, the Coast Conservation Department, the Irrigation Department, the Urban Development Authority (in respect of urban forests) and the Land Commissioner - have special authority over areas under their control.

18.2. Forest management over public lands is in the hands of the Forest Department. The Forest Ordinance provides for the declaration of areas of state land as Forest Reserves. Public lands may also be declared as Conservation Forests or Village Forests. Village forests are meant for use by village communities. Although such village forests have been declared, scarcely any exist on the ground. Village Forests declared over the years have been denuded, in some cases by the villagers, in others by its utilisation for development schemes and settlement schemes. The law regulates entry, logging, hunting etc. within these reserved areas.

There are also provisions applicable to the removal of timber and forest produce from state lands in general. Such action requires a permit from the conservator of forests. Transport of timber, whether from public or private lands, also requires a permit. The Forest department has prepared a Forestry Master Plan and a National Policy on Forestry. The law is currently being revised by a National Task Force with a view to bringing it into conformity with national policy. The new policy encourages commercial forestry and also home gardens. Home Gardens are a traditional concept in which Sri Lankans culturally and historically have created analogue forests around their homes. These home gardens consist of short term vegetable and grain crops, medium high fruit trees, legumes, fodder plants and large shade giving timber trees. Studies have demonstrated that these home gardens are a good analogue forest system.<sup>132</sup> It allows the State to concentrate its efforts at conservation and protection in areas of high biodiversity. It also seeks to liberalise the transport regime with a view to encouraging home gardens.

18.3. A private land owner is free to plant and fell trees on his land subject to two regulations. The first is that if forest cover over the limit specified in the EIA regulations is being felled, the owner must comply with the EIA process

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<sup>132</sup>See page 158 et seq., of the Forestry Master Plan, July 1995, Forestry Planning Unit, Ministry of Agriculture, Lands and Forestry.

under the NEA. Secondly there are a few species that receive special protection under the Forest Ordinance and the Felling of Trees (Control) Act. Logging that may affect a listed species requires a permit. The owner is required to obtain a permit for the transport of such timber. It has been recognised that this area of the law requires strengthening and the task force is seeking to do just that.

18.4. As a result of public and NGO agitation, provisions relating to social and community forestry are being included in the new forest law. They do not currently exist. The new law will provide for tenure agreements between the state and communities and these agreements may include the eventual transfer of ownership of public lands. A system for registration and enforcement of these agreements will also be included.<sup>133</sup>

## 19 OTHER DOMESTIC ENVIRONMENTAL ISSUES

19.1. The National Environmental Act provides for the fixing of noise standards. Such standards were fixed for the whole island in May 1996.<sup>134</sup> The standards seek to divide the country into high noise zones (industrial estates and export promotion zones), medium noise zones (municipal and urban council areas), low noise zones (pradeshiya sabha areas<sup>135</sup>) and silent zones (100 meters from hospitals, courts, recreational areas etc.). The regulations also provide for local authorities to adopt a noise zone map after which more specific and appropriate standards become applicable to the areas zoned.

There are currently no vibration standards Gazetted although the CEA does use in-house standards as a guide.

19.2. There is no special law dealing with indoor air pollution generally. The Factories Act<sup>136</sup> does, however, make provision for the maintenance of indoor air quality. Standards have been fixed by the Labour Departments Occupational Health division and are enforced through Factories Inspectors. Enforcement is however weak

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<sup>133</sup>The draft Forest Conservation Act (June 1997). This draft has just been made public by the Ministry of Forests and Environment .

<sup>134</sup>National environmental Noise Control Regulations, 1996 published in Gazette Extra-ordinary No. 924/12 dated 23.05.96.

<sup>135</sup>Pradeshiya Sabha areas are rural areas consisting of one or two villages.

<sup>136</sup>Act No. 54 of 1961 (cap 144).

19.3. Occupational health and safety is dealt with under a number of statutes. The Factories Act provides for noise, vibration, air and water quality standards as well as other measures concerning worker safety and machine safety. The Act requires the observation of rest periods, the provision of recreational facilities, the protection of machines with fencing and enclosures, the provision of worker safety equipment such as masks, safety belts, and protective garments, the observation of internal noise standards, the provision of ear muffs and no entry zones, and the provision of fire fighting equipment. There are also special statutes dealing with the welfare of women and children at work. These provisions include the granting of maternity leave, the prohibition of the employment of children below the age of 16 at work places, the training of women, the registration of such workers, the provision of safe conveyance for night shift workers, the prohibition of the use of women in late night shifts and the payment of compensation for injuries. Laws dealing with mines have specific provisions for the health and safety of miners.

There is a Workman's Compensation Ordinance which gives a workman injured by accidents arising out of, and, in the course of his employment, a right to be compensated by the employer. It allows workers to petition the Commissioner for Workman's Compensation for the same<sup>137</sup>. The liability extends to occupational diseases listed in the Ordinance which includes anthrax, arsinical poisoning, lead poisoning, and pathological manifestations due to exposure to radio-active substances. Compensation is payable in terms of formulae given in the Ordinance which takes into account the nature and extent of the injury or disease. Workmen's compensation insurance is available in Sri Lanka but is not compulsory. The areas of occupation health and safety is within the mandate of the Labour Department.

## 20. NUISANCE LAW - THE COMMON LAW RESPONSE

20.1 Common law principles of nuisance are part of the law of Sri Lanka. Although nuisance is a tort developed in England, the concept has found its way into Sri Lankan and South African law. The law of nuisance allows land owners and occupants who are victims of environmental pollution to sue for declarations, injunctions and damages. The Sri Lankan courts have even recognised that one does not need to wait till the nuisance manifests itself and that potential victims could bring a *quia timet* action to prevent nuisances.<sup>138</sup>

20.2 The law makes a distinction between private and public nuisances.<sup>139</sup> Public nuisances are an offence punishable under section 261 read with section 283 of

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<sup>137</sup>(Cap. 139)

<sup>138</sup>*Arlis Appuhamy v. Kahavidane* 1983 (2) SLR 493.

<sup>139</sup>For a detailed discussion of these differences see, Salmond on the Law of Torts, 17th Ed. 1977 Page 49 et seq.

the Penal Code.<sup>140</sup> More importantly, Chapter IX of the Criminal Procedure Code Act No. 15 of 1979 provides for the abatement of nuisances through appropriate proceedings in the Magistrates Court. The procedure for the abatement of public nuisances may be initiated by any person lodging an information with the Magistrate.<sup>141</sup> The Magistrate may then, if necessary after taking evidence, issue a conditional order for the abatement of the nuisance. The Respondent on whom the order is served may then show cause against the order or comply with the same. If the Respondent chooses to show cause, the court may take evidence and decide to discharge the order or vary the same or make the same absolute. The Court also has a limited power to issue injunctions pending the determination of the case.<sup>142</sup>

20.3 In *Elal Jayantha v. OIC Panadura Police*<sup>143</sup> the Court of Appeal was at pains to point out that this special procedure should be followed in cases filed for the abatement of public nuisances and that the procedure for summary trial of offences should not be resorted to. In *Greena Fernando v. Tekla Saparamadu*<sup>144</sup> the Court of Appeal held that once a conditional order is issued, the burden of adducing evidence and starting the case was on the Respondent.

20.4 An important question that arises in Public Nuisance cases is the effect of an EPL issued by the CEA to the offending industry. Often, the Respondent would produce an EPL and argue that the industry is acting within the terms of the EPL and within environmental standards. In *Keangnam Enterprises v. Abeysinghe*<sup>145</sup> the Court of Appeal was called upon to decide whether the Magistrates jurisdiction was ousted if the Respondent had obtained an EPL from the CEA. The Court did not decide this issue since it transpired that the Respondent in this case did not have the EPL at the date the conditional order was made but had obtained the same subsequently. The court did however, make a distinction between an EPL and licenses issued by other agencies including local authorities, and emphatically stated that other licenses could not be equated to an EPL.

20.5 As in the case of EIA and EPL regulations, the provisions relating to the abatement of public nuisances contained in chapter IX of the Criminal Procedure Code Act No. 15 of 1979 were, by emergency regulations under the Public Security Ordinance, declared to be of "no force of effect, in so far as they relate to the generation of power and energy."<sup>146</sup> These regulations were Gazetted after a public nuisance proceeding was commenced in the Magistrates Court of Colombo for the abatement of an alleged public nuisance caused by a privately

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<sup>140</sup>(Cap. 19).

<sup>141</sup>Section 98 of the Criminal Procedure Code No. 15 of 1979

<sup>142</sup>See section 104 of the said Code

<sup>143</sup>1986 (1) SLR 334.

<sup>144</sup>1990 (1) SLR 270

<sup>145</sup>1 SAELR 1.

<sup>146</sup>*Supra* footnote 37

operated diesel generator in Ethul Kotte (close to Colombo)<sup>147</sup>. The regulations have been impugned in fundamental rights proceedings before the Supreme Court which are still pending.<sup>148</sup> However, the learned Magistrate, by a recent order has held, that the emergency regulation does not have retrospective effect and decided to proceed with the case, since it had been filed before the regulations.

20.6 Over 200 public nuisance cases relating to environmental pollution have been filed in the last two years. In about 60% of these cases the courts have fashioned an appropriate remedy to abate the nuisance.

## 21. THE EVOLVING PUBLIC TRUST DOCTRINE

21.1 Another useful principle in balancing environmental and developmental interests is the public trust doctrine. The State holds all its property including natural resources in trust for the public. The State may therefore not dispose of natural resources titled to it as if it were a private person, but only for legitimate purposes and in keeping with procedure established by law.

21.2 Although there has never been a case directly raising the issue in respect of the use or disposal of natural resources, the Supreme Court has recognised the public trust doctrine in several recent judgements. In the recent case of *Smithkline Beecham Biologicals S.A. v. State Pharmaceuticals Corporation of Sri Lanka et al*<sup>149</sup> the Supreme Court held that in the area of Government procurement, the State and its agencies are not “on the same footing as a private individual”<sup>150</sup> and that it should be held to its own guidelines, *inter alia*, requiring transparency in the tender process, and recognising a duty to obtain financially the most advantageous and qualitatively the best services and supplies for the country.

21.3 In the cases of *Premachandra v. Jayawickrema*<sup>151</sup> and *Bandara v. Premachandra*<sup>152</sup> the Supreme Court held that powers vested in public officials and agencies of the State were held in trust to be exercised for the lawful purposes for which they were given. In the *Environmental Foundation Ltd Vs The Land Commissioner et al*<sup>153</sup> the Court of Appeal granting interim relief in a public interest writ application concerning the leasing of state lands to a hotel company, was critical of the Secretary to the Ministry of Lands and Mahaweli Development for having placed the company in possession of state land without

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<sup>147</sup>Magistrates Court Colombo case No 76582/4 filed on 20.2.97

<sup>148</sup>*Supra* footnote 38.

<sup>149</sup>Supreme Court Fundamental Rights case No. 89/97 S.C. Minutes of 20th May, 1997.

<sup>150</sup>*Ibid.* Page 19

<sup>151</sup>1994 (2) SLR 90.

<sup>152</sup>1994 (1) SLR 301.

<sup>153</sup>1 SAELR 53.

complying with legal procedure. These provisions required public notification of the proposed lease and a consideration of public objections thereto.

## 22. PROTECTION OF PUBLIC OFFICERS ENFORCING ENVIRONMENTAL LAW

22.1 The Supreme Court has on at least two occasions granted relief to wildlife officers who have been victimised as a result of enforcing wildlife laws. In *Mohammed Faizz v. AG*<sup>154</sup> the Court reprimanded three police officers and a Cabinet Minister for interfering with the discharge of law enforcement functions by a Wildlife Ranger and for assaulting him at a police station. The police officers were also held liable for the assault although they merely stood by. The court ordered compensation to be paid to the Petitioner .

22.2 In *Weragama v. Indran et al*<sup>155</sup> the court granted compensation to a Wildlife Ranger who was arrested and assaulted by police officers. The police officers had been accosted by the Petitioner while attempting to poach in a Wildlife Sanctuary. Other applications for redress by wildlife officers allegedly victimised in consequence of enforcing the wildlife law are pending before the Supreme Court.

## 23. SRI LANKA AND HER INTERNATIONAL ENVIRONMENTAL OBLIGATIONS

23.1 Sri Lanka has become a party to a number of environmental conventions and treaties. These are:

(a). Convention for the Protection of the World Cultural Heritage and Natural Heritage, (1972)<sup>156</sup>

(b). Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Ramsar, (1971)<sup>157</sup>

(c). Conventional on International Trade in Endangered Species of Wildlife and Flora. (1973)<sup>158</sup>

(d). Convention on the Conservation of Migratory Species of Wild Animals (CMS), (1979)<sup>159</sup>

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<sup>154</sup>1 SAELR 62.

<sup>155</sup>2 SAELR 7.

<sup>156</sup>Adopted on 16.11.1972. Sri Lanka acceded on 06.09.1980

<sup>157</sup>Adopted on 02.02.1971. Sri Lanka acceded in 1990.

<sup>158</sup>Adopted on 03.03.1973, Sri Lanka acceded on 02.08.1979

<sup>159</sup>Adopted on 23.06.1979. Sri Lanka acceded on 02.08.1979.

- (e). UN Convention on the Law of the Sea, (1982)<sup>160</sup>
- (f). Vienna Convention for the Protection of the Ozone Layer(1985)<sup>161</sup>
- (g). Montreal Protocol on Substances that Deplete the Ozone Layer, (1987)<sup>162</sup>
- (h). Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal,(1989)<sup>163</sup>
- (i). Convention on Biological Diversity, (1992)<sup>164</sup>
- (j). UN Framework Convention on Climate Change, (1992)<sup>165</sup>
- (k). Stockholm Declaration of the UN Conference on the Human Environment, (1992).
- (l). Rio Declaration on Environment and Development, (1992)

23.2. The question of global equity looms large in a number of these conventions. For instance the Montreal Protocol requires parties to reduce the use and manufacture of Chloro-fluoro-carbons (CFCs) by certain deadlines. Sri Lanka, in pursuance of her obligations, has gazetted the necessary orders prohibiting the use of CFCs after 2005<sup>166</sup> However, Sri Lanka has not yet received the promised financial assistance or technology transfer that would enable local industry to switch to non-CFC substances. The Framework Convention of Climate Change as well as the Biodiversity convention raise the issue of shared responsibility between the North and the South.

23.3. Though Sri Lanka is a party to the above international conventions, several of them have not yet been given proper legal status through the enactment of appropriate legislation. The Biodiversity convention and the Ramsar Convention are two such instances.

## **LIST OF ACTS, STATUTES and ORDINANCES**

**Agrarian Services Act No. 58 of 1979**

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<sup>160</sup> Adopted on 10.12.1982. Sri Lanka acceded on 10.12.1982.

<sup>161</sup> Adopted on 22.03.1985. Sri Lanka acceded on 15.12.1989

<sup>162</sup> Adopted on 16.09.1987. Sri Lanka acceded on 15.12.1989.

<sup>163</sup> Adopted on 22.03.1989, Sri Lanka acceded on 22.08.1992.

<sup>164</sup> Adopted on 22.05.1992, Sri Lanka acceded on 21.03.1994

<sup>165</sup> Adopted in June 1992, Sri Lanka acceded on 23.11.1993.

<sup>166</sup> Order under section 23W of the NEA published in Gazette Extraordinary No. 850/4 dated 20.12.1994.



Animals Act No. 29 of 1958 as amended from time to time  
Antiquities ordinance (Cap. 188)  
Atomic Energy Authority Act No. 19 of 1969  
Botanic Gardens Ordinance of No.31 of 1928 as amended by Act No. 33 of 1973  
Central Cultural Fund Act No. 57 of 1980  
Coast Conservation Act No. 57 of 1981 as amended by Act No.64 of 1988.  
Constitution of the Democratic Socialist Republic of Sri Lanka  
Consumer Protection Act No.1 of 1979 as amended from time to time  
Control of Pesticides Act No. 33 of 1980  
Cosmetics Devices and Drugs Act No. 27 of 1980  
Diseases of Animals Ordinance No. 25 of 1909 as amended from time to time  
Explosives Ordinance (Cap. 183)  
Factories Act No. 543 of 1961 (Cap. 128)  
Fauna and Flora Protection Ordinance (Cap. 469) as amended especially by Act No. 49 of 1993  
Felling of Trees (Control) Act No. 9 of 1951 as amended by Act No. 30 of 1953  
Fertilizers Act No. 21 of 1961  
Fisheries Act No. 2 of 1996  
Food Act No. 26 of 1980  
Forest Conservation Act (draft)  
Forest Ordinance (Cap. 451)  
Greater Colombo Economic Commission Law No. 4 of 1978 as amended by Act No. 49 of 1992  
Imports and Exports Control Act No. 1 of 1969  
Irrigation Ordinance (Cap. 453)  
Land Acquisition Act No. 9 of 1950  
Land Development Ordinance (Cap. 464)  
Land Reform Law No. 1 of 1972 as amended by Act No. 39 of 1975 and No. 18 of 1986  
Land Settlement Ordinance (Cap. 463)  
Mahaweli Authority Act No. 23 of 1979  
Marine Pollution Prevention Act No. 59 of 1981  
Marine Pollution Prevention Authority Act No. 39 of 1981  
Maritime Zones Law No. 22 of 1976  
Mines and Minerals Act No. 33 of 1992  
Motor Traffic Act No. 14 of 1951 as amended from time to time  
National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988  
National Environmental Protection Act (draft)  
National Heritage Wilderness Areas Act No. 3 of 1988  
National Water Supply and Drainage Board Act No. 2 of 1974  
North Western Provincial Environmental Statute No. 12 of 1990  
Plant Protection Ordinance (Cap. 447)  
Poisons, Opium and Dangerous Drugs Ordinance (Cap. 218)

Public Security Ordinance No. 25 of 1947 as amended from time to time  
Soil Conservation Act No. 25 of 1951 as amended from time to time  
State Lands Ordinance (Cap. 454)  
Town and Country Planning Ordinance (Cap. 269)  
Urban Development Authority Act No. 41 of 1978 as amended from time to time  
Water Resources Board Act No. 29 of 1964

## CASES

*Appeal of E.M.S. NiYaz under Sec. 23E of the NEA*, 2 SAE LR 1  
*Arlis Appuhamy v. Kahavidane*, 1983 (2) SLR 493  
*Babu Appu v. Aberan et al.*, 8 NLR 160  
*Bandara v. Premachandra*, 1994 (1) SLR 301  
*Elal Jayantha v. OIC Panadura Police*, 1986 (1) SLR 334  
*Environmental Foundation Limited v. Attorney General et al.*, 1 SAE LR 17  
*Environmental Foundation Limited v. Secretary to the Ministry of Transport and Highways et al*, Court of Appeals Unit Application, No. 549/94  
*Environmental Foundation Limited v. The Land Commissioner et al.*, 1 SAE LR 53  
*Fernando v. Fernando et al.*, 42 NLR 279  
*Fernando et al. v. Fernando et al.*, 22 NLR 260  
*G.M. de Silva v. Director Coast Conservation Department and Honorary Attorney General*, Galle High Court Revision application No. HCR 79/95  
*Greena Fernando v. Tekla Saparamadu*, 1990 (1) SLR 270  
*Harinda et al. v. Ceylon Electricity Board et al.*, Fundamental Rights Application No. 323/97, (pending in courts)  
*Keangnam Enterprises v. Abeysinghe*, 1 SAE LR 1  
*L. Escale Pvt. Ltd. v. Director. Coast Conservation Department and Secretary Ministry of Fisheries & Aquatic Resources*, 3 SAE LR 3  
*M. C. Mehta v. Union of India*, 1987 AIR (SC) 952; 1987 AIR (SC) 965; 1987 AIR (SC) 982; 1987 AIR (SC) 1086  
*Mohammed Faizz v. Attorney General*, 1 SAE LR 62  
*Premachandra v. Jayawickrema*, 1994 (2) SLR 90  
*Rowel Mudliyar v. Pieris et al.*, 1 NLR 81  
*Rylands v. Fletcher*, (1868) L.R. 3 H.L. 330  
*S. C. Amarasinghe v. Attorney General et al.*, 1 SAE LR 17; 1993 (1) SLR 376  
*Smithkline Beecham Biologicals S.A. v. State Pharmaceuticals Corporation of Sri Lanka et al.*, Supreme Court Fundamental Rights Case No. 89/97 S.C. Minutes of 20th May, 1997. Supreme Court Fundamental Rights Case No. 413/93  
*Weraqama v. Indran et al.*, 2 SAE LR 07

## **LIST OF ABBREVIATIONS**

BAP	Biodiversity Action Plan
BOI	Board of Investment
CCA	Coast Conservation Act
CCD	Coast Conservation Department
CEA	Central Environmental Authority
CEIF	Community Environmental Improvement Facility
CFC	Chloro-Fluoro-Carbons
CZMP	Coastal Zone Management Plan
EIIP	Environmental Action 1 Project
EIA	Environmental Impact Assessment
EPL	Environmental Protection Licence
IEE	Initial Environmental Examination
MPPA	Marine Pollution Prevention Authority
NEA	National Environmental Act
NEAP	National Environmental Action Plan
NEPA	National Environmental Protection Act (draft)
NGO's	Non Governmental Organizations
NLR	New Law Reports
PAA	Project Approving Agency
PI	Preliminary Information
SAELR	South Asia Environmental Law Report
SLR	Sri Lanka Law Reports
UDA	Urban Development Authority
UNEP	United Nations Environmental Programme

### **III. NEW DIRECTIONS IN THE PREVENTION AND RESOLUTION OF ENVIRONMENTAL DISPUTES**

**THE EXPERIENCE OF A SPECIALIST ENVIRONMENTAL COURT**

**THE HONOURABLE JUSTICE PAUL STEIN  
JUDGE OF THE COURT OF APPEAL OF NSW, AUSTRALIA AND  
FORMER JUDGE OF THE LAND AND ENVIRONMENT COURT**

**INTRODUCTION**

In order to understand the context of the Land and Environment Court in the state of New South Wales, (the most populous state in Australia) and the court's contribution to the development of Environmental Law, it is helpful to know a little about Australia and its environment. Let me start with some comparisons. The area of New South Wales (NSW) is 800,000 square kilometres (Australia 7.7 million km<sup>2</sup>). The population in NSW is 6 million (Australia 18m) and its capital city Sydney 3.8m.

Australia has an amazing variety of landform and climate. It includes tropical and temperate areas, as well as large tracts of arid and semi-arid lands. Australia suffers, not infrequently, from flood, drought, wild fires and even hurricanes. I am sure you are all aware of its unique fauna and flora.

In social terms Australia, despite its size and the ethos of the "bush pioneer", is a highly urbanised society with 80% of the population living in the cities and large towns in the fertile south east. Through waves of immigration, especially since World War II, Australia is very much a multi-cultural society.

Australia is a federal state with powers shared under the Constitution between the Commonwealth, the States and the Territories. The shared powers include the environment. In turn, the States have established local Government as a third tier of Government. Land use planning is generally the responsibility of state and local Government. The court system reflects the same dichotomy between the States and the Commonwealth.

New South Wales (indeed Australia) does not have a single unified code of environmental law. Rather, environmental law consists of an accumulation of environmental statutes, regulations and policies, together with judicial interpretation thereon, as well as the overlay of the Common Law. It should not be thought that Australia's relative isolation as an island continent means that it has few environmental problems. The fact is that barely 200 years of European settlement has bequeathed a myriad of environmental problems. For example, our soils (which are thin and of poor quality) have been severely

degraded and in some cases literally blown away by land-clearing, over-grazing and poor farming practices. Significant areas of rural land are salt laden and severely eroded due to a rising water table. The cities, in particular Sydney, suffer from poor air quality, polluted water-ways and land-based pollution from disposal of waste, including dangerous substances. Our coastal and interior wetlands have been filled in or degraded, causing a loss of diversity of fauna and flora. This loss of biodiversity has also resulted from agriculture, mining, forestry, tourism, urban development and expansion<sup>167</sup>. Failure to protect historic and cultural heritage has meant the loss of much of our relatively short colonial history and much Aboriginal culture and religion, which is acknowledged to reach back at least 70,000 years.

These are but a few of our 'home made' environmental disasters. They may not be comparable to Chernobyl, Exxon Valdez or acid rain, but in cumulative environmental terms, they are evidence that we are not the 'lucky country' many believe.<sup>168</sup> This brief discourse forms the context for an examination of the creation and role of the Land and Environment Court (the LEC).

## **ENVIRONMENTAL DECISION-MAKING**

Decisions of all kinds which affect the environment are made by numerous different decision-makers in agencies within the various levels of Government. Many emanate from local Government; a number of decisions are made by central Government agencies and an increasing number by Ministers of the State. The vast majority of these decisions can be appealed to the LEC which, in administrative appeals, stands in the shoes of the decision-maker.

## **THE ESTABLISHMENT OF THE LAND AND ENVIRONMENT COURT**

In 1979 the State Government of NSW introduced a series of cognate Bills to wholly reform the environmental planning system, which included the *Land and Environment Court Act 1979* (LECA 1979). The innovative nature of the LEC was stressed by the then Minister for Planning and Environment, the late Paul Landa, in his second reading speech:

"the proposed new court is a somewhat innovative experiment in dispute resolution mechanisms. It attempts to combine judicial and administrative dispute-resolving techniques and it will utilise non-legal experts as technical and conciliation assessors ... The court is an entirely innovative concept, bringing together in one body the best attributes of a traditional court system and of a lay tribunal system.

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<sup>167</sup>*State of the Environment Report, Australia 1996*, State of the Environment Advisory Council, Department of Environment, Sport and Territories, Canberra.

<sup>168</sup>Donald Horne, *The Lucky Country*. Penguin Books, 1964

The court, in consequence, will be able to function with the benefits of procedural reform and lack of legal technicalities as the requirements of justice permit ... The court will establish its own body of precedents on major planning issues, precedents sorely sought by [local Government] councils and the development industry but totally lacking in the now to be abolished local Government appeals tribunal. The decision of the court in its civil jurisdiction is final, except for appeals to the Court of Appeal on questions of law.”<sup>169</sup>

## **PUBLIC PARTICIPATION**

One emphatic theme ran through the comprehensive package of legislation - the right of the general public to participate in the process of environmental planning. This is a specific objective under s. 5 of the *Environmental Planning and Assessment Act 1979* (EPAA 1979). The objective is strengthened by other provisions relating to environmental plan-making, third-party appeals and open standing to enforce compliance with environmental laws. The legislation was an effort to progress from narrow traditional town and country planning, largely based on the UK experience, to a broader and more integrated assessment of environmental issues. It was also a recognition and acknowledgement of the importance of the environment and the development of environmental law, as well as the right of members of the general public to participate.

The establishment of the LEC in 1980 was a crucial ingredient in the initiative. The court was created as an integrated superior court of record of equal status to the State Supreme Court, and with exclusive jurisdiction to determine disputes arising under some 25 separate environmental laws.<sup>170</sup> These statutes make provisions for the protection of the environment and include, *inter alia*, planning, waste management, hazardous chemicals, coastal protection, ozone protection, heritage conservation, national parks and wildlife protection, wilderness, marine pollution, biological control of organisms, air, water and noise pollution. Other categories of the court's jurisdiction include land valuation and rating appeals, building approvals and Aboriginal land rights.

Under the LECA, numerous fragmented jurisdictions were consolidated. Jurisdiction was no longer to be split between different courts, boards, tribunals or authorities. Rather, the court was given an extremely broad jurisdiction to hear all civil and criminal (summary) enforcement matters, judicial review and merit appeals relating to all aspects of land and the environment.

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<sup>169</sup>Hansard, NSW Parliamentary debates, second reading speech, 21 November 1979.

<sup>170</sup>*Land and Environment Court Act, 1979* (NSW) (LECA 1979)

For the first time, in the environmental context, non-judicial members were included alongside judges in a court (as opposed to a tribunal). The LECA 1979 also contained significant procedural innovations in an attempt to make it more accessible and effective. Thus, a unique experiment had begun.

## **JURISDICTION**

A wide-ranging jurisdiction is exercised by judges and technical assessors. The latter are not required to have legal qualifications (although some do) but must be qualified in fields such as planning, local Government, land valuation, engineering, architecture, environmental sciences, natural resources and Aboriginal land rights. The work of the court is divided into six areas or classes.

*Classes 1 and 2* include environmental planning and protection appeals and local Government appeals. These comprise, *inter alia*, development and building appeals, as well as appeals concerning pollution licences and heritage. The majority of these matters are heard by assessors unless issues of law are involved. Such questions, which must be identified shortly after an application is filed, are promptly referred to a judge for determination. If an appeal is unusually complex or controversial, a judge will preside, often assisted by the advice of an appropriately qualified assessor.

*Class 3* concerns land tenure, rating, valuation and compensation for compulsory land acquisition by Governments - local and state. Again, assessors hear the majority of these matters, except the latter category. Aboriginal land rights appeals are also heard in this class, normally by a judge assisted by two Aboriginal assessors. These are distinct from Native Title claims. Internal appeals to a judge are available from any error of law by technical assessors.

*Class 4* includes civil enforcement of environmental laws and judicial review. Injunctions (restraining and mandatory) and declarations of right are among the remedies available. Judicial review of environmental decisions is an integral part of the court's jurisdiction. Open-standing provisions make this a reality for the general public and environmental NGO's, who do not have to jump over the *locus standi* hurdle to gain access to the court.

There is a summary criminal jurisdiction in *Class 5* which covers all pollution and planning laws. Depending upon the offence, penalties that may be imposed range up to \$1,000,000 for corporations and \$250,000 or a maximum 7 years' imprisonment for individuals. The criminal jurisdiction (as well as *Class 4*) are the exclusive province of judges of the court.



A relatively new class of appellate jurisdiction - *Class 6* - redirects all appeals from prosecutions for environmental offences in the local (or magistrates) court from the District Court to the Land and Environment Court

The court is a very public court - mainly because it deals with Public Law and issues which touch upon the everyday concerns of those living in the state. The court continues to strive to be accessible and is mandated to operate with as little formality and technicality as possible. In merit appeals, it is not bound by the rules of evidence. It has abolished the wearing of wigs and robes and introduced procedural innovations in an endeavour to demystify the law and provide efficient dispute resolution. In addition to the final determination of matters by judges and assessors, dispute resolution options of mediation and conciliation are available to litigants, the former from 1991 and the latter since the court's inception in 1980. Indeed, the LEC was the first court outside the industrial/employment context to offer the option of conciliation

## **FEATURES OF THE COURT'S OPERATIONS**

The flexible structure of the court has enabled the moulding of procedures to fit the public law nature of most environmental disputes, thereby facilitating public participation. To this end, the court has instituted a number of procedural initiatives.

Some of the principal features and innovations include:

- Most appeals are heard *de novo* with the court possessing all of the functions and discretions of the body or person appealed against. Its decision is final. As noted earlier, the court is charged not only with acting with as little formality and as much expedition as is consistent with the proper consideration of matters, but is not bound by the rules of evidence in such appeals. It may also inform itself as it thinks appropriate and obtain the assistance of any person with relevant qualifications. This power has been used on a relatively small number of occasions. However, lack of a relevant budget item has curtailed any widespread utilisation.
- The Court is directed to have regard to the public interest in determining appeals.
- The court maintains tight control over its processes and procedures. This is required to meet the pressures and cost of modern-day litigation and the need for efficient case management. Additionally, this control is necessary because the public interest is not always represented by the parties before the court.

- Intense case-flow management has contained delays. Hearings are expedited for good cause. If a major controversy enters the court, which is not infrequent, it is *fast-tracked* to a final hearing in a very short time - weeks not months. This keeps the lawyers and scientists on their toes but is necessary in the general public interest. Indeed, the court has always had the enviable reputation of being a delay free court.
- The court has no formal pleadings but will have issues (of fact and law) identified shortly after the application is lodged. In judicial review, brief points of claim and defence will usually be directed. Issues conferences are frequently held.
- The court has developed policies on costs, which, under the LECA 1979, are a matter of discretion. In administrative or merit appeals no costs will be ordered, save in exceptional circumstances. In civil enforcement and judicial review, costs will normally follow the event of the litigation. However, a number of cases have held that if the unsuccessful party can properly be characterised as representing the public interest and the litigation as public interest litigation, it may be appropriate not to make an order for costs. While the court has developed criteria to determine what may be characterised as public interest litigation, the concept still involves an element of value judgement. It is not surprising, therefore, that judicial minds may vary in the appellation of a particular piece of litigation. The concept has received recognition by the President of the Court of Appeal in *Maritime Services Board v Citizens Airport Environment Association Inc.*<sup>171</sup> While this case concerned an application for security for costs of an appeal from a public interest group and was guided by the Supreme Court Rules (which only allow for such an order in special circumstances), Kirby P made the following observation:

I do not believe that it is appropriate to consider this case as just another suit between ordinary litigants disputing claims of private interest only to themselves. When considering whether special circumstances have been made out, and whether an order for security for the costs of the appeal should be made, it is appropriate to keep in mind the nature of the case and the public interest reasons which may lie behind the bringing of it.

- In applications for security for costs in the LEC, impecuniosity is only a factor to be considered and not necessarily determinative. Regard has also been had to the public interest nature of the case, with the result that few applications for security have been successful. This is a course which has also been applied by the Court of Appeal in *Brown v Environmental*

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<sup>171</sup> (1994) 83 LGERA 107

*Protection Authority*<sup>172</sup> and the aforementioned *Citizens Airport Environment Association* case. In *Brown*, the case was brought by a member of the public (a law student) to test the lawfulness of a decision by the State Environmental Protection Authority (the EPA), pursuant to a particular policy, to grant licences under the *Pollution Control Act 1970* to a pulp and paper mill. In refusing the application for security, Priestley JA had regard to a number of factors including:

... that the provisions of the *Environmental Offences and Penalties Act* under which Mr Brown began his proceedings appear, as does related legislation, to be deliberately aimed at giving access to the Land and Environment Court, in matters of the present type, of a wider than ordinary kind . . . Another factor is that Mr Brown has a right of appeal to this Court.

- Relatively recently the LEC's 'policy' on costs in public interest litigation has been overruled by the Court of Appeal (*Richmond River Council v Oshlack*).<sup>173</sup> The High Court of Australia will shortly determine an appeal from the Court of Appeal which will settle the issue.
- The court's discretion to make such orders as it sees fit (including refusing relief) is very wide. Relief can be moulded to fit the particular circumstances of a case and the acknowledged social justice charter of the court.
- Importantly, undertakings as to damages for interim injunctions to restrain breaches of environmental law are not required as a matter of course. The absence of an undertaking is seen as only one factor to weigh in the balance of convenience. In *Ross v State Rail Authority*,<sup>174</sup> the court, in granting an interlocutory injunction in the absence of an undertaking, referred to the open-standing provisions, the wide discretion regarding the granting of relief and to *Hannan Pty Limited v Electricity Commission* in which Street CJ stated that the task of the court was to administer social justice rather than simply justice between the parties.<sup>175</sup>
- The court has been liberal in orders for discovery and inspection of documents, as well as interrogatories, to the extent that most parties are routinely prepared to produce their files and documents for inspection without order or argument. Further, claims of Crown (Government) privilege are now rare.

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<sup>172</sup> Unreported, Court of Appeal, 1 April 1993.

<sup>173</sup> (1996) 39 NSWLR 622

<sup>174</sup> (1987) 79 LGERA 91

<sup>175</sup> (1985) 66 LGERA 306 at 313

- Equitable defences such as laches, acquiescence and delay are unlikely to have the same impact in the enforcement of Public Law in the LEC as they may where the dispute is a purely private commercial one.
- Solicitor advocates, litigants in person and the use of *amicus curiae* (a friend of the court) are common. The flexible and relatively informal court proceedings helps make this possible and endeavours to ensure that the court is a cost-effective jurisdiction which facilitates, rather than inhibits access.

## **ADVANTAGES OF A SPECIALIST ENVIRONMENT COURT**

There are many reasons why the advent of the LEC has been a benefit in the environmental arena. The mixed personnel of the court and its specialist nature (including the substantial use of expert witnesses) has been successful in generating the expertise and precedents required to facilitate better, more consistent environmental decision-making. This has positive ramifications for administrative decision-makers, business and industry. The range of practical skills possessed by assessors permit of specialist appointments to match the diversity of jurisdiction either through the mix of judges and technical assessors or the matching of the expertise of assessors to particular cases. Importantly, the creation of a specialist court has elevated public and industry awareness of environmental issues. This has been considerably aided by improved access for parties through open-standing provisions serviced by legal aid and a non-profit community legal centre called the Environmental Defenders Office.<sup>176</sup> By contrast, where jurisdiction remains fragmented, the impact of environmental law on public consciousness is diminished.

The experience of 17 years of the court has demonstrated, in terms of cost, efficiency and justice, a number of advantages of having an integrated, wide-ranging jurisdiction (a one-stop shop). The following are some examples:

- decrease in multiple proceedings arising out of the same environmental dispute
- litigation will often be reduced with consequent savings to the community
- a single combined jurisdiction is administratively cheaper than multiple separate tribunals
- a greater degree of certainty in development projects
- reduction in costs and delays may lead to cheaper project development and cost for consumers
- greater convenience, efficiency and effectiveness in development control decisions

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<sup>176</sup> "Special Anniversary Edition, 10 years of EDO", Vol. 13 *Environmental and Planning Law Journal*, June 1996 No. 3 (LBC)

A relatively recent initiative by the court has been to establish a formal Court Users Group to monitor problems for litigants - the Group has a very broad and representative membership.

In addition, the LEC is about to promulgate time standards for disposal of proceedings and delivery of judgements.

## **CRITICISMS**

Although the LEC remains generally popular with the public, it would be remiss not to say that from time to time there have been criticisms of the court, as well as some misunderstandings. These arguments include the following:

### **Appropriateness of an integrated, specialist jurisdiction**

It has been claimed that the integration of environmental law within existing systems should be promoted, rather than create structures which will have the effect of segregating environmental matters. There is said to be nothing distinctive about environmental law to justify separate treatment, such as a specialist court. The argument is that environmental law is, in fact, environmental issues arising under existing areas of law, such as administrative, tort, criminal, nuisance and property/land law, and there is no reason why, for example, toxic torts or environmental crime should be treated differently from other tort or crime.

A number of responses may be made. To start with, environmental matters require specialist knowledge and have generated specialisation in various fields, including the law. The segregation of environmental law to a specialist court could be detrimental *if* it entailed a marginalisation of environmental issues. In this regard, the experience with the LEC has been apposite. There is no doubt that creation of an integrated specialist jurisdiction has heightened Government, industry and community perception of environmental issues and facilitated a better integration of environmental considerations in decision-making. Concentrating jurisdiction over environmental matters in one court has similarly focused public attention.

While the skills a court brings to bear in judicial review, tort or crime may appear to be the same whether concerned with an environmental issue or any other case, there is merit in the argument that judges experienced in environmental matters will be better able to understand and synthesise factual issues and expert evidence. As discussed previously, a specialist jurisdiction has also proved to be more efficient and cost-effective, as well as enabling procedural reforms to develop. The availability of appeal on questions of law in Classes 4 and 5 of the LEC's jurisdiction to the generalist Court of Appeal ensures that there is a consistency of principle applied across the different courts.

As remarked at the outset, Australian environmental law arises mainly under statute. Common law actions, such as nuisance, have generally proved inadequate to serve environmental ends and have been largely superseded by legislative initiatives. Environmental law is now a readily identifiable and acknowledged body of law.

There are nonetheless, still, grey areas. For example, toxic torts are relatively undeveloped in Australia. Only comparatively few toxic tort suits have been brought. The question of whether toxic torts will become the subject of specific legislation or be incorporated through a widening of existing boundaries of tort law, as in the United States, and whether they will come within the jurisdiction of the LEC, lies in the future. No doubt similar arguments on the appropriateness of such jurisdiction as those discussed above may be anticipated.

With regard to environmental crime, a debate has already been taking place in Australia as to whether these are 'real crimes' and what is the appropriate role of criminal law in the protection of the environment. However, no similar debate has arisen as to the suitability of the LEC's jurisdiction over environmental offences.

Certainly no perception has arisen that prosecutions are 'technical infringements' requiring special treatment before a special court and not crimes. I would argue that the perception of environmental harm as a 'crime', rather than a matter of relative insignificance arises from the penalties imposed for such offences and the policies of the prosecuting agencies or, (alternatively) the ability of the community to bring prosecutions, rather than from the jurisdiction of a court. In NSW the penalties imposed are not insubstantial, being the most stringent in the country; the prosecution policy of the EPA has also been strong in recent years and the ability of members of the public (with the leave of the court) to bring prosecutions has been granted under legislation.

### **Criminal Enforcement**

It has been suggested that the need to deal with criminal as well as civil enforcement mechanisms has caused problems for the court in its attempt to deformalise the judicial process. In practice, however, this has not occurred. The court observes the rules of evidence in this jurisdiction and has not inappropriately sought to deformalise its procedures. The court is generally dealing with strict liability offences, with a maximum penalty of \$125,000 for corporations and \$60,000 for individuals, with no option to sentence an offender to imprisonment. These offences are the most commonly prosecuted and convictions are easier to secure. The substantial monetary penalties involved ensure that they are taken seriously by industry and the community.

In my view, traditional criminal law doctrines may be inappropriate in the environmental arena with regard to strict liability offences. There may be a need to develop new approaches to such offences, which balance civil protections and the public interest in the protection of the environment. The court has had to deal with relatively few *mens rea* offences and so far few prosecutors have sought a sentence of imprisonment and very few have been imposed. Nevertheless, the court has had no difficulty dealing with criminal prosecutions in accordance with the proper protections of the criminal law.

Having the majority of environmental offences prosecuted in the LEC has probably better served the ends of justice by aiding the imposition of comparative and reasonably consistent penalties, since judges are able to build up a fund of experience. By contrast, where criminal enforcement of environmental offences occurs in a fragmented jurisdiction, the public perception of their seriousness is diminished. Sentencing perceptions may also be affected by reason of the fact that they would form only a very small percentage of criminal work before a generalised court.

### **Independence and inherent jurisdiction**

Some commentators have voiced concern regarding the independence of the court as a result of it being a 'creature of statute' and, therefore, vulnerable to the whims of parliament. They had previously pointed to a perceived lack of inherent jurisdiction. In 1993 the Court of Appeal confirmed that the LEC had inherent jurisdiction.<sup>177</sup> The court is in the same position as any other court in Australia, as all courts are created by statute - albeit by statutes of longer standing than the LECA 1979. In addition, the judges of the court, in fact all state judges, were relatively recently granted constitutional protection to ensure judicial independence. *Inter alia*, these provisions ensure that no court can be abolished unless the judges of that court are appointed to a court of equivalent status.<sup>178</sup>

With regard to these concerns a court has substantial advantages over a tribunal. These include judicial independence, which is pertinent in the environmental area where the Government is often a party to litigation. Importantly, a superior court is able to secure obedience to its orders through contempt procedures thus enhancing its ability to protect the environment.

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<sup>177</sup> *Logwon Pty. Ltd. v. Warringah Council* (1993) 33 NSWLR 13

<sup>178</sup> *Constitution Act* 1902 (NSW) as amended in 1992. (Part 9)

### **Demarcation disputes**

While there have been a small number of such disputes (between the LEC and the Supreme Court), they are still a source of (sometimes strategic) inconvenience to litigants. Amendments to LECA have vested the court with express ancillary jurisdiction and this has improved the situation.<sup>179</sup> The breadth of the amendment is yet to be thoroughly tested, but it clearly has the potential to overcome most, if not all, demarcation problems. The possibility of cross-vesting legislation, in the event that the amendment is inadequate to resolve jurisdictional issues, is also under consideration.

### **Apportionment of hearings between members**

It has been suggested that there are inefficiencies in the apportionment of hearings between assessors and judges. This has not been proven in fact and the combination of rules of court introduced in 1991 and references of questions of law to judges has ensured this. Legal issues before assessors are now rare, as are internal appeals to judges from decisions of assessors on errors of law.

### **Multi-member boards**

Multi-member boards have been criticised as an inefficient use of resources and it is considered that the numbers sitting on any particular panel should be limited as far as possible. The court recognises that multi-member boards or panels can be inefficient, consequently these are utilised infrequently and only where appropriate to the circumstances of a particular case - for example, in Aboriginal land rights claims or where multiple expertise is required. The other side of this criticism (expressed by some) is that the court should have *more* multi-member panels.

### **'Mareva' injunctions**

'Mareva' injunctions were previously held to be unavailable. However, this has been rectified by amendments to the *Environmental Offences and Penalties Act 1989*.

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<sup>179</sup>LECA 1979, s. 16(1A) introduced in 1993



## **Damages**

Lack of power to award damages and the issue of exemplary/aggravated damages is another issue. My answer to this is that it is a matter for law reform. Proposals have been made for the provision of civil damages, particularly as a means of moving away from criminal sanctions, which are considered by some as inappropriate in certain environmental contexts. Civil enforcement is regarded as better able to achieve environmental protection. It is, therefore, possible that the court will acquire this jurisdiction. At present the court has only limited power to award damages, although this has been extended by changes to local Government law and environmental offences

## **Appeals from magistrates**

The court now has jurisdiction to hear appeals from magistrates on pollution charges, in lieu of the District Court (Class 6). This is an improvement and part of the ongoing process of strengthening and consolidating the court's jurisdiction where such matters have been overlooked in the original formulation or as new environmental legislation is passed into law. It has been argued that the court could have a still broader jurisdiction. I would agree, so long as it extends only to matters properly considered part of environmental law.

## **Centralised court**

It has been claimed that a centralised court prejudices regions. While this has not been the experience, the criticism may in part be due to the geographic and demographic characteristics of the state. However, assessors are regularly on circuit and judges sit in the country as often as is necessary and required.

## **Decisions by the court**

It is maintained that there has been a temptation for Governments to overrule court decisions or exclude the Court's jurisdiction. Indeed, there has been some history of this, particularly prior to 1988, which resulted in a public backlash. It may, however, be pointed out that many of the legislative aberrations have followed rulings or appeals in the Court of Appeal, rather than the LEC. Over the past 8 years Parliament has rarely sought to oust the court's jurisdiction or reverse a decision. Political manoeuvrings can be expected to arise from time to time and have the benefit of taking place in the public arena, where a final resolution is often influenced by public opinion and lobbying. However, the case of *Brown v EPA* is to be noted. Legislative amendments were made following the decision in the LEC. These effectively thwarted a major portion of the appeal before the Court of Appeal. As a result, the appeal was withdrawn. Another reversal came in 1996 when the

Government legislated to reverse a decision of the LEC over a large open-cut coal mine and validate a state policy declared to be void by the court (*Rosemount Estates v The Minister*).<sup>180</sup> This occurred while the case was waiting to be determined in the Court of Appeal.

## OTHER AUSTRALIAN JURISDICTIONS

The issue of a preferred system of appeals and enforcement in the areas of planning and environmental law has been the subject of scrutiny and debate around Australia for many years. A report commissioned for the federal Government in 1990 recommended a single combined appellate and enforcement jurisdiction for development control in each state, necessarily providing a broad jurisdiction to resolve all planning and environmental issues.<sup>181</sup> The authors recommended a specialist court, including judges and commissioners and modelled substantially on the LEC. The principal difference was that the specialist court would exist as a division of the Supreme Court of a State. The thrust of the report was adopted by all Australian planning ministers in 1991 and a number of states have moved towards meeting the recommendation, notably Queensland, South Australia and Tasmania.

Queensland recently built on the previously existing Local Government Court by renaming it the Planning and Environment Court and expanding its jurisdiction. The court is serviced by District Court Judges and remains an intermediate court. The jurisdiction of the court now includes the ability to make declarations and orders that were, under the old legislation, solely the province of the Supreme Court. The expansion of the statutory powers of the court was accompanied by an open-standing provision substantially modelled on the wording of s. 123 of the EPAA 1979 (NSW). However, jurisdiction remains fragmented to the extent that criminal matters are still heard in magistrates' courts, where open standing has also been granted to any person to bring proceedings by way of complaint and summons for certain breaches of the law.

In South Australia, a new court known as the Environment Resources and Development Court has been established by the *Environment Resources and Development Act* 1993 (S Aust). The court is a specialist court, established to deal exclusively with building, environmental and planning disputes and is separate from the existing Supreme, District and magistrates' courts. The court

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<sup>180</sup> (1996) 90 LGERA 1 and (1996) 91 LGERA 31, the former judgement being effectively overruled by the *State Environmental Planning (Permissible Mining) Act* 1996.

<sup>181</sup> B. Hayes and C. Trenorden, *Combined Jurisdictions for Development Appeals in the States and Territories*. Department of Industry, Technology and Commerce; AGPS, Canberra (1990)

is comprised of legal and non-legal appointments, and includes District Court Judges, magistrates and Commissioners (who are equivalent to assessors in the LEC). It hears all merit appeals and criminal and civil enforcement proceedings. The court is not bound by the rules of evidence and is mandated to conduct itself with the minimum of formality and inform itself as it thinks fit, characteristics drawn from the LEC. While the establishment of the court is a positive step and to be commended, there are major deficiencies. The court does not have jurisdiction over judicial review proceedings, which remain with the Supreme Court, and is a court of intermediate status. At this stage its jurisdiction over environmental issues is limited, although it is hoped to be expanded over time.

Tasmania has established the Resource Management and Planning Appeal Tribunal as part of a package of legislation to reform planning, development and environmental protection. The tribunal utilises both legal and non-legal members. Its jurisdiction includes merits or administrative appeals and civil enforcement but not judicial review. An attempt to relax the common law rules of standing has been made for civil enforcement. While the legislative package contains laudable and innovative changes in statutory powers, it has failed in its conception of a curial body. The outcome, I think, will be less efficient and effective than an integrated court of a superior status.

In the remainder of the Australian states and territories, jurisdiction over environmental law continues to be fragmented. Most jurisdictions have planning and building appeals located within their administrative appeal tribunals. Usually, although not exclusively, judicial review or civil enforcement occurs within state or territory Supreme Courts. Criminal prosecutions are normally heard in the magistrates' courts. In the Commonwealth area, jurisdiction is shared between the Administrative Appeals Tribunal and the Federal Court. However, judicial review of environmental law is restricted because of the requirement to establish common law standing and the provisions of the *Environment Protection (Impact of Proposals) Act 1974* (Cth) being drafted in such a way as to make it almost nonjusticiable. In any event, due to the division of powers under the Constitution, State jurisdiction is the more important.

## STANDING

Reading articles on European environmental law which bemoan the problems of establishing *locus standi* to seek to enforce breaches of environmental law, evokes feelings of *deja vu*. 'Any person' may bring proceedings in the LEC to remedy or restrain a breach of environmental law. No special interest in the subject-matter is required. An applicant for relief does not have to be a 'person aggrieved'. No leave of the court is required, except in the case of civil or

criminal enforcement of pollution legislation. Even this is about to change, with leave to be dispensed with. However, no 'floodgates' of litigation have been opened. Most judicial review cases are concerned with enforcing breaches of environmental law in the public interest, not with vindicating some personal or property right.

The success (or otherwise) of the LEC must be judged not only in terms of efficiency and effectiveness, but in terms of access. Without statutory open standing the role of the Court would be considerably reduced. The number of civil enforcement and judicial review applications by individuals, residents, conservation groups and other third parties (as distinct from consent or regulatory authorities) has shown modest but significant growth over the last decade. Importantly, a high proportion have succeeded in exposing and remedying breaches of the law, sometimes by the state or local Government. In short, open standing has not been abused. The existence of self-help remedies to the public at large also acts as an incentive for regulators to do their job. Additionally, civil enforcement of pollution breaches is slowly becoming more popular, leaving the more serious breaches to be dealt with by the criminal law.

One of the successes of the original legislative package has been Part 5 of the EPAA 1979 which controls the bulk of development activities by public authorities and draws on the *National Environmental Policy Act 1970* (the NEPA) in the United States. Part 5 compels the *anticipation* of environmental problems and requires them to be accounted for in the decision-making process. Section III of the EPAA 1979 is pivotal and imposes on a determining authority (usually a Government agency) a duty to examine and take into account 'to the fullest extent possible' all matters affecting or likely to affect the environment by reason of the proposed activity. In addition to this obligation, a duty to prepare and assess an environmental impact statement (EIS) will arise if the carrying out of the activity is 'likely' to 'significantly affect the environment'.

The court may therefore be called upon to examine the lawfulness of an approval in the absence of consideration of an EIS, or the correctness of the decision, if any, by the agency, that an EIS was not required. Extensive case law has developed over the past decade to interpret these provisions and has acted as a guide to proponents and citizens alike.

## **THE DEVELOPMENT OF ENVIRONMENTAL LAW**

The work of the court has made a substantial contribution to the development of environmental law. This has occurred through building up a body of case law precedents, by interpretation of statutes and environmental planning instruments and on occasions by 'making' law. There have been decisions of

the court which have lead to legislation, e.g. the *Chaelundi* forest dispute spawned a new statutory regime to protect endangered fauna, (the *Endangered Fauna (Interim Protection) Act 1991*).<sup>182</sup>

The evolution of environmental law continues apace and is enhanced by the existence of a specialist court. For example, the core principles of ecologically sustainable development (ESD) are receiving attention in the LEC on an increasing basis. This began in 1993 with the decision *Leatch v National Parks & Wildlife Service* which applied the precautionary principle.<sup>183</sup> This and other ESD principles have been examined in the court since, as well as in other Australian jurisdictions. *Leatch* has been cited outside Australia in the UK and New Zealand. It was also referred to in the recent report of the UN Secretary-General on progress in implementation of *Agenda 21*. The interpretation of ESD principles is continuing to engage the court in a number of cases and no doubt this will continue since many NSW statutes adopt core ESD principles in their objectives.

## CONCLUSION

The Chief Justice of NSW, The Hon. Justice Murray Gleeson, has emphasised four principal objectives of the legal system - effectiveness, efficiency, timeliness and, above all, justice. The Land and Environment Court has sought to achieve each of these objectives. It has demonstrated the appropriateness of easy access to a superior court with an integrated, exclusive jurisdiction in environmental law. Part of the court's success is, I believe, due to its mixed personnel - legal and technical. The opportunity of a judge to sit with or to delegate matters to lay assessors ensures determination by persons with appropriate qualifications and experience. The wide discretion to make orders 'as it thinks fit' and to punish for contempt those who disobey its orders, enhances its role as a specialist curial structure.

The LEC's wide-ranging jurisdiction enables it to administer social justice in the legislative scheme of environmental laws, which travel far beyond justice *inter partes*. Its status as a superior court, with an integrated jurisdiction, means that it can, as far as is possible, completely resolve all matters in controversy between the parties and avoid multiplicity of litigation. An important by-product of the court's jurisdiction is the enhancement of the environmental decision-making process. Having a specialist court has also served to elevate public, Government and industry awareness of environmental issues.

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<sup>182</sup> *Corkhill v. Forestry Commission (No. 2)* (1991) 73 LGERA 126 and on appeal *Forestry Commission v. Corkhill* (1991) 73 LGERA 247

<sup>183</sup> (1993) 81 LGERA 270

**NEW DIRECTIONS: PREVENTION AND RESOLUTION OF  
ENVIRONMENTAL DISPUTES**

**HON. MR. JUSTICE B.N. KIRPAL  
JUDGE OF THE SUPREME COURT OF INDIA**

In the field of environment, the judiciary in India today is required to play an assertive role. In response to public demand, the superior courts, namely, the Supreme Court of India and the Provincial High Courts, have progressed from the earlier conservative and sedate approach to assume the mantle of a dynamic and assertive judiciary with a view to promoting the rule of law in the area of the environment. In doing so, however, care has been taken to remain within the domain demarcated by the Constitution for the judicial wing.

In this presentation, I propose to place before you a brief overview of Indian legislative history with regard to the laws concerning the environment and how, in recent times, the Indian judiciary and the Supreme Court in particular has developed this branch of law and given new directions to the prevention and resolution of environmental problems.

**BACKGROUND AND LEGISLATIVE HISTORY**

The concern for the protection and preservation of the environment in India can be traced to the readings from ancient texts of Kautilya's *Arthashastra* written between 321 and 300 B.C. This work deals with diverse subjects including administration, industry and law. One of the laws contained therein requires the ruler or the State to protect existing forests and grow new ones so as to conserve the environment.

There are instances in our history where the wanton felling of trees met with strong resistance from the local population and remedial measures were taken to address this. The extent to which some people were willing to sacrifice for the sake of protecting trees is best illustrated by an incident from the 18th century. In 1730, the erstwhile State of Jodhpur in India was in need of fire wood to extract lime from limestone in order to build a fort. Accordingly, soldiers of the State were sent to bring the firewood. The soldiers began felling trees near the village of Khejarali. A group of men, women and children belonging to the Bishnoi community assembled there and asked the soldiers to stop. The soldiers ignored their request and continued felling the trees. In an attempt to stop the soldiers, the men and women of the community embraced the trees. The soldiers persisted and killed anyone who tried to stop them. In this process, 292 men and 71 women were killed. When this incident was reported to the ruler of the State, he immediately went to Khejarali and ordered the soldiers to stop cutting down the trees. Thereafter, the ruler of the State

issued an order (*parwana*) totally banning the cutting of green trees in the 84 villages where the members of the Bishnoi community were living. The commitment of the Bishnois to trees continues to this day.

The increasing demands on India's natural resources as a result of population growth, economic development and industrialisation have given rise to a greater need for protecting the environment. This resulted in legislative efforts being made to control pollution and address other environmental issues. These efforts, however, were piecemeal and inadequate. According to a report submitted to the Government of India in 1980, there were over 200 Central and State statutes that had some bearing on the environment but in most cases, environmental concerns were only incidental to the principal object of the law in question. Thus the desired result was not effectively achieved.

The first United Nations Conference of Human Environment (Stockholm 1972) was probably the final motivating factor that led to a spate of comprehensive legislative measures for protecting the environment in India. Not only was a well developed body of environmental law enacted by Parliament but even the Constitution of India was amended. In 1976, Article 48A was incorporated into the Directive Principles of State Policy (Part IV) of the Constitution. This article provides that "[t]he state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country." In the same year, Article 51A was added to the newly created Fundamental Duties (Part IVA) of the Constitution. Article 51A(g) states that it shall be the duty of every citizen of India to "protect and improve the natural environment including forest lakes rivers and wildlife, and to have compassion for living creatures." The other important changes made by the 42nd Constitution Amendment Act of 1976 were that legislative entries relating to 'wildlife' and 'forests' were moved from the State List of the Constitution to the Concurrent List. This has intrusted the Central Government with a greater role in the development of national wildlife and forests.

Under the Indian Federal system, the power to enact laws is shared by the Indian Parliament and the 25 states in a well defined manner. The division of legislative powers is contained in the Union List (List I), the State List (List II) and the Concurrent List (List III). Under the Concurrent List, both the Parliament and the State Assemblies have over-lapping jurisdiction to enact laws but where a central law conflicts with a state law on a concurrent subject, the former prevails. Furthermore, the Parliament has residual power to enact laws on any subject not covered by any of the three lists. Thus, the centre has very wide legislative power in the field of environment.

Notwithstanding this division of legislative jurisdiction, Article 252 of the Constitution makes it possible to enact laws with regard to such state subjects contained in the State List whose legislatures pass resolutions empowering the Parliament to enact laws on that subject. Furthermore, Article 253 enables the

Parliament to legislate to give effect to international agreements. In exercise of these powers, five major Acts have been enacted by the Central Parliament which now cover all aspects of environmental protection in India. These are the Wildlife (Protection) Act, 1972; the Water (Protection and Control of Pollution) Act, 1974; the Air (Protection and Control of Pollution) Act, 1981; the Forest Conservation Act, 1980; and the Environment (Protection) Act, 1986.

Of these, the Environment (Protection) Act, 1986 is, in a sense, an umbrella legislation designed to protect the environment as a whole. The Act empowers the Central Government to take all such measures as are deemed necessary or expedient for protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution. It authorises the Central Government to set new national standards for the quality of the environment as well as standards for controlling emission or discharge of environmental pollutants; to prescribe procedures for managing hazardous substances; to establish safeguards for preventing accidents; and to collect and disseminate information regarding environmental pollution. Some rules in this connection have been made with a view to control pollution. In this connection, the Act contains provisions providing for severe penalties in case any person fails to comply with or contravenes any of the provisions of the Act or the Rules. In certain cases, the Act provides for trial and conviction which could result in imprisonment for up to seven years.

## **RESOLUTION OF DISPUTES**

### **Traditional Remedies**

Prior to the enactment of the aforesaid environmental laws, the courts were called upon to play a very limited role in the sphere of environmental protection. The courts were mainly active in instances where individuals had suffered damage or harm due to nuisance caused by a delinquent party. The two judicial remedies ordinarily available to the aggrieved persons were a civil suit for damages and/or injunction as a tort, and remedy under the criminal law.

Unfortunately, very few civil actions were brought, due mainly to the time and cost involved in such an action. Even when actions were commenced, the delay in the adjudication coupled with the relatively low damages awarded, they did little to deter polluters. Injunctions were even less frequent.

In the sphere of criminal law, both the Indian Penal Code of 1860 and the Criminal Procedure Code contain provisions concerning offences which relate to or concern environment. Under Section 268 of the Indian Penal Code, a person could be punished for public nuisance, an offence broad enough in definition that it includes all injuries or hazardous acts, including the pollution



of air, water, noise and land. The punishment for such an offense is a maximum 200 rupee fine. Fouling the water of a public spring, an offence under s.277 of the Indian Penal Code, is punishable by up to 3 months imprisonment or a 500 rupee fine or both. Any person who makes the atmosphere noxious can, under Section 278, be fined up to 500 rupees. When this Code was enacted some 137 years ago, these fines were quite substantial, but they are now little more than nominal fines and insufficient as a deterrent. This may explain why very few, if any, complaints have been filed under Sections 268, 277, or 278 of the Indian Penal Code. The remedy under the Criminal Procedure Code provided by Section 133 is more effective. It is designed to afford a 'rough and ready' procedure for removing public nuisance and is intended to be used in urgent cases. While dealing with the powers of the Magistrate to pass an order under Section 133, the Supreme Court in *Municipal Council, Ratlam v. Vardichand and Others* AIR (1980 SC 1622) treated an environmental problem differently from an ordinary tort or public nuisance. To make the remedy under Section 133 effective, the Supreme Court widened the horizons of the section to enable citizens to bring actions against public bodies to force them to be vigilant and keep the environment unpolluted. Despite the effectiveness of this provision, recourse to this remedy is not very popular. Instead, relief is sought by invoking the writ jurisdiction of the Supreme Court and the High Courts.

### **Current Remedies**

In recent years, an increasing number of cases have been filed directly in the High Courts and the Supreme Court of India. These courts have responded and passed various orders which have the effect of protecting the environment. In implementing environment related laws, the Supreme Court has taken the lead in innovating and adopting procedures which have led to effective directions being given. The procedure devised by the Supreme Court is adopted by the High Courts in the exercise of their writ jurisdiction under Article 226 of the Constitution. I, therefore propose to deal with the procedure followed by the Supreme Court while hearing cases related to the environment and also different types of orders which are passed to indicate the new directions in which the Indian Law has developed for the prevention and resolution of environmental disputes.

It is natural for the Supreme Court to take the lead in this area. Environmental laws apply equally throughout the country and the problems all over are similar. The plenary jurisdiction of the Supreme Court occasions the initiation of most actions before it for speed and uniformity.

The remedy before the Supreme Court under Article 32 of the Constitution for enforcement of fundamental rights is itself a fundamental right in the Constitution. In exercise of its jurisdiction, the court has the power to issue directions, orders or writs, *inter alia*, in the nature of mandamus, prohibition

and certiorari for the purpose of enforcement of any of the fundamental rights. Article 141 states that the law declared by the Supreme Court is binding on all of the courts within the territory of India. Article 142 enables the Supreme Court to pass such a decree or make such an order as is necessary for doing complete justice in any case or matter pending before it and any order so passed is enforceable throughout the territory of India. It is for this reason that a wide range of matters, from protecting historical monuments like the Taj Mahal to the cleaning of the major rivers of the country are brought directly in the Supreme Court and necessary orders are passed from time to time. The orders are in the form of a continuous mandamus which enables the court to monitor the process until full implementation of the mandamus is attained.

The petitions filed in the Supreme Court are treated as Public Interest Litigation which are essentially non-adversarial in character. The court gets assistance from persons and agencies, including experts who are competent in the field. The court usually appoints *amicus curiae* to ensure dispassionate assistance to the court during the hearing of such cases. The *locus standi* rule has been liberalised for entertaining public interest litigation.

Public interest litigation has required innovation of the procedure to suit the needs of the cause. In order to ascertain the correct facts, the courts have frequently appointed expert committees. These committees gather the requisite information and, if need be, hear the representatives of the polluting industry and then forward its findings and recommendations, in the form of a report, to the court. Parties to the proceedings are given copies of the report and they are at liberty to bring to the notice of the court, any errors or mistakes in the report. Experience has shown that reports by such expert neutral committees are rarely challenged.

The procedure of appointing committees for the purpose of gathering information has resulted in the early passing of appropriate orders which are necessary in matters pertaining to environmental laws, so that further degradation of environment is contained and directions issued for the purpose of rectifying the imbalance which has been created. Expedition is achieved by this procedure.

What is now being realized is that for various reasons the authorities concerned have abdicated their role and have not enforced the law. There was, therefore, first of all a need to immediately stop further pollution, and thereafter action was required to be taken to ensure that further degradation of environment does not take place as a result of any industrial or other activity. This resulted in the Courts retaining cases and passing appropriate orders or issuing continuous mandamus from time to time. This has, in effect, resulted in the Supreme Court and the High Court themselves monitoring the implementation of the orders passed by them. In some instances, monitoring committees were established in order to see that the directions issued by the court are complied with, while in other cases reports are submitted to the courts directly, and the courts would then

monitor the progress themselves. For example, in an order which was passed in a Public Interest Litigation Petition which was concerned with large scale deforestation in India, the petition was non-adversarial in character, and the Court appointed a senior advocate as *amicus curiae*. The order which was passed would indicate the on-going exercise in which environment is sought to be protected and information obtained in order to show that the provisions of the Forest Conservation Act 1980 are not violated and the forests are saved from rampant destruction.

## **PREVENTION OF DISPUTES**

The old adage that prevention is better than cure takes on a new meaning in the field of environmental disputes. Events occasioning such disputes are usually accompanied with sordid details of human tragedy rarely seen in other fields. One only has to cite the Bhopal Gas tragedy as a telling instance. However, even seemingly inconsequential events could have the most far-reaching ramifications. The butterfly effect - a flutter of a butterfly's wings in China might have a snowballing effect of a typhoon in America- can make its presence felt with a vengeance. Yet, it is only the largest of catastrophes that awaken us from such somnambulant stupor. The Supreme Court of India, as also the other courts of the country, are getting increasingly sensitive to the phenomena. This is evident from the seeming explosion of jurisprudence in this area of law of the Court's recent history. The first important step taken in this regard by judicial pronouncement is expansion of the boundary of fundamental right to life and personal liberty guaranteed under Article 21. The Supreme Court has interpreted the Right to Life and Personal Liberty to include the right to a wholesome environment. Dealing with such cases, directions have been issued to the Government to re-locate the units which have been causing pollution and to order their closure, to take steps to clean up the rivers Ganga and Yamuna, to take measures to protect Taj Mahal from pollution, to install water treatment plants, to provide alternative areas to which some of the polluting industries could be shifted, and to take steps to educate people with regard to environment.

To the industry or the polluter, directions have been given to include measures like setting up of effluent treatment plants. Adequate time has been given to the industries to set their houses in order, and where this is not done or not possible, considering the nature of the polluting industry, the industry has been directed to be closed.

Another important development which has taken place is that the Supreme Court has held that precautionary principle and the polluter pays principle are essential features of sustainable development and are part of the environmental law of the country. The precautionary principle in the context of municipal law was in *Vellore Citizens Forum vs. Union of India* (5 SCC 647 (1996)) held to be :

- 1) Environmental measures by the State Government and the statutory authorities must anticipate, prevent and attack the causes of environmental degradation.
- 2) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as reason for postponing measures to prevent environmental degradation.
- 3) The onus of proof is on the actor or the developer industrialist to show that his action is environmentally benign.

The polluter pays principle in the aforesaid context has been interpreted as meaning that absolute liability for harm to the environment extends not only to compensate victims of the pollution, but also meeting the cost of restoring environmental degradation. The polluter is held liable to pay the cost to the individual sufferers, as well as the cost of reversing the damaged ecology.

In dealing with matters relating to environment, the Writ Courts have departed from the principle of not itself computing the damages and leaving the parties to make a claim in an action in torts by way of a civil suit. The Writ Courts themselves as well as the High Courts have undertaken the task of assessing the quantum of damages the polluter is required to pay.

The Courts have, in this context appointed experts, *inter alia*, to examine and report on the extent of environmental and other damage caused, and also the amount of money which is required to repair the damage, if possible, and, extent of loss suffered by the people. In determining and levying damages another factor the Courts have kept in mind is the deterrent element. In other words, the amount should not be so little that the polluter considers breach of law, and payment of damages, as the cheaper option to taking measures to control pollution by setting up treatment plants and running or maintaining them.

With regard to the question of liability, the principle of strict liability enunciated in the case of *Rylands v. Fletcher* (1868 LR 3 HL 330) has been applied in a number of cases. However, there has been a departure from the same which has resulted in the forging of an innovative rule of absolute liability to replace the strict liability principle of *Rylands v. Fletcher*, in regard to the operation of a hazardous industry. This rule was first laid down in *M. C Mehta v. Union of India* (AIR 1987 SC 965) commonly known as Oleum Gas Leak Case. The elements of absolute liability were :

- 1) It applies to an enterprise engaged in a hazardous or inherently dangerous activity.
- 2) The duty of care is absolute and non delegatable.
- 3) The exceptions to strict liability accepted under the English Common Law, like an Act of God, was not applicable.
- 4) The larger and more prosperous the enterprise, the greater the amount that may be payable as damages.

These principles have been applied by the Supreme Court in the case of *Indian Council for Enviro Legal Action v. Union of India* (1996 3 SCC 212) commonly known as H-Acid Case. In this case, a number of industrial units had commenced production of H-Acid without proper consent from the Rajasthan Pollution Control Board. Several thousand metric tons of acidic sludge which had been dumped on a land which had resulted in large scale damage to crops, trees and drinking water. Applying the absolute liability doctrine, the Court held that:

“once the activity carried out is hazardous or dangerous, the person carrying out this activity is liable to make good the loss caused to any other person by his activity, irrespective of the fact whether he took reasonable care while carrying on this activity.”

By this principle, the polluting companies became liable to pay the villagers for the harm done and they were also required to defray the cost of remedial measures required to restore the soil and water. This was considered sufficient deterrent for the industries not to pollute.

In order to see that environmental degradation does not take place, the Supreme Court has had to pass harsh orders requiring shifting or closure of certain industrial units. In order to soften the blow on the weaker sections of society, namely the workers, directions have been issued requiring either re-employment at a different site or for payment of adequate compensation to them. Thus, the effort of the Court has always been to try and maintain, as far as possible, a balance between ecology, development and social justice.

The initiative in the field of environment protection is not restricted to the judiciary alone. The passing of various judicial orders in the last couple of years has acted as an impetus to the Government to take administrative measures for the preservation of the environment. With this objective in view at least 5 authorities have been set up under the Environment Protection Act in pursuance of the orders of the Supreme Court. These are -

- 1) The Loss of Ecology (Prevention and Payments of Compensation) Authority for the State of Tamil Nadu,
- 2) The Environmental Impact Assessment Authority for the National Capital Territory Region,
- 3) The Authority for Environment Planning for Thane in the State of Maharashtra,
- 4) The Dahanu Taluka Environment Protection Authority, also in Thane, Maharashtra,
- 5) The Central Ground Water Board Authority

The composition and functions of all these authorities are different. For instance, the first, second and fourth of the aforementioned authorities are chaired by a retired High Court Judge giving the committees a distinctive judicial flavour, while the third and the fifth of the authorities are headed by civil servants. The functions of these authorities can similarly be divided into two areas. The committees either aim at avoiding environmental disasters by employing the precautionary principle mentioned earlier, or have the object of resolving disputes when they arise.

## **CONCLUSION**

The judiciary has, in the recent times, had to give directions which may give the impression to some people that it is an encroachment on a field demarcated for others. The label of judicial activism is given for this process by them. Nothing can be further from the truth. The directions which have been issued in various cases have the effect, in the nature of continuous mandamus, of directing the authorities and the industries to discharge duties and fulfil obligations as contained in the laws. The fact that the Courts have not hesitated in passing appropriate orders is giving rise to the feeling among the silent majority of the people, suffering from the onslaught of pollution, that the judges are more willing than the other wings of the Government to take unpopular decisions that are beneficial to the society in the long run. While dealing with such cases, an important principle which has been applied and followed is that considering the need for economic growth, there has to be sustainable development. It is now recognized that environment and development must co-exist. There cannot be protection of environment at the cost of development, or development at the cost of environment. The two must co-exist. A proper balance must be struck. Keeping this in mind, the Courts in India have carefully moulded the directions in such a way, that there can be industrial and other development while, at the same time, the environment which is essential for human existence is also preserved. That is a duty we owe to future generations. Judicial activism in India in this sphere is in this direction.

**THE ENVIRONMENTAL APPEAL TRIBUNAL OF MAURITIUS**

**HON. MME. D. BEESOONDOYAL  
CHAIR, ENVIRONMENTAL APPEAL TRIBUNAL OF MAURITIUS**

I wish, first of all to give a brief history showing the emergence of environmental concern, the setting up of our present Ministry of the Environment and Quality of Life, the Department of the Environment, the passing of the Environment Protection Act in 1991 and the setting up of the Environmental Appeal Tribunal.

In 1972, when the world was debating the question of "Only One Earth" at Stockholm, environment was not an issue of major concern for Mauritius. However, the country sent a delegation of three persons there including the then Minister of Housing, Lands and Town and Country Planning. Although no formal country paper was tabled, a brief was submitted, highlighting such topics as noise and air pollution, urban and rural problems, population growth, housing, and town and country planning.

By sending delegations to this UN conference and others such as the UN Habitat Conference in Vancouver, Canada in 1976, Mauritius started giving serious attention to environmental issues. For example, in 1975, the Man and Biosphere Advisory Committee was set up under the aegis of the Ministry of Agriculture and Natural Resources. The Committee was constituted as a sub committee of the Board of Agriculture and its main role was to advise the Government of Mauritius on all environmental pollution control matters.

Again in June 1982, responsibility for the committee was transferred from the Ministry of Agriculture and Natural Resources to a new Ministry of Housing, Lands and Environment, when it acquired the responsibility for environmental matters after the general election and the formation of the new Government. And with the formation of the new Government in the 1980s we began to think very strongly about diversifying our industrial sector. We could not just survive on our sugar industry and this is why we started diversifying and developing textile industries and also the tourist industry - so that today, the main industry is the textile industry, the second industry is the tourist industry. Although we are a population of 1.2 million, we have about 900,000 tourists coming in and going out of the country every year. So, in 1982, when the country started developing the tourist industry we began to be concerned about the environment as new projects, such as hotel projects, had to be undertaken. This led to a greater emphasis on environmental protection.

In September 1987, a National Environment Committee was set up consisting of several ministries as well as some members of the public. The Committee set up several sub-committees to look into specific aspects of pollution problems such as

pollution from industries and from tourism, habitat environment, marine and coastal environment and preservation and enhancement of the natural environment. Various Ministers were appointed to chair the sub-committees. The Committee met on a regular basis and recommended the establishment of a Natural Environment Commission (NEC) to be presided over by the Prime Minister. In December 1987, the first National Environment Commission was established in the office of the Prime Minister and at its first meeting, it discussed among other things, the duties and responsibilities of the proposed Department of Environment which would have the following six administrative units:

1. Urbanisation
2. Engineering
3. Health and Safety
4. Aquatic Ecosystems
5. Conservation
6. Information Services

Since its establishment, the Natural Environment Commission has had several meetings. During these meetings, it discussed several important issues such as, whether to declare islets or nature reserves, the problem of either consolidating all the laws pertaining to environment into one law or make amendments on a piecemeal basis. Among other things, it discussed pollution in certain parts of the island, for instance in Grand Baie, which was developing very fast as a tourist area. It also discussed inter-connectedness amongst relevant Government ministries and parastatal bodies responsible for environmental protection and conservation. As more than half of Cabinet Ministries belong to this Commission, the decisions of the Commission were seen as a reflection of Government policy.

By late 1988 the issue of environmental management was taken seriously and a new Environment Protection Department within the Ministry was created in November 1989. However, in mid October 1990, the old Ministry of Housing, Lands and Environment was split into two - the Ministry of Environment and the Ministry of Housing, each being headed by a separate Minister. Subsequently, the Government decided to formally set up the Department of Environment and since 1991, we also have a new Ministry of the Environment and the Quality of Life and we also have a Department of Environment. The Environment Protection Act commonly known as the EPA was enacted in 1991. The object of this Act is to provide one constitutional and legislative framework for the management and protection of the environment, taking into account the need for inter-departmental co-ordination and enforcement.

The Preamble to the Act reads as follows :

“To provide for the protection and management of the environmental assets of Mauritius so that its capacity to sustain the society and development remains impaired and to foster harmony between quality



of life, environmental protection and sustainable development for the present and future generations. More specifically to provide the legal framework and the mechanism to protect the natural environment, to plan for environmental management and to coordinate inter-relations of environmental issues and to ensure the proper implementation of Governmental policies and enforcement of the provisions necessary for the protection of human health of Mauritius.”

The Act is divided into eleven parts and has four schedules. Part I of the Act deals with definitions, words and expressions. For instance, Minister would mean the Minister of Environment, Department would mean Department of the Environment. Part II provides for the establishment of various bodies engaged in the management and protection of the Environment. It establishes the National Environment Council the Department of Environment, administered by a Director, that is a Director of the Environment, the Environmental Advisory Committee and Technical Advisory Committee. This part also sets out the powers of the Ministries. Part III provides for the Coordination of Public Departments engaged in the protection of Environment and the Control of Pollution, it establishes an Environmental Coordination Committee which ensures maximum cooperation and coordination among enforcing agencies and other Public Departments. Part IV (Sections 13-23) relates to the requirement of an Environment Impact Assessment. Section 13 requires a proponent applying for an EIA license in relation to his undertaking to submit to the Director of the Environment an EIA which is open to public inspection and public comment.

Section 16 of the Act vests with the Director, the power to review an EIA submitted by the proponent and to review its scope and contents. For the purpose of the review, the director may require observations in writing from other public departments and enforcement agencies, non-Governmental organizations, or any other person, set up a Technical Advisory Committee to advise him of the EIA or any aspect of the undertaking and require from the proponent a further study or further information for the purpose of ensuring that the EIA is accurate and as exhaustive as possible.

Section 17 establishes an EIA Committee which has a task of examining applications for EIA license after review by the examiner and making recommendations to the Minister. And Section 18 of the Act vests in the Minister the decision on an EIA. The Minister, after taking into account the recommendations of the EIA Committee shall make his decision on the EIA, or he may refer the matter back to the Director with a direction to set up a Technical Advisory Committee for further consideration of the EIA. He may require the proponent to furnish any additional information or he may disapprove the EIA, where the EIA provides insufficient information to determine the scope and impact on the undertaking on the environment, or he may approve the EIA with the direction to issue a license on such terms and conditions as he considers appropriate.

Under Section 19 (3) the Minister may, at any time, notwithstanding the approved EIA, revoke the license or amend the conditions of an EIA license, and give the proponent such directions as he considers necessary in relation to the methods of execution and the phasing of the undertaking which are actions required to prevent, reduce or eliminate the adverse effects of the undertaking on the environment, people and society. He may call for further research, investigation and monitoring programmes related to the undertaking. He may also require the proponent to submit at such intervals as may be determined, reports on the impacts of the undertaking on the environment, people and society.

Section 20 of the Act provides for the submission of a fresh EIA on the order of the Director. Section 20.1 reads : “The Director may at any time after the issue of an EIA license order the holder to issue a fresh EIA in respect of his undertaking within such time as may be specified” and sub-section 2 sets out the reasons for requesting the Director to order the processing of a fresh EIA - for instance where the undertaking is, or is likely to pose a source of pollution or causes a threat to the environment.

Now Part 5 deals with Environmental Emergency, Part 6 of the Act gives the Minister power to prescribe National Environmental Standards in respect of water, effluent discharges, air, noise, pesticide residues, wastes, etc. Part 7 enables a Minister to make regulations for the purpose of preventing pollution in the coastal maritime zone and Section 44 creates an offence of dumping in the zone. Part 8 Sections 45 - 50 establishes the Environment Appeal Tribunal - it sets out its jurisdiction, prescribes its procedures and provides for appeals against the decisions of the Tribunals to the Supreme Court. It provides for the making of regulations by the Tribunal for the purpose of instituting and conducting appeals before it. Part 9 provides for the National Environment Fund and establishes a Board chaired by the Permanent Secretary of the Ministry of Environment to administer the Fund.

Part X of the Act deals with the enforcement powers of the Director and provides for various types of notices. It takes into account the need to adopt preventive measures, to avoid pollution as far as possible, in addition to routine monitoring. It provides that the Director may, under Section 57, cause to be served on a person who in his opinion is contravening or likely to contravene an environmental law, a programme notice inviting the person to submit a programme of measures to remedy a contravention or to eliminate the likelihood of a contravention. On approving the programme the Director issues the programme approval. Should a programme approval prove to be ineffectual, the Director may at any time revoke the programme approval and issue an Enforcement Notice, a Prohibition Notice and Variation Notice Under Sections 58, 59 and 62 respectively. He may also, under Section 66, cause to be carried out or arrange for compliance monitoring.

Part XI deals with Miscellaneous Matters. Of the four schedules to the Act, Schedule 1 lists the undertaking requiring an environmental impact assessment. Among the undertakings requiring an environmental impact assessment, are sugar industries and refineries, manufacture of chemical fertilizers, petroleum refineries, manufacture and packing of cement, saw mills, block making plants, pre-mix plants, factories manufacturing rubber products, manufacture of chemical fertilizers, textile industries, associated with dyeing, weaving, washing, bleaching and printing.

Schedule 2 deals with a National Environment Commission, Schedule 3 lists members of the Environment Advisory Committee and Schedule 4 deals with Duties and Responsibilities of Enforcing Agencies.

## **ENVIRONMENT APPEAL TRIBUNAL**

The Environmental Appeal Tribunal (EAT), established by the EPA in 1991, became operational in July, 1993. However, it started functioning in early 1994 after the administrative formalities relating to the appointment of Chairman and members, secretary and other staff were finalised.

Under Section 45, the Chairman must be a barrister-at-law of not less than ten years standing. The Chairman is appointed by the Public Service Commission, which is an independent body. The members are appointed by the Minister on an *ad hoc* basis and for such time as he considers necessary to serve on the Tribunal.

Section 46(1) of the EPA empowers the Tribunal to hear and determine appeals against:

- A. any decision of the Minister
  - on an EIA under section 18; or
  - revoking an EIA license or amending the conditions of an EIA license under s. 19(3)(a)
- B. a direction given under s. 19(3)(b)
- C. an order of the Director to submit a fresh EIA under s. 20(1)
- D. the revocation of a programme approval under s. 5;
- E. the issue of an enforcement notice and a variation notice under sections 58, 59 and 62;
- F. a requirement of compliance monitoring under s. 66

Under Section 46 (2), any person may appeal within 30 days against the decision, direction, order, notice referred to - sub-section (1) in such form and manner prescribed by regulations of the *Environment Appeals Tribunal Rules of Procedure Regulations 1993*, referred to as Government Notice of 228 of 1993. The important sections of these regulations which serve to institute proceedings of the Tribunal are:

Sections 3 - 6 which set out the procedure to be adopted.

S. 3 Any aggrieved person who wishes to appeal to the Tribunal shall

- a) give notice of appeal in the form set out in the First Schedule by lodging the notice within 30 days of the decision, direction, order or notice referred to in s. 46(1) of the Act with the secretary;
- b) at the same time, send a copy of the notice of appeal to the respondent.

S. 4 The secretary shall on receipt of the notice of appeal, give not less than 15 days notice of the date, time and place fixed for the hearing of such appeal to the appellant and respondent.

S. 5 Either party may be represented by counsel or attorney or any other person duly authorised by him.

S. 6 The secretary shall

- a) send a certified copy of the determination of the Tribunal to the appellant and to the respondent
- b) draw the attention of the parties to the right of appeal against the determination as provided by s. 49 of the Act.

## **PROCEEDINGS OF THE TRIBUNAL**

Once an appeal has been lodged before the Tribunal, the Tribunal proceeds in the manner set out under s. 47 of the EPA which reads as follows:

- A. The Tribunal shall sit at such a place and time as the Chairman of the Tribunal may determine.
- B. Where the Tribunal adjourns any proceedings, it may resume them at such a place and time as the Chairman of the Tribunal may determine.
- C. Subject to any regulations made under s. 50, all appeals before the Tribunal shall be instituted and conducted
  1. as far as possible in the same manner as proceedings in a civil matter before a District Magistrate
  2. in accordance with the law of evidence in force in Mauritius
  3. in public, except with the agreement of all the parties or where the Tribunal so orders in the public interest
- D. The Tribunal may
  1. make such orders for requiring the attendance of persons and the production of articles or documents as it thinks necessary or expedient

2. take evidence on oath and for that purpose may administer oaths;
  3. and on its own motion, summon and hear any person as a witness
- E. Any person who
1. fails to attend the Tribunal after having been required to do so under subsection (4)
  2. refuses to take an oath before the Tribunal or to answer fully and satisfactorily to the best of his knowledge and belief any question put to him in any proceedings before the Tribunal or to produce any article or document when required to do so by the Tribunal;
  3. knowingly gives false evidence or evidence which he knows to be misleading before the Tribunal
  4. at any sitting of the Tribunal
    - a) willfully insults any member thereof;
    - b) willfully interrupts the proceedings or commits any contempt of the Tribunal
- shall commit an offence.

## **DETERMINATION OF THE TRIBUNAL**

Under s. 48

- A. (a) For the purpose of hearing and determining any cause or matter under this act, the Tribunal shall be constituted by the Chairman and at least any two of its members.
- (b) A member of the Tribunal who has a direct interest in any cause or matter which is the subject of proceedings before the Tribunal shall not take part in those proceedings
- B. Where there is a disagreement among the members of the Tribunal, the decision of the majority shall be the determination of the Tribunal.
- C. Subject to s. 46, a decision or finding of the Tribunal on any cause or matter before it shall be final and binding on all the parties.
- D. On hearing an appeal, the Tribunal may confirm, amend or cancel any decision, order, direction or notice referred to in s. 46.
- E. Where a decision, order, direction or notice is confirmed or amended, the Tribunal shall specify the period within which it shall be complied with.
- F. Any person who fails to comply with a decision, order, direction or notice confirmed or amended by the Tribunal, shall commit an offence.

Section 49 deals with appeals to the Supreme Court:

- A. Any person who is dissatisfied with the decisions or findings of the Tribunal relating to an appeal under s. 48, as being erroneous in point of law may appeal to the Supreme Court.
- B. Any party wishing to appeal to the Supreme Court under subsection (1) shall, within 21 days of the date of the decision of the Tribunal
  - 1. lodge with or send by registered post to the Chairman of the Tribunal a written application requiring the Tribunal to state and sign a case for the opinion of the Supreme Court of the grounds stated therein;
  - 2. at the same time, or earlier, forward a copy of his application by registered post to the other party.
- C. An appeal under this section shall be prosecuted in the same manner provided by the rules made by the Supreme Court.

### **POWERS OF THE TRIBUNAL**

- 1. The same procedure as regards pleadings which applies in a civil suit before District Court is adopted before the Tribunal. Pleadings, which constitute an essential feature of the proceedings, are exchanged between the parties before the appeal is heard on its merits. Each party makes its averments of facts and furnishes particulars thereon.
- 2. The Tribunal is not a Tribunal of inquiry having the duty simply to ascertain facts and to report thereon to another body which then takes the decision. It is an adjudicating Tribunal which hears witnesses on oath, examines their demeanour, assesses their credibility, scrutinises documents which are produced before it, visits the locus whenever it feels there is a need to do so and then pronounces on the merits of the decision appealed against in light of all the evidence adduced.
- 3. The decision of the Tribunal is final on the facts.
- 4. The Tribunal is an independent and impartial body. It is not accountable to anyone, it takes no instructions from anyone and it operates and functions in complete independence without any interference. The concept of the independence of the Judiciary which is enshrined in our written Constitution and which has always been safeguarded applies equally to the Tribunal.

## **RECENT DECISIONS OF THE TRIBUNAL**

*Société Wiehé Montocchio v. The Ministry of the Environment Quality of Life* (Cause no. 2/95)

In this case, the Minister had refused an EIA licence for a poultry project on the ground that the project would cause a nuisance to residents in the neighbourhood. Evidence was led on both sides before the Tribunal which also effected a visit to the site of the proposed project. The Tribunal cancelled the decision of the Minister and ordered the issue of an EIA licence subject to specific conditions.

*Mouvement Social de Petit Camp/Valentina v. The Ministry of the Environment and Quality of Life* (Cause no. 2/94)

This was an appeal against the decision of the Minister granting an EIA licence to Maurilait Production Ltd. to operate its factory for the production of Yoplait (yoghurt) in an industrial estate at Valentina on the ground that numerous environmental problems such as dust, ash, smoke emission, daily colouration of river water and noise would be caused. After hearing evidence and visiting the locus, the Tribunal reached the conclusion that the Minister did not act in an unreasonable manner in granting the EIA licence. It accordingly confirmed the Minister's decision.

*Société D'Anna v. The Minister* (Cause no. 4/95) and *Les Tamiers v. The Minister* (Cause no. 5/95)

These two cases involved the same issue and were consolidated. The Minister had refused to grant Société D'Anna an EIA license for a project for the subdivision of a plot of land into 28 residential plots. He had also refused an EIA license to Les Tamiers in respect of an undertaking consisting of a bungalow complex composed of 32 bungalows on a plot of land adjoining that of Société D'Anna. The reasons for refusing the EIA licenses were "[b]ecause of the sensitive nature of the site, the risk of flooding in the area, the presence of high water table a risk to ground water and the lack of a sewerage network."

Following an examination of the evidence led before the Tribunal and after visiting the sites and the surrounding areas, the Tribunal cancelled the Minister's decisions not to grant the EIA licenses and ordered that the licenses be granted subject to strict conditions.

## **SOME CASES PENDING BEFORE THE TRIBUNAL**

*Ste. Marie Stone Crusher v. The Director*

This appeal has been pending before the Tribunal for more than a year now and it is a case where the Director revoked a Programme Approval. Numerous issues

were involved and after negotiations, the parties have succeeded in settling all but one of the issues. The appellant has agreed to carry out compliance monitoring with regard to the nature, extent and effect of the dust that its stone crushing plant emits. The monitoring has already been carried out and a report is expected soon. There is a strong probability that the remaining issue will be resolved.

*Tokay Island v. The Minister*

This is an appeal against the decision of the Minister refusing to grant an EIA license for a hotel project on an islet off the mainland at Blue Bay on the ground that the proposed site has been earmarked for a marine park and the project will cause pollution of the lagoon. The appeal is already underway and an expert working in Tahiti has come especially to give expert evidence on behalf of the appellants.



**PRINCIPLES OF ENVIRONMENTAL JUSTICE: A FOUNDATION  
FOR DISPUTE PREVENTION AND RESOLUTION**

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It is a great honour for me personally, and for the Commission on Environmental Law of the International Union for the Conservation of Nature and Natural Resources (IUCN), to have been invited to participate in this extraordinarily important Regional Symposium on the "Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable development." SACEP, UNEP and NORAD are to be congratulated for taking the initiative to convene this gathering, for the significance of its deliberations, while of great importance in South Asia, certainly extends internationally as well. The judiciary of South Asian nations, and their Supreme Courts in particular, today lead the world in defining and refining the jurisprudence of environmental justice.

Judicial decisions in this region have demonstrated that close attention to fundamental principles of justice are essential to effective environmental protection. These decisions provide precedents for the courts of nations throughout the world, and IUCN's Commission is committed to making all these decisions known and available as guidance for the courts in other regions

The natural environment of the Earth has sustained human life and nourished human cultures in so many ways that society too often has taken Earth's natural systems for granted. Yet, as was amply demonstrated by the recent deliberations of the United Nations General Assembly in the "Earth Summit" during the last week of June, no nation today can afford to neglect care of the natural and human environment. To rebuild and restore sustainability into our economies and societies requires the wide range of new policies and practices that the United Nations Conference on Environment and Development (UNCED) agreed to recommend in Rio de Janeiro in 1992 as *Agenda 21*.<sup>184</sup> Despite the consensus in adopting these recommendations, the progress toward implementing *Agenda 21* has been halting and inadequate.

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<sup>184</sup> See the annotated edition of *Agenda 21* in N.A. Robinson (ed.), *Agenda 21: Earth's Action Plan* (Oceana Publications, Dobbs ferry, New York 1973)

A principal reason for the relatively slow world-wide response to the recommendations in *Agenda 21* is inertia. Why should well established, unsustainable patterns shift into a new paradigm of their own volition? Are there not too many short-term profits still to be made in "business as usual?" Are there not vested interests that are too comfortable to worry about needs of the next generation? Are there not urgent demands for tomorrow's fuel and food that must be met today, and no time left to plan for the day when the sources of that fuel or food or water will be harder to get, if obtainable at all?

## **1. JUDICIAL RECOGNITION OF LEGAL PRINCIPLES FURTHERING SUSTAINABILITY**

What measures are needed, then, to shift societies from unsustainable systems to ones that meet the prescriptions of *Agenda 21*?

To be sure, education is important. I have just come from conducting a one month program sponsored by IUCN, UNEP, and the Asia-Pacific Centre for Environmental Law (APCEL) of the National University of Singapore, and underwritten by the Asian Development Bank, preparing law professors from 15 nations - including those of South Asia - to introduce or expand the teaching of Environmental Law in their Universities. Educating the next generation in the principles and rules of a sustainable society is of course essential. Teaching environmental ethics and the environmental sciences, as well as law, must be a part of all education.<sup>185</sup>

But in many instances, we cannot or should not wait for the education of the next generation for the needed change. Too much is at risk today. It is the mission of Environmental Law to integrate economic and environmental considerations in one sustainable management system. Environmental Law is today the fastest growing field of law at both international and national levels. This trend demonstrates that there is widespread political acceptance of the need to build Governmental systems of sustainability through Environmental Law. In some places the new environmental laws are still rather formalistic, statutes are enacted but not yet implemented. In other places, this new field of law has transformed elements of society from neglectful or profligate patterns to ones that can serve the needs of the next generation.

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. This is the case both for the resolution of disputes over natural

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<sup>185</sup> See Rosamund M. Thomas (ed.), *Teaching Ethics*, vol. 3, *Environmental Ethics* (Centre for Business and Private Sector Ethics, Cambridge University, HMSO, London, 1996).

resources and pollution - and with population growth and resource scarcity, there will be many more such disputes in coming years - and for providing the guidance that can avert or avoid such disputes altogether. 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. The bar can counsel clients in the private sector to follow the clearly delineated path. Similarly, the legislatures can formulate new policies and statutes to give more effective implementation to those principles. In short, as the courts advance the remedial objectives of Environmental Law, they advance the rule of law itself.

This critical role that the courts serve has been ably demonstrated in the presentations at this Regional Symposium. It may be useful, through the techniques of Comparative Law, to reflect on how the courts both serve this role well, and how they can fail to do so. Let me draw on the environmental jurisprudence in the courts of the United States and Europe to provide comparative illustrations.

Unlike the Constitutions of the nations of South Asia, the Constitution of the United States of America provides no basic statement of a right to life. Indeed, lower courts in the early 1970s explicitly declined to read into several clauses the existence of a right to life, and thus a right to environmentally sustaining conditions of life. Similarly, in the United Kingdom where there is no written Constitution, the courts and Law Lords of the House of Lords have been reluctant to recognise environmental rights. In the absence of a recognised fundamental right, the courts look to statutes to define the rights and obligations of parties in disputes before them. In construing statutes, the judiciary can either proceed from a foundation of public policy that would have the statutes construed for environmentally sustainable ways, or proceed to ignore the environment altogether.

Where a principle of environmental sustainability is recognised by the court, the court can apply the law in light of that basic public policy, and many courts have done this. Unfortunately, recent decisions of the United States Supreme Court have failed in this respect.

Basic principles of environmental justice do, therefore, matter.

## **2. THE JUDICIARY'S CHOICE TO RECOGNISE ENVIRONMENTAL PRINCIPLES OF JUSTICE**

The choice confronting a judge as to whether or not to recognise environmental principles of justice is set forth in a straightforward way in contrasting the majority opinion with the two dissenting opinions of the US Supreme Court in 1972 in *Sierra Club v. Morton*.<sup>186</sup> In this case, the Sierra Club, a conservation organisation founded in 1872, sought to challenge a federal agency decision to grant a licence for an electrical transmission line across a National Park into Mineral King Valley, part of a National Forest in California where a ski resort was to be built. Ultimately, the snow avalanche conditions of this alpine location in this steep valley of the Sierra Nevada mountains proved to be unsafe for a ski resort, and the US Congress enacted a law to add the Valley to the National Park because of its pristine beauty, but none of this was known when the case arrived at the US Supreme Court on the question of *locus standi*. Did the Sierra Club have standing to speak for protection of the Valley? Mr. Justice Stevens, for the majority, held that the Sierra Club had to amend its pleadings to assert that its members did use and enjoy the Valley for recreation, camping, skiing and winter mountaineering and the like, and could not simply sue to protect nature because it was a conservation society established for that purpose; the case was remanded to permit the District Court to invite the plaintiffs amendment of the complaint setting forth facts sufficient for establishing the Sierra Club's standing.

The Dissenting Justices would have allowed standing to the Sierra Club. Mr. Justice Blackmun recognised that the threats to the environment by modern society were grave, and, citing the "Devotions" of John Donne as authority, he observed that "no man is an island" and that if a group like the Sierra Club could not be accorded standing in order to advocate the protection of commonly shared interests, then we would all be diminished thereby. He clearly feared that the erosion of the quality of life was gradual, -and needed spokesmen (Donne - "As not for whom the bell tolls, it tolls for thee"). Mr. Justice Douglas went further. He cited a then recent written law review article by Professor Christopher Stone, "Should Trees have Standing?: Toward Legal Rights for Natural Objects"<sup>187</sup> and on the basis of the rationale in that article would have permitted standing for the civic associations such as the Sierra Club that legitimately and selflessly have represented common and shared environmental interests for decades. Justice Douglas saw that deeply held cultural values and the very nature of Nature itself, were entitled to judicial recognition.

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<sup>186</sup> *Sierra Club v. Morton*, 405 U.S. 727 (1972)

<sup>187</sup> 45 S. Cal L. Rev. 450 (1972), republished this year in a 25<sup>th</sup> anniversary edition in Christopher D. Stone, *Should Trees Have Standing? And Other Essays on Law, Morals and the Environment*. (Oceana Publications, Dobbs Ferry, New York 1997)

The US Supreme Court, in certain other decisions also in the 1970s, has come closer to recognising a right to the environmental needed to sustain life. In *Union Electric Co. v. Environmental Protection Agency*,<sup>188</sup> Justice Marshall wrote for the Court the seminal decision on "technology forcing."<sup>189</sup> Congress in the Clean Air Act has required the companies producing electricity to reduce the amount of sulphur dioxide emitted from the burning of fossil fuels, in order to protect the public health, or shut down operations. Union Electric Company claimed it could not do so technologically and that the law would put it out of business and deny its customers the electricity they needed. The Court rejected this argument, holding that if Congress had determined that the public health required cleaner air, then the company must invent new technology within the period of time allowed in the Clean Air Act, or close its operations in order to comply with the law. Appropriate changes in fuels and in the design of new pollution abatement technologies subsequently permitted the industry to meet the Clean Air Act's public health standard, without interruption in operations.

In putting the public's health ahead of business as usual, Congress established a basic right to breathe the air with an ample margin of safety, and legislated that business should do what it needed to comply; Mr. Justice Marshall's decision found this formula to be constitutionally permissible. In another celebrated decision, *Citizens to Preserve Overton Park v. Volpe*,<sup>190</sup> Mr. Justice Marshall ruled that the Department of Transportation could not route a highway through a city park, since the Congress had enacted a statute requiring that the federal highway builders avoid parks unless there was "no reasonable and prudent alternative." The Court found ample evidence in the record that alternatives to the park existed. It has been a practice of highway builders to avoid having to build plans for new roads by using open space, and the highway departments saw parkland as simply a convenient path for a highway

### 3. JUDICIAL AVOIDANCE OF ENVIRONMENTAL JUSTICE

But this set of decisions stands in contrast to the other strand of rulings that simply ignores the environmental public interest, and narrowly hews the statutory line, especially when the statutes protect vested property interests. Even the renown decision of Mr. Chief Justice Burger in *Tennessee Valley*

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<sup>188</sup> 427 U.S. 246 (1976)

<sup>189</sup> "Technology forcing" is the term for environmental legislation that identifies a technological process whose continued use entails unacceptable harm to the public health or environment, and orders that the technology or harm cease in a given period of time; this forces industry to invent or adapt or make other appropriate changes to eliminate the harm if it is to continue its overall operations. In numerous instances, industrial technology has invented new systems within the time allotted.

<sup>190</sup> 401 U.S. 402 (1971).

*Authority v. Hill*,<sup>191</sup> which is often cited as an example of a ruling favouring nature, illustrates a kind of judicial avoidance of environmental justice. In *TVA v. Hill*, nature, in the form of an endangered species, a small fish known as the "snail darter," discovered in the streams of a valley in which a large dam was to be built, was given precedence over economic development. The Court found that in the Endangered Species Act Congress had denied all federal agencies the capacity to destroy an entire species, and since the snail darter was found only in this location, the completion of a dam already under construction would have to be enjoined. The Court did not speak of biodiversity or the web of life; indeed, Chief Justice Burger opined in *dicta* that this decision appeared to him to be an economically questionable result but one which he felt that Court was constrained to reach since the Constitutional-separation of the legislative, executive and judicial branches required the court to enforce the statute when the federal agency sought to ignore. The Court was not identifying its ruling with any principle of the right to life. Moreover, While the Court did enforce and strengthen the federal Endangered Species Act, the case also illustrated why federal agencies should prepare environmental impact assessments thoroughly before undertaking projects, since subsequently, the snail darter was found in other locations.

In *US v New Mexico*, the Supreme Court's failure to comprehend ecology and environmental Law principles is even more starkly set forth. In this case Chief Justice Rehnquist set out to construe whether the Congressional Act establishing the federal Rio Mimbres National Forest had included a reservation of water rights sufficient for the ecology of the forest; the State of New Mexico wished to appropriate water rights from rivers serving the forest areas for economic development. Chief Justice Rehnquist held that the State could take its water, since the Congress has established the National Forest for the purpose of securing and making available timber for market, and had made no mention of reserving federal water rights. In a dissent, Mr. Justice Powell observed that there would be no timber without trees, and there could be no trees without the ecosystems that sustain the trees, of which water was an essential part; in Justice Powell's view, the amount of water needed to sustain the forest ecosystem must have been implicitly reserved by the Congress when it established the Rio Mimbres National Forest. This Dissent was informed by a basic understanding of the web of life, while the majority opinion saw only the commercial interests in New Mexico's development with water and the available timber for market in the National Forest.

Thus, under the guise of deference to Congress, the Supreme Court reaches decisions that lack a scientific basis. The Court chose not to construe statutes in light of either contemporary ecological scientific knowledge or, more profoundly, in light of the principles of environmental justice

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<sup>191</sup> 437 U.S. 153 (1978).

In a series of other cases, the Supreme Court has taken a similarly passive or uninformed position regarding the National Environmental Policy Act of 1969 (NEPA).<sup>192</sup> Congress enacted NEPA to reform the mandates of every executive agency, and make each responsible as a steward of the environment. Section 102(2)(c) of this Act requires all federal agencies, to the fullest extent possible, to prepare detailed written assessments stating the possible environmental impacts from all major federal actions significantly affecting the quality of the human environment, and to set forth alternatives to the proposed actions and ways to mitigate or avoid any adverse environmental effects. NEPA was enacted to ensure that federal agencies looked at all unintended environmental impacts and reasonable alternatives to the proposed actions, as a means to ensure sustainable development and avert environmental disputes.

The need to look at alternatives had been identified in a classic appeals court decision of modern federal Environmental Law, *Scenic Hudson Preservation Conference v. Federal Power Commission*<sup>193</sup>. This case is significant as the first to grant standing to citizens under the Federal Power Act to assert recreational rights in challenging the grant of a permit to pump water out of the Hudson River for a hydroelectric generating system on Storm King Mountain. The Court required the Commission to evaluate the alternative sources of electricity available to the company that had obtained the permit, and to weight the impact of the fish resources, recreation and beauty of Storm King Mountain in the Hudson Highlands, a fjord cut by glaciers through a mountain range just north of New York City. The decision, by Circuit Judge Paul Hays, provided Congress with the model for careful environmental decision-making that Congress chose to apply for all federal agencies through enacting NEPA. NEPA gave birth to environmental impact assessment as a new management tool for sustainable development, not used by over 150 jurisdictions throughout the world.<sup>194</sup> Judge Hays was insightful in recognising that shared community environmental values are entitled to consideration equally with narrow economic values.

Initially, the federal appeals courts enforced NEPA fully. When agencies sought to circumvent it, the Court of Appeals for the District of Columbia formulated the "hard look doctrine" that required the agencies to take a hard look at the environmental impacts and alternatives to the proposed project and ways to mitigate adverse impacts. The "hard look doctrine" appeared to be a recognition that the nation's environmental policy legislation was of such fundamental importance that closer judicial scrutiny was required by the courts

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<sup>192</sup> 42 U.S.C. 4231.

<sup>193</sup> 354 F. 2d 608 (2d Cir., 1965), *cert. Den.* 384 U.S. 941 (1966).

<sup>194</sup> See N.A. Robinson, "EIA Abroad: The Comparative and Transnational Experience", in *Environmental Analysis: The NEPA Experience* (Oak Ridge National Laboratories, CRC Press, Boca Raton, Florida, 1991.)

to ensure that the nation's basic environment well-being was to be maintained and restored. However the Supreme Court looked with suspicion on this case law development, finding it a kind of intrusion on the discretion of the executive branch of Government. In *Vermont Yankee Nuclear Power Corp. V. Natural Resources Defence Council*,<sup>195</sup> Chief Justice Rehnquist ruled that NEPA primarily required only that the agency take the hard look, and did not mandate that it select the most environmentally beneficial means of protecting the environment in undertaking its project. In a series of later rulings involving NEPA, the Court came to hold that NEPA's provisions are essentially a procedure that had to be followed, and that NEPA did not prescribe a substantive rule that agencies substantively had to foster environmental protection.<sup>196</sup>

The Supreme Court restated its deference to the narrow confines of the Statute, when it ruled in *Chevron v. Natural Resources Defence Council* <sup>197</sup> that where the Congressional words in a statute are clear, the court must simply follow them, but if the words are not clear, then the court must defer to the reasonable interpretation of the administrative agency charged with implementing the statute, rather than presenting the court's own interpretation. This rule of construction effectively removes the Supreme Court from asserting basic principles of environmental justice when called upon to enforce environmental or other statutes. If the agency will not chose to follow a course of action protecting the environment, then the court may not compel it to, absent so extreme an agency position that its conduct is arbitrary or unreasonable.

#### **4. JUDICIAL RECOGNITION OF ENVIRONMENTAL JUSTICE**

Thus, the Supreme Court has declined to be guided by any principle of environmental justice. This stands in contrast to the Supreme Courts of some of the States, which have adopted rules more like those favoured in the dissents of Mr. Justices Blackmun, Douglas or Powell.

One of the world's leading ecological scientists, who also today is regarded as the author of a fundamental work in environmental philosophy, is Dr. Aldo Leopold. His posthumously published essay, "A Sand County Almanac"<sup>198</sup> argued as early as 1947 that human development was undermining the basic life support systems in North America, and that a new ethic was needed if society was to avoid harming itself and nature. He had studied the Dust Bowl, the widespread desertification of the middle of the USA in the 1920s and 1930s, and the measures needed to restore the environmental health of the

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<sup>195</sup> 435 U.S. 519 (1978).

<sup>196</sup> See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), and *Marsh v. Oregon Natural Resources Council*. 490 U.S. 360 (1989).

<sup>197</sup> 467 U.S. 837 (1989).

<sup>198</sup> Oxford University Press (1947).



soils and farmlands. His work years later had an impact on the States of the regions affected, and their Supreme courts.

For instance, the Supreme Court of Minnesota in 1987 reviewed a determination of the Minnesota Department of Natural Resources denying a permit to drain a wetland, in *Matter of Application of Christenson*,<sup>199</sup> although Christenson and his family had owned the wetland involved since 1877, the State had come to understand the ecological importance of wetlands for the general public well-being, and had inventoried all wetlands. The Court noted that drainage of the wetland would result in the loss of a significant wildlife habitat. The wetland serves as habitat for both resident and migratory wildlife. It provides food cover, and resting areas for weasel, mink, muskrat, pheasant, fox, rabbit, hare, deer, and a variety of song birds, rails and raptors." The drainage would adversely affect water quality in a lake which it runs into, "since it would eliminate the wetlands natural filtering system and add to the untreated nutrient and sediment-laden water flowing into Lake Koronis." The Minnesota Supreme Court held that Christenson's ownership of the wetland and his otherwise lawful agricultural practices did not give him right or authority to extinguish the public values that the wetland sustained in its natural state. Justice Wahl wrote for the Court the following:

"Over ten years ago this court cited the conservationist Aldo Leopold for his espousal of a 'land ethic' which envisions a community of interdependent parts. 'The land ethic simply enlarges the boundaries of the community to include soils, waters, plants and animals, or collectively: the land.' *County of Freeborn v. Bryson* 243 N.W. 2d at 332, citing *Sand County Almanac* (1949) p. 203. We reaffirm our statement there that the state's environmental legislation had given this land ethic the force of law, and imposed on the courts a duty to support the legislative goal of protecting our state's environmental resources. Vanishing wetlands require, even more today than in 1976 when *Bryson* was decided, the protection and preservation that environmental legislation was intended to provide."

The guidance that the Minnesota Supreme Court drew from Aldo Leopold in the *Bryson* decision is worth recalling:

"To some of our citizens, a swamp or marshland is physically unattractive, an inconvenience to cross by foot and an obstacle to road construction or improvement. However, to an increasing number of our citizens who have become concerned enough about the vanishing wetlands to seek legislative relief, a swamp or marsh is a thing of beauty. To one who is willing to risk wet feet to walk through it, a marsh frequently contains a spring soft moss, vegetation of many varieties, and wildlife not normally seen on higher ground. It

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<sup>199</sup> 417 N.W. 2d 607 (1987).

is quiet and peaceful -- the most ancient of cathedrals -antedating the oldest manmade structures. More than that, it acts as nature's sponge, holding heavy moisture to prevent flooding during heavy rainfalls and slowly releasing the moisture and maintaining the water tables during dry cycles. In short, marshes and swamps are something to protect and preserve."

A generation ago, the conservationist Aldo Leopold espoused a 'land ethic' which he described as follows: 'All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. His instincts prompt him to compete for his place in the community, but his ethics prompt him also to co-operate (perhaps in order that there may be a place to compete for). The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land. In short, a land ethic changes the role of homo sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.'<sup>200</sup>

Similarly, the Supreme Court of the State of Wisconsin has drawn upon the scientific and ethical insights of Aldo Leopold as authority for the identification of environmental rights. *Wisconsin v. Mauthe*<sup>201</sup> involved the question of who pays for cleaning up the source of a chemical contaminant, chromium, seeping from an owner's land when there is not current activity which causes the seepage. The Court held that the owner of the property which contained contaminated soil from which a hazardous substance is being discharged is responsible for cleaning it up. The Supreme Court reversed courts below that had ruled that mere property ownership alone did not require the owner to clean up the hazardous waste on *the* owner's property. In holding the owner responsible, Justice Day observed that "The vitally important work of protecting the life sustaining forces around us, collectively referred to as the environment, is basic and fundamental to our survival. The means to achieve these ends are not always agreed upon. Under our system it is the legislature and-the agencies it empowers to carry out its mandates that bear this tremendous responsibility. It is they who must resolve the conflicting interests and approaches to specific problems. Aldo Leopold, the great Wisconsin conservationist in his well-known work *A Sand County Almanac* (1948) at page 203 said, 'Individual thinkers since the days of Ezekiel and Isaiah have asserted that the despoliation of land is not only inexpedient but wrong.' The

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<sup>200</sup> *County of Freeborn v. William H. Bryson*, 309 Minn. 178 at p. 18, 243 N.W. 2d 316 at p. 322 (1976).

<sup>201</sup> 124 Wisc. 2d 288, 366 N.W. 2d 871 (1985).

statutes under consideration are a legislative recognition that the discharge of hazardous substances is one form of despoliation.”

The Supreme Court of the State of California has also found ecological scientific knowledge must be incorporated into decisions construing the public trust doctrine of the State. Under the public trust doctrine, the public has access to navigable waters for fishing, transport, and related uses of the shared, common resource that rivers and lakes and the sea shore represent. In a case involving Mono Lake, on the border of California and Nevada, the City of Los Angeles many miles away had diverted so much water for its urban needs that it was lowering the level of Mono Lake by reducing the waters flowing into this lake, and endangering its flora and fauna. The Supreme Court held in *National Audubon Society v. The Superior Court of Alpine County and the Dept. Of Water & Power of the City of Los Angeles*<sup>202</sup> that no Governmental unit of the State, including the City of Los Angeles, could be allowed to destroy a natural resource, since the State was trustee for the water access and use protected by the public trust doctrine, and by extension the State has a duty to protect the ecological conditions and water quality of the Lake. Mr. Justice Broussard read contemporary understanding of ecology into the ancient public trust doctrine of water access rights, for of what use is the right to fish if the State as trustee has failed to maintain the conditions necessary to support the fish?

## 5 JUDICIAL BLINDNESS

One classic notion depicts Justice blindfolded. The symbol of the blindfold, of course, is meant to connote the fact that Justice must meet all parties equally, without special favour to any, and is to be administered in an even-handed way. In our environmental context, however, when the court is blind to the science of ecology and to the fundamental principles underlying Environmental Law, it cannot administer even handed justice. When courts blind themselves to science or environmental justice, they perpetuate legal fictions that “externalities” do not exist or that it is not their place to recognise the existence of environmental harm since no one is before the court to speak to the harm.

Some State courts in the United States, like the US Supreme Court, have not found this environmentally intelligent line of judicial reasoning. Examination of other decisions illustrates that when courts do not base their interpretation of common law or statutory claims on this sort of fundamental environmental premise, the courts produce unsustainable results. For instance, the highest court of New York State in *Boomer v. Atlantic Cement Company*<sup>203</sup> actually reversed a long-standing common law right of a property owner, here farmers

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<sup>202</sup> 33 Cal. 3<sup>rd</sup> 419, 658 p. 2d 709 (1983), cert. Den. 464 U.S. 979 (1983).

<sup>203</sup> 26 N.Y. 2d 219 (1970).

and other residents, to secure an injunction to abate a particulate and cement dust pollution, by allowing the polluting cement company to pay damages equal to the market value-of an easement to dump cement dust on the affected properties. The Court clearly valued the economic worth of the cement company as superior to that of others, and left it to the new environmental agencies to decide how to clean the air. No legislature gave the cement company the right to take an easement by eminent domain, but the court - unguided by an environmental principle - favoured the short-term interest of economic production so much that it nullified as outdated the common law right to abate the pollution.<sup>204</sup>

By contrast, the importance of having an explicit Constitutional provision to guide a court is evident in another set of New York judicial decisions upholding a long-term environmental interest. In the 1870s, the deforestation of the Adirondack Mountains in up-state New York was so severe that the resultant erosion and flooding actually inundated the State's Capital city, Albany, many miles down stream from these Mountains along the Hudson River. The people decided to establish the Adirondack Forest Preserve, and wrote in the Constitution of the State that the lands should be kept as "forever wild forest land."<sup>205</sup> The Courts have enforced this Constitutional provision against developmental encroachments on the Forest Preserve.

The bias of a court to favour the familiar and evident short-term economic interests in the absence of a constitutional principle to guide it, similarly is clear in a noise pollution case decided at the outset of this century when the era of the Industrial Revolution had become well established as the favoured economic policy of the day. In *Stevens v. Rockport Granite Company*,<sup>206</sup> a granite quarry was allowed to continue its operations even though it disrupted the recreation and summer residences in the vicinity. The court allowed the operations, so long as they did not interfere by raising noise levels inside the buildings nearby when the windows were shut. This court indicated how little it considered noise to be a serious problem when it drew authority from a British ruling, in *Salvin v. North Brancepeth*<sup>207</sup>: "If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes."

This sort of judicial disdain for environmental interests, and preference for a narrowly defined economic developmental interest, was recently illustrated in

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<sup>204</sup> See *Whalen v. Union Bag and Paper Company*, 208 N.Y. 1.

<sup>205</sup> Article XIV, NYS Constitution. See *MacDonald v. Association for the Preservation of the Adirondacks*, enforcing this position.

<sup>206</sup> 216 Mass. 486, 104 N.E. 371 (1914).

<sup>207</sup> L.R. 9 Ch. App. 705 quoting James, L.J. at 709.

1994 by the Law Lords of the House of Lords in *Cambridge Water Co. v Eastern Counties Leather plc*.<sup>208</sup> Cambridge Water Company found perchloroethene (PCE), a chemical used in tanning, in its water wells. The PCE had been seeping into the aquifer after years of use at the tannery nearby. The water company had supplied the poisoned water to residences. The Court of Appeal below had found the water company liable, since basic hydrology should indicate that chemical wastes spilled on land will percolate into the ground waters eventually. However, the House of Lords reversed, holding that foreseeability for the type of damage, well water pollution and supply of water to consumers, was a prerequisite for liability and the House of Lords found that defendants could not possibly have foreseen that the tannery spills would cause them to violate the European Community's water quality Directive 80/778/EEC. Here, the House of Lords chose not to understand the functions of the hydrological and soil systems, and denied liability for "historic pollution." By ignoring the teachings of natural science, the court found that an economic party did not have to take responsibility for its acts contaminating the environment and a public water supply.

Other cases, of course, can be marshalled on either side of these two patterns of judicial decision-making, from both the United States and European States.

## **6. THE FUNDAMENTAL PRINCIPLES OF ENVIRONMENTAL JUSTICE**

It is evident from this comparative survey of case law that when courts understand and make reference to fundamental principles of environmental justice, grounded in and derived from our contemporary scientific understanding of ecology and public health, the courts produce decisions that sustain long-term economic and environmental well-being. The most basic of the principles of environmental justice is the *right to life* itself, with its basic elements of clean air to breathe and potable water to drink. To neglect to recognise these principles is to maximise short term or present gain, without regard for the sustainability of such economic interests in the long term, and without regard for the non-economic interests that do not appear to be represented in the court.

Reference to environmental justice is especially relevant, and necessarily makes more comprehensive and sound, a court's decisions on such matters vested in the sound discretion of the court. When applying the public trust doctrine, or weighing conduct to determine what may be "reasonable" in a nuisance action, or determining "equitable" apportionment of sharing international waters, or in "balancing" the equities in deciding whether or not to grant an injunction, the court which apprehends environmental justice will

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<sup>208</sup> [1994] 2 AC 264.

reach conclusions that are sustainable with respect to nature and future generation's interests in natural resources.

Courts that find general principles of law, such as the *principle of intergenerational equity* articulated by H.E. Judge Christopher W. Weeramantry in several of his opinions on cases before the International Court of Justice, will tend to make decisions that promote sustainability. Many ecological scientists have agreed with Aldo Leopold that as a moral precept it is more ethical to avoid environmental harm than to allow it. When there is uncertainty about whether there will be an adverse impact, the *precautionary principle* guides a decision to err on the side of not endangering the environment. This methodology underlies the process of environmental impact assessment (EIA), and courts that insist Governmental agencies follow the EIA process fully will facilitate sustainable development in the long term.

When the basic right to life is taken seriously as an environmental principle, courts can guide agencies not to permit actions that threaten human health and life generally. When administrators come to understand that their conduct will be measured against such basic principles, and when the public-understands that they are entitled to basic environmental justice and may appeal to courts that recognise the gravity of environmental protection, then society will have taken a major step toward the sustainability that *Agenda 21* contemplated. Courts in South Asia lead the world in elaborating the jurisprudence of environmental justice. Courts in some other regions, particularly certain State Supreme Courts within the United States, independently have made decisions arriving at conclusions similar to Supreme Courts in South Asia.

If the line of cases recognising the right to life can be expanded through courts in all jurisdictions, then there will be a reduction in the number of environmental disputes regarding short-term exploitation of the environment. Judicial recognition of environmental justice will foster stewardship over natural resource use, and the bounty of the Earth may be sustained for the future. The importance of the Courts in identifying and vindicating the principles of environmental justice cannot be stressed enough.

The world's common interest in sustainability will be furthered by cases that recognise that economic well-being depends upon maintaining the health of the people as a constituent part of the community of life on Earth.

**IV. CONTEMPORARY DEVELOPMENTS IN INTERNATIONAL AND  
NATIONAL LAW IN THE FIELD OF SUSTAINABLE  
DEVELOPMENT**

**THE CHALLENGE FOR THE JUDICIARY IN THE APPLICATION  
OF GENERAL PRINCIPLES OF ENVIRONMENTAL LAW**

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**I. INTRODUCTION**

This presentation seeks to provoke discussions on the question whether certain general principles of environmental law should be recognized as law, enforceable by national courts or tribunals. For this purpose it will rely on the trends in the evolution of soft law in environmental field and what may be characterized as core principles extrapolated from the relevant instruments adopted over the past two decades.

In raising these questions we are abundantly aware that the distinguished jurists gathered here will have given consideration to these new frontiers in the development of environmental law and have individually possible solutions or trends that ought to be emulated. At the same time we are aware that the public out there characterize lawyers as conservative. And therefore it might be inconceivable to that school of thought that we would discuss new horizons in the legal field. Courts have, in some quarters, been characterized as reactionary and relying largely on precedents under the doctrine of *stare decisis*. On the other hand, as the eminent American Supreme Court Justice, Judge William O. Douglas once opined, the court was not simply to follow precedents, but also to set them.

The general principles which we shall discuss below are from declarations of global organizations, referred to as soft law instruments. Therefore, we are constrained to declare that only in limited instances would such principles be recognized as having amounted to customary international law enforceable *erga omnes*, and that courts or tribunals should not ignore them merely because they are not incorporated into treaties binding *inter partes*, or in national statutes.

But it is under these circumstances that courts and other fora have been accused of being self-contradicting or lacking consistency in related practice. For instance, resolutions and declarations solemnly adopted by an overwhelming number of states are considered simply as declarations *de lege*



*ferenda* and not carrying any legal obligations. On the other hand, we are prepared to accept unilateral declaration as giving rise to legal obligations. So the Permanent Court of International Justice was to hold that the so-called Ihlen Declaration made in July 1919 carried legal obligation for Norway in the *Legal Status of Eastern Greenland* case, in 1933, even though Norway was to claim that Nils Claus Ihlen was incompetent to enter such a legal undertaking.

Jurists have also maintained that courts must be moved over any matter and that like tribunals, they will only hear cases brought before them and rely on the evidence adduced thereat, to pass a judgement. But it will be recalled that in the *Nuclear Test Cases* the International Court of Justice (ICJ) relied on public statements made in political fora by the French Government to decide that the question was moot. The French Government had made public statements to the effect that they would discontinue nuclear testing. Relying on the public statements the ICJ declined to decide the question of whether the tests conducted by France, hitherto, violated international law.

More Jurists have maintained that for a principle to assume the status of customary international law it must enjoy widespread acceptance over generations. Moreover, the party invoking the principle should demonstrate the existence of *opinio juris*. But other jurists qualify the stand on the matter. That sage of international law, Sir Hersch Lauterpacht, cautioned in the 1950's that application of technology to such spheres as exploitation of marine resources would require speedier development of the relevant legal regimes. In his view there would have to be acceptance of rapid development of custom to cope with the rapid technological development. In this respect therefore time is not the only underlying basis.

That philosophy in the development of legal principles was enunciated rather eloquently by Judge Tanaka in his dissenting opinion in the *South-West Africa Cases* (second phase) in 1966. He conceded that individual resolutions, declarations, judgements or decisions could not, as such, have binding force upon members of the United Nations organization. In his view what was required was the repetition of the same principles, on the same matters by the same or diverse organization. In conclusion the Learned Judge opined that the collective, cumulative and organic process of custom generation could be characterized as the middle way between legislation by convention and the traditional process of custom making.

It is apparent that the thread of logic in Judge Tanaka's opinion finds an easy link in the view of The Learned Sir Hersch mentioned earlier. The former related to the unacceptable, delicate and socially explosive situation in South Africa. And the position of Judge Tanaka had to be somewhat vindicated by the Advisory Opinion of the I.C.J. five years later. History has finally to be confirmed by the present situation in South Africa.

On the other hand the point made by Sir Hersch related to application of technology to the utilization of natural resources. Again the view was vindicated by the rapid changes in concepts and the legal regimes of the ocean space culminating in the Law of the Sea Convention signed in 1982. The U.S. beat an about-turn on the national claim to 200 miles jurisdiction and declared the Exclusive Economic Zone as a rule of customary law as states gathered at Caracas for the first substantive session of the third United Nations Conference on the Law of the Sea in 1974.

The point in all this is to stress that there is nothing inherently conservative about lawyers nor yet reactionary about the judiciary. Circumstances have dictated the judicial construction and evolving jurisprudence and relevance. It is in that posture, therefore, that we must consider contemporary development in international law related to environment, utilization of natural resources and sustainable development. It will be submitted below that these are matters of survival of the present as well as all future generations. Therefore, it would take the most incorrigible demagogue to insist that law must ignore indicators of the threats to the threshold of sustainability of life to allow custom to evolve over generations.

We must, therefore pay most careful attention in those situations where the global community expresses repeated consensus.

In the following sections we shall, first, briefly outline the repetitive evolution of the broad global soft law instruments related to environment and natural resources, and the trend to acknowledge this in instruments of binding character.

Secondly, we shall extrapolate what may be characterized as the core principles enunciating the basic canon of sustainable utilization of the environment and natural resources. The principles in question are lifted directly from the soft law instruments to underscore their centrality in their rapid evolution as possible rules of customary international law. Or if you may, as general principles of law not to be ignored by civilized nations, if we borrow a bit from Article 38(1)(c) of the Statute of the ICJ.

Thirdly, we shall outline a few decided cases to flag indicators of the contribution which the judiciary can make, and has indeed made, in the rapid development of international law relating to sustainable development.

## **II. GLOBAL SOFT LAW INSTRUMENTS ON ENVIRONMENT**

There is scanty record of global resolutions on the environment or natural resources until 1972. The United Nations General Assembly Resolution on Permanent Sovereignty Over Natural Resources (UNGA Res. 1803. (XVII)) which was adopted on 14th December 1962 was directed at the question of

ownership over such resources and the right of the states to dispose of their wealth according to the national development policies and without external coercion. A similar principle was reiterated by the UN General Assembly ten years later in the Resolution on Permanent Sovereignty Over Natural Resources of Developing Countries (UNGA Res. 3016 (XXVII)) adopted in December 1972. This time, the intention was to extend the application of the principle to cover marine resources. Operative paragraph 1 reaffirmed "the rights of states to permanent sovereignty over all their resources, on land within their international boundaries, as well as those found in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters". Clearly, this resolution was triggered by the process at that time of the negotiations for a new legal regime of the oceans following the call by the Ambassador of Malta, A. Pardo, for the General Assembly to declare the area beyond the limits of national jurisdiction the common heritage of mankind.

The well-known Stockholm Declaration was adopted by the first ever global conference attended by 113 states, to deal with environmental protection. The United Nations Conference on the Human Environment (UNCHE) concluded its work in Stockholm on June 16, 1972 and adopted a Declaration, a set of recommendations and an Action Plan. The Stockholm Declaration, comprising twenty-six principles, has no binding force as such. However, it is an expression of the international consensus and commitment to evolve the protection of the human environment in a particular manner as has happened since.

Prompted by its commitment to nature conservation, the International Union for the Conservation of Nature and Natural Resources (IUCN) (or the World Conservation Union, as it is now better known), decided to build on the enthusiasm generated by the Stockholm Conference. It mobilized an international group of experts to prepare a draft charter for nature which, on a proposal by Zaire, now Democratic Republic of Congo, was adopted by the Twelfth General Assembly of IUCN in September 1975. In 1980 the draft was received by the U.N. General Assembly which agreed to circulate it among its members for their reactions. Eventually, the document was adopted as the World Charter for Nature on 28 October 1982 (UNGA Res. 37/7), by 111 votes in favour, one (USA) against and 18 abstentions.

While the Stockholm Declaration was adopted by consensus, the World Charter was put to a vote, yielding overwhelming acceptance. Nevertheless, it is important that the United States, which had taken a major lead in environmental legislation since the adoption of their framework law in 1969, should vote against the Charter. It is possible that the U.S. objected to the fact that the provisions in all the 24 paragraphs were expressed in mandatory terms of "shall". Secondly, with the few exceptions where the conditions are directed at "all" or "each" person, the requirements are directed at states. Thus, this created sweeping obligations on states in an instrument which was not a treaty.

It will be recalled that the Stockholm Declaration was largely in hortatory language, with about five out of the 26 principles being expressed in mandatory terms. The point remains, though, that ten years after the Stockholm Declaration was adopted, the world community resolved to reiterate their commitment to environmental conservation in the same solemn spirit

The most deliberately planned conference of all these is the United Nations Conference on Environment and Development, (UNCED) held at Rio de Janeiro in June 1992, which adopted the Rio Declaration and the celebrated *Agenda 21*. While the latter reflected the items which constitute a plan of action to be addressed in the management of the environment as the world moves to the 21st century, the Declaration stipulates the precise principles to guide policy and legislation in the same spirit as the Stockholm Declaration and the World Charter for Nature.

The background to the Rio Conference, and therefore its *Agenda 21* and the Declaration, may possibly be traced to pre-Stockholm Conference days when, goaded by the Group of 77, the Secretary General of UNCHE convened a Panel of Experts at Founex in Switzerland from 4 to 12 June 1971 to make recommendations to the conference on the relation between "environment and development". Although the report of the twenty-seven experts submitted to the Conference Secretary-General is supposed to have dissipated the anxiety of the developing countries, the issue remained on the agenda of UNEP for years and of the diplomats who were to plan the Rio Conference, and thus the question of environment and development gave the Rio Conference its title. That decision was fortified by the Brundtland Commission Report titled "Our Common Future" which stressed that environmental conservation is a prerequisite to sustainable development.

Thus, Rio Declaration is significant partly because it followed after, and took into account two other very important soft law instruments. The Declaration is also important because of the celebrated Brundtland Report which set its agenda after about three years of intensive enquiry. To the Group of 77, the outcome of Rio Conference, including the Declaration may be important because they identified with its theme of environment and development. At the end, the Conference adopted, among other things, the Rio Declaration comprising 27 principles, with the doctrine of sustainable development as underpinning its principles.

The fourth soft law instrument which is taken into account in this paper is the Draft International Covenant on Environment and Development which, in this series, belongs to a class of its own. Unlike the foregoing three soft law instruments, which were adopted by Governments in global fora under the auspices of the United Nations, the Covenant was developed under the aegis of the IUCN's Commission on Environmental Law in cooperation with the

International Council of Environmental Law. It is a product of the initiative of experts from distinguished professional organizations and it benefited from the direct contribution of over one hundred distinguished personalities in the field.

This independent and independent-minded initiative commenced in 1990 and concluded its work in 1994. Therefore, it was in motion even as the Rio Declaration evolved and took into account the results of UNCED. The authors were critical enough to face the question of necessity of yet another soft law on the environment given the preceding three which have been introduced above. Out of the nine reasons stated in the "Foreword" to the document the following three present effective justification in the context of this paper. The authors gave the three reasons as follows:

to consolidate into a single juridical framework the vast body of widely accepted but disparate principles of "soft law" on environment and development (many of which are now declaratory of customary international law);

to reinforce the consensus on the basic legal norms, both internationally, where not all States are party to all environmental treaties, even though the principles embodied in them are universally ascribed to, and nationally, where administrative jurisdiction is often fragmented among diverse agencies and the legislation lags behind;

to save on scarce resources and diplomatic time by consolidating in one single instrument norms, which thereafter can be incorporated by reference into future agreements, thereby eliminating unnecessary reformulation and repetition, unless reformulation is considered necessary.

These reasons confirm that the style and content of the Covenant suggest it as a possible draft convention rather than simply a declaration of principles. But the reasons also confirm a widely held belief that these declarations of principles should be working towards an evolution of customary rules. In other words, if the international community is truly committed to a principle they should establish a repetitive position of each principle in different resolutions. It will be important that the same principles are supported by the works of distinguished experts, publicists and commentators. Ordinarily, such principles will find further incorporation into treaties while in many cases they may, in addition, be simply recognized as being declaratory of customary international law.

However, it is becoming a concern on the international plane that such declarations and principles should also actually find direct incorporation not only into binding instruments but into national laws as well, and the Rio Declaration, as the latest international declaration has attracted such an

interest. The Royal Netherlands Government convened and hosted an International Environmental Conference on Codifying the Rio Principles into National Legislation, held at the Peace Palace at The Hague from 22 to 24 May 1996 and attended by over eighty experts from all parts of the world. Additionally in recent years a number of countries are increasingly incorporating such principles into national laws. Let us sieve and select a few such principles for purposes of the present discourse.

### **III. CORE PRINCIPLES**

This discussion focuses on only seven principles and we have assumed the liberty of characterizing them as "core". In the four soft law instruments we have seen that the Stockholm Declaration has 26 principles, World Charter for Nature is presented in 24 paragraphs under three different categories, Rio Declaration has 27 principles, while the Covenant is in 72 articles in treaty form and with commentaries. In most cases and as would be expected there are overlaps among the principles. But the range in the numbers also suggests that such overlaps cannot be complete. Clearly then a discussion of the present scope, which only seeks to stimulate further exploration of the subject, must of necessity identify the principles the enforcement of which will have critical impact on environmental protection. At the same time, the repetitive acceptance of the core principles, we argue, should suggest a rapid evolution of customary law on a global scale.

It will also be clear that the effort is not to discuss specific principles which are prioritized. Rather, it is the central concepts around which principles are organized that have been identified. Thus, a number of items which are couched as principles may, in fact, be placed within a broad rubric. For these purposes the concepts which have been identified are seven, namely:

1. Sustainable Utilization and inter-generational equity;
2. Integration of environmental exigencies into development planning and management;
3. Public participation;
4. Precautionary measures;
5. Polluter pays;
6. Prior consultation and international cooperation;
7. Provision of legal and institutional arrangements.

Each of these is discussed briefly, with some indication of where they fall in some or all of the declarations.

### **1. Sustainable Utilization and Inter-generational Equity**

The principle which states that all environmental management strategies should be aimed at meeting the development objectives of the present generation without jeopardizing the interests of the future generations to enjoy the same is now at the foundation of all environmental legislation and management. It rejects all precepts of short term economic or industrial growth which ignore conservation measures. In fact, with its most popular expression in the Brundtland Commission as Our Common Future, it was pivotal to the discussions and outcome of the Rio Conference.

The principle found direct expression in Principles 1 and 2 of the Stockholm Declaration; paragraph 4 in the World Charter for Nature; Principle 3- of the Rio Declaration: and Article 5 of the Covenant

It is only the principle of sustainable utilization that facilitates the realization of the inter-generational equity. Therefore, the latter doctrine is actually an inextricable correlate of the principle of sustainable utilization. In their commentary to Article 5, the authors of the Covenant state that inter-generational equity is an essential foundation for all international law relating to environmental protection and the concept of sustainable development. Thus, it has the quality of a jural postulate in the realm of environmental management. In other words, the development of environmental law should be viewed as promoting utilization of natural resources which also protects the threshold of sustainability.

### **2. Integration of Environmental Exigencies into Development Planning and Management**

The principle that environmental considerations should be taken into account and to every extent possible, integrated into development planning and management is, arguably, one of the most revolutionary ideas in environmental thought. It will be recalled that hitherto the view in most quarters has been that environmental considerations impede development (read growth). Until recently, the general position has been that environmental degradation, particularly pollution, is historically part and parcel of the economic and industrial prosperity of the western world. Truly this was, in fact, a manifest confusion of concepts because development should include qualitative improvement rather than simple sectoral growth.

But the present principle is a consequence of the recognition that development requires sustainable utilization of the natural resources and the environment within which they exist. It is a part of the general recognition that sustainable

development requires sustainable utilization of the natural resources. And therefore, the imperatives of conservation of the natural resources should be predicated upon environmental planning and management as they actually will protect the threshold of sustainability of all the resource sectors. Therefore, in national legislation, this principle would find expression either explicitly in the statutes or in the nature of obligations imposed on the sectoral or functional departments.

In the Stockholm Declaration, the principle is provided for explicitly while in Rio Declaration it is provided for directly and unequivocally. But the most elaborate provision is in Article 13 of the draft Covenant, where it is expressed in mandatory terms as a requirement for states preparing their development plans.

### **3. Public Participation in Environmental Matters**

It is now well-established that public participation in decision-making is essential for local level development in general, and in the management of natural resources, in particular. The principle may be directed at empowerment of the civil society in decision-making or, more sharply, it may empower members of the public to seek enforcement of environmental protection through judicial and/or administrative mechanisms, and thus underlines the highest expression of public participation.

Public participation may ultimately be provided for through at least three legal machineries. First, such a right may be entrenched in the national constitution, often as part of the Bill of Rights. The second mechanism may be in the public participation in the review of environmental impact assessment. Thirdly, it may be through direct *locus standi* for the public in environmental causes. But while the character of grant of public participation may vary from country to country, it is of crucial importance that it be provided for as is increasingly happening at national level.

The Stockholm Declaration does not include any explicit principle on public participation. It is admitted that the concept had not taken root seriously even though the 1969 US National Environment Protection Act had recognized the necessity of public participation in promoting the enforcement of environmental law. The only reference in the Stockholm principles is Principle 19 where explicit provision for the dissemination of knowledge and information as a form of empowerment, is made.



The World Charter for Nature urges, in paragraph 13, that all persons shall, through national laws, have the opportunity to participate individually or with others, in decision making in environmental matters.

The Rio Declaration makes provision for public participation in Principles 10, 20, 21 and 22. Of these provisions, Principle 10 is broad and all-encompassing. The other three are specific to the promotion of participation for women, youth, and indigenous peoples, respectively, as agents of sustainable development.

#### **4. Precautionary Measures**

Under this rubric is the principle which requires that every precaution and prudence should be exercised to prevent any possible deleterious environmental consequences of any socio-economic or military activities. Such measures may be in different forms. Let us note that since the adoption of the Rio Principles in 1992 the most popular category of precautionary measures is the one well-known as the *Precautionary Principle*. For purposes of this paper other forms of precautionary measures are: environmental impact assessment (EIA); environmental risk assessment (ERA); environmental audit; and environmental monitoring.

The precautionary principle, ERA and environmental audit do not appear in the Stockholm Declaration. But EIA and environmental monitoring are alluded to in Principles 5 and 6. The World Charter for Nature is a lot clearer on the precautionary measures, particularly in paragraphs 11, 16 and 19. Paragraph 11 suggests the requirement for EIA and ERA, while para 16 suggests the requirement for EIA. Environmental audit and monitoring are provided for in paragraph 19 even though the two concepts require delineation.

The Rio Declaration is, for the first time, explicit on the precautionary principle as understood today, while EIA is specifically required in Principle 17. But there is no direct reference to ERA, environmental audit or monitoring.

The Covenant is explicit on the precautionary principle, which is provided for, rather laconically in Article 7. Specific provisions for EIA and environmental monitoring are in Articles 37 and 39, respectively. To some extent, environmental audit may be deemed implied in Article 39. But it is clear that precautionary measures are adequately catered for in the Covenant

#### **5. Polluter Pays Principle**

The principle is used here broadly to imply that whoever is responsible for environmental degradation should be responsible for its reparation. States should therefore ensure both in their legislation and enforcement at municipal

level that these aspects are covered both on civil liability and criminal responsibility.

Principle 22 of Stockholm Declaration requires states to cooperate in the development of international law regarding liability and compensation for victims of environmental damage caused within their jurisdiction. In the World Charter for Nature, paragraph 21 (d) imposes an obligation on states to ensure that activities in their territories do not harm the interests beyond the limits of national jurisdiction. This may be presumed to impose liability on the states.

The Rio Declaration is explicit in its Principle 13 where states are required to develop national laws regarding liability and compensation for victims of pollution and other environmental damage. The Covenant, on the other hand, has elaborate provisions on responsibility and liability in Part IX. Article 47 is specifically on state responsibility while Article 48 imposes state liability for environmental injuries on other territories.

Clearly, there is rapid development of soft law provisions on civil liability and criminal responsibility for environmental injuries. And the Covenant has attempted a detailed differentiation of the level in each case with an elaboration of the available remedies.

## **6. Prior Consultation and Ultimate Cooperation**

Our enquiry under this category is to ascertain the extent to which soft law instruments have provided for requirements for prior consultation and/or cooperation in environmental management. Admittedly, prior consultation is essential for cooperation but the obligation to undertake prior consultation does not, *ipso facto*, imply that there is cooperation. It may only imply an acceptance of coexistence. But because of that link, the two aspects are treated together.

In the Stockholm Declaration there is an explicit provision to this effect in Principle 24 which requires that matters of environmental protection be handled in a co-operative spirit by all countries, big and small and on equal footing. It further urged for cooperation through bilateral and multilateral arrangements. Paragraph 21(a) of the World Charter for Nature is also explicit in requiring states and their component institutions to cooperate in the tasks related to conservation of the environment, including through information exchange and consultation

The Rio Declaration is equally explicit in Principle 7 where it requires states to cooperate in the spirit of global partnership to conserve, protect and, as appropriate, restore the health and integrity of the earth's ecosystem. The draft Covenant in Article 33, calls for prior and timely notification when a proposed

activity is likely to cause transboundary environmental harm. The article urges further that the consultations be conducted in good faith with such states at an early stage. Similarly, Article 34 requires states to cooperate in the conservation and management of transboundary natural resources and to do so on the basis of equity and reciprocity. Where appropriate, they should conclude bilateral and multilateral agreements, and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal expressly underlines the requirements of this principle.

## **7. Provision of Legal and Institutional Mechanisms**

A principle which requires the states to adopt legal arrangements and institutional mechanisms is the bottom-line for actual application of all the principles discussed so far. The actual development and enforcement of environmental law will require the specification of the normative demands, institutional arrangements and the procedural mechanisms and one would expect the various soft law instruments to make appropriate provisions.

The presumption underlying this principle -is that it is not adequate to urge states to provide for any one of the specific principles above. Rather, there should be an explicit requirement for states to enact effective environmental laws. As an enabling provision this should apply to the broad array of principles, and would be strong evidence of the commitment of States that have, in different fora, repeatedly adopted the principles.

The authors of the Stockholm Declaration were, presumably, preoccupied with the adequacy of institutional arrangements which arose from the experience of the western countries in 1960's and led to the law establishing the US Environmental Protection Agency as an apex body. Thus, Principle 17 required the establishment of appropriate national institutions to be entrusted with the overall environmental protection and management. The World Charter for Nature does not explicitly require the adoption of legal and institutional arrangements. But it is implied in the provisions which call for specific items to be provided for in the national legislation. An example is paragraph 23 which only requires national law to provide for public participation. Since Stockholm a variety of mechanisms (Ministry, Department, National Secretariat, Environmental Council/Commission or Agency etc . ) have been put in place in practically all countries.

Principle 11 of Rio Declaration represents a pertinent example. Its first sentence specifically requires states to enact effective environmental legislation. In addition, it urges for adoption of environmental standards which implies development of implementing regulations. Similarly, Article 13(2) the draft Covenant specifically requires states to enact effective laws and

regulations which use, where appropriate, economic instruments to induce compliance. For completeness, the article also requires states to establish or strengthen institutional structures and procedures to fully integrate environmental considerations into development planning and decision making.

It deserves emphasizing that the principles discussed above are selectively identified on the basis of what the authors consider as their significance for environmental legislation and the management of natural resources for sustainable development. It does not constitute a final list in any quarter. However, it will provide a basis for discussion and appraisal of the principles in each of the four soft law instruments. It is also significant that the set of principles provide us with a basis for critical appraisal of national environmental legislation *vis-a-vis* the emerging general principles of environmental law. The concerns which prompted the Dutch Government in May 1996 to convene an international conference, to which a total of 83 participants were invited, to examine the extent to which the Rio Principles have been incorporated into national laws also underscore the concern of some of the Governments in different regions with the issues under review.

Have the principles we have discussed above found support from States in recently concluded binding instruments? The answer is in the positive, as a quick review of three Conventions demonstrates. The Convention on Biological Diversity, 1992, in several preambular paragraphs (5, 6, 7, 14, 15 and 23) underline several of the Principles, while in its articles (3, 14) on Principle and on EIA and issues of cooperation are covered both specifically and generally. Preambular paragraphs 6 and 7 address precautionary measures while in the United Nations Framework Convention on Climate Change under Principles, article 3(3) expressly restates the principle, and reaffirms several other principles in paragraphs 4 and 5 of the same article. Similarly the United Nations Convention to Combat Desertification In 'Those Countries Experiencing Serious Drought and/or Desertification reaffirms the Rio Declaration in preamble no. 15, as well as several principles as exemplified in articles 2, 3, 4 and 12. The various principles, for example, on cooperation are operationized in global instruments recently concluded, and will no doubt find expression in future such instruments. To the extent therefore that these Conventions are applied by parties at the national level, a requirement of the treaties in each case, the key principles discussed in this paper will be part of that process and reinforcement as well.

#### **IV. RELEVANT TRENDS IN CASE LAW**

There are, we believe, a number of jurists among you who have given careful thought to the significance of the development of contemporary rules of environmental law prompted by the principles discussed. Further, we believe that among you here are lawyers and diplomats who took part in the development of all or some of the principles and therefore have clear

appreciation of the detailed work which preceded agreement on these complex instruments. In proposing the principles for discussion over their significance in case law, we are aware that some of the distinguished jurists gathered here may have been professionally involved either as judges or as counsels in litigation where some of the principles have been invoked. Therefore, our intention is to urge for greater details and broader review and exchange of information to promote global consensus over the utility of the principles in the development of law promotive of sustainable development.

We are aware that the judiciary in the Asia and the Pacific area have been seized with, and seriously taken the challenge of, several matters of environmental character in recent years. Therefore, we should err on the side of humility in suggesting recent trends in case law on the subject matter. What we suggest below are only for completeness in the line of our proposals. But detailed discussions will rely on the experience from the region which, by far outweigh any consideration given to these matters in other Regions.

From the Pacific region it is adequate for us simply to refer to the lucid and rich presentation made by the Honourable Justice Paul Stein at an international conference at The Peace Palace, at The Hague in May 1996. Addressing the question of codification of the Rio Principles into national laws, the Honourable Justice recounted a number of decided cases in which the precautionary principle had actually been addressed in national policy and court decisions in Australia. In repeated instances, this principle seems to have been viewed as the most critical safeguard for sustainable utilization of the environment and natural resources and, therefore, sustainable development. We are at considerable advantage, making this presentation after Justice Stein, at this Symposium and, therefore, do not have to mention any of the specific cases since he will have covered them sufficiently

The doctrine of intergenerational equity and its conceptual correlate, sustainable utilization have been suggested above as the most central of the core principles. Perhaps, very few court decisions will have addressed it directly. But thanks to the imagination of both the people and judiciary in Philippines we have a different view. All over the world, people interested in new horizons in the development of environmental law will easily mention a case entitled *Oposa v Factoran*, (Republic of Philippines Supreme Court G.R. No. 10183) in which, as we understand it, the Petitioners, a number of minors suing through their respective parents joined by a national NGO, claimed, *inter alia*, that continued issue of licences to authorize cutting of the country's natural forests posed danger of survival of the present and future generations. The Court recognized the right of the Filipinos to a balanced and healthful ecology as well as the doctrine of inter-generational responsibility and inter-generational justice.

Even though the decision was on a certiorari application and required a hearing on merits, the Court's recognition of the doctrine stands out as a landmark in the jurisprudence in environmental matters and will remain a challenge not only in Asia but to different jurisdictions around the world.

The significance of the case is also prominent in the Court's acceptance of *locus standi* as a requirement in the promotion of public participation in the judicial process where environment is concerned. Thus it is arguable, indeed, that one of the fundamental requirements in protection of inter-generational equity is public participation on behalf of those that are yet to be born or cannot, in law, present cases. The doctrinal base inherent in recognition of the collective trusteeship of the present generation over the interests of the future generations is therefore a crucial dimension binding the past, present and future generations. In fact, a requirement that the present generation is collectively responsible for the compliance with and enforcement of all laws protecting the environment through administrative and judicial remedies may be the basis of efficacy of all environmental laws. With regret the issue of *locus standi* has been applied in many a jurisdiction to defeat the review and application of substantive justice in the superior courts of many a country.

It is with interest, therefore, that cases that have been decided by various national courts and which have a bearing on the right of members of the public to enforce environmental law through national courts are reviewed. Again from the Asian region we followed, with interest, the decision of The Honourable Judge James Fong of the High Court in Kuala Lumpur in the *Kajing Tubek and Others v. Ekran BHD and Others* on June 19, 1996. The Court rejected the contention that the natives resident in an area to be affected by dam construction had no interest and determined that it was, in fact, mandatory for the authorities to have the views of the public before approving the construction of the dam.

The Plaintiffs had relied on the statutory provision in the national Environmental Quality Act of 1994 which required an environmental impact assessment and that the views of the public likely to be affected should be taken into account before approving a project. We are intrigued by the court decision only partly because of its recognition of the principle of public participation. It is intriguing because at the root of that requirement is the idea that protection of the threshold of sustainability requires both the engineering expertise as well as the native knowledge and wisdom. That the decision may have been later challenged and even overturned may be subject to a different commentary and analysis of the underlying circumstances. The critical issue is that the Court recognized the necessity for special precaution and prudence in the management of the environment and natural resources to ensure sustainable development. The crux of the matter in sustainable development is to protect the lives of the people who are to enjoy and in whose interest that development may be engineered in the first place.

The Supreme Court of Pakistan accepted a bold and innovative interpretation of the right to life when they heard *Ms. Shehla Zia & Others Vs. WAPDA* (Human Rights Case No: 15-K of 1992). In this case, the Petitioners who were residents in the vicinity of a proposed electrical grid station alleged that the electromagnetic field created by high voltage transmission lines would pose serious health hazards endangering their lives.

It is not disputed that evidence was not conclusive about the consequences of the ensuing electromagnetic waves on the residents. And, therefore, there was uncertainty in scientific evidence. In the view of the Court it was proper to adhere to the rule of prudence and to observe the precautionary policy which first considers the welfare and safety of human beings and the environment and only after that picks up a policy and executes a plan which is more suited to obviate the possible dangers or makes alternative precautionary measures which ensure that safety. In consequence the precautionary principle was, rightly, applied in that case.

These examples have focused on Asia and more could be enumerated, particularly from India and Bangladesh where the judiciary has been particularly forthcoming. The reason is largely because of the exemplary initiatives taken by the people of this region and the readiness with which the judiciary has responded. We are conscious too that this Symposium is to promote further discourse over what is happening in the SACEP area. We should mention only in passing at least one novel court decision where wildlife-human interfaces were at stake, and where the judiciary was again not found wanting.

The novelty is in the facts of the case itself. But I would be remiss if I failed to point out that Kenyans, the people who host UNEP, take their wildlife very seriously and will go to court to protect it. In the case, *Abdikadir Sheikh Hassan & 4 others (Plaintiffs) Vs Kenya Wildlife Service (Defendant)* [High Court Nairobi Civil Case No. 2059 of 1996] a local community sought orders restraining the Kenya Wildlife Service, a Government agency responsible for the protection and management of wildlife, from translocating or in any other way moving a rare and endangered animal called "the Hirola" from its natural habitat to other destinations. The plaintiffs contended that the animals are a gift of God to the people of the area and should be left there. In their view translocating the animals would deprive the local community of their natural heritage that forms and is a part of the local ecology. They feared that a new habitat might endanger the survival of the hirola.

For their part the defendant contended that the injunction should not be granted and/or should be lifted as it would prevent the respondent from carrying out its statutory duties. This position, as such, seemed extraneous to general expectations. It is often the case that the relevant Government agency

acts to restrain adventurous people from interfering with animals in their natural habitats, and therefore, the Government view and action left many observers rather surprised.

The court reviewed the relevant principles under common and customary law, the Kenya Constitution and the relevant statutes. In summary, it concluded that those entitled to the use of the land are also entitled to the fruits thereof, which include fauna and flora, unless this has been negated by law. As the constitution and the relevant statutes did not entitle the Government agency to translocate the animals, the Court found for the plaintiffs and granted an injunction. Although the court did not enunciate the principle of public participation, as such, the effect of the judgement was directly in support of the principle, and seemed to usher in a different trend from the one previously taken by the Kenyan judiciary which, in denying *locus standi* to such challenges, declined consideration of the merits in environmental challenges presented.

## **V. CONCLUSION**

The foregoing examples are indicators of the general readiness of courts, particularly in Asia to entertain and even apply some of the emerging principles of environmental law found in global soft law instruments. But these are only indicators which we have identified for illustrative purposes. The purpose of this expose is, therefore, twofold. First, we urge for more widespread acceptance of the principles in public policy domain in order to promote their incorporation not only into national laws but in emerging instruments. Second, it is urged that Courts should consider enforcement of the principles in judicial decisions in recognition of rapidly evolving trends in creating customary laws.

We are aware of the possible criticism against advocating some kind of instant growth of custom in environmental law. Such might be the contention of the traditionalists who would rather wait for custom to evolve over generations; a concept that is totally meaningless in the context of inevitable scientific, technological progress and change, as well as interdependent and orchestrated fora for ascertaining and building on consensus.. But there lies the fundamental problem, namely, if statutes and case law do not protect the present generation then there might be no future generations to recognize the acceptability of the eventual customary law

Is the fate of humankind therefore to rest in the judiciary, the junior partner in consensus building? This gathering, no doubt, is a step in the right direction, and we are privileged to think aloud together. if not to reach a solution, to compound a problem.



**CONTEMPORARY DEVELOPMENTS IN NATIONAL LAWS IN THE  
FIELD OF SUSTAINABLE DEVELOPMENT WITH SPECIAL  
REFERENCE TO ASIA**

**HON. SARATH SILVA  
ATTORNEY GENERAL OF SRI LANKA**

**INTRODUCTION**

- I. Objectives of National Legislation are threefold. Namely:
  - A. to give effect to the policies of the Government which are considered to be most appropriate for achieving a particular goal;
  - B. to provide for the relevant implementing mechanism necessary to achieve the desired goal;
  - C. to give authority to the related institutions to function efficiently within the framework of such policy parameters
- II. Some of the major environmental problems which need to be addressed by national legislation:
  - A. over exploitation of natural resources such as deforestation etc.;
  - B. pollution resulting from increasing industrial and agricultural production;
  - C. environmental problems arising out of urban migration.

**CHALLENGES**

- I. A unique feature of this area of law is that it calls for an inter disciplinary approach, as it encompasses every aspect of life and its surroundings. Accordingly, contemporary environmental legislation requires a consultative approach in order to secure a change in the traditional attitudes and approaches to present day environmental problems which have arisen as a result of development processes, unsustainable practices in relation to natural resources, urbanization

and population growth; and increased industrial and agricultural production.

- II. The foremost challenge faced by contemporary legislation in developing countries is to strive to achieve an effective balance between environment concerns and development. For example, environmental pollution is an inevitable by-product of economic activity which cannot be completely prohibited or stopped. Of course this does not mean that steps shouldn't be taken to minimize, control or even prohibit where necessary harmful activities. Thus the main policy issue in national legislation should be to prohibit or control activities that endanger the environment without restricting the development process, thereby striving to achieve development which is sustainable.
- III. It is also important for national legislation to be country specific as has been acknowledged even in *Agenda 21*. As the Rio Declaration states:

“Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.”

It is also worth noting that common but different responsibilities of States in the area of sustainable development has also found recognition in Biological Diversity and Climate Change Conventions.

## **LEGISLATIVE APPROACHES TO ENVIRONMENTAL PROBLEMS**

- I. The concept of "environment" includes the physical and social factors of the surroundings of human beings. This places an enormous responsibility on the legislature. It is certainly no easy task which can be dealt with in an haphazard manner. The necessary laws should ensure on one hand that environmental issues are taken into consideration whilst at the same time such laws would not curb industrial development. *Litigation and entitlement Kendra Dehradun vs. The State of Uttar Pradesh* Air 1985 SC 652 was the first case that came up before the Supreme Court of India in which this conflict was sought to be resolved. The Supreme Court noted the havoc caused to

the environment of the region by mining operations. One of the three limestone quarries was found to have caused substantial harm to the ecology of the region, and a closure order was issued by the Court. The few quarries that were permitted to continue were directed that they should take into consideration the ecological needs of the region.

- II. In many countries in Asia the respective Constitutions acknowledge the importance of the preservation and protection of the environment while national legislation addresses issues pertaining to sustainable development which is described as development that meets the needs of the present without compromising the ability of future generation to meet their own needs.
- III. It is of utmost importance for the Legislature to realize that the failure to adopt a holistic approach to the conflicting issues involving environment and development can cause problems which hinder the path to sustainable development in developing countries. Thus the problem of balancing these ecological imperatives with the development needs of the country represents the greatest challenge faced by the modern legislatures.

## **MODERN LEGISLATIVE TECHNIQUES FOR ACHIEVING SUSTAINABLE DEVELOPMENT**

### **1. Framework Law**

Many developing countries depend on “framework environmental law” for environmental management. Such legislation usually have provisions spelling out the national environmental objectives and policies, the establishment of implementing agencies, cross sectoral issues such as - Environmental Impact Assessment, environmental quality criteria and public participation in decision making and implementation. More often than not such framework legislation doesn't give much detail and hence requires further enabling legislation. The advantage of adopting the framework law technique is its flexibility so that the main legislation can remain unchanged while ever changing social, economic and ecological factors can be taken care of by subsequent implementing regulations.

### **2. Licensing and Standards Setting**

This technique is commonly used for controlling pollution in air, water, marine pollution, solid waste disposal etc. and the conformity with standards is achieved through a system of authorization like permits, licenses, etc. issued

by Government departments or agencies. However, the Legislators should be careful to ensure that these standards are cost effective and implementable without causing unbearable restraints on the developer, so that country's national development process would not be adversely affected. Further, the standards should be within the technical capabilities of each country. To blindly follow the standards which have been set in developed countries can cause disastrous consequences to the national economy of a developing country. In Sri Lanka the National Environmental Act (Section 32) empowers the Minister to exercise wide regulatory powers to control pollution. However, it appears that there is an emerging trend to move away from the old bureaucratic approach and to follow a collective approach to standard setting. This trend is reflected in the draft National Environmental Protection Act (see Sections 25-34) prepared by Sri Lanka's National Task Force, in that it provides for the views of the private and public sectors to be taken into consideration when establishing, prescribing, re-visiting and adding to standards criteria etc.

### **3. Regulatory Mechanisms**

Different jurisdictions in Asia have applied various regulatory mechanisms to address the issues connected with sustainable development such as land use, planning, zoning, licensing and standard setting, environmental impact assessment, incentives for compliance and public participation.

(a) Land use and Planning is an important regulatory measure for the purpose of achieving sustainable development. The evaluation of land, the alternative patterns of land use and other social economic considerations such as adoption of land use types compatible with sustainable resource utilization are important aspects of a proper and effective land use planning. In addition, a land use plan can again be sub-divided to accommodate zoning for residential, industrial, agricultural, and forestry purposes. So that after such a declaration all polluting activities can be either restricted or prohibited by appropriate regulations, in appropriate zones.

(b) The EIA process is a mechanism used in national laws in many countries for the purpose of integrating environmental considerations into national social-economic planning and finding best project options in both environmental and socio-economic terms. EIA can serve an integrative and preventative role in development planning as it requires public participation, inter-sectoral co-ordination and the consideration of alternatives. However, the main draw back of this mechanism as seen in developing countries is the natural inclination of the investor to pursue profits at the expense of even irreversible environmental degradation because EIA is a part of the project preparation and can involve high costs. The opinion of the people most likely to benefit from a proposed project could seriously influence the EIA process. Sri Lankan experience with regard to Katunayake Express Highway, Marine

Drive, Kotmale Hydro Power Project illustrate this point and also the case of *Shehla Zia and others v. Wapda S.C.* of Pakistan. The element of public involvement in the EIA process contributes to better informed and more balanced decisions by the decision makers.

#### **4. Incentive and Disincentive Mechanisms**

This is yet another method adopted in contemporary legislation as a means of achieving sustainable development. Incentives such as user pay schemes and disincentives such as the polluter pays principle have gained much popularity among the contemporary law makers. Some Governments have even dealt with certain consumer practices that contribute to pollution by imposing direct taxes on products that are considered environmentally unfriendly.

For example, the Government of the Republic of Korea was considering imposing a tax on disposable items as it is the consumer who pollutes by purchasing disposable items. Another method invented to encourage the development of environmentally sound products is to grant eco-mark labels to such products. Such a programme has commenced in the Republic of Korea and also in India from 1993. In certain countries like India and Malaysia legislation allows the Government to pursue the polluter and recover the expenses incurred by any Government authority or agency to remedy or clean up environmental damage caused by the activities of the polluter.

#### **5. Sanctions and Penalties**

In situations where voluntary compliance cannot be achieved environmental legislation depends on administrative, civil and criminal penalties to attain its objectives. However, their effectiveness as enforcement tools may not be that effective due to several reasons including the socio-economic realities in developing countries which leaves room for exploitation. Accordingly, consensual partnership and collective responsibility for management of environmental and development seem to be more appropriate and a more effective approach to achieve the goals of sustainable development.

Finally, it may be noted that legislation by itself can achieve very little by way of social regulation, and that it could only be treated as an integral part of a multi-dimensional process towards achieving environmental and economic goals of a particular country. However, implementable legislation which has gained public support and consensus could be an effective means of promoting the goals of sustainable development.

## **V. CLOSING SESSION**

## **CLOSING REMARKS**

**HON. MR. JUSTICE A. R. B. AMERASINGHE**

**JUDGE OF THE SUPREME COURT OF SRI LANKA AND  
SECRETARY-GENERAL OF THE SYMPOSIUM**

It had been originally planned to have an entire session of this Symposium for consideration of plans for the future. However, certain logistical problems have compelled us to abridge the proceedings and accelerate the conclusion of the Symposium. Essentially, my task as Secretary General has been to assist the South Asia Co-operative Programme (SACEP) and the United Nations Environment Programme (UNEP) in planning of this Symposium over the past several months and helping to structure it and keep it moving along notwithstanding some unexpected difficulties sometimes of a fairly serious nature from time to time, and even after the Symposium got under way. If my UNEP/SACEP colleagues and I succeeded in giving you the impression that all was well and that we were gliding along nicely and effortlessly like graceful swans on a tranquil pond, we are happy, although we don't mind telling you that although your work, not ours, is almost done and therefore cannot affect your work, that there was an awful lot of hectic paddling going on under the mirrored surface. Judges of course know exactly what this means - we do this all the time, don't we? You will not doubt recall that Lord Pearce and Megarry expressly admitted the swan phenomenon and I shall advert to this again. But for the present since I shall not speak again, let me formally record my thanks to the South Asia Co-operative Environment Programme (SACEP) the United Nations Environment Programme (UNEP) and the Norwegian Agency for Development Co-operation (NORAD) for enabling us to hold this meeting that has been repeatedly referred to, and in my view adequately referred to, as an unique event and an event and an event of great significance. Was the Symposium a success - that is a matter for you to judge.

There are many people in the Government, in the Ministry of Forestry and Environment, the Ministry of Justice, the Ministry of Foreign Affairs, and the Ministry of Defence, the Immigration, Customs and Airport Authorities, and outside including my Private Secretary, the Staff of SACEP Colombo, the cheerful group of Liaison Officers from the Law College, the discreet Security Staff of the Management and Staff of Trans Asia Hotel who have in several different ways at different levels made this Symposium what it has been. To each and everyone of them I would like to say 'thank you'. I would be failing in my duty if I do not specially refer to the unremitting dedication, care and attention given to every minute organisational detail given by Mr Lal Kurukulasuriya and Mr Prasanthia Dias Abeygunawardene. I should like to thank His Excellency, Judge Weeramantry, Vice-President of the International Court of Justice for generously accommodating the Symposium within his busy schedule. Your

presence was, for all us, Sir, a great encouragement and your wise guidance both during your formal interventions in this room and during informal discussions has been a source of great inspiration and encouragement. For readily having undertaken to chair the meetings and function as Moderator at short notice in addition to making your scheduled contributions, I can only say this - Your Excellency has placed us all very heavily in your debt. Thanks are also due to the Hon Chief Justices and other Hon Justices and Judges who graced this occasion and we significantly advanced our knowledge of the problems that confront us and the means and the techniques for their solution. Your most valuable papers and interventions during our discussions was, of course, the most valued of all inputs. It was what the Symposium was essentially about.

I must of course refer to our Resource Personnel, the Hon Attorney General Mr Sarath Silva and his staff who with UNEP put together the compendium. Functioning as Resource Persons, The Hon Sarath Silva, Professor Mohan Munasinghe, Mr Justice Paul Stein, Prof. Nicholas Robinson, Mr Donald Kaniaru and Mme Beesoondoyal have all placed us heavily in their debt. No words of thanks howsoever eloquent or praise, howsoever fulsome, can we add to it.

As we reach the final moments of this Symposium I should like to make some very brief observations. Some of them are obvious, but nevertheless if I may respectfully say so, need to be stated, for at the very heart of the crisis lies the fact that what is supposed to be fundamental and therefore obvious is being overlooked. How else may a reasonable man or woman explain the fact that, despite what was seriously and solemnly declared at Rio in June 1992, the recent review during the past few weeks at the United Nations at Rio + 5, discloses the disturbing fact that there has not only been a lack of improvement, but that there has been a serious deterioration of the environment during the past 5 years. Dangerous levels of pollution in water, air, earth and living beings. Major and undesirable disturbances to the ecological balance of the biosphere, the destruction and depletion of irreplaceable resources, gross deficiencies harmful to the physical, mental and social health of human beings in the environment, we have created. That is not my private opinion. It is the publicly stated view of informed commentators, based on evidence painstakingly, systematically gathered over the years and scientifically analysed. We have all had various pieces of legislation. Several hundred of them in some jurisdictions, enacted from time to time to remedy specific mischief relating to various aspects of the environment. Some of them, notably those concerned with the Abatement of Nuisances have been on our Statute Books for a very long time. Admittedly, due to the erosion of monetary values the penalties have long ceased to be effective from the point of view of deterrents. It is a simple matter to put that right. However, more importantly, on account of their growing size and complexity in recent times, the problems have come to be seen as going beyond one's backyard, beyond one's street and city, district, province and state or nation. In the past two or three decades we, as human kind, not merely irritated private individuals have come to realise that there is a need, an urgent need, for a common outlook and



common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment.

As the United Nations Conference on Human Environment declared at Stockholm in 1972, it is an accepted fact that both you and I are creature and moulder of our environment which gives us physical sustenance and affords us the opportunity for intellectual, moral, social and spiritual growth. Through the rapid acceleration of science and technology we have acquired the power to transform our environment in ways on an unprecedented scale. Our capability to transform our surroundings if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. It can seriously undermine our well being, radically curtail the enjoyment of our basic human rights, and even impair and imperil the most elementary and fundamental right of all, the right to life. Every nation must try to safeguard and improve the environment. Yet, those of us in the less developed countries where millions of people continue to live far below the minimum levels required for a decent human existence, deprived of adequate food, clothing, , shelter, education, health and sanitation, the task of achieving social progress while safeguarding and improving the environment, the task of achieving sustainable development becomes a formidable almost daunting task. Nevertheless, we must face the fact that it is the desire of the peoples of the whole world and it is the duty of governments in developed as well as developing nations to protect and improve the human environment.

What is our role as Judges? Naturally we would like to find out what views our colleagues hold. We should always give them the most respectful and careful attention. Those are our traditions. Yet, eventually, in my view it is a question to be answered by each judge for himself or herself at whatever level, be he or she Chief Justice or recently appointed Magistrate. There can be, in my view, no such thing as a universal, regional or even national approach. Our independence as judges in my view, permits us no other course. There was a time when it was said, and perhaps honestly believed, that the ideal judge was a person whose mind was a *tabula rasa*. However, as Mr. Justice Rehnquist pointed out in his famous memorandum in the *Tatum* case, proof that a judge's mind was a blank at the time the judge assumed judicial office would be evidence of lack of qualification, not lack of bias. I must add that I entertain great reservations about his failure to recluse himself, but that is another matter.

As judges I feel it is necessary for us in exercising the judicial power of the people to be aware of the context in which we are called upon to discharge our duties. On the other hand we need to be cautious. We have our work cut out for us by the Constitution and by tradition, and we must not trespass upon the domain of the legislature and the executive. In his paper Mr Justice Kipral of the Supreme Court of India succinctly referred to the matter by emphasising the need to remain within the domain demarcated for the Judiciary by the Constitution.

There are some people who will urge judges to become activists. I find this utterly repulsive. While noting with great satisfaction, the observation of Professor Robinson that judiciaries of our region are looked upon with some admiration for their enlightened approach to the problem of sustainable development, I do not think we should avail ourselves to be blown off course. To suggest that the judiciary has been activists, might neither be fair or accurate. Mr. Justice Kirpal in his stimulating paper explained the position in India in the following words.

“The judiciary has had, in recent times, to give decisions which may give the impression to some people that it is an encroachment in the field demarcated for others. The label of Judicial Activism is given for this process by them. Nothing can be further from the truth. The directions which have been issued in various cases are in effect in the nature of continuous *mandamus* directing the authorities to do their duties and fulfil their obligations as contained in their laws. Policy is not a matter for us. Our function is to interpret and give effect to what is contained in the laws as sensitively and as imaginatively as possible, but within the framework of established laws, rules, principles, and canons of construction. As every judge knows, there is a great deal of work which we can usefully and legitimately do without being black letter literalist lawyers on the one hand or on the other, venturing into forbidden territory. In the process of exercising our legitimate functions in a permissible manner, important changes have been brought about by the judiciary. The development of the concept of strict liability, to take account of *Rylands v. Fletcher*, could not adequately deal with this significantly, yet in a perfectly acceptable manner enlarged the basis of liability.”

The ‘Polluter Pays’ principle in awarding relief and the precautionary principle in the matter of proof, have gone a long way towards fulfilment of public expectations. On the other hand when you recall the fate of Justice Thomas Burger of Canada and Chief Justice Neville Samarakoon of Sri Lanka, we must surely realise that if public confidence is to be maintained, if we are to retain our usefulness as independent judges, if we are not to be progressively stripped of our powers by legislative intervention, we must, I submit, tread warily. The famous words of a great Sage come to mind : “God give us the serenity to accept the things we cannot change, Courage to change the things we can, and the wisdom to know the difference” and when we make the changes we can make, let us do so without fanfare, eschewing the temptation of headline hunting. Let us, whatever furious activity lies underneath, glide smoothly like swans in the discharge of our duties.

There is another matter to which I would like to refer. The use of case law in other jurisdictions. Certain academics and writers in our Press are often critical of our decisions, pointing to the alleged superior ways in which matters have been

dealt with by so-called more enlightened judges elsewhere. Even though the decisions of other courts are not binding, we are only too happy to see how our colleagues elsewhere have dealt with similar questions and allowed ourselves to be guided by them in appropriate cases. However, as we have known all along and have seen during our Symposium, the framework, language and political background of the constitutional and legal instruments are not the same. It seems to me therefore that universality and uniformity are out of the question as far as a detailed understanding of interpretation and application of the law is concerned. On the other hand, where legislation is based on a particular international instrument and I think we may all be called upon to deal with that increasing amount of such legislation as regional and international instruments proliferate and States undertake to give effect to them through national legislation, relating to the major concepts underlying such instruments will I think be highly relevant and persuasive, even though, the autonomous meaning of each piece of domestic legislation may be insisted upon. Divergencies are bound to exist for each Court, and each Judge must act independently. On the other hand, decisions of other Tribunals, divergencies will be reasoned, informed and conscious. This, will, I believe greatly assist us in our judicial work and help to develop International Jurisprudence in the area of growing importance to human kind. In that background I would like to propose the following projects as a follow-up to this Symposium.

1        You have been given the South Asia Handbook of Treaties and other Instruments in the Field of Environmental Law prepared by the South Asia Co-operative Environment Programme (SACEP) and the United Nations Environment Programme (UNEP). I should like to propose that the Handbook be updated and revised once in three years with a list showing the status of each country with regard to accession, ratification and so on. The feasibility of the Handbook covering the Asia Pacific Region deserves serious consideration.

2        Secondly, you have been given a Compendium of Decisions prepared by the officers of the Dept of the Attorney General of Sri Lanka and UNEP for this Symposium. I would agree with the views of some delegates communicated privately to me, that we should have a comprehensive Asia-Pacific Environmental Law Report. The first volumes should, in my view, contain the full report of the decisions of the superior courts up to and including 1996. Thereafter there should be an annual Asia Pacific Environmental Law Report.

3        Thirdly, I propose that there should be published a comprehensive Asia Pacific Collection of Principle Domestic Environmental Legislation up to and including 1996. There should be an updated version every three years. There were suggestions that there should be some networking, but that pre-supposes the existence of national focal points and Centres of Excellence for the preferred course of international practice is not to create new institutions but to use existing ones. Can you identify such institutions specifically within the judiciary in your countries? Is networking in the field of Environment Law necessary?

4        Finally, there is the question of regular meetings of the sort we are concluding. I would urge you to express your view on the value of regular meetings of the judiciary on the vital question of Sustainable Development, the foremost and ultimate aim of every Government. After all, it is the judiciary that is eventually responsible for giving effect to the policies of the Executive as enacted by the Legislatures of our country.

I thank you

**CLOSING ADDRESS BY**

**H.E. JUDGE CHRISTOPHER G. WEERAMANTRY**

**Judicial Opportunities of Enriching Modern Law Through Ancient Wisdom**

Thank you very much, Justice Amerasinghe. It has been a great privilege to be able to participate in this fruitful seminar which has thrown up so many ideas and so many matters for reflection in connection with the environment. I think many of us will go away much the richer for all that we have heard and for the discussions we have had. Trying to draw this all together is a difficult task, but perhaps I might start with some general reflections.

Much of the pollution that we see around us today is due to the progress of science and technology. When one reflects on this matter, one comes away with the idea that science and technology in our present 20th century civilization have run away from all controls. In older civilizations there was at least some attempt to restrain science and technology and contain it within the social framework, but the power of modern technology is such that it has raced out of control and consequently the law is unable to exercise any kind of restraints upon it. Philosophers on the history of science point out that modern science in the West has exhibited this phenomenon, but that that was not so in the case of other manifestations of the scientific spirit. For example, there was a great deal of scientific learning and invention in Chinese civilization. Likewise, in Arabic civilization. Even inventions like the mariner's compass, printing and gunpowder came from China. But so long as they were within that civilization they were kept contained within the matrix of that civilization and within its accepted standards and mores for centuries. Yet the moment these ideas and inventions got to the West - and that has been pointed out even by Francis Bacon - they turned society upside down because technology raced out of control and broke through the social framework. The restraining moral influence of society was not able to hold them in check, and in consequence we face the phenomena with which we have been grappling at this Conference - that technology out of control is turning back upon society and destroying the moral and the economic base of society, although it should only be an implement for betterment of the human condition. Philosophers of science trace this back as being possibly due to the teachings of Francis Bacon who taught that the progress of science should be unimpeded by all the restraints of what he described as the idols of the tribe, the idols of the market place, and the idols of the den. Free yourselves of superstition and other antiquated beliefs and prejudices and just go ahead in the pursuit of truth. That teaching of Bacon is believed to have liberated Western science and ever since then science has raced out of control.

Now, what can we do to bring it back within social controls? Well, one of the important agencies we have for this purpose is the judicial process, and that is why an assembly of judges such as this is of particular value. The judicial process is one of the few instruments we still have available for ensuring that these various activities that inflict damage on society are kept within the law. The courts can be a restraining influence ensuring that the felt mores of the community and the social interest are not disregarded.

Those who philosophize on the judicial process have pointed out that the judicial process is not merely a scientific, fact-finding sort of 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 three, or four alternative solutions, and one of the tasks of the judicial function, as it is understood today, is to make a choice between the different alternative results that might equally well be available in terms of logic and the law. Judicial philosophers like Justice Cardozo and Justice Holmes, together with many others have pointed out that there are many factors - sociology, history, custom, the *mores* of the community, and so on - which the judge does use and which the judge might be invited to use in order to make those judgments which would be in the best interests of society.

Of course, the judge is not a legislator. The judge, unless he has specific power so to do, would not overturn legislation. But within legislation and the law, he has a power to mould emerging principles of law and give them a sense of coherence and direction. That moulding power is very important and that is what I think can be usefully stressed at a gathering of judges such as this, for we are at the frontiers of an important developing section of the law, namely, environmental law. At this frontier, the judiciary may well be moulding the law of the future. They have the ability, within the legitimate scope of the judicial function, to build the law in this way. Within the law, there may be many alternative choices which they must make. They make their choice by a process of value judgment which is influenced by their assessment of what is best for the community. When we have seminars like this, we highlight, through multi-disciplinary studies of the problems, what is best in the environmental interests of the community. Science and technology, sociology, economics, ethics, philosophy and comparative approaches are all studied, and the judges then have the opportunity of giving practical effect to the best solutions in the context of the very specific problems that may arise. In doing so, they will be guiding the law and giving it clarity. At this seminar, we have dealt at great length with the traditional values of our region and we have drawn out - I will expand on that in a little while - a number of very important values which tend to be submerged under the influence of the

individualistic legal philosophy which we have recently imported from Western systems. So, let not our traditional value systems be submerged in this new culture of heavily individualistic legal doctrine which seems to be in many senses a retrograde step. And it may be that the judges are one of the means by which we can reassert some of our very rich traditions.

Many speakers have given us insights into their different legal systems and one could collect a cornucopia, so to speak, of important traditional ideas which are of special value in the field of the environment. I give you just about a dozen or so of them that have emerged in our discussions, all of them deeply rooted in the traditions of our region. First of all, the very concept of development and of a sustainable system goes back to our ancient traditions, and as I have pointed out, there are numerous instances of the needs of conservation and the needs of development going hand in hand. There were various principles of what we would today call environmental law which are recognized by Royal Edicts, and by customary law in those communities. At the same time, those sovereigns who reigned during those periods were no laggards in development. They pursued development with all the resources and all the technology available in an amazing manner, with intricate irrigation systems. So development and conservation went hand in hand. That is one important lesson we can learn from our culture.

Second, we have the important lesson of trusteeship which is one of the central planks of environmental law today.

An evolving principle of modern environmental law is the principle of intergenerational rights. That was a well recognized concept in our traditional systems and is thus a third principle we can extract from our cultural inheritance.

Fourth, there is the principle of respect for all forms of life. Our traditions and our religious scriptures refer to all life with reverence and respect.

Another concept is that of use of resources without waste or destruction. The idea is that we should keep them intact for an indefinite period of time. Do not use it if the manner of your use is to destroy it. As the Attorney General said today, we should not cannibalize our resources. Many ancient cultures are rich in that tradition. Perhaps I should remind you in that respect of the Native American tradition which says that you should not conduct any activity upon land without considering the impact of what you are doing for seven generations. That principle is well documented, as far as the Native American custom is concerned. Likewise, we have similar ideas in our legal systems which preserve the environment for the use of future generations - for hundreds of years if not millennia. This leads to another principle, namely, that one should aim at maintaining a stable lifestyle.

Stability in the use of resources is vital as a test of whether technology should be permitted or discouraged. If those resources are destroyed, there is no stability of lifestyle.

Yet another principle is that land has a vitality of its own. Land is a living thing. It grows with the people. If it suffers, the people suffer; if land dies, the people die. So there is the principle of treating land as an integral part of the community, rather than as an abstract item of property which you buy and sell like an item of merchandise over a shop counter. That idea has come to be attached to land under the influence of western concepts, but we have to reintroduce the old concept that we treasured so much, of land being treated as much more than a saleable item which passes from hand to hand like a common commodity.

A perspective of great importance we can derive from traditional law is the view of law as not restricting the benefits it confers to human beings. Humans are not the only bearers of rights. There is the old idea in our traditions, which has been recaptured in some modern western writings, that all living things have a place in the universe and therefore have to be protected from wanton destruction. There is an article by Christopher Stone which was referred to by Justice Douglas in a judgment of the United States Supreme Court, titled "Do Trees Have Standing?" That concept is a deeply Buddhist concept. It is a concept found in various religious traditions that attach importance to every form of life.

One of our distinguished delegates referred yesterday to the statement in the Koran that everything that has been created has been created for a purpose and so must be respected. So the underlying idea was that you should not in your vision of rights and obligations concentrate only upon humankind. There is a broader canvas you must have in mind. Likewise, you must bear in mind that, even if you are thinking of humans, you should not restrict your perspectives to humans who are now alive. The human community does not begin and end with those who are alive now. There are those who have gone before us, and those who are to come after us to whom we owe duties.

Then, again, our traditions are rich on the concept of duties, rather than rights. In the sphere of the environment, duties become of much greater importance than in most other spheres. If you concentrate solely upon rights, you tend to exercise your rights to the limit of their logic and, in consequence, you cause enormous devastation of the environment. The idea that animal life must be protected and the idea of bird sanctuaries and game sanctuaries reach back deep into our ancient history.

There are also many practical problems associated with development. One of the problems of development is what do you do with the waste? What do you do with the by-products of your development project?



The development projects of the ancients were mainly irrigation works and one of the by-products of irrigation works was silting. They were extremely conscious of the silting problem. Even in modern irrigation works, this presents a great environmental problem. The ancients had their answers to the silting problem with various devices and practices and customs in relation to how to deal with silt.

We also have the benefit of our ancient writings which record some of the philosophy of those times. In Sri Lanka, for instance, we had our ancient chronicle, the *Mahawansa*. This chronicle records that the purpose of all our irrigation development is the betterment of all living creatures. That was the broad objective to which development was dedicated as understood then.

The conservation of the forests was another environmental principle which was deeply respected, and we had very useful contributions in this regard from different countries of our region. The prohibition of felling of timber was an aspect which was very zealously guarded in the ancient days to the extent that certain forests were declared to be totally protected from felling. Then, again, the idea of the collective aspect of rights was emphasized, rather than the individualistic aspect of rights. The idea of group rights was strongly entrenched, for we are all members of a community, rather than islands on our own. As the poet said, "No man is an island unto himself".

The importance of the group to which one belonged - such as a small rural community - resulted in a constant stress on the duties towards one's group and one's neighbours. This concept is very important in all modern environmental law. It is a fundamental duty under modern law that "One must so use one's property as not to injure one's neighbour" (*sic utere tuo ut alienum non laedas*). This basic principle of modern environmental law was deeply ingrained in our traditional legal system.

Old notions as to who your neighbour is must be considerably expanded as a result of modern technology and all of us are familiar with the case of *Donoghue v. Stephenson* and the way in which Lord Atkin extended the ambit of tortious responsibility in English law by asking the question "Who is my neighbour?". He offered an extended answer to that question, in the sense that any one who may be affected by my conduct is my neighbour - any one who could foreseeably be affected by my conduct. Technology has expanded to such an extent today that practically everybody in the world is my neighbour. If we perform some action in South Asia, for example by felling some of the forests there, that action has its impact on people as far away as China and Brazil. So the whole world has got closer together. The world has shrunk and environmental law gives an expanded meaning to the word "neighbour". This is in accordance with what our traditional systems

emphasize, that everybody is our neighbour, e.g., the ideas of Buddhism that we owe duties to everyone.

I think I have given you 14 or 15 environmentally-related notions of our traditional systems. Let me offer another final example - the idea that the maximum value must be taken for the benefit of everybody from all species and from all the resources that are available to us. This is typified by an edict of one of our outstanding kings which said that "No drop of water should flow into the sea without first serving the purposes of man". Likewise, all the various medicinal and other species which can be of use to humanity must be used and preserved for future use. And we know that one of the great environmental problems of today is that, as a result of the destruction of the great tropical forests, numerous species of plants that would be of use to humanity from a medicinal point of view are being lost. In the ancient days we even had special plantations of these medicinal plants, so that they could be of use to everybody. That is the idea which Mr. Kaniaru mentioned, of the number of plant species that were useful in the old days, that were actively used then and not used today.

All of these ideas are part of the traditional wisdom which for some reason we have neglected. We have permitted these ideas to lie buried, but it is time that we resurrected them and engrafted them upon our legal systems. The people who can do that best are the judges. That is one message that I would like to convey to the judges of the region. You have a unique opportunity, as heirs to this infinitely rich heritage, to try to remedy the break that has taken place when western legal systems were introduced into our part of the world. They marked a sharp break from tradition which was most unfortunate. In some countries of our region, such as Bhutan, there has been a conscious effort to avoid this break from the past. We suffer in many of our legal systems from a severance of the past from the present through the sharp introduction by the colonial system of a western legal system, with western values and western concepts. That made us forget that we had a rich traditional inheritance containing all these principles which are of such value in our legal systems, and that has led to some of the judicial blindness that Justice Stein referred to. The judges can sometimes be blind, because they tend to adhere to the letter of the law. They may not therefore see the overall perspective. They see the man who steals a loaf of bread as committing a greater crime than the man who despoils the countryside. The latter is permitted by the law, but not the former, however hungry that first man may be and however greedy the second. The judges sometimes do not see this aspect, because the legal system does not see it that way. Indeed, if you go back to 19th century England, one knows that a starving person could be transported for life for stealing a loaf of bread, for instance, whereas a man who despoiled the common got away scot free. There is an old rhyme of that period that captures that judicial blindness in this way:

“The law locks up both man and woman  
Who steals the goose from off the common  
And lets the greater felon loose  
Who steals the common from the goose.”

So, if you punish the man who steals the goose, but you do not punish the man who destroys the whole common - that is part of judicial blindness which sometimes manifests itself in the area of environmental matters. At a Judicial Conference, it is well that we bear that aspect in mind.

This Conference has been extremely rich. It has yielded a crop of new ideas, and there would scarcely be time to go through all of them. Among the new ideas, there is what Professor Munasinghe referred to as the “tunnel of safety”. The “tunnel of safety” is a means of overcoming this notion that we have to go past the barrier of danger before realizing that we are on such dangerous ground that we must therefore turn back. We must devise means of turning the curve back before we reach the level of danger, and of tunnelling to safety before we reached the level of danger. That was a very important idea emanating from Professor Munasinghe’s paper. He told us that we could have a ten-fold increase in the availability of resources and generation of power if we took due precautions. With controls we could hold the situation to what it is now and, with better control resulting from the tunnel of safety, we can even reverse the damage that has been done.

Another idea emanating from his paper was the gradient method of taking our bearings. In environmental matters, it is often difficult to know exactly whether the route we are taking is correct. We will find it by trial and error, and we are probably on the right route, so long as we are ascending all the while. Let us not lose our way merely because we feel that our ultimate direction is not clear. We know where we want to get, but let us keep ascending slowly and not slip downwards. It helps greatly to have the gradient method constantly in mind.

There were lots of other interesting ideas. I think it was Justice Gopal who referred to the “spider’s web” theory that, whenever you touch the delicate fabric of the environment, you do not know where the tear will occur. It is like a spider’s web. Once you touch it at one point, damage will occur at another point, however remote and however unforeseeable. The environment is an infinitely intricate web that is so delicately woven together.

Another important idea that emanated from the Indian presentation, which I think we should carry to our respective jurisdictions, is the question of environmental education. India, through the action of its Supreme Court, has made environmental education compulsory - that is a wonderful idea. But I would go further and say that it is useful for us to include in all of our

university and other courses an element of the environment and of the social responsibilities of citizens, especially in science courses. I have tried hard to get this done, but not with much success. You find university courses, on engineering for example, structured for five years, but not one slot is provided in that five-year course for the social responsibilities of the engineer. Likewise, in medical courses, you do get courses on medical ethics in a very narrow way, but not the greater panorama of a conspectus of the doctor's social duties.

Likewise, I criticize legal curricula as well, because I think the courses that we offer in our law schools tend to be far too narrow and confined to the black-letter law. We do need to introduce philosophical concepts and also ethical components into our legal courses. So, right through the whole structure of our education, we must introduce this social service component, and a fine vehicle for doing so is through environmental matters, because everybody understands the importance of the environment.

Then, again, we were told of the idea of inter-disciplinary committees being set up. The Supreme Court of India was instrumental in bringing these into existence but, on a wider scale, we should promote the idea of cross-fertilizing the disciplines. There is so much the theologian can teach us, so much the ethicist can teach us, so much the sociologist can teach us, so much the scientist can teach us. We must pool this fund of information if we are to get the best possible result.

Another idea that came out of our discussions is an idea pertaining to the judicial process. It was in relation to the judicial method of investigating a science-based matter. I think in all our countries, we have the adversarial system of judicial proceedings. This is not necessarily the best system for the ascertainment of scientific truth. The adversarial system tells us which of the two contending parties is entitled to success. There is, for example, a case between A and B. A does not lead certain evidence. The judge does not have the power to summon witnesses on his or her own initiative because the judge is not an investigator. The judge is more like an umpire who decides which of the two parties ought in fairness to succeed. Adversarial judicial procedure lets each party present its case and does not interfere. Active intervention may be possible under the inquisitorial system, but not under the adversarial system. So the judge has to be content with the case that is placed before the Court by the parties, and judges accordingly on the evidence the parties make available. If the parties do not produce certain vital evidence, the judge's horizon is restricted. The case has to be determined without that vital evidence. Moreover, each party produces the evidence that suits his or her case and is not anxious to offer all the evidence available, especially if that evidence may damage the case presented. The judge then determines the case on that evidence. Now, that is far from the way in which you ascertain

scientific truth. Scientific truth has to be ascertained on the basis of all the material available.

Again, there are strict rules of civil procedure and of evidence. For example, I will not be permitted to produce a copy of a document in my adversary's possession if I have not given notice to my adversary to produce it. I may not be allowed to produce a document which I have not listed in advance. There are various rules of that sort. If I have made representations to the other party on the strength of which he has acted to his detriment, the judge will prevent me from going back upon those representations in court. Rules like that, procedural rules, rules of evidence, rules of estoppel, and so on, are fine as between party and party. They serve well for determining which party should succeed. But where the matter involved goes beyond the interest of the two parties, as is the case in environmental matters, those rules will just not work. The community has an interest in environmental matters, and merely because one party is estopped or has been negligent in producing relevant evidence, that should not debar the court from looking at those matters. The court must always be conscious that, in the language of international law, which I think should also be a part of domestic law, environmental law involves matters *erga omnes*, i.e., matters which concern all people.

Adversarial litigation is *inter partes* - it concerns only two parties - only two parties go before the court. So you cannot apply *inter partes* rules in deciding *erga omnes* matters. There is a logical fallacy in applying *inter partes* rules to *erga omnes* matters, but we often tend to slip into that fallacy because we are not always conscious of the difference. So that, again, is an area which I commend to the judges for their consideration. So, also, I commend for your attention the problem of understanding the true nature of the judicial process. In its true nature, it is a choice of *fairness* between *two* contending parties, where *value judgments* may be used in making your choice. The italicized words indicate aspects which are altogether inappropriate for scientific fact-finding in matters involving the entire community.

Perhaps I should have mentioned the name of Professor Julius Stone in this connection. Professor Julius Stone's treatise, *Legal Systems and Lawyers' Reasonings*, exposes the various errors that follow from the commonly held misconception among judges that they decide their cases by a process of pure logic. This whole book is devoted to showing that it is not by pure logic that judges decide cases. In fact, Professor Stone has told me that he used to hold seminars for judges to disabuse their minds of what he calls "this childish fiction" that they decide cases only according to logic and the letter of the law. I think these perspectives are important for the judicial process in our region.

Another factor that has emerged at this Conference is that the orders that the judges can make can be much wider than we have traditionally thought them to be. The Indian Supreme Court has indicated to us so many valuable areas to which the judicial writ could extend, including community service orders, closure orders, and writs of continuing mandamus. The Attorney General has told us about incentives and disincentives to proper environmental conduct. I think these are not merely legislative ideas, but can also be embodied in judicial decrees. We have also discussed penalties, such as that your power supply may be cut off, or that there will be a closure of your mill if you do not comply with a particular order. All of that could well be within the proper sphere of judicial authority. Judges need to consider these in working out the extent of their jurisdiction and what they can do for the benefit of the community through their judicial orders. They ought not to restrict themselves to the traditional types of judicial orders that were made under a particular historical or cultural background such as that of mediaeval England, which evolved certain of its legal remedies under very rigid constraints. In legal history, one will find that judicial inventiveness has often devised new remedies within the ambit of the judicial process. The great growth of equity jurisprudence in England was due to judicial initiative and imagination, of course always acting within the law. In the environmental field, there is much scope for similar action.

There are a number of topics which have emerged which call for a deliberation among our members, for example, the concept that development is not an enforceable right. To what extent can development or the right to development be made an enforceable right? To what extent can cultural traditions be brought in? To what extent can the public trust doctrine be brought in through the judicial process? To what extent can the role of the judiciary be kept within its sphere without trespassing on the sphere of the executive? The latter issue was very sharply raised at the Conference, and I think, now that we have made a beginning at this Judges' Conference in this area, it could be an area for on-going discussions. It is a very sensitive topic, and one to which the judges must give their best attention.

If I may digress for a moment, we have at this Conference achieved, perhaps for the first time, a dialogue among the judges of our region on problems specific to our region. Our region constitutes, shall I say, a very special cultural universe in itself. It has a commonality of background and when the judges of this region, with this common background, meet together to discuss common environmental problems, they will be able to enrich each other's thinking in a manner we cannot now comprehend, but will only emerge as we proceed. So, I do hope that what we have launched at this Conference will only be the beginning of an on-going series of exchanges between the judges, by which they will expand their understanding of the problems of this region and increase the ability of the judiciary to handle them.

There has been a great clarification of issues as a result of this Conference. An important concept stressed here is that environmental growth and economic growth do not have to be in opposition to each other, but can be complementary to each other. That is an idea which Professor Munasinghe elaborated upon. We must break away from the traditional assumption that environmental protection and economic growth are values in opposition to each other. And through our judicial thinking, we can show how they can be harmonized.

Another question that was clarified was the way in which the economic system fails to recognize accountability. A person can often pollute the environment with impunity. For example, in the case of pollution of a river, there may be no way in which the person 100 miles downstream who is adversely affected will be able to pinpoint a particular person as the source of this trouble. The polluter can often get away, especially if he has large financial resources at his disposal. It is also very easy to get away from responsibility under our modern corporate law. The multiple screens of corporate registration can effectively hide the actual wrongdoer. In fact, some of the very big corporations in the world have over a thousand registrations, and to research those registrations alone is the work of a lifetime. There are some registrations which the whole Justice Department of the United States has been researching for years, because a thousand interlocking registrations in 25 different countries make it difficult to untangle one from the other. One registration may be wrapped up in another, which itself is wrapped up in another, and the whole structure is so complex that it is very difficult to get to the actual perpetrator of the wrong.

All these camouflages that modern law has erected to screen the wrongdoer from the effect of his wrongdoing have to be broken through, and we have to realize that the legal system contains within itself many ways in which wrongdoing can be concealed. The judiciary often has the task, of course, of ascertaining responsibility and apportioning blame. I think the legal system, both the legislature and the judiciary, working hand in hand, will need to make special efforts to pierce these screens and track down the actual source of wrongdoing. That is most important in environmental matters, because the corporate headquarters that decides in some great capital of the world to release its waste in some Third World country will often function behind multiple screens of corporate protection. It is for us to see in what way accountability can be brought home. That is a great task in which judiciary and legislature can collaborate.

It is the duty of the law to try to seek out the source of wrongdoing, not only in domestic law, but also under international law. International law, recognizes the principle that if you cause harm to anyone, you will be held accountable for that harm. In the *Corfu Channel* case, Albania placed mines in the Corfu Channel and, of course, they did not know whom that mine was

going to strike. Eventually a British warship was struck. When Albania put those mines in the water, it knew it was creating a new danger. That damage would be caused was foreseeable. Therefore, it must be held accountable for the resulting harm. That principle of international law is also a basic principle of domestic law as well, and is one of the prime principles involved in environmental damage. *Sic utere tuo ut alienum non laedas*.

The Polluter Pays Principle (PPP) is also a consequence of that legal maxim. Whoever does the damage has to pay. The case we discussed here of the Maldives, and the catastrophic impact on that country of any rise in the ocean level indicates, in a most spectacular fashion, how those who cause global warming can evade the liability resulting from this basic principle of all legal systems. All legal systems categorically state that whoever causes damage must pay for that damage. The Maldivian Islands are a land surface positioned just a few inches above the water level. They are not in any way responsible for the pollution which causes the depletion of the ozone layer and global warming. They are probably the people least responsible for this phenomenon. But should the water level rise by a few inches as a result of this phenomenon, the Maldivian Islands can be wiped out. The actual polluters are just not identifiable. Is that not a dramatic instance in which the polluter avoids the Polluter Pays Principle? As judges and lawyers coming together, how can we make the instruments of the law better able to do justice in a case like that? That is of course a problem on a magnified scale, but it often comes in micro form, before individual judges. The Polluter Pays Principle must be honoured, not only in its formulation, but in its observance, and the judiciary carry a great responsibility in this regard.

Again, the judiciary is under the obligation to take a common-sense view of matters. Not every matter can be provided for in laws and constitutions. For example, as was pointed out very effectively yesterday, you do not want a constitution to tell us that we have the right to breathe. We all have the right to breathe. And the right to breathe does not mean the mere right to breathe, but the right to breathe so that we do not get ill by breathing contaminated air. The process of breathing should not induce cancer, for example. So the right to breathe, by implication, is the right to breathe pure air. And the right to breathe pure air is part of the right to life, which is guaranteed by human rights and constitutional protections. You do not have to spell out in Constitutions the right to breathe or the right to clean air - but, through normal common-sense interpretation of constitutional provisions, you can get results which are environmentally very powerful.

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What are the institutions we can create as a result of this Conference? Perhaps I should try to categorize it this way - it might have been useful if I had mentioned this much earlier. Sociologists of the law tell us, that if you are examining any legal system, you could examine it in four compartments:

What are the concepts of this legal system?;

What are the procedures of this legal system?;

What are the structures of this legal system?; and

Who are the personnel of this legal system?

When we are dealing with environmental law, we need to deal with all those four departments because we are dealing with a whole system, with a many-faceted impact on society. So we need to examine to what extent our concepts can be improved so that environmental law is better served. To what extent can our procedures be improved and, likewise, our structures and our personnel? Who are our personnel? They are our judges and our lawyers. So their sensitivity to environmental matters must be improved. In all these four departments, we must effect improvements, because a legal system cannot be improved unless you improve all four departments of it. This Conference has yielded rich results in relation to the fertilization of each of these departments of the environmental legal system.

Regarding structures, there is the idea that we had from Justice Stein, of a specialist Environmental Court which Australia has set up and which has worked well for the last 17 years, and has many achievements to its credit. Can we make provision for a court or tribunal, with exclusive jurisdiction over land, water, air, rivers, and so forth? In that way, or otherwise, we can make all courts more sensitive to environmental issues and more aware of environmental problems. Whichever way we do it, if we sensitize the existing judges, we would be effecting an improvement in the area of structures.

Then, again, reference was made to an Environmental Defence Office. Can we not set up some structure of that sort to help people interested in protecting the environment to get to the law? Having fine laws on paper is one thing, but enabling people to reach the legal system is another. And you need some apparatus of that sort to produce this result.

And what about the lawyers themselves? To what extent are they organized? There are many legal professions - the American legal profession and the Japanese legal profession, in particular - which have committees dealing with the environment. In other words, their regular professional associations of lawyers would have committees of lawyers who are specially interested in environmental matters. They make it their special business to

keep environmental matters under surveillance. In all the countries of our region, we should stimulate the creation of committees of the Bar who make the environment their special concern. Lay people by themselves are quite unable to monitor the legal system, so far as concerns the environment, but the Bar can. And a specially interested Bar can do a great deal to unravel environmental problems, and to bring to the surface environmental issues which would otherwise escape detection.

Then, again, we must consider the establishment of Monitoring Committees, Interdisciplinary Committees, Environmental Impact Committees. May I say also that the environmental impact principle, requiring an examination of the environmental impact of a project in advance, is not merely a "once and for all" principle. You do not end the application of that principle once you have conducted your preliminary environmental impact assessment. You do your survey, you give your project the "go ahead", but environmental impact does not stop there. It must go on for the entire duration of the project, because otherwise it would be meaningless. Because every project which may be passed initially may generate its environmental consequences later, there must be some continuous monitoring, and continuous monitoring committees are required for that purpose.

We had from Mauritius the interesting structure of the Environmental Appeals Tribunal and the way in which that has been functioning. That precedent would be of great assistance to all our jurisdictions which may be considering the creation of a Tribunal of that sort. All of these are structures that have emerged which would be useful in relation to the environment.

In relation to concepts, there is the concept of absolute liability which has been well developed in India. If someone brings a noxious substance on to his land and starts meddling with that noxious substance, and someone is injured in consequence, he cannot say, "Well I cannot be held liable, because I took every possible precaution. I was extremely careful." The principle of absolute liability must be brought into operation. So that concept has to be developed and it is very important.

Another concept<sup>1</sup> that needs developing is the concept of damages. Damages must always be of such an order that a person should not be able to flout his environmental obligations and get away merely with a fine which imposes no real hardship. In Roman Law, there is a story of a rich man who wanted to show his contempt for the law. The law said that if a man assaulted a person, the penalty was a certain stipulated fine. To show his contempt for the law, he ordered a slave to walk behind him with a whole basket of coins, and he walked down the public street assaulting every person he met. Of course he was committing an offence, but he tossed the appropriate coins to the persons assaulted and proceeded to treat the others likewise. By paying the penalty, he had satisfied the law and demonstrated his contempt for it.

But you do not satisfy environmental law in that way. And therefore the courts must see to it that, merely by paying a fine, you cannot get off scot free. You may derive, shall we say, a \$100,000 benefit by an act of pollution. If you have to pay a \$10,000 fine for this offence, you would be quite happy to repeat it because you have received a \$100,000 benefit at a cost of only \$10,000. So the judges need to ensure that what the man gets by reaping the rewards of his act of pollution are outweighed by the damages that the court awards.

A conceptual breakthrough that has been achieved by the courts is the idea of a continuous mandamus. Mandamus, again, should not be a "once and for all" matter, for environmental damage is a continuing wrong. And, if the court has powers of supervision, that supervision should be a continuing process.

Then, again, we need to work into the law the idea that homo sapiens is not a conqueror of the land, or a subjugator of the land, but just a plain member of the community that is benefited by the land. We are dependent on it in this age of so-called advanced civilization to much the same degree as when our most primitive ancestors first trod the earth. The wisdom of Aboriginal art, which often depicts man as tied to Mother Earth by an umbilical cord, has much to teach us.

The notion of "Participation Action Research" is another important concept. In some other countries, this notion is gathering momentum. It is quite easy for us to say that all members of the community must participate in the major decisions that produce an impact on the land. But how do we activate the mechanism of such participation? It is not so simple. We need the wisdom of sociologists who have studied this problem and there is now a great deal of research in progress on this topic. Participation Action Research (PAR) tries to answer many different questions. How do you assess the needs of a community? How do you assess the wishes of a community? How do you apprise the community of the consequences? All these are important to participation, and participation is important to environmental regulation. Very often the technology that we get in our part of the world is technology that is foisted upon us. We get technology that the industrialized world has developed, and the industrialized world then, through various pressures - economic, political and otherwise - makes us feel obliged to receive that technology. We often receive that technology, not through the free volition of our people, but because a combination of circumstances leaves us no option. It is not technology that we have freely chosen, but technology that comes to us by force of circumstances. We have to research the ways in which we can introduce a participatory element into the choice of technology, as the choice of technology is undoubtedly part of the sovereign right of a people.

Very often a great financial institution, or a multinational corporation, offers a technology to a country which has no choice but to receive it, because that country is bargaining with this corporate giant on terms of total inequality. Contract law everywhere in the world now recognizes the principle that where there is bargaining inequality in contract, the weaker contracting party needs to be compensated. Judicial action is often taken to compensate the weaker contracting party. If you looked at 19th century Contract Law, you found for example that a multi-millionaire owner of a coal mine could contract with a coal miner who did not know where his family's next meal was coming from. So he entered into a contract of employment on terms dictated by the mine owner, which he accepted because - poor man that he was - he had no alternative. There, in fact, was a case where a coal mine owner had inserted into the contract a clause that even if the miner should be killed in the employment of the mine owner, his family should have no compensation. When the widow brought the matter before the courts, the courts said in effect, "What can we do? Here is a contract freely entered into by your husband and his employer, and that is sacred ground into which the court cannot enter. The contract is the product of two freely-consenting minds and it is not the policy of the law to interfere with matters to which the parties have consented".

That was 19th century Contract Law, but 20th century Contract Law has recognized the principle that fairness of contract is essential, and where there is manifest unfairness of contract, or manifest inequality of bargaining power, the courts can come in on the side of the weaker contracting party. Not only courts, but legislatures also do so.

One of the problems we have in Environmental Law is that what is accepted doctrine for every contract lawyer in practically every jurisdiction in the world today - that there must be fairness of contract and equality in bargaining power, in default of which the Court can intervene - is totally unknown in the international field. International contracts are still entered into in the context of total inequality of bargaining power and with the free-for-all fierce competition - the tooth-and-claw competition - of the open marketplace. And very often the technology that the Third World receives is received in those circumstances. So, can we not give some thought to the ways in which our legal systems can respond to such inequality of bargaining power when it comes to technology that damages the environment? To what extent can we, through judicial action, remedy the imbalance? There is precedent in the area of fair contract and fair trade practices. Moreover fair trade practices can also involve environmental matters, where the contract involves industrial production in a developing country, which impacts adversely on its environment. To what extent can principles of fairness of contract be judicially used in the field of international trade? To what extent can we also assert the right to freedom of information? This is very important. The right to information is now an acknowledged human right. The right to information means that if there is some activity which affects me and my rights, I am

entitled to information about that activity. However, when technology adversely affects my rights, there is often a screen of protection surrounding corporate secrets - a screen of protection of patent rights and research information which I cannot penetrate. Therefore, if I want information about some matter concerning corporate wrongdoing towards me, I cannot obtain that information to place before a court. I would not know the corporate secrets about the degree of pollution that corporation is releasing into the atmosphere. I may be the victim, but all the relevant information is with the other party. On ordinary rules of litigation, I should be able to summon the other party to produce its records.

We are deeply obliged to Justice Stein for the stand he took in relation to the case he outlined and for the clarification of the law that has resulted. Ideas of protection of information, whatever the rubric under which they are sought can often operate in denigration of human rights. Protection may be sought under many rules - it may be under the rule that you cannot be made to incriminate yourself, it may be under the rule of security of patent information or research information, or it may be under the rule of corporate privilege, or under defence or security information. Whatever be the protection accorded to that information, if it affects me, it is something which I must have a right to know. After all, it is by that activity that I am being hurt. So that is a principle that we have to work out for the environmental law of the future.

And in this respect we have to look also at the apparatus of company law which gives this protection. We also have to look at company law in another way. Company law, at present, is geared to the ethic that the purpose of the company is to make profit for the shareholder. You ask any director of a company for whose benefit he works and he will say it is for the benefit of the shareholders. Companies therefore tend to operate in such a manner as to make the maximum profit. The company thus tends to operate exclusively for its own benefit. I think it is important that company law should enforce upon companies a duty also of a certain element of public service.

After all, a large company which owns vast factories, vast plantations or vast warehouses receives protection of its property from the police force, the legal system and the public service apparatus of the country. The company only pays taxes, but the protection of the whole service apparatus of that country is at its disposal to protect its assets. Large companies are not like the little businesses and corner shops of yesterday. They make money on a large scale from the public and owe a duty to the public. Why should there not be some principle of service by that company to the community which is protecting it, and out of which it is making its profits?

Sometimes companies, e.g., pharmaceutical companies, make very great profits in different parts of the world - profits that may even appear to be far more than what might be legitimate. Company law needs to build into its

principles the concept of a duty of service to the community out of whom company profits are made. That is also an area that judges and lawyers and legislators can look at - to try to build into the company ethic a public service element. You get this argument sometimes in the field of the media as well. The media, after all, function on the air waves that belong to the public not to the media. The media merely have a licence to use those waves and they use those air waves to their profit and do indeed make enormous profits. Should they not be obliged to make some small part of their broadcast time available for some programme with a public service orientation? Perhaps an environmental element could be introduced into this service-oriented broadcast, so that the media can, by educating the public on environmental matters, render a service to the community. They can perhaps devote something like half an hour a week for such a service. Is that too much to ask? Such an ethic could perhaps be built into company law, in order to help the community in the cause of the environment.

There are many areas of law that we could study to get the maximum benefit on possible developments in environmental law. OECD law and World Trade Organization law are sources of many ideas for the protection and preservation of the environment. For example, the idea of sustainable development is built into the Charter of the WTO - World Trade Organization - which has set out Sustainable Development as one of its objectives. The World Bank, the Asian Development Bank, the Multilateral Investment Guarantee Agency all work upon this hypothesis. Is there something we can gather from the body of law that is growing up there?

I wish to make a point here about foreign investment. Foreign investment law is very often geared to the needs of the investor, and the investor strikes a bargain with the country in which the investment is to be made. The investor invariably has a battery of lawyers with the latest law at their fingertips - because they have been at all the conferences on investment law that have taken place, and they are superbly equipped with the latest law on the matter. But the country which is receiving the technology is not so well served legally. Its lawyers are not quite so up-to-date, they have not had all those opportunities of informing themselves of the latest developments in that department of investment law. Very often the bargain that is struck is struck through the force of enormous legal expertise, on the one hand, with comparatively slender legal expertise with which to counter it, on the other. This is a factor also to bear in mind because it impinges on the environment in a great way.

So I think our Conference could also resolve to promote studies of all these areas of law which impinge upon the environment in one way or another.

We have had a wealth of information as to the judicial function. Just as we should give a broad interpretation to the right to life, we should also take a

broad view of the question of "standing". In contrast to the *Sierra Club* case, the idea of open standing has been established in Australia. The judges in our region have likewise an opportunity to mould the law in this respect. There are established notions they can draw upon from western legal systems - such as the *res communis* idea in the Roman-Dutch Law, as well as the *actio popularis*. Those are ideas which our Roman-Dutch legal system in Sri Lanka can offer which even common law based legal systems can draw upon. The Roman-Dutch Law is an equity-based system - unlike the English Law, where equity developed as a separate system of law, and was merged with the common law only in the 1870s. It then became a combined system of law and equity, unlike the Roman-Dutch Law which, from its commencement, was a combined system of law and equity. Likewise, in the other traditional legal systems of our region, there may be a great deal of benefit they can derive from looking back on their own traditions of group rights and communal ownership of public resources. So Open Standing is a very important legal idea, and the judiciary could act as a catalyst in strengthening this approach. These are procedural ways in which there can be an important judicial input into the environmental debate.

As a result of our deliberations, a number of new problems have received close attention. The flow of information is one problem. I have already dealt with that. Redress against foreign polluters is another. Within our legal system we can of course have redress against the domestic polluter who pollutes the country. But if the polluter is abroad and ensconced in the Board Room of another country, how do we reach him? That is something the judges can look at, and certainly the judicial writ could possibly extend to an investigation of the actual cause of the act of pollution which the judge is investigating.

Then there is the question which I think the Chief Justice of Bangladesh raised, the question of rising expectations owing to judicial activism. There is now in the popular mind a rising expectation of action from judges. This rises sometimes to an expectation that the judges will do the impossible. Do we need to try to tailor our judicial result to the popular expectation? And is there some process by which we can indicate to the public that there are, after all, certain limits to what the judges can do?

Another vital problem that emerged also from the Bangladesh presentation, was the problem of inter-country pollution. We have jurisdiction to deal with pollution within our borders. We can find out the perpetrator and deal with him. But suppose the pollution comes not from within our borders, but from a neighbouring country, or is pollution which affects our country and our neighbouring country as well, and we do not know where it came from. What do we do? It might affect three or four countries. Is there a possibility of some kind of joint action in relation to the common source of that pollution? Since our writ does not extend beyond our borders, we need to enlist the

co-operation of the law-enforcing mechanisms of the other country. Both parties can benefit and obtain some relief. The judiciaries of our neighbouring countries need to consider what co-operative procedures they can evolve for this purpose.

These are only some of the factors which have emerged as a result of our Conference, which has stimulated much fruitful discussion on matters of great practical interest to us all.

Finally, what is the on-going result of this Conference? I see, first and foremost, as I said earlier, that we have perhaps for the first time assembled the highest judiciaries of our region in a discussion in depth on the common problems of our region. Let not that momentum die down. Let us keep getting together so that, at regular intervals, our judges can cross-fertilize their thinking with new ideas. They need to exchange their latest practical experiences. The environment, I think, was a fine catalyst for doing this because it brings together in the common interest of the whole region the region's highest judicial talent and experience. As we have seen at our Conference, it has united our region through our common concerns, as well as through our common traditions. Fortified in this way, we can address those common concerns more effectively. After all, we have a common interest and a common background, so that there is a lot to bring us together and keep us together. Functioning as all of us do under the adversarial system, we can work out ways and means of making that adversarial system yield better results which will be more in accordance with the community's expectations from us. So, regular Judges' meetings should be one result of this Symposium.

Secondly, the proceedings of this Conference could make a useful publication which will bring together for further reflection a number of important ideas. I hope the organizers would be able to bring out a volume containing these proceedings.

Thirdly, there are judicial decisions of each jurisdiction in the region, which all of us could benefit from. Perhaps a regular series of judicial reports on environmental matters could be brought out, as well as a collection of Environmental Statutes.

I think we were all encouraged by the observations made by our colleagues from the United States and from Australia who have pointed out that our region has given judicial leadership in matters relating to the environment. We have blazed a trail, so to speak, which judges in other regions can follow. And the work of our Supreme Courts is being hailed with acclaim in many other foreign jurisdictions. Can we pursue that further and, having taken the initiative, keep up the momentum of that initiative and of that leadership?



And also can we, as another spin-off benefit, examine to what extent we can feed our data into the computer systems that all of us can mutually tap, so that the information from each country could easily be available to all the others?

I do hope I have been able to cover at least some of the main items in the rich material that has emerged from this Symposium. These are just a few ideas, out of many, which, no doubt, the Secretary-General will develop. There can be numerous spin-off benefits from this conference.

Thank you.

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