

THE ROLE OF THE ENVIRONMENTAL JUDICIARY

A Word from the Executive Editors ■ *Juanita Bing Newton and Michelle S. Simon* i
 Issue Editor’s Note: The Role of the Environmental Judiciary ■ *Christopher Riti* iii
 About the *Journal of Court Innovation* ix

INTRODUCTION

An Institute for Enhancing Effective Environmental Adjudication ■ *Sheila Abed de Zavala, Antonio Herman Benjamin, Hilario G. Davide Jr., Alexandra Dunn, Parvez Hassan, Donald W. Kaniaru, Richard Macrory, Brian John Preston, Nicholas A. Robinson and Merideth Wright* I

Increase in Environmental Courts and Tribunals Prompts New Global Institute
 ■ *George Pring and Catherine Pring* 11

SURVEY OF ENVIRONMENTAL TRIBUNALS AND REGULATORY SCHEMES

The Austrian Environmental Senate ■ *Verena Madner* 23

Environmental Courts and the Development of Environmental Public Interest
 Litigation in China ■ *Alex L. Wang and Jie Gao* 37

Environmental Law and Administrative Courts in Finland
 ■ *Justice Erkki J. Hollo, Justice Pekka Vihervuori and Justice Kari Kuusiniemi* 51

Environmental Courts and Tribunals in England and Wales—
 A Tentative New Dawn ■ *Richard Macrory* 61

On the Quest for Green Courts in India ■ *Bharat H. Desai and Balraj Sidhu* 79

The Role of Courts in Environmental Law—Nordic Perspectives
 ■ *Helle Tegner Anker and Annika Nilsson* 111

Green Courts Initiative in the Philippines
 ■ *Hon. Hilario G. Davide Jr. and Sara Vinson* 121

The Judiciary and Environmental Governance in Singapore ■ *Lye Lin Heng* 133

Some Brief Observations on Fifteen Years of Environmental Rights
 Jurisprudence in South Africa ■ *Louis J. Kotzé and Anél du Plessis* 157

Experiences of Sweden’s Environmental Courts ■ *Ulf Bjällås* 177

The United States' Environmental Adjudication Tribunal	
▪ <i>Anna L. Wolgast, Kathie A. Stein and Timothy R. Epp</i>	185
The Vermont Environmental Court ▪ <i>Judge Merideth Wright</i>	201

SETTING THE STANDARD FOR NEW MODELS OF ADJUDICATION

The Case for an International Court for the Environment ▪ <i>Stephen Hockman QC</i> ...	215
American Indian Tribal Courts as Models for Incorporating Customary Law	
▪ <i>Elizabeth A. Kronk</i>	231
A Judge's Perspective on Using Sentencing Databases	
▪ <i>Hon. Justice Brian John Preston</i>	247
New Method With Experts—Concurrent Evidence	
▪ <i>Hon. Justice Peter McClellan</i>	259
History of Environmental Courts and UNEP's Role	
▪ <i>Lal Kurukulasuriya and Kristen Powell</i>	269
Asian Judges, Green Courts, and Access to Environmental Justice: An Asian Judges Network on the Environment ▪ <i>Kala Mulqueeny, Sherielysse Bonifacio and Jacqueline Esperilla</i>	277
Educating Judges About Environmental Law ▪ <i>John Pendergrass</i>	305

EMERGING THEORIES IN ENVIRONMENTAL LAW

On the Comparison of Environmental Law ▪ <i>Jan Darpö and Annika Nilsson</i>	315
Sustainability and the Courts: A Journey Yet to Begin? ▪ <i>Klaus Bosselmann</i>	337

INTERVIEWS

Dr. Parvez Hassan: Pakistani Environmental Laws ▪ <i>Hannah Cochrane</i>	349
Professor Bharat H. Desai: India's National Green Tribunal ▪ <i>Sara Vinson</i>	361
Lalanath de Silva: Sri Lanka Environmental Laws ▪ <i>Sara Vinson</i>	375

BOOK REVIEW

Environmental Governance in Kenya: Implementing the Framework Law by Charles O. Okidi, Patricia Kameri-Mbote and Migai Akech, Eds. ▪ <i>Hannah Cochrane</i> ...	389
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The Journal of Court Innovation

The *Journal of Court Innovation* is published by the New York State Judicial Institute and Pace Law School to promote and highlight innovative programs and strategies in court systems around the United States.

Geared to both practitioners and academics, the *Journal's* audience includes court administrators, attorneys, judges, scholars, non-profit executives, legislative and executive branch officials, and anyone interested in improving the administration and delivery of justice.

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Contents

THE ROLE OF THE ENVIRONMENTAL JUDICIARY

A Word from the Executive Editors <i>Juanita Bing Newton and Michelle S. Simon</i>	i
Issue Editor's Note: The Role of the Environmental Judiciary <i>Christopher Riti</i>	iii
About the <i>Journal of Court Innovation</i>	vi

INTRODUCTION

An Institute for Enhancing Effective Environmental Adjudication <i>Sheila Abed de Zavala, Antonio Herman Benjamin, Hilario G. Davide Jr., Alexandra Dunn, Parvez Hassan, Donald W. Kaniaru, Richard Macrory, Brian John Preston, Nicholas A. Robinson and Merideth Wright</i>	1
Increase in Environmental Courts and Tribunals Prompts New Global Institute <i>George Pring and Catherine Pring</i>	11

SURVEY OF ENVIRONMENTAL TRIBUNALS AND REGULATORY SCHEMES

The Austrian Environmental Senate <i>Verena Madner</i>	23
Environmental Courts and the Development of Environmental Public Interest Litigation in China <i>Alex L. Wang and Jie Gao</i>	37
Environmental Law and Administrative Courts in Finland <i>Justice Erkki J. Hollo, Justice Pekka Viheruori and Justice Kari Kuusiniemi</i>	51
Environmental Courts and Tribunals in England and Wales—A Tentative New Dawn <i>Richard Macrory</i>	61
On the Quest for Green Courts in India <i>Bharat H. Desai and Balraj Sidhu</i>	79
The Role of Courts in Environmental Law—Nordic Perspectives <i>Helle Tegner Anker and Annika Nilsson</i>	111
Green Courts Initiative in the Philippines <i>Hon. Hilario G. Davide Jr. and Sara Vinson</i>	121
The Judiciary and Environmental Governance in Singapore <i>Lye Lin Heng</i>	133
Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa <i>Louis J. Kotzé and Anél du Plessis</i>	157
Experiences of Swedish Environmental Courts <i>Ulf Bjällås</i>	177

The United States' Environmental Adjudication Tribunal <i>Anna L. Wolgast, Kathie A. Stein and Timothy R. Epp</i>	185
The Vermont Environmental Court <i>Judge Merideth Wright</i>	201

SETTING THE STANDARD FOR NEW MODELS OF ADJUDICATION

The Case for an International Court for the Environment <i>Stephen Hockman QC</i>	215
American Indian Tribal Courts as Models for Incorporating Customary Law <i>Elizabeth A. Kronk</i>	231
A Judge's Perspective on Using Sentencing Databases <i>Hon. Justice Brian John Preston</i>	247
New Method With Experts—Concurrent Evidence <i>Hon. Justice Peter McClellan</i>	259
History of Environmental Courts and UNEP's Role <i>Lal Kurukulasuriya and Kristen Powell</i>	269
Asian Judges, Green Courts, and Access to Environmental Justice: An Asian Judges Network on the Environment <i>Kala Mulqueeny, Sherielysse Bonifacio and Jacqueline Esperilla</i>	277
Educating Judges About Environmental Law <i>John Pendergrass</i>	305

EMERGING THEORIES IN ENVIRONMENTAL LAW

On the Comparison of Environmental Law <i>Jan Darpö and Annika Nilsson</i>	315
Sustainability and the Courts: A Journey Yet to Begin? <i>Klaus Bosselmann</i>	337

INTERVIEWS

Dr. Parvez Hassan: Pakistani Environmental Laws <i>Hannah Cochrane</i>	349
Professor Bharat H. Desai: India's National Green Tribunal <i>Sara Vinson</i>	361
Lalanath de Silva: Sri Lanka Environmental Laws <i>Sara Vinson</i>	375

BOOK REVIEW

Environmental Governance in Kenya: Implementing the Framework Law by Charles O. Okidi, Patricia Kamari-Mbote and Migai Akech, Eds. <i>Hannah Cochrane</i>	389
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A WORD FROM THE EXECUTIVE EDITORS

This is the last issue of the *Journal of Court Innovation*. With this issue we bid farewell to one of our founding partners, The Center for Court Innovation (CCI). We have greatly enjoyed working with Greg Berman, Robert Wolf, and the staff at CCI, and we wish them well as they continue their vitally important work with problem-solving innovations in courts at the local and national levels.

The New York State Judicial Institute and Pace Law School will continue to publish in partnership, and as we move forward, we will increasingly focus on issues relating more specifically to scholarship about the judiciary. We believe there is a growing interest in and need for scholarship about judges, judicial administration, judicial education, judicial decision-making and the role that judges have in our courts and society generally. The future publication will recognize the unique partnership between the legal academy and the bench. We hope that it will provide a place for the development of scholarship and exchange of ideas relating to the judiciary. We will continue to publish practice pieces, as well, that share strategies and tools to help judges in their always demanding work. By highlighting new trends, data and scholarship, we aim to serve as a resource for judges and everyone who cares about the courts and the judiciary.

Our current issue sets us off on our new course. The idea for an issue on the role of the environmental judiciary was born of a project that Pace Law School is initiating. The International Judicial Institute for Environmental Adjudication (IJIEA), which Christopher Riti discusses further in the Issue Editor's Note, is designed primarily as

an educational resource and information exchange for judges from around the world who adjudicate environmental disputes. In this issue, we provide an international overview of courts and tribunals that focus on environmental law and discuss some of the obstacles, problems, innovations and solutions for judges who work in environmental tribunals. We hope you enjoy it.

Juanita Bing Newton and Michelle S. Simon

ISSUE EDITOR'S NOTE: THE ROLE OF THE ENVIRONMENTAL JUDICIARY

Pace University School of Law (Pace) and the New York State Judicial Institute proudly present this volume of the *Journal of Court Innovation*, devoted entirely to the issue of environmental courts and tribunals (ECTs). The publication of this volume is in anticipation of the launch of the International Judicial Institute for Environmental Adjudication (IJIEA), a collaborative initiative sponsored by Pace and the International Union for Conservation and Nature's (IUCN) Commission on Environmental Law, a volunteer global environmental law network.

Indisputably, the quality of our natural environment has deteriorated dramatically over the past several decades. The significant difficulties posed by climate change, biodiversity loss, transboundary pollution, explosive growth in both population and consumption, and natural resource depletion all require innovative solutions, tailored to the individual needs of those most affected. Moreover, concerns of intergenerational equity — regarding the distribution and usage of natural resources — must be held paramount. Developing and strengthening the specialized judicial institutions that serve to protect our natural capital and the health of our populace is critical to the rule of law and sustainable development.

Visionary world leaders at the 1992 Rio Earth Summit agreed that sustainable development is the only way forward given the constraints and limitations inherent in the Earth's natural systems, and

formally recognized the fundamental relationship between such development and public participation in no uncertain terms. Environmental adjudicative bodies are a necessary component of this vision as institutions that check the undue influence of political and economic interests while enforcing effective accountability measures. Institutional innovation is crucial, as traditional judicial models in some systems fail to safeguard participation or tackle the many scientific, technical, and logistical complexities of environmental litigation. In an effort to share effective and innovative practices, many experts, judges, judicial administrators, and legal scholars have offered invaluable perspective and insight in this issue about the most successful processes, models, and case studies throughout the world.

We believe that law schools in general and Pace in particular will continue to be at the forefront of crafting initiatives to advance environmental law to the next stages of its development. For the better part of four decades, Pace has been a leader in this area, having sponsored a multitude of judicial training workshops, symposia and conferences in collaboration with dozens of esteemed public and private institutions. And now, the knowledge that Pace has gained over the years through its staff, conferences and workshops have culminated in the creation of the IJIEA. This journal's introductory piece, *An Institute for Enhancing Effective Environmental Adjudication*, recites the history and confluence of efforts that have led to the establishment of the IJIEA. The article describes not only the proliferation of ECTs throughout the world, but also the series of conferences dedicated to the training modules, theoretical underpinnings, and motivating factors of such institutions. Regional workshops have focused on the many ways in which specific courts — each designed to match the problems endemic to that region — have been driven by an active judiciary and able administrators, and supplemented by the tireless capacity-building of academic, governmental, United Nations, IUCN and other environmental law advocacy institutions.

Following this introductory piece, the first set of articles provides an extensive survey of a number of ECTs and national environmental regulatory regimes, and the ways in which both facilitate the broader development of environmental law. Authors representing over a dozen countries describe diverse legal systems, socioeconomic

conditions, and cultures. The next set of pieces is more experiential in nature, focusing on specific topics of implementation, outreach work, pioneering proposals, and novel techniques related to the development of environmental adjudication. These pieces highlight the work of some of the agencies, advocacy groups, and legal institutions that have been setting the standard for new models of adjudication, including UNEP, the Environmental Law Institute, and the Asian Development Bank. Complementing these are two scholarly articles examining emerging theories in environmental law.

We have also conducted a set of short interviews with several influential practitioners in the field, examining in greater detail the triumphs, hardships, and significant barriers that have defined their experiences. Finally, we conclude with a book review of Charles O. Okidi's *Environmental Governance in Kenya*. Kenya recently established an environmental court.

This issue of *Journal of Court Innovation* presents a valuable collection of multidisciplinary resources and analyses for the benefit of a community that is aggressively engaged in improving and expanding these institutions. Underlying themes of environmental governance surface repeatedly throughout: observing international norms for public participation; the importance of cataloguing decisions for the benefit of precedence; the institutionalization of transparency and accountability provisions; and strong enforcement mechanisms. All are vital to further success. Highlighting these themes and normalizing best practices are two of the main purposes of this volume. By examining changing practices and novel forums for environmental adjudication, we hope to identify those models that are best suited to accomplishing true environmental justice and equity in a flexible, inclusive manner.

Readers are presented with a practical resource through which to review the logistics of establishing and administering new and existing ECTs.

"The Role of the Environmental Judiciary" is an innovative theme for a law journal. The broad selection of pieces included herein emphasizes experience and critical analysis by authors hailing from a wide range of nations and backgrounds. In this way, we have tried to form a representative (though certainly not exclusive) cross-section of perspectives from a panoply of diverse legal traditions. Most of these

pieces are short, yet insightful. Due to resource and time limitations, we were unable to cover every nation, legal system, or development. We invite our readers to bring to our attention any innovative developments that we were unable to include. Updates, inquiries and comments can be sent to ijiea@law.pace.edu.

This volume complements the stated mission of IJIEA: to foster professionalism; to share insights and ideas; to build an integrated scholarly network founded upon strong working relationships and mutual respect; and to increase exposure to the extensive body of constantly expanding scientific, policy, and legal debates within the field of environmental governance. Through these pages, we look to facilitate a dialogue that offers practical solutions, templates and recommendations for further progress. The future of effective environmental law — in all of its various manifestations and at all levels — rests on the judiciary developing in a way that is deeply attendant to the needs and pressures of the twenty-first century. Building networks and fostering solidarity is a means to this end, and the New York State Judicial Institute and Pace contribute to this common effort. We hope that this volume advances the further development of ECTs throughout the world, engendering new scholarship, continuing dialogue, and forging new paths through which the judiciary may constructively confront the exigencies of a changing global environment, to protect Earth's shared resources and the beauty of our common heritage.

Christopher Riti

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AN INSTITUTE FOR ENHANCING EFFECTIVE ENVIRONMENTAL ADJUDICATION

*Sheila Abed de Zavala, Antonio Herman Benjamin, Hilario G. Davide Jr., Alexandra Dunn, Parvez Hassan, Donald W. Kaniaru, Richard Macrory, Brian John Preston, Nicholas A. Robinson and Merideth Wright**

The first decade of the twenty-first century has witnessed escalating environmental degradation and a burgeoning human population.¹

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1. See generally Intergovernmental Panel on Climate Change, *4th Assessment Report, Climate Change 2007: Synthesis Report* (2007).

Yet, this decade also boasts the worldwide emergence of new judicial systems of environmental courts and tribunals.² No treaty or international agreement mandates the establishment of these many new environmental courts and tribunals around the world. Rather, independently and successively, judicial authorities in all regions have determined that without providing more specialized environmental judicial authority, environmental legislation is too randomly applied and enforced. We concur.

The remedial objectives of environmental legislation require an understanding of ecology and the environmental sciences, and demand an openness to admit to judgment a range of hitherto unfamiliar claims, for instance those concerning disrupted food chains, bioaccumulation of chemicals, species threatened with extinction, pollution of water bodies shared in common by many persons, and degradation of sacred sites and sites of exceptionally beautiful cultural and natural heritage. Not all environmental courts today have the competence to hear the full range of pressing environmental claims, but through comparative legal analysis of judicial experience in different nations, trends toward a common set of competencies, procedures and remedies can be discerned.³

The articles in this issue of the *Journal of Court Innovation* are singularly important, for they illuminate several aspects of environmental judicial practices that recur in courts around the world. Counter-intuitive though it may seem, it is not surprising that the growing volume of environmental adjudications worldwide is giving rise to specialized environmental courts and tribunals. First, ever since the 1972 United Nations (U.N.) Stockholm Conference on the Human Environment, nations have been enacting environmental legislation, promulgating the regulations to implement the legislation, and

2. See U.N. ENVIRONMENT PROGRAMME, GLOBAL JUDGES PROGRAMME (2005), available at www.unep.org/law/PDF/UNEP_Global_Judges_Prog_New.pdf; GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

3. See, e.g., JUDGES AND THE RULE OF LAW: CREATING THE LINKS: ENVIRONMENT, HUMAN RIGHTS AND POVERTY, IUCN ENVIRONMENTAL POLICY AND LAW PAPER 60 (Thomas Greiber ed., 2006) (based on the Commission on Environmental Law's Symposium at the 4th World Conservation Congress in Bangkok, Thailand, 2004.)

establishing environmental ministries and agencies to apply and enforce these norms. Chapter eight of “Agenda 21,” adopted at the U.N. Conference on Environment and Development (UNCED) in Rio de Janeiro, called on all nations to elaborate and complete their environmental statutes;⁴ many nations adopted their own local “Agenda 21s,” and more than eighty nations have amended their constitutions to provide a right to the environment.⁵ Furthermore, more than 300 environmental treaties and multilateral environmental agreements (MEAs) are now in force around the world, and nations are implementing their provisions.⁶ Inevitably, and appropriately, many of the new legal questions associated with this new volume of legislation require judicial interpretation or enforcement. As a result, in many nations the field of criminal environmental law has emerged, as has administrative environmental law.

The sharing of judicial experience as a means to enhance the efficacy of environmental law began in Africa, with several judicial seminars and conferences held in the late 1980s and early 1990s with the assistance of the U.N. Environment Programme (UNEP).⁷ Successive seminars for judges in Africa were conducted by the Environmental Law Institute (ELI),⁸ and also in Latin America,⁹ the

4. U. N., AGENDA 21: EARTH SUMMIT – THE UNITED NATIONS PROGRAMME OF ACTION FROM RIO ch. 8(B) (1993) (Resulting from U.N. Conference on Environment and Development (UNCED), Rio de Janeiro, Braz., June 3-14, 1992) (“To effectively integrate environment and development in the policies and practices of each country, it is essential to develop and implement integrated, enforceable and effective laws and regulations that are based upon sound social, ecological, economic and scientific principles.”) Agenda 21 “reflects a global consensus and political commitment at the highest level on development and environment cooperation. Its successful implementation is first and foremost the responsibility of Governments. National strategies, plans, policies, and processes are crucial in achieving this.” *Id.* at ¶ 1.3.

5. The latest such instrument is Kenya’s constitution, promulgated on August 27, 2010. See CONSTITUTION (2010) (Kenya).

6. See generally U.N. ENVIRONMENT PROGRAMME, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW (Lal Kurukulasuriya & Nicholas A. Robinson, eds., 2006).

7. U.N. Environment Programme, Environmental Law Program, Regional Judges Symposia, http://www.unep.org/law/Programme_work/Judges_programme_e/judges_prog_regional.asp (last visited July 19, 2010).

8. See Environmental Law Institute, Africa Program: Governance, http://www.eli.org/Program_Areas/africa_governance_access.cfm#judicial (last visited July 19, 2010).

9. See Environmental Law Institute, Innovation and Governance, Training, http://www.eli.org/program_areas/innovation_governance_training.cfm (last visited July 19, 2010).

Caribbean,¹⁰ and India.¹¹ The region then with the most advanced body of environmental case law, South Asia, held a conference under the auspices of the South Asia Cooperative Environment Programme in Sri Lanka in 1997,¹² followed by one for South East Asia in Manila, Philippines, hosted by the Philippine Supreme Court in 1999,¹³ and one in Bangkok, Thailand, in 2003.¹⁴ Conferences on the role of the judiciary in environmental law followed in Latin America (with the Institute of Law for a Green Planet and the Fundación Ambiente y Recursos Naturales, in Argentina, 2000). The Caribbean (Jamaica, in 2001) and the Pacific (with University of Auckland, 2002) followed, ably organized by Lal Kurukulasuriya of UNEP. The Commission on Environmental Law, then chaired by Professor Nicholas A. Robinson, cosponsored a judicial symposium organized by the International Court of the Environment Foundation in Rome in 2003.¹⁵ The IUCN organized symposia for Western Europe in London in 2002,¹⁶ for courts of the Arab States in Kuwait in 2000 (with Kuwait University and the Arab Regional Centre for Environmental Law), for Eastern Europe and Eurasia in L'viv, Ukraine, in 2003 (with the University of L'viv Faculty of Law),¹⁷ and for North America, in cooperation with the NAFTA Commission on Environmental Cooperation (CEC) and UNEP, in New York in 2004 (with Pace University),¹⁸ and Mexico City in 2005 (with the Inter-American University). The Supreme Judicial Court of Egypt convened a further consultation among Arab nations

10. *See id.*

11. *See id.*

12. U.N. Environment Programme, Environmental Law Programme, Regional Judges' Symposia, http://www.unep.org/law/Programme_work/Judges_programme/judges_prog_regional.asp (last visited July 12, 2010).

13. *Id.*

14. *See also* U.N. Environment Programme, Environmental Law Programme, Regional Judges Symposia, http://www.unep.org/law/Programme_work/Judges_programme/judges_prog_regional.asp (last visited July 12, 2010).

15. International Court of the Environment Foundation, Programme of the Rome Symposium, http://www.icef-court.org/base.asp?co_id=44 (last visited July 19, 2010).

16. International Union for the Conservation of Nature, *Environmental Law Programme 2002: The Year in Review 12*, available at cmsdata.iucn.org/downloads/iucn_elp_year_in_review_2002.pdf.

17. International Union for the Conservation of Nature, *Environmental Law Programme 2003: The Year in Review 9*, available at cmsdata.iucn.org/downloads/elp03_iucnelprep_final2003.pdf.

18. National Judicial Institute, *Symposium: The Judiciary and Environmental Law*, available at weavingaweb.org/pdffdocuments/DEV09_JudiciarySymposium.pdf.

in Cairo (2004), and the Cour de Cassation of France convened a conference for courts from the Francophone nations (2008).

The evident progeny of these many regional judicial consultations, symposia and seminars, in which UNEP, IUCN, and ELI have been the major players, is the rapid emergence of more than 350 environmental courts and tribunals sitting in different nations around the world today.¹⁹ Brazil has just established four new federal environmental courts for the region of the Amazon,²⁰ and, as Professor Richard Macrory reports in this issue of the *Journal of Court Innovation*, England and Wales have established a specialized environmental tribunal system in 2010.²¹ India has also enacted legislation to establish new nationwide green courts.²²

The legal traditions vary across different regions, yet each of these regional judicial gatherings shared some common characteristics. For instance, the courts confront similar problems, such as pollution from misused technologies, affecting air, water, flora, fauna and public health. Nations have the same sorts of environmental conditions, just as they have similar public health concerns. Several recurring themes also have emerged. First, judges rarely have an opportunity to meet and confer across nations; their modest budgets are national or sub-national in scope and do not provide for travel outside their jurisdictions. Second, there are few, if any, judicial publications or institutions that exist to facilitate sharing environmental law judicial practices across nations. Third, upon learning about effective innovations in environmental adjudication in one nation, the judges could see for themselves ways to adapt and adjust the practice for possible use in their nations; there is an ample legal foundation in each nation's environmental legislation to make such comparisons germane. Fourth, judges agreed that their knowing the fundamentals of ecology and environmental sciences facilitated

19. The Access Initiative, *Press from Greening Justice: Creating and Improving Environmental Courts and Tribunals*, <http://www.accessinitiative.org/press/2010/04/press-greening-justice-creating-and-improving-environmental-courts-and-tribunals> (last visited July 19, 2010).

20. International Court of the Environment Foundation, *Final Recommendations from the ICEF International Conference on Global Environmental Governance* (2010), available at <http://www.icef-court.org/uploads/file/Final%20Recommendations.pdf>.

21. Richard Macrory, *Environmental Courts and Tribunals in England and Wales: A Tentative New Dawn*, 3 J. CT. INNOVATION 61 (2010).

22. The National Green Tribunal Bill, No. 63-C of 2009; India Code (2010).

environmental adjudication, in terms of understanding the issues at contest, saving time in deliberation, and fashioning effective order; they recognized a need for access to continuing judicial education about environmental sciences. Fifth, the judges called for expanding environmental law courses in law schools, noting a deficit in knowledge about environmental law among the lawyers in most regions. Sixth, because vested economic interests often wrest short-term profits from averting environmental controls, the role of the courts needs to be secured from political or economic pressures. Seventh, broad access to justice and liberal standing provisions are essential for public interest environmental litigation; the door to the courthouse must be open. Eighth, there is a need for special masters, site inspections by the courts, or supplemental fact-finding to ensure that the courts fully understand all aspects of environmental cases, and to ensure that court orders are being implemented.

As a result of the many regional symposia and seminars of judges, UNEP convened the Global Judges Symposium on Sustainable Development and the Role of Law in Johannesburg, South Africa (August 18-20, 2002).²³ The symposium enjoyed the participation of Chief Justice Hilario G. Davide Jr. and Donald Kaniaru, along with UNEP, and featured addresses by both Dr. Parvez Hassan and Professor Nicholas A. Robinson on behalf of the IUCN Commission on Environmental Law. The Global Judges Symposium adopted "The Johannesburg Principles on the Role of Law and Sustainable Development,"²⁴ and Chief Justice of South Africa, Hon. Arthur Chaskalson, shared the recommendations with the U.N. World Summit on Sustainable Development, and later the UNEP Governing Council.²⁵ UNEP subsequently published the *UNEP Judges Handbook of Environmental Law*,²⁶ supplementing both its earlier publication, *Compendium of Summaries of Judicial Decisions in Environment-Related*

23. U. N. Environment Programme, Global Judges Symposium on Sustainable Development and the Role of Law, http://www.unep.org/law/Symposium/Judges_symposium.htm (last visited July 19, 2010).

24. JOHANNESBURG PRINCIPLES ON THE ROLE OF LAW AND SUSTAINABLE DEVELOPMENT, Global Judges Symposium, Aug. 18-20, 2002, Report, Vol. 1 at 14 (UNEP 2002), available at <http://www.unep.org/dpdl/symposium/Principles.html>.

25. U.N. Environment Programme, Governing Council Decision 22/17/II A (2003).

26. DINAH SHELTON & ALEXANDRE KISS, UNEP JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW (2005).

Cases,²⁷ and the several volumes of cases that Prof. Charles O. Okidi (University of Nairobi) had earlier compiled for UNEP. IUCN convened a symposium at the World Conservation Congress (WCC) in Bangkok in 2004, and the WCC adopted a resolution, which encouraged further cooperation to assist in the effectiveness of environmental courts and tribunals.²⁸ IUCN established a judicial portal, through its Environmental Law Programme in Bonn, to permit access to environmental decisions posted from around the world; the portal was re-launched in Brasilia in 2009.²⁹ The Judges Ad Hoc Meeting, convened in Nairobi by UNEP in 2003, "called upon UNEP and IUCN to further develop the judicial portal for the purpose of collecting and making available widely environment-related judgments, and providing an opportunity for interaction and sharing of experiences among judges worldwide."³⁰ UNEP also compiled recommendations from nine regional needs assessments, all of which uniformly encouraged continuing environmental law services for the judiciary.³¹ In the European Union, a European Forum of Judges for the Environment was established in 2004.³² In the cone of South America, annual conferences of the judges of Mercosur have been held on environmental law. A draft statute for an Arab Judges Union for the Protection of the Environment was drafted in 2004, but awaits further cooperative measures for its adoption.³³

ELI and other organizations continued to provide judicial capacity building seminars and courses around the world. Despite their value, the rapid growth of environmental courts and tribunals around the world has required a re-evaluation of these initial efforts to serve environmental adjudication. As more advanced national

27. U.N. ENVIRONMENT PROGRAMME, COMPENDIUM OF SUMMARIES OF JUDICIAL DECISIONS IN ENVIRONMENT-RELATED CASES (2006).

28. IUCN World Conservation Congress, Res. 3.083 (2004).

29. See ECOLEX, <http://www.ecolex.org/start.php> (last visited Nov. 23, 2010) (this database began as "ECOLEX," a collaborative partnership of IUCN, UNEP, and the U.N. Food & Agricultural Organization.). See also IUCN – ECOLEX, http://www.iucn.org/about/work/programmes/environmental_law/elp_resources/elp_res_tools/elp_res_tools_ecolex/ (last visited Nov. 23, 2010).

30. U.N. ENVIRONMENT PROGRAMME, GLOBAL JUDGES PROGRAMME 20 (2005), available at www.unep.org/law/PDF/UNEP_Global_Judges_Prog_New.pdf.

31. See *id.* at 32-58.

32. Statute of the European Union Forum of Judges for the Environment, (adopted at the meeting for the Establishment of the EU Judges Forum for the Environment, European Court of Justice, Luxembourg, April 26, 2004).

33. U.N. ENVIRONMENT PROGRAMME, GLOBAL JUDGES PROGRAMME 66 (2005), available at www.unep.org/law/PDF/UNEP_Global_Judges_Prog_New.pdf.

judicial environmental practices emerge, more sophisticated and specialized services are needed to synthesize the new developments, explain and disseminate them, and convene judges to evaluate and enhance them. Neither UNEP nor IUCN presently have the capacity to serve these new demands.

To continue the support for environmental courts and tribunals, the mantle of capacity-building needs to shift from general inter-governmental bodies, such as IUCN or UNEP, to more specialized judicial bodies, which have independence and autonomy within the judicial branch of government. The many national judicial institutes around the world have the experience and capacity to serve the new environmental courts and tribunals. Hitherto, few have done so, in part because the demand had not yet emerged. While that demand has since manifested itself, existing judicial institutes generally lack in one or more of three key areas: (a) partnerships with environmental law experts (such as university professors or members of the IUCN Commission on Environmental Law) and environmental forensic scientists, who can bring knowledge of environmental law to the judicial institutes and, through them, to the judges; (b) a platform for inter-regional and international cooperation with other judicial institutes, enabling them to collaboratively serve the needs of courts regionally and internationally; and (c) the supplemental financial resources to provide transportation to assemble judges on specialized topics regionally at central locations, such as a host judicial institute.

The new International Judicial Institute for Environmental Adjudication (IJIEA) is designed to meet these three needs. IJIEA is a collaborative partnership of national judicial institutes, rather than a new or competing institution. IJIEA is not designed to be, or become, a large institution, but rather to facilitate the cooperation of courts and their own judicial institutes nationally and regionally, and to facilitate the extension of services to nations and states that do not yet have judicial institutes, to serve their growing needs for more effective environmental adjudication.

The Pace University School of Law has sponsored regional judicial symposia for federal and state judges in Mexico, Canada, and the United States with the New York State Judicial Institute (NYSJI), and will be leveraging this extensive experience to facilitate the initiatives of IJIEA. Both Pace and the NYSJI are pleased to have extended this issue of their *Journal of Court Innovation* to address

relevant questions and issues specific to environmental adjudication. The IUCN Commission on Environmental Law has extended IUCN's tradition of environmental judicial programs to include cooperation with Pace to launch IJIEA. IJIEA is constituted through memoranda of agreement by cooperating judicial institutes, and, on their behalf, is currently seeking funds to meet the expanding needs for building the capacity of courts to effectively address environmental law issues.

Ultimately, the IJIEA and the new environmental courts and tribunals serve to strengthen the rule of law around the world, while bringing environmental laws into force and effect. Applying and observing environmental law is not a mere amenity. As the "Declaration of Johannesburg at the World Summit on Sustainable Development" states, environmental protection is a pillar of sustainable development.³⁴ Without potable water, clean air, adequate sanitary services, intact forest watersheds and wetlands to recharge ground water, biodiversity whose ecosystems' services can provide pollination for crops or contain zoonotic diseases, and parklands, the needs of people and nature together would not be met. Environmental laws for adaptive coastal zone management are enabling states to cope with rising sea levels and to resettle peoples displaced by climate change. Development of eco-cities and environmental urban land use is essential to sustaining livable cities as the world's population grows, adding two billion more humans to the planet. Environmental courts and tribunals also can give a forum to hear and learn from indigenous peoples, as the U.N. General Assembly's Permanent Forum on Indigenous Issues annually makes clear;³⁵ for instance, the Gayanashagowa,³⁶ the Great Law of Peace of the Iroquois Nations, should be heard as law and environmental courts can be open to recognizing such fundamental environmental customary law.³⁷ Procedures to facilitate doing so are emerging; for

34. World Summit on Sustainable Development, Aug. 26-Sept. 4, 2002, *Report on the World Summit on Sustainable Development*, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002).

35. U.N. Declaration on the Rights of Indigenous Peoples, <http://www.un.org/esa/socdev/unpfii/en/drip.html> (last visited July 19, 2010).

36. See Iroquois Nations' Constitution – Gayanashagowa, INDIGENOUS PEOPLE.NET, <http://www.indigenouspeople.net/iroqcon.htm> (last visited Oct. 20, 2010).

37. See, e.g., Preliminary Response of the Onondaga Nation to the Organization of American States Questionnaire Regarding the United States Legal System with Regard to the Land Rights of Indigenous Nations and Peoples (September 21, 2009), Special Rapporteurship on the Rights of Indigenous Peoples,

example, beyond its role of enhancing consideration of “traditional” environmental law matters, the new Writ of *Kalikasan* (Nature) in the Philippines³⁸ provides an innovative, adaptable context in which indigenous customary laws regarding nature may come to be recognized.

Without the rule of law, there can be neither sustainable development nor environmental quality adequate for healthful living conditions. Without a functioning public justice system, open to all, human rights become ephemeral and environmental degradation accelerates. The judiciary is uniquely equipped to secure public and shared rights, to safeguard individual environmental rights and to hold accountable the authorities whose primary responsibility is environmental protection. The new environmental courts and tribunals can succeed over time, case by case, but to succeed they will need the help of the traditional courts, lawyers, universities, foundations, companies, environmental governmental agencies, non-governmental organizations, and the general public. Courts are essential to delivering justice, yet they have less financial and other resources than do the legislative and executive branches of government. For the environmental courts and tribunals to succeed, all those who support the rule of law will need to become “friends of these courts.”

We welcome the emergence of the environmental courts and tribunals and the still embryonic IJIEA, and look forward to a robust debate about this issue of the *Journal of Court Innovation*. We hope that these articles will give rise to further judicial scholarship and help facilitate the expansion of environmental courts and tribunals around the world.

Inter-American Commission on Human Rights, OAS, Washington, D.C.

38. Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (April 13, 2010) (Philippines).

INCREASE IN ENVIRONMENTAL COURTS AND TRIBUNALS PROMPTS NEW GLOBAL INSTITUTE

George Pring and Catherine Pring***

Hundreds of specialized environmental courts and tribunals (ECTs) are suddenly emerging on every inhabited continent, in every major legal system, in rich and poor countries alike. Our University of Denver ECT study book *Greening Justice: Creating and Improving Environmental Courts and Tribunals*¹ and other publications document the growth of this innovative institutional approach to resolving disputes about the environment, natural resources, land use, and sustainable development.

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1. GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

Prior to the environmental movement of the 1970s, there were only a few specialized environmental adjudication bodies, yet today over 360 national or sub-national ECTs exist in some forty-two countries, approximately *half of which have been created in the last five years*.² In just the last two years alone, nations as diverse as Bolivia, Belgium, China, England, Paraguay, the Philippines, South Africa, and Thailand have created ECTs, and there are more on the drawing boards in other countries. Each is unique, developed in response to different environmental issues, laws, political institutions, cultural and religious norms, and advocacy pressures, but all have much in common and much to learn from one another.

This explosion of ECTs makes Pace Law School's launching of a new forum — the International Judicial Institute for Environmental Adjudication (IJIEA) — extremely timely and important. Currently, there is no other global forum in which environmental judges, commissioners, officials, and other stakeholders can share perspectives and learn from each other.³ The IJIEA will connect countries and people seeking to increase access to environmental justice — through sharing ECT successes and failures, brainstorming new ECT innovations, and evaluating the contribution of ECTs to environmental protection and sustainable development.

Why the sudden upsurge in specialized ECTs? In over 175 interviews with ECT-experienced judges, prosecutors, development attorneys, government officials, nongovernmental organizations (NGOs), and academics in twenty-four countries, we found six factors converge, leading to their development.

The first and second factors, not surprisingly, are the growth of environmental problems and public awareness of them. Rapid development, industrialization, and urbanization in many countries

2. We use “court” to indicate a body in the judicial branch of government and “tribunal” to indicate all non-judicial bodies empowered to decide disputes (typically in the executive or administrative branch of government).

3. Some *regional* environmental-judicial organizations exist, bringing together certain geographic groupings of states, *e.g.*, European Union Forum of Judges for the Environment (EUFJE), <http://www.eufje.org/> (last visited Dec. 2, 2010); Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT); the Asian Justices Forum on the Environment (AJFE), <http://www.aecen.org/strengthening-asian-judiciaries> (last visited Dec. 2, 2010); the Working Group on Environmental Law of the Association of European Administrative Judges (AEAJ), <http://www.aeaj.org> (last visited Dec. 2, 2010).

have resulted in severe water, air, and land pollution; deforestation; wildlife loss; desertification; and other problems with major health, ecosystem, and societal impacts. In our own way, we all experience our London smogs, Bhopals, Chernobyls, Love Canals, Amazon rainforest destruction, and BP Deepwater Horizon blowouts. But development has also expanded public awareness and response, notably with innovations in and expansion of media, Internet, email, blogs, and other forms of communication.

The third factor is a response to the first two. Many nations have responded to these environmental pressures by adopting complex environmental laws — from constitutional “rights to a healthful environment,” to substantive environmental quality laws, to procedural rights of access to information, public participation, and access to justice.⁴ International environmental treaties and agreements also create new rights and duties — principles such as sustainability, polluter-pays, precautionary, prevention, inter-generational equity — that increase expectations and the pressure on countries to adopt strong laws protecting the environment.⁵ But in many countries (a cynic might say “all”), the laws on the books are not adequately enforced, and so environmental problems and public outrage continue.

Then the fourth factor can occur. In response to the lack of environmental enforcement and protection, civil society in the form of environmental NGOs, advocacy lawyers, as well as public entities begin bringing their complaints to the available general courts. At this point, the all-important fifth factor can occur — the traditional courts disappoint expectations, failing to deliver environmental justice. They often do not provide an ideal adjudication, one that is, in the succinct words of Australian court procedural law, “just, quick, and cheap.”⁶ Barriers to existing court effectiveness in resolving environmental conflicts are many and various — the most significant being long delays, huge case backlogs, poor case management, decision-makers lacking in environmental expertise, narrow

4. PRING & PRING, *supra* note 1, at 6-11.

5. *Id.*

6. Civil Procedure Act, 2005, § 56(1) (N.S.W. Consol. Acts); see Hon. Justice Brian J. Preston, *Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales*, 25 ENV'T & PLAN. L. J. 385, 393 (2008).

definitions of plaintiff standing, the high cost and economic risks of litigation, lack of consistent decisions, intimidation, and corruption.⁷

At this point the decisive sixth factor can occur. Visionary leadership emerges, with strong environmental advocates inside and/or outside the government urging ECTs as a solution to the problems with the general courts. When these strong environmental advocates connect with reform-minded judicial or governmental leaders, the prospects for an ECT multiply. In some instances, these visionary leaders even “change hats” — from advocate to judge or advocate to government official — giving them the ability to implement the changes they have been seeking.

The convergence of these six factors — environmental problems, public awareness, unenforced laws, public interest litigation, traditional court failure, and emergence of reform-minded leaders — prompts the search for new solutions. As William Ruckelshaus, the first administrator of the U.S. Environmental Protection Agency, summed up recently, “Yesterday’s solutions worked well on yesterday’s problems, but the solutions we devised back in the 1970s aren’t likely to make much of a dent in the environmental problems we face today.”⁸

At this point, ECTs can be an attractive solution for some or all of the following reasons:

- expert judges and decision-makers with knowledge of environmental law, science, and economics
- greater efficiency through careful case management
- higher visibility of environmental cases and decisions
- cost reduction, including special rules of procedure
- consistency in decision-making
- expansion of standing to permit public interest lawsuits (PILs) and class actions
- demonstration of government and judicial commitment to environmental justice
- increased transparency and accountability for government agencies
- prioritization of environmental cases over other civil,

7. PRING & PRING, *supra* note 1, at 13-16.

8. William Ruckelshaus, *A New Shade of Green*, WALL ST. J., Apr. 17, 2010, <http://online.wsj.com/article/SB10001424052702303410404575151640963114892.html> (last visited February 11, 2011).

criminal, and administrative cases

- ability to be creative, reform procedures, remove barriers, and use problem-solving approaches not available in traditional courts
- use of alternative dispute resolution (ADR) to craft non-adversarial solutions for environmental problems
- ability to integrate environmental, sectoral, and land use laws to achieve more holistic decisions
- authority to use a broader range of remedies
- expansion of public information, leading to greater public participation and confidence
- potential for judicial activism and reform by judges committed to environmental justice⁹

There are of course arguments against ECTs. Some opposition is based on practical considerations (concerns about insufficient caseload, training costs, competing needs, and industry capture), and some on more theoretical issues (concerns about marginalization, fragmentation, defining “environmental,” and judicial activism).¹⁰

Given the many positive arguments, why have ECTs so far been created in only about 20% of the world’s nations? The U.S. government, for example, considered creating a national environmental court in the 1970s and decided against it,¹¹ and major European nations, such as France, Germany, and Italy, also do without specialized environmental courts. Experts we interviewed point to public satisfaction with the general courts — absence of the fifth factor — as forestalling development of ECTs in those and other countries. We anticipate that the increasingly complex environmental issues of the twenty-first century, such as climate change, will increasingly move government and civil society leaders to consider expert ECTs.

Pace Law School’s Advisory Board for the IJIEA and other

9. PRING & PRING, *supra* note 1, at 13-16. See also, *inter alia*, RICHARD MACRORY & MICHAEL WOODS, *MODERNIZING ENVIRONMENTAL JUSTICE: REGULATION AND THE ROLE OF AN ENVIRONMENTAL TRIBUNAL* (University College London 2008); Preston, *supra*, note 6; Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, 37 ENVTL. POL’Y & L. 459 (2007) (Neth.); LAW COMM’N OF INDIA, 186TH REPORT OF THE LAW COMMISSION OF INDIA: PROPOSAL TO CONSTITUTE ENVIRONMENTAL COURTS (2003).

10. PRING & PRING, *supra* note 1, at 17-18.

11. Judicial Conference of the United States, *Federal Courts Study Committee Report*, 22 CONN. L. REV. 733 (1990).

authors in this issue of the *Journal of Court Innovation* are excellent examples of the visionary leaders who have helped create ECTs:

Before going on the bench, Ambassador Hilario Davide Jr.¹² personally authored the provision in the Philippines' 1987 Constitution creating a "right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."¹³ When he was appointed to the Supreme Court of the Philippines, he wrote the landmark opinion in *Oposa v. Factoran*¹⁴ and subsequently became chief justice. That groundbreaking 1993 case was brought by award-winning environmental advocate Antonio (Tony) Oposa against the national government for failing to protect hundreds of thousands of acres of virgin Philippine forests from clearcutting. Davide's decision laid the foundation of Philippines environmental jurisprudence, establishing the constitutional right to a sound environment as enforceable and "grant[ing] standing to [the plaintiff] children in the present generation to represent both their own interests and those of future generations."¹⁵ External advocacy continued to receive internal support under Davide's successor, Chief Justice Renato S. Puno, who has just retired. Under Puno's leadership, in 2008 the Court designated 117 existing trial courts as "environmental courts."¹⁶ In 2009, it ruled against the government in another Tony Oposa case demanding the cleanup of polluted Manila Bay and adopted the remedy of "continuing mandamus" as an environmental enforcement tool.¹⁷ In 2010, it produced a sweeping set of Supreme

12. Ramon Magsaysay Award Foundation, *2002 Ramon Magsaysay Award for Government Service: Citation for Hilario Davide, Jr.* (2002), <http://www.rmaf.org.ph/Awardees/Citation/CitationDavideHil.htm> (last visited Dec. 2, 2010).

13. Const. (1987), Art. II, sec. 16, (Phil.).

14. *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.), http://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html (last visited Dec. 2, 2010).

15. Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 ENVTL. L. 321, 342 (2001).

16. Philippines Supreme Court Administrative Order, A.O. No. 23-2008, Re: Designation of Special Courts to Hear, Try and Decide Environmental Cases (Jan. 28, 2008).

17. *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, G.R. Nos. 171947-48 (S.C., Dec. 18, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/171947-48.htm> (last visited Dec. 2, 2010); see also Presbitero J. Velasco, Jr., *Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Protection*, 11 ORE. REV. OF INT'L L. 441 (2009) (opinion author's article about the case).

Court Rules of Procedure for Environmental Cases,¹⁸ including a unique fast-track Writ of *Kalikasan* (Nature), which permits a serious environmental complaint affecting two or more locations to be filed directly in the Supreme Court, streamlining the trial-appeal process; Advocate Oposa has just filed the Supreme Court's first Writ of *Kalikasan* petition, involving climate change and water storage.¹⁹

Merideth Wright, Judge of the Environmental Court of the State of Vermont in the United States since its creation in 1990, is another example of this leadership synergy and ability to "change hats." Dedicated environmentalists took office in key state government environmental positions in the 1980s,²⁰ and the creation of an Environmental Court was initially advanced by opponents who wanted a "watchdog" to protect against overzealous environmental enforcement. Wright, then the Director of the Environmental Division of the Vermont Attorney General's Office, was selected as its first judge, and has overseen the expansion of the Environmental Court's jurisdiction and budget, the development of its jurisprudence and procedures, and the appointment of a second judge in 2005.

Barrister Richard Macrory, a Professor at University College London, continues a distinguished career in and out of government, focusing on environmental justice and judicial reform. He has been a member of the Royal Commission on Environmental Pollution, a board member of the Environment Agency of England and Wales, and has co-authored one of the seminal works on the need for an

18. Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (S.C., Apr. 13, 2010) (Phil.).

19. The Global Legal Action on Climate Change v. The Philippine Government, Special Civil Action, G.R. No. 191806 (S.C., filed Apr. 21, 2010) (Phil.). See Edu Punay, *Supreme Court orders government to answer first kalikasan petition*, THE PHILIPPINE STAR, Apr. 29, 2010, <http://208.184.76.174/Article.aspx?articleid=570587> (last visited Dec. 2, 2010).

20. The Director of the State Agency of Natural Resources at the time was Jonathan Lash, previously an attorney for the environmental NGO Natural Resources Defense Council (NRDC) and now President of the World Resources Institute (publisher of *Greening Justice*). See World Resources Institute: Jonathan Lash, <http://www.wri.org/profile/jonathan-lash> (last visited Dec. 2, 2010). His second-in-command as Commissioner of the Department of Environmental Conservation was Patrick Parenteau, previously a Vice President of the environmental NGO National Wildlife Federation and now Senior Counsel to the Environmental and Natural Resources Law Clinic and Professor of Law at Vermont Law School. See Vermont Law School: Patrick A Parenteau, <http://www.vermontlaw.edu/x6702.xml> (last visited Dec. 2, 2010).

environmental tribunal in Britain.²¹ He has seen his advocacy rewarded with England's establishment of the new "First-tier Tribunal (Environment)" in April 2010.

Nicholas A. Robinson, Pace University Professor on the Environment and founder of Pace Law School's globally-regarded Environmental Law Program, is the ideal catalyst for the new IJIEA. One of our most respected international environmental law leaders, he has practiced, taught, and advised on environmental law issues and has led major government and public interest environmental bodies since the 1960s. His contributions to environmental jurisprudence, to judicial training and capacity-building, and to the development of national and international environmental law can now be carried on in new and creative ways through the IJIEA.

The research we conducted for *Greening Justice* reveals similar stories of the interaction of environmental advocates with responsive judges and other officials in almost every country with an ECT. Examples include:

- India's M.C. Mehta brought his landmark cases to a sympathetic "green bench" of the Supreme Court of India, resulting in major new environmental precedents, principles, and practices, leading to the creation of India's new National Green Tribunal in 2010.²²
- Vladimir Passos de Freitas, the distinguished Brazilian law professor and longtime advocate of ECTs, while president of the Federal Court of Appeals of the Fourth Circuit in 2003-2005 created trial-level federal environmental courts in each of the three states in his circuit.²³
- Kurt Deketelaere, now secretary general of the League of European Research Universities, "changed hats" from a leading environmental law professor to chief legal advisor and chief of staff for the Environment Ministry of the Flemish Region of Belgium (Flanders), where he led the drafting of

21. See MACRORY & WOODS, *supra* note 9.

22. M.C. Mehta Environmental Foundation, <http://mcmef.org/> (last visited Dec. 2, 2010).

23. Vladimir Passos de Freitas: Resumé, http://www.vladimirfreitas.com.br/bio_en.asp (last visited Dec. 2, 2010).

legislation creating several new regionwide ECTs in 2009.²⁴

- Donald Kaniaru, a pioneering Kenyan environmental lawyer and former United Nations' Environment Programme official, helped establish Kenya's National Environmental Tribunal in the 2000s,²⁵ with support from dedicated University of Nairobi environmental law professors Charles Okidi and Alfred Mumma.
- Indonesia's environmental NGO Forum for the Environment (*Wahana Lingkungan Hidup Indonesia* or WALHI) has litigated important precedents, including establishing citizen standing for class actions and public interest lawsuits. In response, the Indonesian Supreme Court is now considering a special training and certification program to qualify judges to hear environmental cases.²⁶

ECTs are among the most innovative adjudication bodies in the world. Judges and other decision-makers have stepped "out of the box" in many countries to transform traditional environmental jurisprudence. Some of the creative examples (of which the IJIEA can help raise awareness) include:

- In the heart of Brazil's Amazon, State Environmental Court Judge Adalberto Carim Antonio is the master of the creative criminal remedy. He regularly orders offenders to attend an environmental night school he has created; makes community service directly relate to the offense (e.g., sentencing waste dumpers to work in a recycling plant, illegal foresters to plant trees, wildlife poachers to work for wildlife recovery groups); and provides community education through billboards on buses and environmental comic books he has personally authored and illustrated and which are paid for by offenders

24. Kurt Deketelaere – Work History, <http://www.kurtdeketelaere.be/> (last visited Dec. 2, 2010); League of European Research Universities – Secretary General, <http://www.leru.org/index.php/public/about-leru/office/SecretaryGeneral> (last visited Dec. 2, 2010).

25. Kenya Community Development Foundation – KCDF Trust, <http://kcdf.or.ke/page/kcdf-trust/> (last visited Dec. 2, 2010).

26. Friends of the Earth Indonesia, <http://www.walhi.or.id/en> (last visited Dec. 2, 2010).

in lieu of fines.²⁷

- In New South Wales, Australia, Chief Justice Brian Preston of the Land and Environment Court is creating a model “multi-door courthouse,” utilizing different adjudication pathways, ADR, and social services.²⁸
- In New Zealand’s Environment Court, Alternate Environment Judge Fred McElrea requires some parties to participate in a “restorative justice” process, in which the community that has been harmed assists in designing the sentences for environmental violators.²⁹
- In the Philippines, the Supreme Court recently designated 117 local trial courts as environmental courts and adopted revolutionary new rules of procedure for environmental cases, such as creating a Writ of *Kalikasan* (Nature).³⁰
- In Sweden’s Environmental Court of Appeal, scientists and engineers sit with law-trained judges to make environmental decisions.³¹
- In Ireland, the An Bord Pleanála holds hearings in the locality of the dispute and conducts site visits to understand the problems first-hand.³²
- In South Korea, the national and subnational Environmental Dispute Resolution Commissions rely primarily on mediation to resolve environmental complaints.³³
- In Denmark, the Environmental Board of Appeals maintains a

27. See Karen Johansen, *The Environmental Court of Manaus: Review and Analysis*, 5 ENVIRONMENTALLY FRIENDLY 20 (Fall 2001), <http://web.pace.edu/emplibrary/Env.%20Law%20GreenLaw%20Issue%20Volume%2051.pdf> (last visited Dec. 2, 2010).

28. Hon. Justice Brian J. Preston, *Keynote Address – The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse* (Nov. 15, 2007), [http://www.bocsar.nsw.gov.au/lawlink/lec/ll_dec.nsf/vwFiles/Paper_15Nov07_Preston_LEC_Multi_door_Court.doc/\\$file/Paper_15Nov07_Preston_LEC_Multi_door_Court.doc](http://www.bocsar.nsw.gov.au/lawlink/lec/ll_dec.nsf/vwFiles/Paper_15Nov07_Preston_LEC_Multi_door_Court.doc/$file/Paper_15Nov07_Preston_LEC_Multi_door_Court.doc) (last visited Dec. 2, 2010).

29. Restorative Justice Online – Fred McElrea, <http://www.restorativejustice.org/leading/mcelrea> (last visited Dec. 2, 2010).

30. Rules of Procedure for Environmental Cases, *supra* note 18.

31. Sveriges Domstolar – Environmental Court, http://www.domstol.se/templates/DV_InfoPage_2328.aspx (last visited Dec. 2, 2010).

32. An Bord Pleanála, <http://www.pleanala.ie> (last visited Dec. 2, 2010).

33. National Environmental Dispute Resolution Commission, http://eng.me.go.kr/content.do?method=moveContent&menuCode=abo_sub_resolution (last visited Dec. 2, 2010).

list of several hundred volunteer environmental experts — from government, industry, agriculture, NGOs, and academia — that it can call upon to sit on and decide cases requiring special expertise.³⁴

While every ECT is unique, each model has much to share with other ECTs as well as with civil, judicial, and governmental leaders interested in creating or reforming ECTs in their jurisdictions. Whether the sharing is about new computerized case management tools, creative use of ADR, development of environmental training programs, adoption of innovative rules of procedure, unusual but effective remedies, special approaches for access to scientific and technical expertise, principles for expanding standing, reducing costs for parties, taking justice to the people through traveling courts and site visits, or evaluation methodology for ECT performance — all ECTs have exciting innovations to share.

Pace's timely creation of the new IJIEA will provide a valuable forum for sharing the best theories, experiences, and practices from environmental decision-makers, enhancing environmental justice globally.

34. Danish Ministry of the Environment, Decision-Making Process in Denmark § 4.1.3, <http://www2.mst.dk/udgiv/publications/1995/87-7944-324-9/html/4.htm> (last visited Dec. 2, 2010).

THE AUSTRIAN ENVIRONMENTAL SENATE

*Verena Madner**

For fifteen years, the Austrian *Umweltsenat* (Environmental Senate) has been operating as an independent tribunal handling environmental permit appeals. This article intends to present and further the understanding of the *Umweltsenat*. It also seeks to highlight some aspects of the Austrian experience that may contribute to the debate on environmental courts in other countries and legal systems.

Background

Purpose of the *Umweltsenat*

In 1994, the Austrian Constitution¹ was amended to create the *Umweltsenat* as an independent body to hear environmental appeals under the Federal Act on Environmental Impact Assessment (EIA Act).²

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1. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl No. 1/1930, as last amended by BGBl I No. 57/2010 (Austria).

2. Federal Act on Environmental Impact Assessment [EIA] Bundesgesetzblatt [BGBl] No. 697/1993, as amended by Environmental Impact Assessment Act 2000 [EIA Act] Bundesgesetzblatt Teil I [BGBl I] No. 87/2009 (Austria). An English translation of the EIA Act is available on the English version of the database of the Federal Chancellery, www.ris.bka.gv.at.

The jurisdiction and procedures of the *Umweltsenat* are regulated by a special Federal Act.³ The *Umweltsenat* consists of forty-two members, ten of whom are members of the judiciary and thirty-two of whom are legally qualified expert-members.⁴

Why was there a need for a special judicial body? Two main reasons can be identified: First, the *Umweltsenat* was established to meet the requirements of Article 6 of the European Convention on Human Rights and relieves the Austrian Supreme Administrative Court of its steadily increasing workload.⁵ Second, it was felt that an independent specialized tribunal acting as an appellate body would contribute to transparent decision-making and promote acceptance of EIA decisions. Both these intentions and expectations call for a short exploration of the legal background and the jurisdiction of the *Umweltsenat*.

Environmental Permits

Environmental law in Austria is mainly administrative law. Austria is a federal state and jurisdiction regarding environmental protection is fragmented. Both the federation and the federal provinces (Laender) have legislative and administrative powers in this field.⁶ Before EIA was introduced in Austria, operators had to address multiple administrative agencies on federal, state and local levels in order to obtain environmental permits.⁷ Accordingly appeals against these decisions had to be lodged with authorities at both the federal and state levels. Not surprisingly this situation was regarded as unworkable. Whereas industry was primarily concerned about the complexity and duration of proceedings, environmentalists argued that the status quo inhibited comprehensive environmental protection and was thus an impediment for the implementation of EU-directives.

Over the years, considerable efforts have been made to unify the

3. UMWELTSENATSGESETZ [USG 2000] BGBl I No. 2000/114, as last amended by BGBl I No. 2009/127. *See infra* pp. 28-31.

4. § 1 (2) USG 2000, available at www.umweltsenat.at.

5. *See* explanatory marks on the government bill to the Austrian EIA Act. 1142 BIGNR, 18.GP, 4.

6. Legislative competences of the federation are predominant in environmental matters. The most important competences of the federal provinces in the field of environmental protection encompass nature preservation legislation and zoning law.

7. For an overview of the introduction of EIA in Austria, *see* Benjamin Davy, *The Austrian Environmental Impact Assessment Act*, 15 ENVTL. IMPACT ASSESSMENT R. 361 (1995).

permit system.⁸ However, attempts to reform the constitutional framework and the legal requirements for environmental permitting have failed so far. Following years of discussion, with the process of joining the European Union, a breakthrough was finally achieved.⁹ An amendment to the Austrian Constitution unified legislative and administrative powers in the field of EIA.¹⁰

The EIA Act 1993 fundamentally reformed environmental permit procedures for major installations and activities.¹¹ The EIA was integrated into a consolidated permit procedure, thus assuring comprehensive review of environmental impacts.¹² The authority competent for the EIA (*Landesregierung*, State Government) is required to apply all relevant legislation both at the state and federal levels and to determine if the criteria of the relevant legislation are met.¹³ This means that, although the permit standards and regulatory framework are not unified in a single act, each matter is dealt with by one single authority in one procedure. If the EIA authority grants the permit, a single permit is issued instead of the multiple permits usually required by federal or state law.¹⁴ The jurisdiction for appeals against decisions of the EIA authority was also unified and the *Umweltsenat* was established to decide appeals in EIA matters.¹⁵

Judicial Character of the *Umweltsenat* Tribunal for the Purposes of Article 6 ECHR

8. The scope of the Trade Code (*Gewerbeordnung*), the central and most comprehensive framework for business operations, has been extended over the years. Nonetheless, additional permits are required under the zoning law rules of the Austrian states. Additional permits may be required pursuant to the Water Act and the nature conservation legislation of the Austrian states.

9. See Verena Madner, *Umweltverträglichkeitsprüfung*, Handbuch Wirtschaftsrecht 837 (Holoubek/Potacs, 2006); Christian Baumgartner & Waltraud Petek, *Kommentar zum UVP-G 2000*, 19 (2009).

10. See Amendment to the Federal Constitution, BGBl 1993/508.

11. Bundesgesetz über die Prüfung der Umweltverträglichkeit und die Bürgerbeteiligung [UVP-G] [Environmental Impact Assessment and Citizens's Participation Act], BGBl No. 1993/697, as last amended by BGBl I No. 2009/87 (Austria). As amended by BGBl I No. 2000/89 (Austria), the title of the Austrian EIA Act was changed to *Umweltverträglichkeitsprüfungsgesetz 2000* [UVP-G 2000].

12. This permitting process is established in Chapter 2 of the Austrian EIA Act. According to Chapter 3 of the Act, high-capacity railroad lines and highway sections are not subject to a fully consolidated permitting procedure.

13. § 17 UVP-G (2000).

14. § 3 (3) UVP-G (2000).

15. Regarding high-level traffic projects see *supra* note 12.

Article 6 of the European Convention on Human Rights (ECHR) guarantees that claims concerning “civil rights and obligations” are decided by an independent and impartial tribunal established by law. Within the Austrian legal system, this provision raised some problems.¹⁶ The European Court of Human Rights interprets the term “civil obligations” in a broad sense, affecting decisions based on administrative law as well as environmental permit decisions.

In the Austrian legal system, decisions of administrative authorities are in general subject to review by the Administrative Court. However, the Administrative Court’s scope of review is restricted to legal review based on the finding of facts by the authority.¹⁷ It is therefore doubtful whether the Administrative Court is qualified as a tribunal under Article 6 ECHR.¹⁸

The European Court of Human Rights held that, under Article 6 ECHR, the term “tribunal” is not restricted to courts but may also include independent authorities that constitute administrative bodies if certain criteria regarding independence and impartiality are met.¹⁹ It is in this context that the creation of several independent authorities in Austria has to be regarded. The *Umweltsenat* is one of those bodies established outside the judicial system, created to meet the requirements of Article 6 ECHR.

The Austrian Constitutional Court (*Verfassungsgerichtshof*) has imposed substantive conditions on administrative review bodies in order to make them operate more like a court than an administrative authority.²⁰ The Administrative Court has held in several decisions that the *Umweltsenat* complies with Art 6 ECHR, especially with regard to appointment and impartiality.²¹

16. See Theo Öhlinger, *Austria and Article 6 of the European Convention on Human Rights*, 1 EJIL 286 (1990).

17. Verwaltungsgerichtshofgesetz [VwGG] [Administrative Court Act] § 41, BGBl No. 1985/10 as last amended by BGBl Vol. I No. 2008/4 (Austria).

18. Verwaltungsgerichtshof [VWSLG] [Administrative Court] No. 16.241 A/2003 (Austria). According to the Administrative Court, the answer is negative. In several decisions the European Court of Human Rights however has held that the scope of review in the relevant cases had been sufficient for purposes of Article 6 of the ECHR. See, e.g., European Court of Human Rights [ECHR] Sept. 21, 1993, *Zumtobel v. Austria*, 782.

19. European Court of Human Rights [ECHR] Jul. 16, 1971, *Ringelsen v. Austria*.

20. See Theo Öhlinger, *Verfassungsrecht* 282 (2009).

21. Verwaltungsgerichtshof [VwGH] [Administrative Court] June 24, 2009, docket No. 2007/05/0101. Also see Verwaltungsgerichtshof [VwGH] [Administrative Court] Oct. 18, 2001, docket No. 2000/07/0229;

Court or Tribunal for the Purposes of the Aarhus Convention

In order to implement the obligations arising under the *Aarhus Convention* and to provide for effective public participation and access to justice in the rendering of EIA decisions, the community EIA directive was amended.²² Member states have to guarantee “access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.”²³ In Austria, the *Umweltsenat* fulfills the role of an independent and impartial body in EIA matters.

Court or Tribunal for the Purposes of Article 234 EC

The European Court of Justice (ECJ) has concluded “that *Umweltsenat* meets the criteria that it be established by law, be permanent and have compulsory jurisdiction, apply rules of law and be independent.”²⁴ Accordingly, the *Umweltsenat* is considered a court or tribunal for the purposes of Article 234 EC which can refer questions for preliminary ruling to the ECJ.

Jurisdiction and Cases Filed

The *Umweltsenat* rules on appeals brought against decisions of state government adopted under Chapter 1 and 2 of the Austrian EIA Act.²⁵ Two types of decisions may be distinguished: permit-

Verwaltungsgerichtshof [VwGH] [Administrative Court] Feb. 24, 2006, docket No. 2005/04/0044.

22. U.N. ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Jun. 25, 1998, <http://www.unece.org/env/pp/documents/cep43e.pdf>.

23. Directive of the European Parliament and of the Council, No. 2003/35/EC, art. 3, 2003 O.J. (L 156) 17. (EU) amending Council Directive No. 85/337/EEC.

24. Case C-205/08, *Umweltanwalt von Kärnten v. Kärntner Landesregierung*, 2009 E.C.R. para 36 (Dec. 10). According to § 40 EIA Act, appeals against those permits cannot be brought before the *Umweltsenat*. However the Austrian Administrative Court recently decided (VwGH, Sept. 30, 2010, Docket No. 2009/03/0067, 0072) that in order to fully apply European Union law and protect the rights conferred thereunder on the public by the public participation provisions of the EIA Directive (*see supra* note 23), the *Umweltsenat* also is to be regarded as the competent authority to hear appeals against permits for high-level traffic projects.

25. Pursuant to Chapter 3 of the Austrian EIA Act, high-capacity railroad lines and highway sections are not subject to a fully consolidated permitting procedure. Appeals against those permits cannot be brought before the

decisions;²⁶ and decisions determining whether an EIA is to be carried out for a certain project.²⁷ The latter decisions predominate. If the EIA authority fails to decide on a permit in due time, an action for failure to act can be brought before the *Umweltsenat*. If the action is successful, the *Umweltsenat* acts as permit authority.²⁸

The jurisdiction of the *Umweltsenat* reflects the scope of the EIA Act²⁹ and covers a rich spectrum of projects, including: large infrastructural projects such as urban-development projects, power-lines, power plants or waste-incinerators, and smaller projects likely to have significant local environmental impact such as intensive livestock installations, ski lifts, shopping malls or holiday villages. As explained above, only one authority issues EIA permits under various federal and provincial laws. When deciding appeals, the *Umweltsenat* has to apply the whole range of environmental legislation including zoning and building law.³⁰

Decisions of the *Umweltsenat* have rarely been overturned. Between 2006 and 2009, 75 cases were filed, 65 of which were decided. Twenty-one *Umweltsenat* decisions have been appealed to the Administrative Court (*Verwaltungsgerichtshof*), while eight have been appealed to the Constitutional Court (*Verfassungsgerichtshof*). The Administrative Court has set aside only two of the decisions of the *Umweltsenat*. Only one appeal against a permit decision of the *Umweltsenat* has been set aside by the Administrative Court.

A request for a preliminary ruling on an *Umweltsenat* decision was made to the European Court of Justice under Article 234 EC³¹ for the first time in 2008.

Organization and Procedure

Composition of the *Umweltsenat*

Umweltsenat.

26. § 17, § 40 UVP-G (2000).

27. § 3 (7) UVP-G (2000).

28. § 39 Abs 2 UVP-G (2000); § 73 AVG; § 68 Abs 4 AVG (the *Umweltsenat* also has the right to declare void legally-binding decisions of the authorities under certain conditions set up in the statute).

29. The scope of EIA in Austria is of course significantly determined by amendments to the EIA Directive and by the case law of the ECJ.

30. This legislation notably includes the Trade Code, legislation concerning waste management, water management, air pollution control, IPPC law, nature and countryside preservation legislation.

31. Case C-205/08, *Umweltanwalt von Kärnten vs. Kärntner Landesregierung*, 2009 E.C.R. para 36 (Dec. 10).

The law provides that the *Umweltsenat* shall consist of ten members of the judiciary and thirty-two additional legally qualified members.³² The forty-two members are appointed by the federal president upon recommendation of the federal government. This recommendation must include eighteen members recommended by the nine state governments.³³

Umweltsenat members are appointed for a six-year term and may be reappointed.³⁴ Their appointment cannot be revoked. Members of the *Umweltsenat* carry out their functions independently.³⁵

Internal Operation and Allocation of Business

The organization and the procedure of the *Umweltsenat* decision is determined by federal law. The members of the *Umweltsenat* constitute the plenary assembly. The plenary assembly of the *Umweltsenat* elects a chairperson (president), and adopts Rules of Federal Practice and Procedure (*Geschäftsordnung, Geschäftsverteilung*).³⁶ The *Umweltsenat* pronounces judgments in chambers composed of three members.³⁷ Deliberations of the chambers are confidential.³⁸ The Registry (*Geschäftsführung*) is the permanent administrative service of the *Umweltsenat*. The Registry's tasks are carried out by officials of the Federal Minister of Agriculture and Forestry, Environment and Water Management.³⁹ Registry personnel must follow the instructions given by the president and sitting members of the *Umweltsenat*.

Procedure

Umweltsenat procedures are governed by provisions of the Act on the *Umweltsenat*⁴⁰ and by the general law on administrative procedure.⁴¹ The *Umweltsenat* must ascertain that all facts relevant for

32. § 1 Abs 2 USG (2000); § 3 Abs 1 USG (experts require at least five years of relevant legal practice).

33. § 2 Abs 2 USG (2000). Members of State or Federal Government may not be appointed.

34. § 2 Abs 1 USG (2000).

35. § 4 USG. *See also* BUNDES-VERFASSUNGSGESETZ [B-VG] bs 7 Art. 11.

36. § 8, § 9 USG (2000), *available at*: www.Umweltsenat.at.

37. § 10 Abs 1 USG (2000).

38. § 67f Abs 2 AVG.

39. The minister is responsible to provide the *Umweltsenat* with sufficient and adequately-trained staff to carry out these duties. § 14 USG (2000).

40. § 12 Abs 1 USG (2000).

41. ALLGEMEINES VERWALTUNGSVERFAHRENSGESETZ [AVG]. *See* Karl Weber,

a decision have been examined. Official technical experts or sworn-in external experts are often consulted by the *Umweltsenat*.⁴² The *Umweltsenat* may continue the investigation as part of the appellate procedure. However, if the *Umweltsenat* concludes that the investigation of the first instance was highly deficient, it may refer a case back to the administrative authority.⁴³ In practice, this rarely happens.

All parties must be heard. This may be accomplished by written procedure, by a hearing on *Umweltsenat*'s own motion, or at the request of one of the parties. In summary, although the decisions of the *Umweltsenat* have the characteristics of an administrative action, they have the force of *res judicata*: they must state reasons; they are delivered in open court; they are enforceable; and they may be contested only before the Administrative Court (*Verwaltungsgerichtshof*) or the Constitutional Court (*Verfassungsgerichtshof*).⁴⁴

Right to Appeal

An appeal must be lodged within four weeks of notification of the decision of the administrative authority, the effects of which are suspended *ex lege* unless there is express provision to the contrary.⁴⁵ In administrative proceedings, the right of appeal rests with the parties. In EIA permit decisions, neighbors and a number of institutions have rights of appeal.⁴⁶ These include the *Umweltanwalt* (Ombudsman for the Environment),⁴⁷ ad hoc local citizens' groups,⁴⁸ environmental non-governmental organizations (NGOs)⁴⁹ and

Public Law in Austria, in COMPARATIVE ENVIRONMENTAL LAW IN EUROPE 20 (Seedern/Heldeweg, 1996).

42. *See infra* p. 34.

43. § 66 Abs 2 AVG.

44. Case C-205/08, *Umweltanwalt von Kärnten vs. Kärntner Landesregierung*, 2009 E.C.R. para 59 (Jun. 25) (Advocate General Ruiz Jarabo Colomer, opinion).

45. § 64 Abs 1 AVG.

46. § 19 UVP-G (2000).

47. The Environmental Ombudsmen have been established by state law to defend environmental interests in administrative proceedings, notably in proceedings concerning nature preservation legislation. The EIA Act has conferred to the Environmental Ombudsmen of the *Laender* the right to act as party in EIA proceedings.

48. § 19 Abs 4 UVP-G (2000). A number of at least 200 local citizens may constitute a citizens' group by expressing their written support to a written statement. The right of citizens' groups to act as parties and obtain *locus standi* does not include proceedings following a simplified procedure thus significantly restricting public participation of ad hoc local citizens' group.

49. § 19 (7) UVP-G (2000). In order to become eligible to exercise party rights

municipalities. The right of neighbors to appeal is limited.⁵⁰ The *Umweltanwalt*, citizens' groups and NGOs are entitled to challenge a decision with respect to any violation of environmental legislation.⁵¹

Scope of Review

The *Umweltsenat* has unlimited jurisdiction. It may change the decision of the administrative authority in any respect.⁵² For example, if an operator appeals air pollution limit values in an EIA permit, the *Umweltsenat* may impose stricter conditions or other permit requirements. NGOs are entitled to appeal against a permit decision by invoking all relevant environmental legislation to effectively challenge a decision. It is controversial whether appellate authorities are entitled to full review if an appeal is raised by a party who is a neighbor and therefore has only limited rights of appeal on the basis of individual rights.⁵³ In several decisions, the *Umweltsenat* has held that the purpose of administrative appellate procedure is not only to protect individual rights, but to ensure the legality of an administrative decision in general.⁵⁴

Future Developments

Administrative Courts of First Instance

The Austrian Constitution has long provided for the power to create independent bodies that control administration.⁵⁵ This power

in EIA proceedings, an NGO has to be recognized by administrative order beforehand. In the context of the EIA Act an environmental organization is an association or a foundation that is non-profit oriented and whose primary objective is the protection of the environment. A further requirement is that it has been in existence for at least three years. Currently, 30 NGOs have been registered.

50. For example, permit conditions on emission limit values according to BAT or obligations concerning nature preservation are considered public interest legislation that is not subject to neighbor rights.

51. § 19 UVP-G (2000).

52. § 66 Abs 4 AVG. Obviously, if an appeal is about a rejecting decision (*e.g.*, due to a lack of standing), the *Umweltsenat* must not decide on the granting of the permit; instead, if the appeal is successful, the case has to be referred back to the administrative authority.

53. For a discussion of consenting based on convincing arguments, *see* Rudolf Thienel and Eva Schulev-Steindl, *VERWALTUNGSVERFAHRENSRECHT* 272 (2009).

54. At present, one of those cases is pending before the Court of Administration.

55. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl I 2/2008, art. 20 Abs 2; BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] art. 133 Z 4. Art.

has been widely exercised.⁵⁶ Nonetheless, efforts to create a two-stage administrative court system in Austria have been made for decades. It was against the background of this debate on a reform of the court system that the *Umweltsenat* was originally established for only a limited period of time.⁵⁷

At present there is a discussion about abolishing all existing independent administrative appellate bodies and instead establishing administrative courts of first instance both at the federal and state levels (*Landesverwaltungsgerichte* und *Verwaltungsgericht des Bundes*)⁵⁸ Courts of first instance conduct a full review. Appeal against their decisions is made to the Administrative Court for legal review.⁵⁹ Administrative authorities act as decision-makers at first instance only. Both the current and the previous federal government have drafted bills on this matter. The jurisdiction now covered by the *Umweltsenat* is proposed to be conferred to the State Administrative Court of First Instance (*Landesverwaltungsgerichte*). However, no bill addressing this reform has yet been proposed to Parliament.

The establishment of administrative courts and a system of two-stage administrative jurisdiction is to be valued as an improvement in the system. In the course of the review procedure, the *Umweltsenat* itself has taken a position favoring assignment of environmental review in EIA matters to a federal administrative court of first instance. Three arguments have been set out, to explain support of

20 B-VG was reformed recently, broadening the possibility to create independent authorities and expanding the range of activities that may be conferred to those authorities (not necessarily tribunals under Art 6 ECHR). For further details on this reform see *Christoph Grabenwarter & Michael Holoubek, Verfassungs und Allgemeines Verwaltungsrecht* 337 ff (2009); *Theo Öhlinger, Verfassungsrecht* 231 ff (2009).

56. See Christoph Grabenwarter, BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] art. 133 Z 4 in, *Österreichisches Bundesverfassungsrecht* (Korinek/Holoubek, 2009). Furthermore, tribunals acting as appellate bodies against decisions of the authorities, concerning administrative fiscal penalty procedures, have been established. See *Unabhängige Verwaltungssenate – UVS und Unabhängiger Finanzsenat – UVS* (independent administrative tribunals and independent fiscal tribunal).

57. The mandate of the *Umweltsenat* was originally limited until 2000 in order not to interfere with the then awaited reform of the court system and to gain experience with this kind of tribunal. Following several renewals, the Constitution now provides for a permanent establishment. BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl I 2009/127.

58. Georg Lienbacher, *Staatsreform, Die Ergebnisse der Expertengruppe im Jahr 2007*, in *Jahrbuch Öffentliches Recht* 23 (Lienbacher/Wielinger, 2008).

59. Generally speaking, the Administrative Court currently acts as the first and last administrative court of instance for appeals.

this recommendation:

First, a federal instance of appeal promotes the uniform application of the relevant legislation. Moreover, EIA cases are often highly controversial and have great significance for local politics.

Second, decision-making authorities are often under pressure about their decisions. The *Umweltsenat* was set up to provide for a transparent and independent appellate review. It may be argued accordingly, that a federal appellate court is more shielded from local controversies than a state court.

Finally, Austria is a small country and the number of cases filed in any of the nine state administrative courts would be very low, thus making it difficult for these courts to develop expertise.

Conclusion

Some characteristic features of the *Umweltsenat* and its judicial role accentuate its potential as well as the difficulties it is experiencing.

Full review

The obligation of the *Umweltsenat* to fully investigate all relevant facts and provide for a complete review supports fast and effective legal protection. Furthermore, the requirements of the *Aarhus Convention* and of Article 6 ECHR are met by the composition and procedure of the *Umweltsenat*.

Collegial System

Environmental permitting is highly complex, and EIA cases are the most complex in this area. The *Umweltsenat* is rarely reversed by the Administrative Court. It is safe to suggest that the *Umweltsenat* benefits from the collegial system, enabling it to build up specific knowledge in handling these cases by rendering decisions in specialized chambers. The experts nominated from federal and state authorities usually contribute their extensive experience of enforcing environmental law. On several occasions, decisions of the *Umweltsenat* have stimulated interpretation of environmental regulations and principles.⁶⁰

60. See, e.g., *Umweltsenat* 5B/2004/11-18 (regarding the relevance of limit values for air pollution and consistent interpretation of community directives on air quality); *Umweltsenat* 3/1999/5 (regarding the level of protection and the specification of suitable permit conditions concerning environmental quality

Expert Opinion

Of course, it is not only legal expertise that matters. To properly address and investigate the issues at stake, expert knowledge on scientific and technical matters has to be obtained. In practice, the conditions and procedural rules for obtaining expert opinions impact fairness as well as acceptance of decisions. The *Umweltsenat* needs to establish trust, while at the same time avoiding delays in the decision-making process.

Pursuant to the general Law on Administrative Procedure, expert opinion has to be gained principally from officially appointed experts (*Amtssachverständige*) who are public servants. An appellate body such as the *Umweltsenat* may even call for an opinion of an expert who has already given an opinion in the first instance. In EIA procedures however, according to a special regulation, the *Umweltsenat* is free to call in sworn experts, thus being more flexible and in a better position to establish trust, by choosing a different expert in appellate procedures.⁶¹

Nonetheless the public often questions the neutrality of sworn in experts who offer their services on the market. There have been calls for establishment of a panel of experts working exclusively for the appellate body. In Austria, there is no tradition of “technical judges.” The members of the *Umweltsenat* are all legal experts, and the decision-making power is invested only with them. In a field like EIA, which involves highly scientific and technical knowledge, this may be contested. On the other hand, the establishment of “technical judges” raises several questions. Which disciplines are to be chosen? Will they keep up with developments in scientific knowledge? Will the concept of fair trial be impacted, if no outside expert witness is heard because a “technical judge” is participating in decision-making? Other countries, Sweden for example, have experience with “technical judges” in environmental courts.⁶² These experiences may be worth examining.

standards in EIA permit procedures); *Umweltsenat* 6B/2003/8-57 (on the direct applicability of the Soil Conservation Protocol of the Alpine Convention).

61. § 12 Abs 2 UVP-G (2000).

62. Jan Darpö, *Justice through Environmental Courts? Lessons learned from the Swedish Experience*, ENVIRONMENTAL LIABILITY (2007); www.jandarpo.se/inenglish.asp.

Promoting Acceptance of Permit Decisions

The *Umweltsenat* was established to provide transparent and independent appellate review thus promoting acceptance of EIA permit decisions. While it is hard to evaluate whether these expectations have been met, opposition to the proposed abolition of the *Umweltsenat* suggests that acceptance has been achieved.⁶³ A variety of institutions have spoken out in favor of upholding the *Umweltsenat*. These have included, for example, the Austrian Chamber of Commerce, the Association of the Electricity Industry, Ökobüro (an umbrella association for environmental NGOs), and the environmental ombudsmen.

Apparently, the approach of the Austrian EIA Act, providing both for broad public participation and comprehensive consideration of environmental issues, works well to generate acceptance of permit decisions. Nonetheless, it has to be emphasized that the EIA cases dealt with by the *Umweltsenat* often arise from controversies that cannot be resolved at permit-decision stage, such as disputes on policy approaches or siting conflicts.

63. See Statements to proposed bill in opposition (94/ME, XXIII.GP, 129/ME XXIV.GP), made available at: www.parlament.gv.at.

ENVIRONMENTAL COURTS AND THE DEVELOPMENT OF ENVIRONMENTAL PUBLIC INTEREST LITIGATION IN CHINA

Alex L. Wang and Jie Gao***

Environmental public interest litigation (EPIL) has been the subject of much discussion in China for a number of years. However, even though the State Council's "Decision on the Implementation of Scientific Development and Strengthening of Environmental Protection" specifically mentioned the "promot[i]on of] environmental public interest litigation" in 2005,¹ the development of environmental

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1. Relevant wording stated in Article 27: "Develop the potential of social groups, encourage reporting to authorities and exposing various environmental law violations, promote environmental public interest litigation." See *Decision on the Implementation of Scientific Development and Strengthening of Environmental Protection*, (St. Council, effective Dec. 13, 2005) ST. COUNCIL GAZ. (P.R.C.), available at http://www.gov.cn/zwgk/2005-12/13/content_125680.htm.

public interest litigation has been slow to move beyond desire and debate.² This situation fundamentally changed on December 27, 2007, when the Environmental Court of Qingzhen, a county-level city under the jurisdiction of Guiyang, the provincial capital of Guizhou Province, publicly rendered its judgment on the *Tianfeng Chemical Factory* case.³ Though only a few other environmental public interest litigation cases have been filed and accepted in China since then, the Qingzhen Environmental Court and ten other environmental courts in Guizhou Province, Jiangsu Province, and Yunnan Province have nonetheless become important focal points for the development of the legal framework and the implementation of environmental public interest litigation, as these courts have set forth innovative rules on EPIL and provided an important forum for such cases. What was the impetus for the development of these courts? How have they performed in practice? What are their strengths and weaknesses? How have they advanced the development of environmental public interest litigation? What is the future of these courts? This article will address and provide preliminary answers to these questions.

Environmental Courts in China

China has a four-level court system, including Basic Courts, Intermediate Courts, Provincial High Courts, and the Supreme People's Court. While there were experiments with environmental courts as early as the late 1980s,⁴ the environmental courts established

2. See *id.* Others have focused on expanding the role of various government entities, such as the procuratorate (which handles criminal prosecutions), and various agencies with environmental responsibilities in bringing public interest lawsuits. In remedy, it is often contrasted with "private interest" suits that seek compensation or other remedies that do not accrue to the benefit of the general public; therefore, public interest remedies are often injunctive in nature, seeking to stop pollution or harm to natural resources.

3. See *infra* note 16.

4. In 1989, the People's Court in Qiaokou District of Wuhan attempted to establish an environmental court, but the Supreme People's Court (SPC) vetoed the attempt in an official response. See [Report about Establishing an Environmental Court by the People's Court of Qiaokou District in Wuhan City] (Sup. People's Ct, effective Feb. 10, 1989) 1989 FAJINGHAN 19 (P.R.C.). Subsequently, in the early 1990s, many courts established environmental *xunhui* (literally, "circuit") courts, which were later disbanded by the SPC in the mid-1990s. See Xuehua Zhang, *Enforcing Environmental Regulations in Hubei Province, China: Agencies, Courts, Citizens* (2008) (unpublished Ph.D dissertation, Stanford University) (on file with author) at 105-106 [hereinafter *Enforcing Environmental Regulations*].

since 2007 have been noteworthy in setting forth rules or implementing practices with a variety of innovations in standing, jurisdiction, and remedies, among other things. The term “environmental courts,” as used in this article, refers to judicial bodies established for the adjudication of environmental protection cases in China.⁵ The environmental courts have generally taken the form of environmental divisions within Intermediate People’s Courts (*huanbao shenpanting*) and environmental divisions or separate tribunals at the basic court level (*huanbao fating*).⁶ As of this writing, eleven environmental courts in three provinces in China have been in operation long enough for preliminary analysis of their experiences to be possible: two in Guizhou Province, one in Jiangsu Province, and eight in Yunnan Province.⁷

5. This does not include environmental panels (*huanbao heyiting*) and environmental *xunhui* courts, which generally involve judges being assigned to work onsite at agency offices, including environmental protection bureaus (EPB’s), land bureaus, and water bureaus (*huanbao xunhui fating*). These bureaus have been more limited experiments that have not produced significant breakthroughs for public interest litigation.

6. In addition, members of China’s Supreme People’s Court, as well as legal experts, have proposed that the role of China’s maritime courts be expanded to incorporate adjudication of water pollution cases, including trans-boundary cases. Reduction of the influence of local government and other interests on a court’s adjudication of cases, commonly referred to as local protectionism, is a major aim of this proposal. Wan E’xiang, the Deputy Chief Justice of the SPC, has been one of the most prominent supporters of this reform. At the 2009 National Conference of Maritime Court Presidents, Wan recommended that Provincial High Courts grant the maritime courts the authority to try water pollution cases. For example, the Wuhan Maritime Court has jurisdiction over cases on the Yangtze River and its tributaries, and could try water pollution cases occurring within these geographic bounds. Wan also encouraged maritime courts to explore environmental public interest litigation brought by water resource agencies, environmental groups, and environmental protection legal aid institutes. See *The Supreme Court requires improvement of the special jurisdiction system of the maritime courts, relevant higher courts may grant maritime courts jurisdiction over water pollution cases*, LEGAL DAILY, June 26, 2009 (P.R.C.), available at <http://news.sohu.com/20090627/n264802523.shtml>. Wan submitted a proposal to the 2010 National People’s Congress and Chinese People’s Political Consultative Conference (CPPCC) proposing legal amendments to grant maritime courts jurisdiction over water pollution cases and to establish a national environmental public interest litigation system. See *Wan E’xiang: Build public interest litigation system, execute the special jurisdiction*, XINHUA NEWS, Mar. 12, 2010 (P.R.C.), available at http://www.gov.cn/2010lh/content_1554274.htm.

7. Environmental courts have also been established since mid-2009 in Zhangzhou, Fujian Province [see http://www.enlaw.org/bmgl/wrfz/201005/t20100525_21984.htm (P.R.C.)]; in Tuorong, Fujian Province [see <http://www.ndzrw.cn/sygl/dtxx/201003/117213.html> (P.R.C.)]; in Nanjing, Fujian Province [see http://www.enlaw.org/bmgl/wrfz/201006/t20100606_22023.htm (P.R.C.)]; in Liupanshui, Guizhou Province [see <http://www.legaldaily.com.cn/zfb/content/>

While the traditional practice in the Chinese court system is to direct cases to separate civil, criminal or administrative divisions, these environmental courts have adopted new rules that allow them to accept and process *all* environmental cases, whether civil, administrative or criminal. Although enforcement of judgments has traditionally been handled by a separate enforcement division, some of the environmental courts have also incorporated enforcement authority as well.

The Impetus for Environmental Courts — Major Environmental Pollution Accidents

The establishment of the environmental courts followed the outbreak of major local environmental pollution incidents. The two environmental courts in Guizhou Province — the Guiyang Environmental Court and the Qingzhen Environmental Court⁸ — were established on November 20, 2007, to address serious environmental pollution in Hongfeng Lake, Baihua Lake, and Aha Reservoir, the main sources of drinking water for the 3.9 million people of Guiyang Municipality.⁹ The Wuxi Environmental Court was established on May 6, 2008, exactly one year after a well-publicized major outbreak of blue algae in nearby Tai Lake. Yunnan Province established its first group of environmental courts in December 2008¹⁰ and six additional environmental courts by September 2009. Showing no signs of slowing, the Province announced plans to establish more environmental courts in the future.¹¹ The establishment of the Yunnan environmental courts was triggered in part by the discovery of high levels of arsenic from industrial pollution in Yangzong Lake.

2010-03/04/content_2072929.htm?node=20609 (P.R.C.); and in Qingdao, Shandong Province [see http://www.enlaw.org/bmg1/wrfz/201004/t20100414_21747.htm (P.R.C.)].

8. Qingzhen is a county-level city within the jurisdiction of Guiyang Municipality. Cases in the Qingzhen Environmental Court, a basic-level court, are appealed to the Guiyang Environmental Court, an intermediate-level court.

9. Zhou Zhijiang, *Guiyang City establishes environmental protection courts to make polluters of water resources accountable*, XINHUANET, Nov. 21, 2007, http://news.xinhuanet.com/newscenter/2007-11/21/content_7119580.htm (P.R.C.).

10. Bai Licheng, *Environmental Protection Tribunal of Kunming Intermediate Court established and Kunming has specialized court for environmental cases*, YUNNAN NET, Dec. 12, 2008, http://www.yunnan.com.cn/2008page/yn/html/2008-12/12/content_161890.htm (P.R.C.).

11. Wang Yan, *Yunnan promotes environmental courts in the whole province*, XINHUANET, May 14, 2009, <http://env.people.com.cn/GB/9296891.html> (P.R.C.).

Environmental Court Caseloads

The caseloads of the environmental courts differ greatly in number and type. Seventy percent of the cases handled by the Guiyang environmental courts have been criminal cases. On the other hand, ninety-five percent of the cases handled by the Wuxi Environmental Court have been non-litigation administrative enforcement cases, pursuant to Article 66 of China's Administrative Litigation Law.¹² The Kunming court handled a mixture of criminal, civil and administrative cases.

12. Non-litigation administrative enforcement cases in the environmental context are cases in which local EPB's seek assistance from the courts to enforce administrative penalties or injunctive orders against intransigent enterprises.

Table I Environmental Court Caseloads

Court (Date of Establishment)	Total # of Cases	Case Distribution	# of EPIL Cases
Two courts in Guiyang, Guizhou Province ¹³ (Nov. 20, 2007)	110 [†]	70% - criminal cases; 12% - civil cases; 9% - enforcement cases; 8%- non-litigation administrative enforcement cases; 0%- administrative cases	3
Wuxi Environmental Court, Jiangsu Province ¹⁴ (May 6, 2008)	More than 300 ^{††}	95% are non-litigation administrative enforcement cases brought by environmental authorities	1
Kunming Environmental Court, Yunnan Province ¹⁵ (Dec. 11, 2008)	12 ^{†††}	4 - criminal cases; 1 - administrative case; 6 - civil cases (all related to one incident)	0
†Nov. 20, 2007 – Dec. 20, 2008 †† May 2008 – May 2009 ††† Dec. 2008 – May 2009			

The Guiyang courts and the Wuxi environmental court are noteworthy for having accepted several public interest litigation cases including the *Guiyang Two Lakes and One Reservoir Management Bureau v. Guizhou Tianfeng Chemical Ltd.* decided in late 2007.¹⁶ This case included innovations with regard to (i) standing – a government agency brought a civil suit against a polluter; (ii) jurisdiction – the defendant was outside of the normal geographic jurisdiction of the

13. Data provided by Qingzhen Environmental Court, April 2009 (interview notes on file with author).

14. Zhao Weimin, Chief Judge, Administrative Division of Wuxi Intermediate Court, Address at the Environmental Litigation and Environmental Court Workshop, Beijing (May 22-23, 2009).

15. Yuan Xuehong, Member, Adjudication Committee of the Kunming Intermediate Court, Address at the Environmental Litigation and Environmental Court Workshop, Beijing (May 22-23, 2009). According to Yuan, the Kunming Environmental Court has been the most active of the Yunnan environmental courts.

16. *Guiyang Two Lakes and One Reservoir Management Bureau v. Guizhou Tianfeng Chemical Ltd.*, (Qingzhen Env'tl Ct., Dec. 27, 2007) (P.R.C.).

Qingzhen court, which was granted jurisdiction over the case by the Guiyang Intermediate Court; (iii) remedy — the court ordered an injunction to stop defendant fertilizer manufacturer from dumping waste that polluted a local drinking water source, and ordered remediation of existing waste, and (iv) evidence - the court in effect lowered the evidentiary burden on plaintiff by requiring only a demonstration that water quality standards had been violated, rather than a showing of economic or health damages suffered and causation between such damages and defendant's actions.¹⁷

The Guiyang Municipal Procuratorate (responsible for criminal prosecution in China) brought a suit against defendants for illegal building construction in a water source protection area in the *Guiyang Procuratorate v. Xiong Jinzhi, Lei Zhang and Chen Tingyu* case.¹⁸ This case included innovations in standing — a procuratorate brought a civil suit against polluters¹⁹ — and and remedy — the court ordered an injunction to tear down the illegal building and reforest the water source protection area.

Although the *Zhu Zhengmao and All-China Environmental Federation (ACEF) v. Jiangyin Port Container Ltd.* case was ultimately settled through mediation, the court issued a written document setting forth the agreement between the parties²⁰ and elaborating several key legal issues: (i) standing — this was the first civil suit accepted by a Chinese court with an environmental group as the plaintiff, (in the court document, the Wuxi environmental court

17. *Case four: Guizhou Province Tianfeng Chemical Company Environmental Tort Case*, May 8, 2009, (P.R.C.).

18. *Guiyang Procuratorate v. Xiong Jinzhi, Lei Zhang and Chen Tingyu*, (Qingzhen Env'tl Ct., Nov. 26, 2008) (P.R.C.).

19. Though this was the first civil suit brought by a procuratorate in the environmental courts, the practice of procuratorate-initiated civil suits in state-owned property protection and environmental protection had commenced in other courts and maritime courts in years prior. Wang Fuhua, a Chinese law professor, cited a state-owned property protection civil case brought by local procuratorate in Pujiang, Zhejiang province. See Wang Fuhua, *The Dilemma of the Procuratorate's Role in Civil Suits*, CCELaws, July 7, 2002, <http://www.ccelaws.com/chengxufaxue/2009-01-01/6063.html> (P.R.C.). Bie Tao, Deputy Director General of the Law and Policy Department of China's Ministry of Environmental Protection, cited an environmental civil case brought by local procuratorate in Leling, Shandong province. See Bie Tao, *Environmental Public Interest Litigation is Emerging*, CENEWS 2003, http://www.cenews.com.cn/xwzx/fz/qt/200812/t20081229_597206.html (P.R.C.).

20. *Zhu Zhengmao and All-China Environmental Federation (ACEF) v. Jiangyin Port Container Ltd.*, <on file with author> (Wuxi Env'tl Ct, July 6, 2009).

affirmed ACEF's standing by pointing to its registered organizational mission as an environmental protection group²¹); (ii) remedy – the court ordered a preliminary injunction before the hearing to prevent further harm from pollution during the judicial process; (iii) evidence – the court cited violations of environmental impact assessment procedures as the basis for ordering an injunction, and did not require proof of economic or other harm; and (iv) enforcement of the settlement agreement – defendant was required to submit periodic enforcement progress reports with official monitoring data to the environmental court.

In *ACEF v. Qingzhen Land and Resources Management Bureau*²² the plaintiff withdrew its complaint after the defendant agency acted to reclaim a piece of land near a water source protection area, thereby mooting plaintiff's case. This case was noteworthy for being the first administrative lawsuit accepted by a Chinese court with an environmental group as the plaintiff.²³

Local Rules on Standing, Jurisdiction and Remedies

The environmental courts or their local governments have promulgated detailed local court rules that include innovations in standing, jurisdiction and remedies, among other things. There are presently no central level laws, regulations or policies explicitly governing environmental courts.²⁴

21. See All-China Environment Federation, *China's first environmental public interest civil litigation brought by a social organization - the All-China Environment Federation (ACEF) - is resolved through mediation*, <zhonghua huanbao lianhehui tiqi de woguo shouli shetuan zuzhi huanjing gongyi minshi susong tiaojie shenjie (Sept. 23, 2009), <http://www.acef.com.cn/html/hjflfw/wqdt/3854.html> (P.R.C.). See also Associated Press, *China Accepts 1st Environment Lawsuit Against Govt*, ECON. TIMES, July 31, 2009, <http://economictimes.indiatimes.com/Environment/China-accepts-1st-environment-lawsuit-against-govt-/articleshow/4841442.cms>.

22. *ACEF v. Qingzhen Land and Resources Management Bureau*, <on file with author>, (Qingzhen Env'tl Ct., July, 28, 2009) (P.R.C.).

23. See All-China Environment Federation, *China's first environmental public interest administrative lawsuit - brought by the All-China Environment Federation - is accepted*, <zhonghua huanbao lianhehui tiqi de woguo diyi li huanjing gongyi xingzheng susong huo li'an>, July 28, 2009, <http://www.acef.com.cn/html/hjflfw/wqdt/3361.html> (P.R.C.).

24. Indeed, the legal authority for these environmental courts is uncertain, and the innovative rules appear to conflict with existing law. While it is common practice in China for the government to designate pilot sites or zones, the environmental courts do not appear to have been formally authorized as pilot sites. Such a situation is unlikely to persist for long and the Supreme People's Court will likely issue guidance either authorizing or canceling these experiments.

Guiyang

The Guiyang Intermediate People's Court issued a series of documents and orders to establish the basic rules on the handling of cases in the Guiyang and Qingzhen Environmental Courts.²⁵ According to these documents and orders, procuratorates, relevant administrative agencies, and special agencies such as the Management Bureau of Honghong Lake, Baihua Lake, and Aha Reservoir, have standing to initiate public interest actions. More importantly, the People's Congress of Guiyang Municipality, working with the environmental courts, adopted the *Regulations Promoting the Development of Ecological Civilization* in October 2009. This document, approved by the Standing Committee of the People's Congress of Guizhou Province, has been effective since March 1, 2010, and creates the legal authority for expanded standing set forth in the Guiyang court documents and orders.²⁶ Article 23 of the Guiyang Municipal regulations specifically provides that the procuratorates, environmental authorities, and environmental non-governmental organizations (NGOs) have standing to bring suit. This is the first law in China to explicitly authorize broadened standing of this sort for environmental cases.²⁷ The Guiyang Environmental Court also used an innovative reading of the procedure laws for civil, administrative and criminal litigation to grant expanded jurisdiction to the Qingzhen Environmental Court.²⁸

25. Documents and orders include: the "Implementation Plan on the Establishment of Environmental Court of Guiyang Intermediate People's Court;" the "Decision of the Guiyang Intermediate People's Court on the Change of Venue (2007);" and the "Rules on the Jurisdiction of the Environmental Protection Tribunal of Guiyang Intermediate People's Court and the Environmental Protection Tribunal of the Basic People's Court of Qingzhen City."

26. Unlike in the United States, standing to sue in China is not a constitutional limit on access to the courts. The legal basis for standing in Guiyang and the other jurisdictions discussed herein is unclear, nor is there public documentation authorizing these jurisdictions to conduct pilot experimentation, as is the common practice in China.

27. *Guiyang: Environmental NGOs may bring cases for inaction of the government concerning the environment and resources*, XINHUANET, Jan. 15, 2010, http://www.3.xinhuanet.com/chinanews/2010-01/15/content_18777895.htm.

28. See <zhonghua renmin gongheguo minshi susong fa 中华人民共和国民事诉讼法> [Civil Procedure Law] art. 37, 39 (promulgated by the President, Apr. 9, 1991, effective Apr. 9, 1991) LAWINFOCHINA (last visited July 23, 2010) (P.R.C.). See also <zhonghua renmin gongheguo xingzheng susong fa> [Administrative Procedure Law] art. 23, 23 (promulgated by the President, Apr. 4, 1989, effective Oct. 1, 1990) LAWINFOCHINA (last visited July 23, 2010) (P.R.C.). See also <zhonghua renmin gongheguo xingshi susong fa> [Criminal Litigation Law] art. 26 (promulgated by 2d

Wuxi

In November 2008, the Wuxi Intermediate People's Court and the Wuxi Procuratorate jointly issued the *Experimental Rules on the Handling of Civil Environmental Public Interest Actions*, the first local rules on environmental public interest litigation in China.²⁹ Compared with the documents and orders issued by the Guiyang Intermediate People's Court, the Wuxi rules provide more expansive and detailed procedural rules on civil environmental public interest litigation, including with respect to: (i) the procuratorate's standing to bring EPIL civil suits; (ii) the procuratorate's role in supporting other work units or individuals to bring environmental suits and in urging relevant agencies to bring EPIL civil suits; and (iii) plaintiff-favorable litigation fee rules. Given the procuratorate's involvement in the drafting of the rules, it is not surprising that these rules emphasize the role of the procuratorate in the Wuxi environmental court. The rules do not cover standing regarding other actors or alter jurisdiction in any way. In practice, however, the Wuxi Environmental Court was the first court to grant standing for an environmental organization to bring a civil environmental public interest lawsuit in *All-China Environment Federation v. Jiangyin Port Container Company, Ltd.*³⁰

Yunnan

Yunnan's environmental court system is the largest in the country with eight environmental courts. Yunnan has also promulgated environmental court rules at the provincial High Court level and the intermediate court level.³¹ For example, in November

Session of the 5th Natl. People's Cong., effective, July 1, 1979) LAWINFOCHINA (last visited July 23, 2010) (P.R.C.).

29. Chen Yuanyuan, *Wuxi issues rules on environmental public interest actions*, CHINA ENVIRONMENT DAILY, Nov. 24, 2008, http://www.cenews.com.cn/xwzx/fz/qt/200811/t20081124_591631.html.

30. ACEF is a government-organized non-governmental organization (GONGO) registered under the Ministry of Civil Affairs and supervised by the Ministry of Environmental Protection, so it remains unknown whether the court would grant standing to a wholly-private non-governmental organization.

31. Kunhuanbao [Implementation Opinions Regarding Implementation of a Coordinated Environmental Protection Enforcement System] No. 520 (Kunming Intermediate People's Ct., Kunming People's Procuratorate, Nov. 6, 2008) Kunming Env'tl. Protection Bureau (P.R.C.), available at <http://www.kmepb.gov.cn/kmhbj/75157117316628480/20081106/11030.html>. See also Yunnan issues "trial guide" for environmental cases, ruling on reforestation can be made if there is deforestation, XINHUANET, May 14, 2009, http://news.xinhuanet.com/legal/2009-05/14/content_11372002.htm.

2008, the Intermediate Court, Environmental Protection Bureau, People's Procuratorate, and Public Security Bureau of Kunming Municipality jointly issued the *Implementation Opinions Regarding Implementation of a Coordinated Environmental Protection Enforcement System*.³² This document, among other things, established standing to sue for the procuratorate, environmental agencies and environmental NGOs; clarified the reversal of burden of proof in environmental public interest cases; authorized the use of injunctions where enterprise activities "could cause harm to the ecological environment;" and established plaintiff-favorable fee provisions. In May 2009, the Yunnan Provincial High Court officially issued a document on province-wide rules for environmental courts and adjudication of environmental cases. As of this writing, this is the highest level official document (province-level) regarding environmental courts and environmental public interest litigation in China. The document, among other things, clarified standing for registered environmental NGOs to bring environmental public interest lawsuits, provided for injunctions to prevent environmental harm, and suggested the use of natural resource damage considerations in forestry-related cases.

In practice, however, the Yunnan courts have not utilized the most innovative provisions set forth in the official documentation at either the provincial or intermediate court level. In contrast to the Guiyang and Wuxi environmental courts, the Yunnan courts have not yet accepted any environmental public interest actions.

Strengths and Weaknesses of Environmental Courts

Environmental courts have a number of potential benefits: promotion of greater consistency in application of the law; improved proficiency of environmental judges; increased societal and government awareness of environmental protection; greater deterrence against environmental violations, and heightened enforcement. Furthermore, these courts serve as laboratories for innovations in environmental public interest litigation.

However, questions remain about the effectiveness of the environmental courts. Given that the environmental courts were

32. <关于建立环境保护执法协调机制的实施意见>, 昆环保【2008】520号, <http://www.kmepb.gov.cn/kmhbj/75157117316628480/20081106/11030.html>.

created in response to major local environmental incidents, there is a question as to whether the courts were meant as symbolic demonstrations of the local government's resolve to fix these problems, rather than genuine efforts at judicial reform. There also remains an unresolved question as to whether the courts will have sufficient caseloads to justify their existence. Moreover, while the courts have served as laboratories for innovations, the various innovative rules or practices have not been regularly used. One commentator at a 2009 conference on environmental public interest litigation in China noted that government officials sometimes are granted "innovation points" in their bureaucratic job evaluations, and receive no further credit for additional uses of the same practice. Therefore, there may not be a further incentive to implement a given innovation more than once. Finally, the courts have not yet proven that the new structures and rules will lead to more effective environmental enforcement — that is, although the environmental courts represent a change in form and procedure, do they actually deter environmental violations and strengthen enforcement of environmental laws?

The Vitality of Environmental Courts

It is still too early to pass judgment on the environmental courts discussed here. Furthermore, several courts established in 2010, such as the Qingdao and Zhangzhou Environmental Courts, are providing new data for analysis. Yet, there is preliminary evidence suggesting that the concerns about the efficacy of the courts are unwarranted.

For example, insufficient caseload is not likely to be a problem given that environmental caseloads in general are increasing and the environmental courts have already seen significant increases in caseloads since their establishment. Before the establishment of environmental courts, the relevant divisions of the Qingzhen courts only handled seven environmental cases in 2006. Within one year of the establishment of the environmental court, 110 cases were filed.³³ In

33. These two data points are not entirely comparable for two reasons: first, the data on the number of cases in the year after the establishment of the Qingzhen Environmental Court is for a 13-month period (from November 20, 2007 to December 20, 2008). The 2006 data, on the other hand, is for a 12-month period. Second, the 110 cases for the 13-month period after the creation of the Qingzhen court include cases from both the Guiyang Environmental Court and the Qingzhen Environmental Court. The 2006 data only includes cases from the Qingzhen Basic

Wuxi, two levels of courts handled a total of 302 environmental cases during the three years from 2005 to 2007. In its first year of operation, the Wuxi Environmental Court received more than 300 cases.

More importantly, the environmental courts have shown initial signs of improving the effectiveness of environmental protection. A number of cases in the environmental courts have led to actions that prevented pollution, rather than only compensating for past harms. The *Tianfeng Chemical Factory* case is an example of a public interest lawsuit leading to injunctive action against a polluter. It was also an instance in which court action helped to achieve enforcement against a polluting enterprise that had not responded to environmental officials' orders to comply with environmental laws. The Qingzhen Land and Resources Management Bureau case was another example in which court action helped spur the defendant agency to perform its duty to properly manage a water source protection area, a duty the agency had failed to perform for fifteen years. Moreover, a number of the public interest cases discussed above effectively lowered the evidentiary burden on plaintiffs by requiring only a showing that environmental standards or laws were violated. In traditional environmental tort cases, it is necessary to demonstrate harm, such as to human health, crops or other resources, which can be substantially more difficult to prove. But the decision in the Tianfeng case relied on evidence that the factory had violated water quality standards. While these cases have no precedential value, practices piloted at the local level that are identified by central-level lawmakers as worthy of broader dissemination can be incorporated into subsequent laws and regulations.

It is still too early to render a verdict on the Chinese environmental courts. Further research is needed to determine whether other factors not now readily apparent are motivating the implementation of the new practices seen in the environmental courts. One study of courts and environmental protection bureaus in Hubei Province, for example, suggested that incentives to generate higher caseloads and court fees motivated the creation of environmental "circuit" courts, and that the circuit courts did not ultimately contribute to a deterrence of environmental violations or reduced

Court. Data regarding the number of environmental cases in the Guiyang Intermediate Court in 2006 was not available.

pollution.³⁴ Whether aims other than the strengthening of environmental enforcement are the impetus behind the developments in the environmental courts described in this article is a question requiring further examination.

Yet there are sufficient indications that the environmental courts are improving environmental enforcement to warrant further examination. Weak environmental enforcement is a perennial problem in China and these environmental court experiments hold the promise of making real, lasting improvements to China's environmental governance and rule of law.

34. Zhang, *supra* note 4, at 105-6.

ENVIRONMENTAL LAW AND ADMINISTRATIVE COURTS IN FINLAND

Justice Erkki J. Hollo, Justice Pekka
Vihervuori** and Justice Kari Kuusiniemi****

The Finnish legal system is based in the civil law tradition with a written Constitution.¹ The Constitution includes important provisions concerning basic rights. Two of these provisions, the protection of ownership and the responsibility for the environment, are relevant to the field of environmental law. These provisions respectively provide as follows:

The property of everyone is protected. Provisions on the expropriation of property, for public needs and against full compensation, are laid down by an act of Parliament.²

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1. Suomen perustuslaki [Constitution] (Fin.).
2. *Id.* § 15.

Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavor to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.³

The Constitution provides for a dualistic court system, with courts of general jurisdiction for civil and criminal cases⁴, and administrative courts for public law matters. These administrative courts include the Regional Administrative Courts (there are eight on the mainland of Finland) and the Supreme Administrative Court (hereinafter SAC).⁵

Inasmuch as environmental law can be characterized generally as public law, environmental cases primarily are litigated in the administrative courts, with civil and criminal law playing a less significant role. Of course, civil and criminal courts of first instance are responsible for the sentencing of environmental crimes and for awarding damages in environmental pollution cases. However, in certain cases, jurisdiction also may lie with an administrative court.⁶

Finnish (as well as Swedish) environmental law has its roots in land and water resources law. As a result, environmental law comprises a broad content of matters compared to many other countries where environmental law is limited primarily to pollution control and nature conservation. The extension of environmental law concepts and instruments to other fields is most evident in cases dealing with land use planning, land surveying and water construction. Land use and planning law follows the procedural, and to some extent also the substantive, rules of "essential" environmental law, but land surveying law adheres to civil court procedures, not to administrative law. Water law today, as the law on water

3. *Id.* § 20.

4. Judicial System in Finland, Finnish Courts, <http://www.oikeus.fi/8854.htm> (last visited July 11, 2010).

5. Judicial System in Finland, Administrative Courts, <http://www.oikeus.fi/17598.htm> (last visited July 11, 2010).

6. For example, the Regional State Administrative Agency in its role as permit authority may issue damages for water pollution (besides *ex officio*), and its decision on all issues may be appealed to Vaasa Administrative Court and further to the SAC, which may also hear appeals concerning damages. ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE EU 180 (Jonas Ebbesson ed. 2002) (hereinafter ACCESS TO JUSTICE).

management, follows broadly the same procedural rules as environmental protection law.

At present, Finland does not have any courts bearing the name “environmental court.” However, the administrative courts and the SAC have many features that justify the epithet “environmental court.” These features will be discussed below, but it is important to first look briefly at the history of environmental litigation in Finland.

The concept of proper environmental courts has been vital in Finland for decades. Water legislation, which originally intended to safeguard economic interests, has also for a long time protected certain environmental values, linked to the use of waterpower, floating of timber and the use of watercourses to receive industrial wastewater. Beginning with the medieval Nordic laws banning the pollution of bodies of water, this tradition has been further developed in the water legislation of 1902 and 1961.⁷ Since the ban was designed to protect both public interests as well as the private interests of land and water owners and adjacent real estate owners, the regulation could not be classified solely as private law or public law, and led to the creation of the Water Courts pursuant to the 1961 Water Act.⁸

The Water Court’s jurisdiction was concentrated in a wide range of judicial and administrative matters, with its role as a permit authority being the most prominent.⁹ The Water Court was presided over by a chairman, who was a lawyer trained on the bench, and two expert (non-lawyer) members, who were typically an engineer and a natural scientist.¹⁰ The Water Court was modelled on the Swedish court, although there were some domestic forerunners, too.

A decision of the Water Court could be appealed to the Superior Water Court¹¹ (originally linked to Vaasa Court of Appeal, but later established as an independent administrative court), and further to the SAC.¹² Originally, the line of appeal was determined by the “nature” of the case: permit decisions of the Water Court were appealed directly to SAC, while cases involving damages and

7. See the Water Rights Act (1902) (Fin.); The Water Act (1961) (Fin.).

8. The Water Act (1961) (Fin.).

9. ACCESS TO JUSTICE, *supra* note 6, at 179-180.

10. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENTAL REQUIREMENTS FOR INDUSTRIAL PERMITTING, VOLUME 3, 64 (1999).

11. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, WATER LAW IN SELECTED EUROPEAN COUNTRIES, VOLUME II, 52 (1984).

12. *Id.*

penalties were appealed to the Superior Water Court and the Supreme Court.¹³ This division clearly demonstrated the overall nature of water legislation as a “miniature legal order.”

The extensive environmental and water law reform of 2000 changed both the statutory framework and the system of authorities and courts.¹⁴ The new framework of the Environmental Protection Act integrated main previous permit systems, including the permit to discharge wastewater.¹⁵ Pursuant to this reform, the Environmental Permit Offices (now known as the Regional State Administrative Agencies)¹⁶ replaced the Water Courts and acquired their previous competence to issue decisions concerning use of water resources and water management.¹⁷ Despite the metamorphosis from a court to an administrative authority, the previous independent, collegial and multi-disciplinary decision-making concept of the Water Court prevails.

At present, the Regional State Administrative Agency acts as the state permit authority in the field of the Environmental Protection Act and the Water Act.¹⁸ Appeals of this newly-established administrative agency as well as of the municipal agencies in corresponding cases are heard by Vaasa Administrative Court,¹⁹ whose origins derive in part from the former Superior Water Court.²⁰ Vaasa Administrative Court is the only competent administrative court in the area of environmental protection and water law in the entire country. In the court, there are both judges trained in the law (justices) and full-time expert members (non-lawyer) with technical and ecological expertise. Decisions of Vaasa Administrative Court can be appealed to the SAC,

13. *Id.*

14. Ministry of the Environment, Environmental Protection Legislation, Environmental Protection Act, <http://www.ymparisto.fi/default.asp?contentid=162217&lan=en#a0> (last visited July 11, 2010) (stating that the revised environmental protection and water legislation came into force in Finland on Mar. 1, 2000).

15. *Id.*

16. Site legislation (since January 2010).

17. *Id.*; see also ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENTAL PERFORMANCE REVIEWS, FINLAND, VOLUME 30, 171, n.29 (2009).

18. Ministry of the Environment, Former Permit Authorities, <http://www.ymparisto.fi/default.asp?node=5296&lan=en> (last visited July 11, 2010).

19. The Brochures of the Ministry of Justice, Judicial Procedure in the Administrative Court, http://www.om.fi/en/Etusivu/Julkaisut/Esitteet/Oikeuden_kayntihallintooikeudessa (last visited July 11, 2010).

20. ACCESS TO JUSTICE, *supra* note 6, at 180.

without leave to appeal.²¹ In cases involving the Environmental Protection Act or the Water Act, the SAC bench also includes technical and ecological experts (five justices and two expert members).²² However, unlike their colleagues in Vaasa, the SAC experts, mainly renowned scientists, only hold part-time posts.²³ Nonetheless, their role in the decision-making process is crucial.

Environmental cases are multifaceted since they require a comprehensive understanding of technical, economic and environmental facts within the established legal framework. Even if an expert member is not trained in the particular field at issue, these expert members have a sound scientific literacy. Their scientific background gives them the ability to interpret the relevance of different evaluations, assessments, statements and expert opinions included in the typically extensive case files. Accordingly, when the expert members take part in decision-making, they share responsibility equally with the justices to act as independent adjudicators. This provides the court with the necessary expertise to resolve the case with respect to non-legal material relevant to the interpretation of the law and eliminates the need for additional expert testimony.

Before the reform of 2000, legislators had the option to create specialized, proper environmental courts as permit authorities and environmental courts of appeal. Instead, they chose to replace the three Water Courts with independent administrative authorities and to concentrate appeals in pollution control and water law cases in the first instance in one single court, Vaasa Administrative Court.²⁴ This solution maintained the structure of administrative courts of general competence without compromising the necessary expertise and independence of decisions needed in this field of law.

As a consequence, Vaasa Administrative Court is a general regional administrative court but it functions as well as a kind of an environmental court of appeal. It hears cases in various fields of administrative law, such as social law, taxation and municipal law. The court also hears environmental law cases outside the fields of

21. *See, e.g.*, The Environmental Protection Act § 96(5) (2000) (Fin.).

22. ASSOCIATION OF THE COUNCILS OF STATE AND SUPREME ADMINISTRATIVE JURISDICTIONS OF THE EUROPEAN UNION, NATIONAL ADMINISTRATIVE COURTS AND COMMUNITY ENVIRONMENT LAW, FINLAND 7 (2008).

23. *Id.*

24. LUC LAVRYSEN, THE ROLE OF NATIONAL JUDGES IN ENVIRONMENTAL LAW (2006), available at http://www.inece.org/newsletter/12/regional_europe.html.

pollution control and water law. In these cases, there are no expert members.²⁵

The SAC also is an administrative court of general jurisdiction.²⁶ Approximately 20% of appeals (more when measured by workload) involve environmental law.²⁷ The types of cases vary: pollution control, water management, nature protection, land use planning, permits for building activities and demolition, soil excavation permits, waste law, road planning, mining, forestry, hunting, fishing, animal welfare and expropriation permits. These cases are heard in the First Chamber of the Court, which given its area of jurisdiction and expert members in pollution control and water law cases, could be considered an environmental court.²⁸

Generally, the administrative system of appeal in Finland represents a so-called reformatory type of review. This implies that an administrative court has the power not only to annul or repeal the decision of the administrative authority but also to change the decision or amend its provisions on legal grounds. However, constitutional limits to the judiciary normally prevent a court from acting as a permit authority. If a permit has been disallowed by the administrative permit body on grounds not compatible with law, the court shall repeal the decision and remand the permit application back to the permit authority for reconsideration.²⁹ In some cases, however, Vaasa Administrative Court has directly granted a permit on appeal of the permit applicant (e.g., granted a permit for a minor part of a peat production area which had been rejected by the permit authority). This conduct of a court of appeal, which as such seems consistent with the former Water Court practise where expert judges acted as the permit authority, has been met with some criticism from the SAC. Nevertheless, the SAC's practice of amending permit provisions may happen on a daily basis, supported by the presence of

25. Act on the Expert Members of The Supreme Administrative Court (2006) (Fin.) (As to environmental law, the act only specifies for expert members in Water Act and Environmental Protection Act cases).

26. The Supreme Administrative Court Act, § 1(1).

27. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ENVIRONMENTAL PERFORMANCE REVIEWS, FINLAND, VOLUME 30, 192 (2009).

28. THE SUPREME ADMINISTRATIVE COURT OF FINLAND ANNUAL REPORT 2003 12 (Supreme Administrative Court Publications, 2004) available at www.kho.fi/en/uploads/5zmqamjg11gnye.pdf.

29. AHTI RIHTO, THE SUPREME ADMINISTRATIVE COURT OF FINLAND, REVIEW OF ADMINISTRATIVE DECISIONS OF THE GOVERNMENT BY ADMINISTRATIVE COURTS AND TRIBUNALS 10-11 (2010).

the expert members in the pollution control and water law cases. It is, for instance, not uncommon to change a reduction percentage of a pollutant or a specific emission limit value on an appeal of a permit holder, a NGO or supervisory authority.

An exception is appeals based on the Municipalities Act, where in cases involving land use planning, the inherent authority of municipal self-government restrains the court from changing or amending a municipal decision.³⁰ However, it should be emphasized that the substantive legality of the planning decision can be contested in the administrative court.

While having a court system that is structured so that it can ably handle environmental law cases (or appeals), there also must be adequate access to justice in environmental matters. The right to appeal and who can take an appeal are significant factors in evaluating the effectiveness of the environmental law adjudicatory structure. Access to justice in environmental matters has been pushed to the forefront in part by the Aarhus Convention.³¹ Nevertheless, in Finland the development started before the Convention, and its ratification did not cause any major amendments to Finnish environmental law. Already the 1995 amendment of the Constitution, giving every citizen the right to have an influence on the decision-making concerning their own living environment, was significant in bringing about an attitudinal change about environmental participation and justice.³²

Traditionally, various environmental interests have been safeguarded by administrative authorities, who have had a longstanding right to appeal in certain matters, within their administrative competence, affecting the environment. Authorities responsible for, *inter alia*, nature protection, environmental quality, fisheries management, roads and waterways have been able to appeal decisions contrary to their relevant interests.³³ In contrast, NGOs'

30. ACCESS TO JUSTICE, *supra* note 6, at 182.

31. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (AARHUS Convention), June 28, 1998, 2161 U.N.T.S. 447, available at <http://www.unece.org/env/pp/>.

32. Suomen perustuslaki [Constitution] § 20 ("The public authorities shall endeavor to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.").

33. ACCESS TO JUSTICE, *supra* note 6, at 186.

right to appeal was limited until the mid-1990s.³⁴ The administrative judicial procedure law was interpreted narrowly so as to exclude environmental or inhabitants' associations from the groups who were entitled to appeal.

Currently, environmental legislation includes numerous provisions affording NGOs the right to appeal.³⁵ Furthermore, no limitations regarding NGO membership numbers or the length of time an NGO has been active before it is entitled to take an appeal, have been provided in Finnish law.³⁶ The only prerequisite is that the NGO be registered by the competent register office and that its regulations include the mandate to influence environmental matters.³⁷ Additionally, several other environmentally relevant acts have similar provisions, such as the Water Act, the Nature Protection Act, the Land Use and Building Act (in part), the Highways Act, the Railways Act and the draft Mines Act.³⁸ Associations may also have the right to institute proceedings in matters concerning coercive measures at the administrative authority, provided that the purpose of said proceedings is to prevent the destruction of the environment or any deterioration of its ecological value deemed to be of not minor

34. ACCESS TO JUSTICE, *supra* note 6, at 189 ("As the Constitution since 1995 includes an explicit provision that presupposes improved opportunity of the citizens to influence decision-making concerning their living environmental, new environmental legislation widely affords locus standi to certain NGOs.")

35. For example, the Environmental Protection Act states that appeals may be made by: all whose right or interest may be concerned (the parties); registered associations and foundations the task of which is protection of the environment, health or nature or promotion of amenity of an inhabited area, provided that the project impact their geographical area of activities; the municipality where the project of the applicant takes place, and such other municipality the area of which is impacted by the project; the (regional) Centre for Economic Development, Transport and the Environment, the municipal Environmental Authority of the municipality where the project of the applicant takes place, and the municipal Environmental Authority of such other municipality the area of which is impacted by the project; and any other authority in charge of keeping an eye on specific public interests. The Environmental Protection Act, *supra* note 21, § 97.

36. *Cf.* case C-263/08 of the EU Court of Justice, concerning the Swedish Environmental Code. The Code has recently been amended in order to meet the standards set in the EU Courts decision.

37. ACCESS TO JUSTICE, *supra* note 6, at 186.

38. *See, e.g.*, The Nature Conservation Act (1096/1996) § 61(3) (Fin.) ("In matters — the right of appeal also belongs to any registered local or regional association whose purpose is to promote nature conservation or environmental protection. A decision taken by the Council of State concerning the adoption of a nature conservation programme can also be appealed by a corresponding national organization or any other national organization safeguarding the interests of landowners.")

importance (e.g. Nature Conservation Act § 57 (2)). Through these statutes, the legislature has fulfilled the constitutional task set out in § 20 of the Constitution.³⁹ There are some acts, however, that do not include modern provisions of expanded rights to appeal.⁴⁰ Nevertheless, the SAC has taken into consideration the interpretative effect of the Constitution and the obligation to ensure the effectiveness (*effet utile*) of the EU Law, and heard the appeals of environmental organizations with respect to derogations from the protection of wolves and closed seasons for unprotected birds.⁴¹

Another important factor that should be stressed when assessing the effectiveness of the environmental law adjudicatory structure is the system's ability to uphold the rule of law. Use of coercive measures – administrative force – is a significant guarantee of environmental quality. For example, if someone operates a polluting plant without a valid permit or against the permit's provisions, the competent administrative authority may issue injunctions and order that the plant operator restore the environment. These orders normally include a conditional fine, which must be paid unless the violator remedies the damage caused by his violation or omission in the time frame defined by the decision. Victims of pollution, NGOs or public authorities can institute this procedure in the competent administrative authority whose decision, in turn, may be appealed to an administrative court (Vaasa Administrative Court under the Environmental Protection Act or the Water Act) and further to the SAC. Also an authority's refusal to order injunctive measures may be appealed by the initiator of the procedure. Hence, the Finnish environmental system effectively upholds the rule of law also by providing recourse to individual victims in order to adjudicate the private neighborhood relations between them and the plant operator.

39. Suomen perustuslaki [Constitution] § 20.

40. The Hunting Act (1993) (Fin.).

41. KHO:2004:76 (birds) and KHO:2007:74 (wolf).

ENVIRONMENTAL COURTS AND TRIBUNALS IN ENGLAND AND WALES – A TENTATIVE NEW DAWN

*Richard Macrory**

Environmental courts and tribunals have been discussed and analyzed in the United Kingdom (UK) for over twenty years, yet real progress has been made only recently. As a result of recent institutional and legal changes unconnected with the environment, the prospects for a permanent environmental tribunal in England and Wales are better than ever in the near future. Indeed, an environmental tribunal has been established within the new 2010 tribunal system – admittedly one still in largely virtual form and with limited jurisdiction, but an important first step in an area which has long resisted reform.

Traditional arrangements

Traditionally, there have been no specialist environmental courts or tribunals in England and Wales. Prosecutions for environmental offenses are handled in the criminal courts before general criminal judges. Private civil actions for damages or other civil remedies arising out of environmental issues are heard in the ordinary civil courts. Public law cases, where the legality of a decision of a

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government body such as the Environment Agency is challenged, (whether by industry or by non-governmental organizations), are heard at first instance in the Administrative Court by High Court judges assigned to that division.¹

Decisions concerning which judges will hear environmental matters have been ad hoc and unsystematic. There is some informal specialization with some individual judges frequently hearing environmental cases and developing a detailed knowledge of this area of law.² Land-use planning controls, introduced comprehensively in the United Kingdom after the Second World War, were the precursor to modern environmental controls and in many ways remain a bed-rock of a preventative regulatory system in what is a densely-populated island.

Environmental assessment procedures for new projects, introduced formally in the UK in 1987, are largely located within the planning system. Rights of public participation were developed within the planning system well before environmental regulation incorporated equivalent rights. Within this system, one can identify the closest form the country has had to an environmental tribunal.

Most planning decisions are made by local government. Developers who are refused permission or are unhappy about conditions imposed on any permission have always had the right to appeal on the merits to central government. Appeals, including hearings, are heard by the Planning Inspectorate, an independent arm of the local government ministry, the Department of Communities and Local Government. Inspectors conduct hearings, evaluate evidence and, in controversial or high-profile cases, make recommendations to the secretary of state who has the final decision. In the vast majority of cases however, formal decision-making power has been delegated to the Planning Inspectorate. Modern environmental regulations involving consents and licenses often contain an

1. The Administrative Court was created in 2000 as part of the High Court specifically to hear claims for judicial review and other public law issues in England and Wales. Cases are normally heard before a single judge. At present 37 High Court judges have been nominated to sit in the Court.

2. Recently, and unusually, an Appeal Court judge with perhaps the leading experience in environmental law in the country was designated to sit in the High Court to hear a controversial and high profile judicial review concerning a proposed new runway at Heathrow Airport. *R on the application of London Borough of Hillingdon & Ors v. Secretary of State for Transport* [2010] EWHC (Admin) 626.

equivalent right of appeal on the merits to the Secretary of State. In practice, these decisions are often delegated to the inspectorate.³ In fact, some 99% of appeals are determined by the inspectors themselves with the remainder taking the form of recommendations to the secretary of state to take the final decision.⁴

The Planning Inspectorate resembles a form of land and environmental tribunal. The inspectorate, though part of the Department of Communities and Local Government, has considerable financial and operational autonomy. Inspectors are similar to Administrative Law Judges within the United States Environmental Protection Agency. Individual inspectors hear appeals, and generally have a professional qualification such as engineering, architecture, or planning. They are assigned appeals by senior management, chosen as best suits the particular case. Few inspectors are legally qualified. In contrast, more formal tribunals in England and Wales typically are comprised of a legally qualified chairman plus two non-legal members with specialized knowledge.⁵

Analysis but No Action: First Stage 1989-2000

The first public call for some form of environmental court was in a 1989 report by Sir Robert Carnwath, then a leading planning barrister and now a judge in the Court of Appeal and the senior judge of the new Tribunal Service. He was commissioned by the Secretary of State for the Environment to examine problems of enforcement of planning controls.⁶ Though much of his report concerned improving enforcement systems, Sir Carnwath made a tentative call for some new form of land and environmental court or tribunal:

3. Current examples include appeals under environmental liability regulations, environmental permitting, hazardous substance consents, and water abstraction consents.

4. See [Planning-inspectorate.gov.uk](http://www.planning-inspectorate.gov.uk), The Planning Inspectorate Agency Information, http://www.planninginspectorate.gov.uk/pins/agency_info/index.htm (last visited Nov. 7, 2010).

5. Specialized tribunals have been developed under different laws in the United Kingdom over many years, where it was considered that the greater degree of specialism, together with less formal and cheaper procedures, was preferable to using the courts. In 2006 the tribunals were brought together under a new Tribunal Service to provide greater coherence and administrative efficiency and flexibility. See <http://www.tribunals.gov.uk/> (last visited Nov. 7, 2010).

6. ROBERT CARNWATH ENFORCING PLANNING CONTROL (HMSO 1989).

I can see a case for a form of tribunal which is able to encompass the whole range of planning appeal and enforcement work, including the levying of penalties. Alternatively, there may be a case for reviewing the jurisdiction of the various courts and tribunals which at present deal with different aspects of what might be called “environmental protection” (including planning) and seeking to combine them in a single jurisdiction.⁷

Three years later, then Lord Chief Justice, Lord [Harry Kenneth] Woolf, gave an annual environmental law lecture under the provocative title, “Are the Judiciary Environmentally Myopic?”⁸ Part of his analysis concerned the role of an unelected judiciary in dealing with politically-sensitive environmental cases, and he concluded that the British judiciary had rightly refrained from becoming over-involved in policy-making which was best left to the politically accountable. He noted that one distinctive feature of environmental law is the possibility of a single pollution incident giving rise to many different types of legal actions in different forums — a coroner’s inquest if deaths are involved; criminal prosecution, civil actions, and judicial review if public authorities are involved. Under such circumstances, Lord Woolf concluded that there was a strong case for a single environmental court — which might deal with all the legal con-sequences arising from an environmental incident or problem.

Lord Woolf’s vision, therefore, was not just for a court or existing tribunal under another name, but something quite radically different. He explained: “It is a multi-faceted, multi-skilled body which would combine the services provided by the existing courts, tribunals, and inspectors in the environmental field. It would be a ‘one-stop shop’ which should lead to faster, cheaper, and more effective resolution of disputes in the environmental area.”⁹

The Environment Ministry next commissioned Malcolm Grant — then a leading legal academic at Cambridge University who made his name in land-use planning law and developed a high profile in environmental law — to examine environmental courts in other jurisdictions and to consider possible models that might be applicable in England and Wales. Grant’s final report was comprehensive, detached, analytical, and lacked a simple politically attractive

7. Harry Woolf, *Are the Judiciary Environmentally Myopic?* 4 J.ENVTL. L. 1, 12 (1992), (quoting Sir Robert Carnwath).

8. Woolf, *supra* note 1.

9. *Id.* at 14

message. The report laid out two main choices: a “big bang” approach establishing a major new judicial institution, or a more incremental policy that worked with existing institutions and adapted them to the new environmental climate.¹⁰

The government made no firm response, but a debate on the need for an environmental court was initiated in the House of Lords.¹¹ The government minister rejected the need for any immediate action:

The government welcomes the opportunity to debate this issue. We are not persuaded of the need for an environmental court, certainly not on its possible shape. Our discussions today have been part of a wide-ranging debate about the mechanisms necessary for countries to ensure effective environmental protection and enforcement, not least the role of courts and tribunals in this process.¹²

The Second Period of Analysis 2001-2004

From 2001 to 2004, there was growing discussion of how environmental courts and tribunals might be introduced in England and Wales including three key reports designed to influence the policy and political agenda.

First, in 2002, the Royal Commission on Environmental Pollution published its twenty-third report, “Environmental Planning.”¹³ Much of the report concerned improving linkages between the land-use planning system and the demands of the environment and sustainability. It largely focused on institutional structures and analytical tools. An important section of the report focused on improving public confidence and participation in the system. The commission called for extension of rights to appeal decisions of local authorities or regulators. In this context the report made a case for

10. MALCOM GRANT, DEP'T OF THE ENV'T, TRANSPORT & THE REGIONS, ENVIRONMENTAL COURT PROJECT: FINAL REPORT, 2000. The Government expressly asked Professor Grant to analyze options but not to identify preferences.

11. 617 PARL. DEB., H.L. (5th ser.) (2000) 86. (Initiated by Lord Brennan.)

12. 617 PARL. DEB., H.L. (5th ser.) (2000) 100.

13. ROYAL COMMISSION ON ENVIRONMENTAL POLLUTION, 2002, Cm 5459. The Royal Commission on Environmental Pollution was established in 1970 as an expert body providing high level advice to Government across a range of environmental issues. The Commission generally determines its own subject matter for investigation and publishes a detailed report about every 18 months, covering such matters as transport, energy, waste, and genetically manipulated organisms. Its Reports are not binding on government but have generally been very influential. In 2010, the new Coalition Government announced that as part of general spending cuts the Commission would be abolished in 2011.

establishing some new form of environmental tribunal to determine environmental appeals:

Establishing an environmental tribunal would be a significant contribution to a more coherent and effective system of environmental regulation. We envisage such a tribunal would consist of a legal chairperson and members with appropriate specialized expertise. It would rapidly develop the authority and understanding needed to handle complex environmental cases.¹⁴

The commission recognized that eventually it might be sensible to combine the jurisdiction of an environmental tribunal with land-use planning appeals handled by the Planning Inspectorate. At the same time the inspectorate recommended against doing so immediately to avoid overwhelming the new tribunal with the large number of land-use appeals.¹⁵

The establishment of an environmental tribunal was not a primary focus of the Royal Commission study. Therefore, part of the Environment Ministry's response was to commission the present author to conduct a more detailed review of the case for such a tribunal.¹⁶ The report concluded that a "one stop shop" environmental court covering criminal, civil, and public law issues was unconvincing in principle and unlikely to be realized politically, not least because of the costs involved. After examining over fifty sets of environmental regulations, the report highlighted the enormous range of appeal forums — the Secretary of State, the High Court, Magistrates' Courts and the Planning Inspectorate among others and pointed out that there seemed little underlying principle in the choice of appeal routes.

The report advocated establishment of a tribunal as a focal point for environmental appeals and recommended that criminal environmental law cases continue to be heard in the ordinary criminal courts. The report suggested further that the proposed tribunal not be

14. *Id.* at ¶5.37.

15. There are around 20,000 land-use planning appeals in England each year, compared to around 50 appeals based purely on environmental legislation. Many land-use planning appeals may have significant environmental implications so it is not easy to draw a hard and fast line. See PLANNING INSPECTORATE, STATISTICAL REPORT: ENGLAND 2008-9, (Planning Inspectorate 2009).

16. RICHARD MACRORY & MICHAEL WOODS, UNIV. COLL. OF LONDON, MODERNIZING ENVIRONMENTAL JUSTICE: REGULATION AND THE ROLE OF AN ENVIRONMENTAL TRIBUNAL (2003).

responsible for handling judicial reviews. In line with normal tribunal practice, the proposed tribunal would likely have a legal chair together with more technically qualified members, thereby giving its decisions more authority than the haphazard arrangements in effect at the time.

There was considerable support among the judiciary and other professionals for this proposal. Lord Justice Carnwath, who chaired the report project's steering committee, noted in the foreword:

[T]he report provides a practical and workable "road-map" for the development of a new Environmental Tribunal structure. The authors show how (if we concentrated for the moment on the regulatory and civil aspects of public environmental law), we can devise a structure which would be manageable and economical, and would build on the best features of current practice.¹⁷

At about the same time, the Department for Environment, Food and Rural Affairs, commissioned a parallel study of environmental law issues by a coalition of non-governmental organizations.¹⁸ The Environmental Justice Project report highlighted problems of access to environmental justice caused by high costs of litigation in the United Kingdom, and especially the risk of adverse costs orders should cases be lost. The report rejected the model of an environmental appeals tribunal as failing to address the more serious problems:

We do not, however, believe that a tribunal of such limited scope as identified in the UCL Report is, in itself, sufficient to achieve access to environmental justice. Moreover, we are concerned that the establishment of a tribunal limited to regulatory appeals could fill the "window of opportunity" to improve access to environmental justice at a time when more fundamental reform is clearly necessary.¹⁹

The Environmental Justice Project report advocated a more radical approach, urging establishment of a specialist forum, i.e., a separate environmental court or tribunal, with the jurisdiction to hear all civil law claims with a significant environmental component.²⁰

Faced with competing models from environmental law experts,

17. *Id.* at 4.

18. ENVIRONMENTAL JUSTICE PROJECT, A REPORT (2004).

19. *Id.* at 12.

20. *Id.* at 11.

the government adopted a minimalist approach, which was to do nothing.

New Alignments

The momentum for establishing any new form of environmental court or tribunal appeared to have run its course by 2005. However, three recent institutional and legal changes suggest that the opportunity for change has arisen again: the reform of regulatory sanctions, the international pressure to expand access to environmental justice, and the reorganization of the tribunal system.

Reform of Regulatory Sanctions

In 2005, the Cabinet Office initiated a review of regulatory sanctions covering sixty-one national regulators as well as local authorities and dealing with areas such as workplace safety, trade descriptions, food safety, and consumer protection. The review, conducted by the present author, resulted in a final report entitled “Regulatory Justice – Making Sanctions Effective” (Macrory Report).²¹ It followed Philip Hampton’s “Reducing Administrative Burdens: Effective Inspection and Enforcement” (Hampton Report) published earlier that year which examined generally the relationship between regulators and businesses, and concluded that too many regulators had adopted a “tick box” mentality towards the enforcement of regulations, forgetting their underlying purpose.²²

The Macrory Report endorsed the Hampton Report approach that the best way of securing compliance by business was through persuasion and advice.²³ It advocated a flexible system of sanctions as a vital element of any regulatory system. In nearly all areas of regulatory law in the United Kingdom, outside the field of modern competition and economic regulatory law, the long-standing custom has been to use the criminal law as the core sanction of last resort. License breaches and other failures to comply with regulatory requirements are made into specific criminal offenses, normally couched in strict liability terms, meaning that no intention or

21. RICHARD MACRORY, REGULATORY JUSTICE: MAKING SANCTIONS EFFECTIVE (Cabinet Office, London 2006).

22. PHILIP HAMPTON, REDUCING ADMINISTRATIVE BURDENS: EFFECTIVE INSPECTION AND ENFORCEMENT (HM Treasury, London 2005).

23. RICHARD MACRORY, REGULATORY JUSTICE: MAKING SANCTIONS EFFECTIVE (Cabinet Office, London 2006).

recklessness need be proved. Companies are criminally liable for actions carried out by their employees in the course of their employment.

The Macrory Report recognized that criminal law would remain an important element of any regulatory system, but advocated that regulators should have access to a wider range of sanctions that would better reflect the breadth of circumstances in which regulations are breached. On the one hand, it seemed overly costly and inappropriate to prosecute a company in the criminal courts where the regulatory breach was caused by an oversight or unexpected breakdown of equipment. On the other hand, the consequences of even an unintentional breach may be serious, and no sanction at all, or a mere warning, would be an equally inappropriate response.

Central to the Macrory Report was the call for a range of civil sanctions, including financial penalties, which could be imposed by a regulatory agency without the need to go through the courts. The regulator would choose the most appropriate sanction in the light of the sanctions principle and its own published enforcement policy.

One feature of the proposed system which distinguishes it from equivalent systems in other jurisdictions is the close integration of criminal and civil regulatory structures. No new offenses are created under the proposed system, but the same offense could give rise to either a criminal or civil response. Furthermore, the report advised that a regulator who imposes a civil sanction must be able to prove the case to criminal standards beyond all reasonable doubt. This requirement is now reflected in legislation.²⁴

The purpose of the proposed new system was not to facilitate easier convictions, but to provide more appropriate sanctioning routes. Investigation of potential breaches would continue to be governed by criminal procedures. Only after the regulator decided there is sufficient evidence to secure a conviction would the most effective and suitable sanction route be determined.

The proposed new civil sanctions system would include a right of appeal on the merits to an independent judicial body both as to the

24. See 42 Regulatory Enforcement and Sanctions Act 2008; in relation to environmental offenses, see Environmental Civil Sanctions (England) Order 2010 No 1157, Schedule 2, para 1(2), which provides that before service notice of a civil sanction the regulator "must be satisfied beyond reasonable doubt that the person has committed the offense."

existence of the breach and as to the amount of the penalty. This is both a matter of fairness to those subject to the new regime and a guaranteed legal right under the European Convention of Human Rights to which the United Kingdom is a party.²⁵ The report recommended that criminal and civil sanctions be closely linked, and concluded that any appeal should be heard before a specialized-administrative tribunal rather than revert back to the ordinary courts. Under the proposal, once a civil sanction is imposed, all procedures remain within the administrative system rather than within criminal courts. When the report was issued, the Tribunal Service was being reorganized and this reorganization provided a relatively easy route for a new appeals tribunal to be established.

The Macrory Report recommendations are incorporated into the Regulatory Enforcement and Sanctions Act of 2007 which provide the core framework for the new civil sanctions. The report recommended that these new powers should be drawn down to individual regulators by ministerial order as and when appropriate.

In practice, the first movers have been in the environmental field with the passing of an order in April 2010 granting these new sanction powers to England's two core national environmental regulators, the Environment Agency and Natural England.²⁶ Following consultation, the Environment Agency plans to publish its statutory guidance concerning the new penalties in the autumn of 2010 with the first sanctions being applied probably in early 2011.²⁷ The first appeals

25. European Convention on Human Rights art. 6, Nov. 4, 1950, 213 U.N.T.S. 221 (provides that "[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Case law of the European Court of Human Rights indicates that large penalties, even if described as civil or administrative, within a national jurisdiction may still be treated as criminal in nature under the Convention. It is likely that in this context some of larger, so-called "variable" penalties within the new civil sanction will indeed be treated as criminal under the Convention but the right to a hearing before an independent court or tribunal applies to both civil and criminal matters).

26. Environmental Civil Sanctions (England) Order, 2010, S.I. 2010/1157. The Environment Agency is primarily responsible for regulating industrial pollution including waste. Natural England is responsible for nature conservation, including the protection of designated sites. In practice, much of Natural England's focus is concerned with the agricultural community.

27. The Agency consulted on its proposed use of civil sanctions in early 2010. See ENVIRONMENT AGENCY, FAIRER AND BETTER ENVIRONMENTAL ENFORCEMENT, (Consultation Paper 2010). Its actual Enforcement Policy following the consultation is planned for publication in autumn 2010. See <http://www>.

against imposition of the new sanctions will be heard by the new Environment Tribunal in 2011.

International Pressure to Expand Access

The United Kingdom is a party to the 1998 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in June 1998 in the Danish city of Aarhus, generally referred to as the Aarhus Convention. The first two parts of the Aarhus Convention concern access to environmental information and public participation in environmental decision-making. Most commentators agree that the United Kingdom is compliant with these obligations.

The third so-called “pillar” of the Aarhus Convention concerns access to justice, and gives rights to members of the public as well as non-governmental organizations to challenge the legality of decisions by public authorities as well as other acts or omissions of national laws relating to the environment. Over the last thirty years, United Kingdom courts have generally adopted a liberal approach toward standing to bring a case for judicial review.²⁸ In that sense, current practice meets the Aarhus Convention requirements concerning the right of access of the public and non-governmental bodies.

Article 9(4) of the Aarhus Convention also requires that the procedures be “fair, equitable, timely, and not prohibitively expensive.” Early on, it was thought that the “not prohibitively expensive” requirement referred to court fees for lodging a judicial review, which were modest. Increasingly, however, it has been recognized that “not prohibitively expensive” includes legal costs, including the exposure to adverse costs.²⁹ Environmental judicial review claims have followed Britain’s standard “cost in the cause” principle, which requires that the losing party pay the winning party’s legal costs. Given the “cost in the cause” principle, an ordinary individual who is neither poor enough to be entitled to legal aid nor

environment-agency.gov.uk/business/regulation/116844.aspx. At the time of writing, Natural England’s timetable for implementation was less clear though it is likely to follow a similar pattern.

28. The basic requirement is that the claimant must have “sufficient standing,” but both local and national environmental groups have passed this test, as have individual citizens with no property interest.

29. Adverse costs may be assessed against a party to cover the adverse parties’ court proceeding costs, including fees and expenses.

rich enough to pay for litigation costs outright, is likely to be deterred from taking action, as would a non-governmental organization with limited resources.

Pressure on the government to move away from this principle has come from various sources. The Aarhus Convention Compliance Committee set up under the convention may hear complaints from individuals and non-governmental organizations concerning alleged failings by parties to the convention.³⁰ Access to justice issues have formed the basis of a number of complaints and the most wide-ranging UK complaint is likely to be determined during 2010.³¹

The Aarhus Convention contains no formal sanctions for non-compliance. More problematic for the UK are two key European Community Environmental Directives: the 1985 Directive on Environmental Assessment and the 1996 Directive on Integrated Pollution and Prevention Control, which were both amended in 2003 to include specific reference to the Aarhus Convention provisions on access to justice. Accordingly, the requirement that procedures must not be prohibitively expensive is now a legal obligation under European Community law giving the European Commission the right to bring an infringement proceeding against a member state for non-compliance. In March 2010, the European Commission issued the United Kingdom with a reasoned opinion concerning costs in environmental cases.³² This is the final stage before action is taken in the European Court of Justice. Environment Commissioner Janez Potočnik noted at the time:

When important decisions affecting the environment are taken, the public must be allowed to challenge them. This important principle is established in European law. But the law also requires that these challenges must be affordable. I urge the UK to address

30. See UNECE Compliance Committee: Background, <http://www.unece.org/env/pp/ccBackground.htm> (last visited Nov. 8, 2010).

31. See Aarhus Convention, Compliance Committee: Communications from the Public, <http://www.unece.org/env/pp/pubcom.htm> (last visited June 20, 2010). The main complaint concerning access to justice in the UK is 2008/33. See Access to the courts: an introduction, <http://www.clientearth.org/the-case-for-access-to-the-courts> (last visited Nov. 8, 2010). In August 2010, the Committee issued its draft findings holding the UK to be in breach of the Convention, a decision likely to be confirmed at its September meeting. See UNECE Compliance Committee: Meetings, <http://www.unece.org/env/pp/ccMeetings.htm> (last visited Nov. 8, 2010).

32. Europa, *Commission Warns UK About Unfair Costs of Challenging Decisions*, Mar. 18, 2010, <http://europa.eu/rapid/> (Search by reference IP/10/312).

this problem quickly as ultimately the health and well-being of the public as a whole depends on these rights.³³

Judges in a number of cases have expressed concern about the cost of access, questioning the narrow interpretation of the Aarhus Convention advocated by the government.³⁴ In 2008, the working group on Access to Environmental Justice, chaired by a High Court judge, and including experienced environmental law practitioners and academics, published a report entitled "Ensuring Access to Environmental Justice in England and Wales," (Sullivan Report) expressing doubt as to whether current practice was consistent with the Aarhus Convention and recommending significant changes to current costs rules³⁵ in environmental cases falling within the Aarhus Convention.³⁶ The courts have recognized the problem of cost exposure in public interest cases and, within the limits of judicial discretion, some have attempted to modify the principle in cases raising issues of high public interest.³⁷ However, courts are reluctant to develop a special set of principles for environmental cases, preferring instead that any new approaches be applicable to all types of judicial review.³⁸ The final outcome of these developments is, as yet, unknown.

The most recent contribution to the debate has been the

33. *Id.*

34. *See, e.g.*, R on the application of Burkett v London Borough of Hammersmith and Fulham [2004] EWCA Civ 1342 ("If the figures revealed by this case were in any sense typical of the costs reasonably incurred in litigating such cases up to the highest level, very serious questions must be raised as to the possibility of ever living up to the Aarhus ideals within our present legal system"; Morgan v. Hinton Organics, [2009] EWCA (Civ) 107 (Eng) ("The requirement of the Convention that costs should not be 'prohibitively expensive' should be taken as applying to the total potential liability of claimants, including the threat of adverse costs orders.").

35. *See* WORKING GROUP ON ACCESS TO ENVIRONMENTAL JUSTICE, ENSURING ACCESS TO ENVIRONMENTAL JUSTICE IN ENGLAND AND WALES, (Centre for Law and the Environment, UCL 2008) (the SULLIVAN REPORT). The Sullivan Report recommended that for judicial reviews falling within the scope of Aarhus, judges should always issue an order before trial that, whatever the result, the person bringing the case will not be exposed to paying the costs of the other side.

36. *Id.*

37. The development started from the Court of Appeal decision in the 2005 Corner House case, which was a general public interest case and did not involve Aarhus or environmental issues: R (Corner House Research) v. Secretary of State for Trade and Industry [2005] 1 WLR 2600.

38. *See* Morgan v. Hinton Organics, *supra* note 34. *See also* Compton v. Wiltshire Primary Care Trust, [2008] EWCA (Civ) 749 (Eng).

publication in January 2010 of a major report on civil litigation costs by Lord Justice Jackson.³⁹ Jackson, while recognizing the significance of the Aarhus Convention, proposed a set of principles which would cut across all types of judicial review, and recommended a solution he characterized as “qualified one-way costs shifting.” In other words, he suggested that there should be a presumption that whatever the outcome of the case, each party would be responsible for its own costs. The government is now considering its response to Jackson.

In the context of environmental law, two aspects of the current debate on access to justice are striking. First, whatever its response to Jackson’s proposal and the longer-term revision of costs rules in civil litigation, the government is likely to respond positively in the environmental field earlier than in other fields because of international and European community pressures. Second, the debate has raised the question of whether costly judicial review procedures before the High Court provide the most appropriate forum for resolving environmental disputes in cases other than those that are legally or factually complex. Indeed, many countries in Europe have much less costly procedures, such as local tribunals, to address environmental challenges.

The Aarhus Convention vision of wider access to courts and tribunals puts into doubt whether the UK can continue to provide a gold-plate standard of judicial review before the High Court in all cases. The Sullivan Report recognized this possibility, noting that each year there are approximately twenty judicial environmental law reviews before the Administrative Court. While Sullivan acknowledged that if costs rules were modified to reduce the risk of exposure, then the numbers might increase. Such increase would likely be modest since judicial review would remain a matter of last resort. Moreover, as the Sullivan Report further noted, inasmuch as the new Upper Tribunal has the power to handle judicial reviews and adopt its own rules concerning costs and procedures, “If there was a substantial rise in environmental judicial review applications then it may be that the Upper Tribunal would provide a suitable forum for

39. RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT (TSO Dec. 21, 2009), *available at* <http://www.judiciary.gov.uk/publications-and-reports/reports/civil/review-of-civil-litigation-costs/civil-litigation-costs-review-reports>.

reducing an unacceptable overload on the Administrative Court.”⁴⁰

Reorganization of the Tribunal Service

In 2000, the government commissioned a senior Court of Appeal judge to conduct a wholesale review of the tribunal system in England and Wales.⁴¹ His report advocated complete reorganization of the system, urging establishment of a new unified tribunal system that would “re-engineer processes radically, so that just solutions can be found without formal hearings at all.”⁴²

The Tribunal Courts and Enforcement Act 2007 implemented the key recommendation of the “transforming public services” report, setting up a single tribunal service including both a lower and an upper tier.⁴³ Under the new system, new tribunals can be set up when needed without new legislation. The aim is to provide a responsive and flexible tribunal service.

The lower tier level is being organized into six chambers: Social Entitlement; Health, Education and Social Care; War Pensions and Armed Forces Compensation; Tax; Land, Property and Housing; and finally, a General Regulatory Chamber which incorporates a wide number of tribunals that do not readily fall within the other categories. Many existing tribunals have been transferred to these new chambers, and the process will continue. Establishing wholly new tribunals is relatively straightforward within this structure. Indeed, earlier this year, a new environmental tribunal was established within the General Regulatory Chamber to hear appeals of new environmental civil sanctions.

At the time of this writing, the new environmental tribunal remains an untested body. Appointments have been made with a panel of ten, mainly existing, judges and twenty lay members. The tribunal will be operational by the time first appeals are made, probably in 2011. Appeals forms already appear on the website, and rules of procedure have been adopted.⁴⁴

40. SULLIVAN REPORT, *supra* note 35, at ¶ 107.

41. SIR ANDREW LEGGATT, REPORT OF THE REVIEW OF TRIBUNALS, 2001, available at <http://www.council-on-tribunals.gov.uk/consultation/374.htm>.

42. DEPARTMENT OF CONSTITUTIONAL AFFAIRS, TRANSFORMING PUBLIC SERVICES: COMPLAINTS, REDRESS AND TRIBUNALS, 2004, Cm 6243, at ¶ 6.4.

43. *See id.*

44. Tribunal Services, *Forms and Guidance*, <http://www.tribunals.gov.uk/Environment/FormsGuidance/HowtoAppeal.htm> (last visited Jun. 20, 2010). The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules,

Sir Andrew Leggatt's "Report of the Review of Tribunals," (Leggatt Review) considered existing appeals routes haphazard and called for a single Upper Tribunal which will have equivalent status to the High Court and deal primarily with errors of law of first-tier tribunals.⁴⁵ The new Upper Tribunal is considered a "court of superior record" and its decisions are binding on tribunals and public authorities below. Section 15 of the Tribunals, Courts and Enforcement Act 2007 also gives the Upper Tribunal power to hear judicial reviews instead of the High Court. Individual judicial reviews may be referred to the tribunal if a High Court judge considers it "just and convenient to do so."⁴⁶ Alternatively, the Lord Chief Justice may transfer classes of judicial review to the Upper Tribunal. It is unlikely that many judicial reviews will be heard by the Upper Tribunal, but it could prove a significant forum in the environmental context in the future.

The Future

The first chairman of the United Kingdom Royal Commission on Environmental Pollution once argued there were two preconditions for effective reform in environmental policy and law — a robust and detached analysis of the underlying issue coupled with some form of "ignition" event such as a major pollution episode or some equivalent scandal.⁴⁷ Yet, ignition events are perhaps not the only precondition for reform. Sometimes, unexpected alignments produce the opportunity for major reform.⁴⁸

After over twenty years of debate and political inaction, an environmental tribunal was established in England and Wales in 2010 with little fuss or fanfare. Admittedly its jurisdiction remains modest, being confined to hearing appeals concerning new civil sanctioning powers given to the core national environmental regulators. Nevertheless, this new tribunal may form the nucleus of a more substantial institution which will hear many types of environmental

2009, S.I. 2009/1976 (L.20).

45. See LEGGATT, *supra* note 41.

46. Supreme Court Act, 1981, c. 54 § 31A, amended by Tribunals, Courts and Enforcement Act, 2007, c. 15 § 19.

47. See generally ERIC ASHBY, RECONCILING MAN WITH THE ENVIRONMENT 14-29 (1977).

48. RICHARD MACRORY, REGULATION, ENFORCEMENT AND GOVERNANCE IN ENVIRONMENTAL LAW 18 (Hart Publishing 2010).

appeals. In many ways, the approach is typically British – cautious, pragmatic, learning from experience, yet containing elements of a radical vision. The key is that the principle of an environmental tribunal has now been accepted, and, indeed, implemented. How can one explain this dramatic change in approach?

Paradoxically, the two main drivers for change providing the opportunity for establishing the environmental tribunal were not environmental factors. Rather, the new tribunal system was established as a result of a general recognition that the existing tribunal system could be run more efficiently and with greater flexibility. The new civil sanctions and rights of appeal to a tribunal are derived from a review of regulatory sanctions cutting across all areas of business regulation.

In contrast, the UCL Report on the need for an environmental tribunal, for example, argued a case for the special features of environmental law which justified a distinct tribunal.⁴⁹ This argument has not always proved wholly convincing.⁵⁰ Under the recent developments, the case for civil sanctions and the need for appeals to go to an administrative tribunal were justified on general regulatory grounds rather than distinctive environmental needs.

The Environmental Tribunal has been established because it was the environmental regulators who first secured the new civil sanction powers. In the future, if few environmental appeals are made but occur in other regulatory areas, then the tribunal can adapt and appeals will change its focus. Alternatively, the new tribunal may secure other environmental rights of appeal including those concerning environmental permitting and other aspects of environmental regulation.⁵¹ This seems the more likely course and

49. MACRORY & WOODS, *supra* note 18.

50. See, e.g., the response of the Scottish Government: “We acknowledge the special characteristics listed by Macrory and Woods and accept that they are features of environmental law. However, we are not persuaded that these features, or indeed this combination of features is unique to environmental law and it could be argued that similar statements could be made equally about other areas of law such as health, health & safety and employment none of which have specialist courts/jurisdiction.” SCOTTISH GOV'T, ENV'T AND RURAL AFFAIRS DEP'T, STRENGTHENING AND STREAMLINING: THE WAY FORWARD FOR THE ENFORCEMENT OF ENVIRONMENTAL LAW IN SCOTLAND, ¶ 2.99, (2006), available at <http://www.scotland.gov.uk/Resource/Doc/155498/0041750.pdf>.

51. At present these statutory appeals under various environmental regulations tend to go to a range of different bodies including magistrates courts, the planning inspectorate, and individual lawyers appointed by the Secretary of

one that would at last firmly embed the idea of an environmental tribunal within the British judicial system.

State. There is little rhyme or reason in the disparate arrangements other than historical accident.

ON THE QUEST FOR GREEN COURTS IN INDIA

Bharat H. Desai and Balraj Sidhu ***

Introduction

The diagnosis of environmental problems at the historic first U.N. Conference on the Human Environment (UNCHR) in 1992, otherwise known as the Earth Summit, unleashed a spate of administrative and legislative measures in both developed and developing countries. The environmental renaissance, which saw the development of global conferencing technique at Stockholm (1972),¹ Rio de Janeiro (1992),² and Johannesburg (2002)³, has brought about worldwide phenomenal growth in environmental awareness, policies, legislation and institutions.

The importance of this development lies in the fact that enforcement of global regulatory measures has to take place at the national level. As the volume of environmental law, including both “hard law” and “soft law” grows, the question of adjudication of disputes gains prominence.⁴

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1. Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Report of the UN Conference on the Human Environment*, 1-68, U.N. Doc. A/CONF.48/14/Rev.1.

2. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Report of the UN Conference on Environment and Development*, vol. I-III, UN Doc. A/CONF.151/26,

3. World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26 – Sept. 4, 2002, *Report of the World Summit on Sustainable Development*, pp.1-173, A/CONF.199/20.

4. Bharat H. Desai (1996), *Environmental Law: Some Reflections*, 23 INDIAN BAR REV. 191 (1996) (issue no. 3-4).

Moreover, as the seriousness of environmental problems grows, the national courts and tribunals have a greater role to play in interpreting and giving effect to this rapidly expanding body of law.

Indeed, the global environment has continued to witness serious deterioration.⁵ This is especially seen in cases of environmental disasters (both natural and manmade).⁶ This disturbing trend remains unabated in spite of a quantum jump in intensified regulatory efforts at the national, regional and global levels.

The various threats to the global environment include severe erosion of the natural resource base, disappearance of species, depletion of the ozone layer, loss of biological diversity, deforestation and desertification, as well as a spiraling increase in hazardous wastes, chemicals and persistent organic pollutants.⁷ Thus, the global environmental problems are increasing in terms of diversity, intensity and the adverse effect on human life and the living environment. These problems pose a serious regulatory challenge for the growing body of environmental law, and necessitate innovative tools and techniques to grapple with sector specific environmental issues. Since the body of environmental law has been rapidly expanding, the concerted law-making process has been reflected in the growing *institutionalization* of international environmental law.⁸ In turn, this has contributed to the growth of a sizeable body of domestic environmental policies, laws, and regulatory and judicial institutions. This growth of international environmental law, coupled with increasing stress on the global environment and acute resource-related conflicts, has unleashed prospects for international

5. P. Birnie & A. Boyle, *INTERNATIONAL LAW AND THE ENVIRONMENT*, 139, 141 (Oxford University Press 2002); see Philippe Sands, *International Environmental Litigation and Its Future*, 32 U. RICH. L. REV. 1619 (1999).

6. See, e.g., Bharat H. Desai, *Managing Ecological Upheavals: A Third World Perspective*, 30 SOC. SCI. & MED., 1065 (1990).

7. See Bharat H. Desai, *Threats to the World Eco-system: A Role for the Social Scientists*, 35 SOC. SCI. & MED. 589 (1992); see also, Susan M Hinde, *The International Environment Court: Its Broad Jurisdiction as Possible Fatal Law*, 32 HOFSTRA L. REV. 727 (2004).

8. Philippe Sands, *Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law* (2008), www.oecd.org/investment/gfi-7 (distributed at the OECD Global Forum on International Investment VII, Paris, Fr., Mar. 27-28, 2008).

environmental disputes among the sovereign States and calls for an institutionalized effort to address the challenges of international environmental dispute settlement. In addition, the increase in environmental disputes within the domestic jurisdiction of sovereign states calls for special adjudicatory mechanisms to resolve them. This paper seeks to provide some reflections on the state of international environmental dispute settlements and the need to consider more seriously entrusting these disputes to a specialized set of environmental courts. It also briefly examines the quest for an environment court in India, where the right to environment has been considered a fundamental right to life under the constitution.

International Settlement of Disputes

Developments in international dispute resolution, as well as the growth in the number of international courts and tribunals, have increased in recent years. Understanding these institutions is important because they are crucial to dispute resolution in the international legal system.⁹ They are one of the most important tools for the peaceful settlement of disputes in situations where the parties have consented to the jurisdiction of the particular court or tribunal.¹⁰ The decisions of these courts and tribunals clarify international law in important ways and, although usually not formally binding on states that are not a party to a dispute, it is contended that they establish a form of de facto international common law.¹¹

The first tentative steps towards settlement of disputes through international courts and tribunals were taken at the turn of the nineteenth century.¹² The delegates to the Hague Conferences of 1899 and 1907 agreed to establish an international arbitral body, the Permanent Court of Arbitration (PCA). The PCA had a modest goal

9. Karen J. Alter, *Do International Courts Enhance Compliance with International Law?*, 25 REV. ASIAN AND PAC. STUD. 52, 54 (2004).

10. See Andrew T. Guzman, *International Tribunals: a Rational Choice Analysis* (U.C. Berkley Pub. L. Res. Paper No. 1117613, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117613; see also, Stefan Mrozinski, *Why do States Support International Criminal Courts and Tribunals? A Neoclassical Realist Approach* (U. Cambridge Working Paper Series 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1464144.

11. *Id.*

12. Eric A. Posner & John C. Yoo, *A Theory of International Adjudication* (U. Chicago Law & Econ., Olin Working Paper No. 206 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=507003; see also, David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT'L L. 563 (2007-08).

of encouraging states to use arbitration by providing a set of procedures for choosing arbitrators.¹³ The next step was the establishment of the Permanent Court of International Justice (PCIJ), which, along with the League of Nations, was supposed to maintain international order after World War I (1919).¹⁴ The demise of the League of Nations by the end of World War II (1945) resulted in the creation of the Charter of the United Nations.¹⁵ It also led to the sculpting of a new International Court of Justice (ICJ), the principal judicial organ of the United Nations, which continued in 1946 from where the PCIJ had left off (as its successor).¹⁶

At roughly the same time that the ICJ began its operations, drafters were putting the finishing touches on the General Agreement on Tariffs and Trade (GATT), a legal framework for international trade that eventually resulted in a relatively systematic form of arbitration.¹⁷ After several decades of operation, the GATT arbitration system gave way to the more court-like dispute settlement mechanism (DSM) of the World Trade Organization (WTO) in 1995. Unlike GATT's standard arbitration system, the DSM has compulsory jurisdiction and states are practically unable to refuse consent to the creation of the tribunals and their adjudication of the disputes.¹⁸

In the 1950s, several regional courts were created. The European Court of Justice (ECJ), created in 1952, adjudicates disputes arising under European law.¹⁹ The European Court of Human Rights (ECHR), created in 1959, adjudicates disputes involving the 1950 European Convention for the Protection of Human Rights and

13. Permanent Court of Arbitration, <http://pca-cpa.org/> (last visited Nov. 16, 2010).

14. See International Court of Justice, Permanent Court of International Justice, <http://www.icj-cij.org/pcij/index.php?p1=9> (last visited Nov. 16, 2010).

15. U.N. Charter, available at <http://www.un.org/en/documents/charter/index.shtml>.

16. See International Court of Justice, <http://www.icj-cij.org/> (last visited Nov. 16, 2010).

17. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

18. See Laurence R. Helfer, Annie-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J., 273 (1997); see also Laurence R. Helfer, Annie-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

19. Europa, The Court of Justice, http://europa.eu/institutions/inst/justice/index_en.htm (last visited Nov. 20, 2010).

Fundamental Freedoms (also known as “The European Convention on Human Rights” (ECHR)).²⁰ The Inter-American Court of Human Rights, created in 1979, hears cases involving the 1969 American Convention on Human Rights.²¹ Additionally, there are similar regional courts in other parts of the world that generally deal with human rights and commercial relationships.²²

Another important development was the creation of the International Tribunal for the Law of the Sea (ITLOS) in 1996, which has jurisdiction over a range of maritime disputes governed by the United Nations Convention on the Law of Sea (UNCLOS).²³ Similarly, international adjudication has witnessed growth in the area of war crimes-related trials. The Nuremberg²⁴ and the Tokyo²⁵ tribunals, after World War II, were followed, after a long hiatus, by the International Criminal Tribunal for the former Yugoslavia (1993) and the International Criminal Tribunal for Rwanda (1994)²⁶ and several other ad hoc tribunals for Sierra Leone,²⁷ Lebanon,²⁸

20. *Id.*

21. *See* Inter American Court of Human Rights, <http://www.corteidh.or.cr/index.cfm?&CFID=666614&CFTOKEN=69520161> (last visited Nov. 16, 2010).

22. *See, e.g.,* IHRDA, African Court of Justice and Human Rights (ACJHR), <http://www.ihrda.org/african-court-of-justice-and-human-rights-acjhr/> (last visited Nov. 20, 2010).

23. United Nations Convention on the Law of Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261.

24. For the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, August 8, 1945, see <http://www.icrc.org/ihl.nsf/FULL/350?OpenDocument>

25. The Tokyo Trials took place on the basis of The International Military Tribunal for the Far East; see <http://www.yale.edu/lawweb/avalon/imtfech.htm>

26. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); *see also* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

27. The Special Court for Sierra Leone was set up jointly by the Government of Sierra Leone and the United Nations. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996; see <http://www.sc-sl.org/>

28. The mandate of the Special Tribunal for Lebanon is to prosecute persons responsible for the attack of February 14, 2005, resulting in the death of former Prime Minister Rafiq Hariri and in the death or injury of other persons. Pursuant to Security Council resolution 1664 (2006), the United Nations and the Lebanese Republic negotiated an agreement on the establishment of the Special Tribunal for Lebanon; Security Council resolution 1757(2007) of May 30, 2007, the provisions of the document annexed to it and the Statute of the Special Tribunal thereto attached, entered into force on June 10, 2007; see <http://www.stl-tsl.org/section/AbouttheSTL>

Iraq,²⁹ and Cambodia.³⁰ The drafters of the Rome Statute of 1998 aspired to transform these ad hoc war crimes tribunals into a permanent judicial settlement forum called the International Criminal Court (ICC).³¹

Given the proliferation of international courts and tribunals of a more diverse and specialized nature, there is concern about the coherence of international law. It is contended that a large number of such forums may create a “cacophony of views that would damage prestige of the ICJ and undermine effort to promote the effectiveness of international law.”³² Nevertheless, these other forums may not necessarily have a deleterious effect on the international legal system. Rather, they could help to expand the application of international law to disputes not likely to come up before the ICJ and provide additional opportunities to develop the law without undermining its legitimacy per se.³³

The rapid upswing in the number of international courts and tribunals can be understood in light of the increasingly complex relationships between States after the end of the Cold War.³⁴ The need for specialized expertise in new and developing areas of

29. The Supreme Iraqi Criminal Tribunal has jurisdiction over every natural person, whether Iraqi or non-Iraqi resident of Iraq, accused of committing any of the crimes listed in Articles 11, 12, 13 and 14 of the Law of the Supreme Iraqi Criminal Tribunal (Number 10 of 2005), committed during the period from July 17, 1968 to May 1, 2003, in the Republic of Iraq or elsewhere; see <http://www.ictj.org/static/MENA/Iraq/iraq.statute.engtrans.pdf>

30. The Cambodian National Assembly passed a law to create a court to try serious crimes committed during the Khmer Rouge regime 1975-1979. This court is called the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (Extraordinary Chambers or ECCC). This special new court was created by the government of Cambodia and the UN but it will be independent of them. It is a Cambodian court with international participation that will apply international standards. See Introduction: Extraordinary Chambers in the Courts of Cambodia, http://www.eccc.gov.kh/english/about_eccc.aspx (last visited Nov. 25, 2010).

31. Rome Statute of International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, available at, <http://untreaty.un.org/cod/icc/statute/rome.htm>.

32. Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 Colum. J. Transnat'l L. 143, 153 (2001); see also Michael Reisman, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 5-6 (1992).

33. J.I. Charney, *International Law and Multiple International Tribunals*, 271 RECUEIL DES COURS 115, 126 (1998).

34. *Id.*

international law may have been the driving force behind the creation of many new tribunals in the latter half of the twentieth century. In essence, the proliferation of international courts and tribunals is an attempt by states to maintain the viability of the international judicial system in light of the increased complexity of international relations.³⁵ The so-called moral dilemma is sought to be put to rest as it is felt that there is “no alternative to having numerous international tribunals to interpret international law; an international system with only few judicial bodies is no longer feasible.”³⁶

International environmental disputes have an impressive history. The resolution of the earliest known dispute in the Trail Smelter Arbitration (1939) has become a benchmark decision in the field of international environmental law.³⁷ The case dealt with transfrontier pollution for the first time in legal history and the tribunal established the “no harm principle.”³⁸ Numerous forums such as the International Court of Justice (ICJ),³⁹ Permanent Court of Arbitration (PCA),⁴⁰ International Tribunal on the Law of Sea (ITLOS),⁴¹ and the World Trade Organization (WTO)⁴² aid in the resolution of international environmental disputes.

Environmental Dispute Settlements

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. Article 36 (1) of its statute provides that

35. Spelliscy, *supra* note 32, at 150.

36. Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 704 (1999).

37. *United States v. Canada*, 3 R. Int'l Arb. Awards 1911 (1938), *reprinted in* 33 AM. J. INT'L L. 182 (1938); *see also* *United States v. Canada*, 3 R. Int'l Arb. Awards 1938 (1941), *reprinted in* 35 AM. J. INT'L L. 684 (1941).

38. In a pioneering effort to lay down the law, the Tribunal observed: “(U)nder the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another to the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”; *see* 35 AM. J. INT'L L. 716 (1941).

39. *See* International Court of Justice, <http://www.icj-cij.org/homepage/index.php?lang=en> (last visited Nov. 25, 2010).

40. *See* Permanent Court of Arbitration, http://www.pca-cpa.org/showpage.asp?pag_id=363 (last visited Nov. 25, 2010).

41. *See* International Tribunal for the Law of the Sea, http://www.itlos.org/start2_en.html (last visited Nov. 25, 2010).

42. *See* World Trade Organization, <http://www.wto.org/> (last visited Nov. 25, 2010).

its jurisdiction “comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”⁴³ The ICJ has full competence to adjudicate upon any area of international law. Thus, the ICJ, in principle, could address any environmentally related dispute. In fact, the role of the Court in the settlement of international environmental disputes was established in its 1997 decision in the case concerning the Gabčíkovo-Nagymaros Project.⁴⁴ The court had an opportunity to address a wide range of international legal issues, including the law of treaties, the law of state responsibility, the law of environment and the relationships between these areas. While the Court had a golden opportunity to demonstrate its ability to master the legal and factual elements in a comprehensive legal manner, in view of the sheer technicalities of this celebrated environmental dispute, for the first time in the history of international adjudication, the full court decided to make an on-the-spot visit to the disputed site of the project in order to appropriately comprehend the dispute.⁴⁵ As a consequence, the Court ruled that Hungary was not entitled in 1989 to suspend or terminate work on the joint project solely on environmental grounds.⁴⁶

The Court also went on to find that Czechoslovakia and, subsequently Slovakia (as a successor state), was not entitled to a unilateral solution in deciding to divert the Danube (beginning in October 1992) without the agreement of Hungary.⁴⁷ The Court ruled that the construction prior to the operation was not lawful.⁴⁸ Finally, the Court held that Hungary was not entitled to terminate the 1977 Treaty in May 1992.⁴⁹ As to the future, the Court indicated the basis

43. Patrick Kelly, *The International Court of Justice*, 12 YALE J. INT'L L. 342, 342 (1987).

44. Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25); see also Sands, *supra* note 5, at 1626.

45. See Press Release, International Court of Justice, Visit by the Court to the site of the Gabčíkovo-Nagymaros hydro-electric dam project (Feb. 17, 1997), available at <http://www.icj-cij.org/docket/index.php?pr=262&p1=3&p2=1&case=92&p3=6>.

46. 1997 I.C.J. 7, 82.

47. *Id.* at 83.

48. *Id.*

49. *Id.*

for cooperation and agreement which it hoped the parties might pursue, suggesting that the preservation of the status quo — one barrage, not two operated jointly — would be an appropriate solution.⁵⁰ Nevertheless, the judgment fell short of the expectations of a detailed exposition on international environmental law. Moreover, given the difficulty of striking a balance between both contending states, as well as the unique nature of such environmental disputes, the case highlighted the need for a specialized environment court that could adequately promote justice.

Environmental factors have been increasingly acknowledged to be a relevant source of international tension and disputes, and even of actual threats to international peace and security. The main considerations, which seem to justify heightened attention to the prevention and settlement of environmental disputes, include the fact that there is a growing demand and need for access to natural resources, coupled with a limited, or at least shrinking, resource base.⁵¹

Further, the nature and extent of international environmental obligations has enormously increased as states assume broader and deeper commitments. The thickening web of multilateral environmental agreements (MEAs) and norms increases the likelihood that disputes might arise about how to interpret the scope of these obligations. As these increasing international environmental obligations affect national interests, and impose on states large administrative, economic, and political burdens, states that do not comply with environmental obligations are perceived to gain an unfair competitive advantage. Accordingly, as national economies are increasingly globalizing, states are more likely than ever to be dragged into international disputes caused by environmentally degrading activities of their nationals, or in defense of nationals affected by activities elsewhere.⁵²

Hence, the environment is increasingly featured as a factor in disagreements between countries in various international forums, and indeed, the number of available forums in which these disputes can be

50. 1997 I. C. J. 7; *see also* Sands, *supra* note 5, at 1630.

51. CESARE P.R. ROMANO, *THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES: A PRAGMATIC APPROACH* 163 (Kluwer Law International 2000).

52. *Id.*

heard is increasing.⁵³ The proliferation of a large number of regional and global regulatory frameworks (mainly through MEAs) has opened up the possibility of referral of a dispute to the ICJ, or to arbitration. However, in view of the very state-centric nature of the international system, environmental dispute settlement still remains largely illusive and lacking in appropriate adjudicatory mechanisms.

Special Character of Environment Disputes

In a way, it is difficult to define the term “environmental dispute” because the term “environment” is not absolute. The decisions rendered by international courts and tribunals illustrate the difficulties involved in defining international environmental disputes. Furthermore, sector-specific regimes and fragmented proliferation of MEAs, make it even more difficult to define “environmental dispute” comprehensively.

It is in this context, as well as the technical nature of environmental disputes, that it is contended that there is a need for a specialized environment court. Generalist judges in the ordinary court do not seem to have sufficient experience with the complex laws and principles that form environmental law, and are uncomfortable dealing with highly expert testimony and the necessity of balancing anticipated environmental harm and economic benefits.⁵⁴ Distinctive features of environmental law include technical/scientific complexity; challenging and rapidly developing legislative and policy bases; overlapping remedies and interests; international environmental treaties; fundamental principles such as the precautionary approach; principles concerning third-party access to environmental justice; and the emergence of the overarching principle of sustainable development.⁵⁵ The combined effect of these factors underscores the need for a specialized environment court, both at global and national

53. Sands, *supra* note 5, at 1622.

54. See GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), at 14-16, available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

55. Maurice Sunkin, *Modernizing Environmental Justice: Regulation and the Role of an Environmental Tribunal*, 16 J. ENVTL. L. 307, 308 (2004).

levels.

Even as the quest for an International Environment Court (IEC)⁵⁶ is still at a nascent stage, there is a flurry of developments within the domestic jurisdiction of the states. In fact, the twenty-first century has experienced huge growth in environmental courts and tribunals. Over 350 of these specialized environmental dispute settlement forums for resolution of environmental, natural resource, land use development and related issues can now be found in several countries, in almost every region of the world.⁵⁷ A comparison could be made of three such full-fledged existing environment courts (see **Table I**): The Land and Environment Court of New South Wales, the Environment Court of New Zealand, and the National Green Tribunal of India, the latest to join the elite club of specialized environmental dispute settlement forums.

Quest for Environmental Courts in India

Preliminarily, it is pertinent to examine the legal developments that have propelled the quest for an environment court in India, the foundation of which has essentially been provided by the specific provisions of the Indian Constitution that require the state and the citizens to protect the environment. Although these provisions were absent from the original version of the constitution, there were other significant provisions that provided an initial trigger for liberalization of the rule of *locus standi*, especially in cases involving the protection of human rights.⁵⁸ The 42nd Constitutional Amendment (1976)⁵⁹

56. See, generally, Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting up an International Court for the Environment within United Nations*, 20 ENVTL L. 321, 327-28 (1990). Also see ELLEN HEY, REFLECTIONS ON INTERNATIONAL ENVIRONMENTAL COURT 9 (2000).

57. PRING & PRING, *supra* note 54, at 1.

58. See INDIA CONST. art. 21 (Protection of life and personal liberty), Article 42 (Provision of just and humane conditions of work and maternity relief), art. 47 (Duty of the State to raise the level of nutrition and the standard of living and to improve public health) & art. 49 (Protection of monuments and places and objects of national importance).

59. This constitutional amendment became very ambitious in terms of a larger number of provisions that came to be amended (Preamble; Articles 31 C, 39, 55, 74, 77, 81, 82, 83, 100, 102, 105, 118, 145, 166, 170, 172, 189, 191, 194, 208, 217, 225, 227, 228, 311, 312, 330, 352, 353, 356, 357, 358, 359, 366, 368, 371 F, Seventh Schedule) as well as several provisions that were substituted (Articles 103, 150, 192, 226) and inserted new provisions that (Articles 31D, 32A, 39A, 43A, 48A, 51A, 131A, 139, 144A, 226A, 228A, 257A, 323A and 323B). The historic amendment almost led to complete revision of the constitution. It received assent of the President of India on December 18, 1976. It took place during an unprecedented internal emergency

included a Directive Principle in Article 48A [protection and improvement of the environment and safeguarding of forests and wildlife] and a Fundamental Duty in Article 51A(g) [to protect and improve the natural environment, including forests, lakes, rivers and wildlife, and to have compassion for living creatures]. Under the same Amendment, forests and the protection of wild animals and birds were brought into the Concurrent List as entries 17A and 17B.

Table –I: Comparison of Select Existing Environment Courts and Tribunals

Basic Features	New South Wales Environment Court	Environment Court of New Zealand (<i>Te Kooti Taiao o Aotearoa</i>)	National Green Tribunal of India
Act	The Land and Environment Court Act, 1979 (Court Act).	The Resource Management (Amendment) Act, 1996	The National Green Tribunal Act, 2010
Composition	Chief Judge and other judges and nine technical and conciliation assessors.	Environment Judges (at the level of District Judge) and Environmental Commissioners as technical experts.	Chairperson; Not less than ten but maximum twenty full-time judicial as well as expert members.
Jurisdiction	Merits review, judicial review, civil enforcement, criminal prosecution, criminal appeals and civil claims about planning, environmental, land, mining and other legislation.	Reference about the consents of regional and districts statements and plans; and appeals arising out of application for resource content; and consents apply for land use, sub-division, coastal permit, water permit or discharge permit or combination of these.	All civil cases involving substantial questions relating to environment; arising from implementation of the seven enactments specified in <i>Schedule I</i> of the Act.
Locus standi	Proceedings can be initiated by anyone.	Parties before the Court are usually represented by lawyers, but anyone may appear in person or be represented by an agent.	Any person, owner, legal representative, agent, representative body or organization aggrieved by any order, decision or direction or determination can appeal to the tribunal.
Procedure	Not bound by rules of evidence.	Not bound by rules of evidence.	Guided by principles of natural justice; not bound by rules of evidence in the Indian Evidence Act, 1872.
ADRS techniques	Act refers to mediation and neutral evaluation by the Court.	Encourages mediation and arbitration presided by Environment Commissioners.	Nil

period (1975-77). When the new government came to power in 1977, it repealed most the amendments. See DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 458-59 (20th ed., LexisNexis Butterworths 2010).

Penalty	The Court is empowered to punish individuals guilty of contempt with fines or imprisonment and corporations with fines or sequestration orders.	Two years imprisonment or fine up to \$200,000; in case of continuing offense, \$100 per day.	For failure to comply, up to three years imprisonment or up to ten crore INR fine or both; up to twenty-five crore INR for companies.
Appeals	Only on question of law. From commissioner decision to judge under Court Act. Also allow appeal to Court of Appeal and in criminal matters to Court of Criminal Appeal.	Only on question of law to the High Court.	To the Supreme Court

Activist Judicial Approach

The Indian higher judiciary, especially the Supreme Court, has played the role of judicial activist with great finesse. In fact, a remarkable body of environmental jurisprudence has emerged in the past three decades or so. It is significant to note that judicial decisions have not only played the vanguard role in protecting the citizens' right to a wholesome environment, but have also crystallized legal principles through activist interpretation, which gradually took the form of a body of environmental law.⁶⁰ In this context, activist citizens took advantage of the liberalized rule of *locus standi* to seek judicial intervention to ensure protection of those constitutionally-recognized environmental rights that related more to "diffuse interests than to ascertainable injury to individuals."⁶¹

Adjudication of Environmental Cases

The public interest litigation in India has been primarily judge-led and, even to some extent, judge-induced. The Supreme Court and the state High Courts have often deliberately jettisoned apologist postures in regard to their active involvement in social problems, and have justified activist judicial attitudes.⁶² One of the pioneers of the apex court's jurisprudence concerning human rights and environmental matters, Justice P.N. Bhagwati, argued that, in a developing country such as India, the modern judiciary cannot afford to hide behind notions of legal justice and plead incapacity when social justice

60. Desai, *supra* note 4, at 190.

61. P. LEELAKRISHNAN, ENVIRONMENTAL LAW IN INDIA 139 (1999).

62. Bharat H. Desai, *Enforcement of the Right to Environment Protection through Public Interest Litigation in India*, 33 INDIAN J. INT'L L. 28, 28-29 (1993).

issues are addressed to it.⁶³ As a logical corollary to the activist role pursued by the higher courts, justice's center of gravity shifted from the traditional individual *locus standi* to community-oriented public interest litigation. The liberalization of the rule of *locus standi* enabled environmentally-conscious and public-spirited individuals or groups easy access to the highest court of India and judge-fashioned remedies.

The interpretation of the right to life (Article 21) took a major turn when in 1985 the Supreme Court was faced with adjudging a conflict which set environmental protection issues against industrialization in the *Doon Valley* case.⁶⁴ In that case, which involved a large number of lessees of limestone quarries, the Court ordered the closure of all but eight of the quarries.⁶⁵ The Court took notice of the fact that limestone quarrying and excavations of the limestone deposit affect the perennial water springs. Taking a serious view of this environmental disturbance, the Court recognized that the right to life includes the right to a wholesome environment.

In 1987, the Supreme Court laid down not only principles of strict liability in the matter of an injury caused by the use of hazardous substances in *M.C. Mehta v. Union of India (Oleum Gas Leak case)*, but also for the first time, mentioned setting up specialized environment courts.⁶⁶ The Court tacitly recognized that citizens' right to life was adversely affected by the leakage of oleum gas from the premises of Shriram Foods and Fertilizers Ltd. Therefore, in addition to preventive relief, it proceeded to determine *remedial relief* under Article 32.⁶⁷ In the process, the Court radically transformed the criteria for liability and compensation under the law of torts. A Constitution Bench of the apex court unanimously articulated a new standard for the hazardous substances industry's "absolute and non-delegable

63. *Id.*; see also P.N.Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L L. 566 (1985).

64. *Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1985 S.C. 652 (The Supreme Court has issued, among others, several opinions and orders: A.I.R. 1985 S.C. 1259; 1985(2) S.C.A.L.E. 906; A.I.R. 1987 S.C. 359; A.I.R. 1987 SC 2426; A.I.R. 1988 S.C. 2187; J.T. 1988 (4) S.C. 710; J.T. 1990 (2) S.C. 391).

65. 1985(1) S.C.A.L.E. 408.

66. *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 965; A.I.R. 1987 S.C. 982; A.I.R. 1987 S.C. 1086 (three main orders in this case).

67. A.I.R. 1987 S.C. at 1099.

duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of activity. . . .” The Court emphatically ruled that such industry is to be subjected to strict and absolute liability without exceptions, and the measure of compensation is to be correlated to the magnitude and capacity of the enterprise.⁶⁸ The Supreme Court further advocated the establishment of specialized environment courts, stating:

We would also suggest to the Government of India that since cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, *it might be desirable to set up environment courts on the regional basis with one professional Judge and two experts drawn from the Ecological Sciences Research Group keeping in view the nature of the case and the expertise required for its adjudication. There would of course be a right to appeal to this Court from the decision of the environment court (emphasis added).*⁶⁹

Thereafter, in 1998, the *Ganga Pollution* case addressed the issue of river pollution caused by tanneries.⁷⁰ The Court declared that the right to life referred to in Article 21 of the Constitution included the right to free water and unpolluted air. Further, the Court observed that “we are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people.”⁷¹

The apex court again recognized the citizens’ right to fresh air and a pollution-free environment in the *Stone Crushers* case, and ordered the closure of all mechanical stone crushers in the Delhi and Faridabad area.⁷² These stone crushers were operating without requisite licenses and emitting hazardous dust around the clock. Passing strict restrictions, the Court ruled that “the quality of environment cannot be permitted to be damaged by polluting air, water and land to such an extent that it becomes a health hazard for

68. *Id.*

69. (1986) 2 S.C.C. 176, 202, para 22.

70. *M.C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1037 (Tanneries); A.I.R. 1987 S.C. 1115 (Municipalities).

71. A.I.R. 1988 S.C. at 1048 (per Singh, J.).

72. *M.C. Mehta v. Union of India* (Stone Crushers case), W.P. 4677/1985 (1985).

the residents.”⁷³

Similarly, in the *Sariska Bioreserve* case, decided in 1992, the Supreme Court expressed its anguish against damage done to the environment, ecology and wildlife by mining activities in the protected forest areas.⁷⁴ It prohibited all mining activities within the Sariska National Park and the area designated as Tiger Reserve.⁷⁵

In an effort to further define what constitutes an environmental case, in *Virendra Gaur v. State of Haryana*, the Supreme Court observed that “[t]he word ‘environment’ is of broad spectrum which brings within its ambit, ‘hygienic atmosphere and ecological balance.’ Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment.”⁷⁶

Again, in 1995, in one of its landmarks rulings, *Indian Council for Enviro-Legal Action v. Union of India*, the apex court reiterated the idea of having independent specialized environment courts.⁷⁷ The case involved serious damage to the environment by certain industries producing toxic chemicals. The Court found that the water in wells and streams had turned dark and dirty, rendering it unfit for human consumption, or even for cattle and irrigation. The Court gave several directions, including the closure of industries. Due to the technicality of the subject matter, a committee of experts was appointed. The Court also took the opportunity to underscore its longstanding suggestion for the creation of specialized environment courts. It observed that, “Environmental Courts having civil and criminal jurisdiction must be established to deal with the environmental issues in a speedy manner. Further, it must be manned by legally-trained persons/judicial officers.”⁷⁸

The foundation for applying the precautionary principle, the

73. Desai, *supra* note 62, at 35.

74. Tarun Bharat Sangh, *Alwar v. Union of India*, A.I.R. 1992 S.C. 514; A.I.R. 1993 S.C. 293 (the main two orders passed in this case).

75. A.I.R. 1992 S.C. at 515 (India).

76. *Virendra Gaur v. State of Haryana*, (1995) 2 S.C.C. 577 (India).

77. *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 S.C.C. 212; *see also*, *Indian Council for Enviro-Legal Action v. Union of India*, A.I.R. 1996 S.C. 1446.

78. 1996) 3 S.C.C. 212, 252 (emphasis added).

polluter pays principle and the new burden of proof (which shifted the burden to the person or body interfering with ecology to prove no adverse impact) was laid down by the Supreme Court in 1996 in *Vellore Citizens' Welfare Forum v. Union of India*.⁷⁹ Further, the court proposed that "the Central Government should constitute an authority under section 3(3)[of the 1986 Environmental Protection Act] headed by a retired judge of High Court and it may have other members — preferably with expertise in the field of pollution control and environmental protection — to be appointed by the Central Government."⁸⁰

The activist approach of the Supreme Court (and also of some of the State High Courts) has ranged across a gamut of other environmental issues, including banning aquaculture industries in coastal areas to prevent drinking water from becoming saline,⁸¹ issuing directions for improving air quality in the *National Capital Territory of Delhi*⁸² and protecting the *Taj Mahal*,⁸³ prohibiting cigarette smoking in public places,⁸⁴ addressing issues of solid waste management,⁸⁵ proscribing construction activities in the vicinity of lakes⁸⁶ and directing the lower courts to deal strictly with environmental offenses.⁸⁷

The demand for specialized environmental courts from the judiciary reached a crescendo with the 1998 decision of the Supreme Court in *A.P. Pollution Control Board v. Prof. M.V. Nayadu*, wherein the Supreme Court acknowledged that both it, as well as the High Courts, were experiencing considerable difficulty in adjudicating upon the correctness of technological and scientific opinions.⁸⁸ The Court, reiterating its suggestion in earlier cases, opined that "of paramount

79. *Vellore Citizens' Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715.

80. *Id.* at 2726.

81. *S. Jagannath v. Union of India*, (1997) 2 S.C.C. 87.

82. *M.C. Mehta v. Union of India*, (1998) 8 S.C.C. 648 (introducing lead free petrol); *M.C. Mehta v. Union of India*, (1998) 8 S.C.C. 206 (phasing out commercial vehicles older than 15 years).

83. *M.C. Mehta v. Union of India*, (1996) 8 S.C.C. 462 (Taj Trapezium Case).

84. *Murli S. Deora v. Union of India*, (2001) 8 S.C.C. 765.

85. *Almitre H. Patel v. Union of India*, (1998) 2 S.C.C. 416; *B.L. Wadhwa v. Union of India*, (1996) 2 S.C.C. 594.

86. *M.C. Mehta v. Union of India*, (1997) 3 S.C.C. 715 (matter relating to Badkal and Surajkund Lakes).

87. *U.P. Pollution Board v. Mohan Meakins Ltd.*, (2000) 3 S.C.C. 745.

88. *Andhra Pradesh Pollution Control Bd. v. M.V. Nayudu* (1999) 2 S.C.C. 718.

importance was the need to establish environmental courts, authorities and tribunals for providing adequate judicial and scientific inputs rather than leaving such complicated disputes to be decided by officers drawn from the executive.”⁸⁹

In *A.P. Pollution Board (II) v. Prof. M.B. Nayadu*, the Supreme Court referred to the serious differences in the constitution of appellate authorities under plenary, as well as delegated legislation, and pointed out that except in one state where appellate authority was manned by a retired judge of the High Court, in other states they were manned only by bureaucrats.⁹⁰ Accordingly, the Court suggested that the government of India amend the environmental statutes, rules and notifications to ensure that in all environmental courts, tribunals and appellate authorities, there is always a judge of the rank of a High Court Judge or a Supreme Court Judge sitting or retired, and a scientist or group of scientists of high ranking and experience to help in the proper and fair adjudication of disputes relating to the environment and pollution.

The difficulty on the part of courts in appreciating scientific evidence is not limited to Indian courts, but is a global phenomenon. There is an ongoing debate among scholars regarding the need and justification for a specialized International Environment Court (IEC) to adjudicate the growing number of environmental disputes. Several arguments have been advanced to justify the establishment of an IEC. These arguments include the many pressing environmental problems that humans are facing and the need for a specialized adjudicatory bench comprised of experts in international environmental law to consider these problems,⁹¹ the need for international organizations to be able to be parties to disputes related to the protection of the environment,⁹² the need for individuals and groups to have access to environmental justice at the international level⁹³ and the need for

89. *Id.* (emphasis added).

90. *Andhra Pradesh Pollution Control Bd. v. M.V. Nayuda* (2001) 2 S.C.C. 62.

91. Sunkin, *supra* note 55, at 308.

92. Peddy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 219 (2001).

93. Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting up an International Court for the Environment within United Nations*, 20 ENVTL L. 321, 327-28 (1990).

dispute settlement procedures that enable the common interest in the environment to be addressed.⁹⁴ Each of these arguments has its own merit.

Thus, it can be said that the emergence of public interest litigation, as well as the “activist” approach of the higher judiciary, especially the Supreme Court in India, has provided an important tool for the enforcement of the fundamental right to environmental protection. While clarifying its role, the apex court has often asserted its goal is simply to uphold the constitution and ensure the statutory rights of citizens. The court’s role in expanding public interest litigation, then, might be better explained in terms of its active enforcement of statutory and constitutional rights rather than any “activist posturing” per se. It has always been a judge or a bench of the court that has shown active assertion of the quest to render social justice rather than the apex court as a whole performing such a role. This has been demonstrated with ups and downs in the court’s handling of such “public interest” litigation.

However, it could not have been possible without liberalization of the traditional rule of *locus standi*,⁹⁵ which facilitated *access to justice*⁹⁶ by invoking the writ jurisdiction. The strong rationale for this

94. ELLEN HEY, REFLECTIONS ON INTERNATIONAL ENVIRONMENTAL COURT 9 (2000).

95. The trigger for this inclination of the Supreme Court to liberalize the issue of “standing” before it came from its basic presumption that procedure is merely hand maiden of justice and therefore should not stand in the way of access to justice to the weaker sections of society. As such, the Court went on to devise ways and means to expand the concept of *locus standi*, rejecting the need for personal stake or injury in the traditional doctrine of standing. This paved the way for “citizen suits” by allowing any member of the public or social action group to seek judicial redress under Article 32 or Article 226 of the Constitution for a legal wrong or legal injury caused to a person or to a determinate class of persons “(who) by reason of poverty or disability or socially or economically disadvantaged position (are), unable to approach the Court for relief.” See S.P. Gupta v. Union of India, A.I.R. 1982 S.C. 149.

96. The Supreme Court has been particularly concerned – while liberalizing *locus standi* – with facilitating ‘access to justice’. The Court jettisoned alarm raised by many concerning its invoking of writ jurisdiction based on mere letters addressed (even to individual judges) to the Court. It emphatically observed: “We do not think that it would be right to reject a letter addressed to an individual Justice of the Court merely on the ground that it is not addressed to the Court or to the Chief Justice and his companion Judges...If the Court were to insist (on that)...it would exclude from the judicial ken a large number of letters, and in the result deny access to justice to the deprived and vulnerable sections of community...We are of the view that...it should be entertained, provided of course, it is by or on behalf of a person in custody, or on behalf of a woman or child or a class of deprived or disadvantaged persons...Nor should the Court

given by the Court was based on the ground that if no one can maintain an action for redress of a public wrong or public injury, it would be disastrous for the rule of law. In the absence of such liberal *locus standi*, the state or a public authority could act with impunity beyond the scope of its power or in breach of a public duty owed by it. In order to enforce its directions, the apex court had to devise a monitoring and reporting mechanism, which sometimes was tantamount to taking over the administrative functions of the public authority implicated in a particular matter. This caused much consternation in the executive. The Court wielded its judicial power with considerable finesse in some of the big environmental litigations (for instance, *Ganga Pollution* and *Taj Mahal* cases).

In these marathon litigations, the apex court issued show cause notices to concerned industries and municipal bodies through newspapers, closing them down for failure to enforce statutory requirements and passing strictures or even bringing actions against authorities for contempt of court. Since environmental cases are technical in nature, the apex court realized quite early on that it required the assistance of neutral scientific experts. In this respect, the court's recommendation in the *Delhi Oleum Gas Leakage* case for the setting up of environmental courts has remained the basic reference point for subsequent judgments of the Supreme Court, as well as the Law Commission of India.

Law Commission Recommendation

Based on the foregoing, the Law Commission of India in 2003 proposed a structure in which environmental courts could be established at the state level with flexibility to have one court for more than one state.⁹⁷ The 186th Report of the Law Commission summarized the major recommendations relating to the composition, powers and procedures of the proposed courts. In fact, it sought to derive its mandate and justification for the proposal from some

adopt a rigid stance that no letters will be entertained unless they are supported by an affidavit." See *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1090.

97. LAW COMMISSION OF INDIA, 186TH REPORT ON PROPOSAL TO CONSTITUTE ENVIRONMENT COURTS 142 (2003), available at <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf>.

celebrated judgments of the Supreme Court of India.⁹⁸

The Law Commission stated that the proposed environment court was to consist of a chairperson and at least two other members. The chairman and other members were suggested either to be retired Judges of the Supreme Court or of the High Court, or have at least twenty years experience as practicing advocates in any High Court. The term of the chairperson and members was to be for five years. More significantly, each environmental court was to be assisted by at least three scientific or technical experts known as commissioners. Each commissioner must have (1) a degree in environmental sciences, together with at least five years experience as an environmental scientist or engineer; or (2) adequate knowledge of, and experience to deal with, various aspects of problems relating to the environment, and in particular, the scientific or technical aspects of environmental problems, including the protection of the environment and environment impact assessments. However, the commissioner's role was to be advisory only and a minimum quorum for hearing a case was to be two members, including the chairperson.

The commission suggested that the proposed court have jurisdiction over all environmental issues⁹⁹ and incorporate the definition of "environment" and "environmental pollution," as provided in Section 2(a) and Section 2(c) of the 1986 Environment (Protection) Act, respectively. It was also suggested that the court have original jurisdiction in environmental disputes, with all powers of a Civil Court, as well as the power to grant all relief which the latter can grant under the 1908 Code of Civil Procedure or other statutes such as the 1963 Specific Relief Act. Further, the court was to have all appellate powers now conferred under the 1974 Water (Prevention & Control of Pollution) Act, the 1981 Air (Prevention & Control of

98. See *M.C. Mehta vs. Union of India*, (1986) 2 S.C.C. 176, 202. This was reiterated by the Supreme Court in *Indian Council for Enviro-Legal Action vs. Union of India*, (1996) 3 S.C.C. 212. Finally, the need for such Environment Courts was referred to in *A.P. Pollution Control Board vs. M.V. Naidu*, (1999) 2 S.C.C. 718. In fact, in the follow up case of *A.P. Pollution Control Board II vs. M.V. Naidu*, (2001) 2 S.C.C. 62, the Court required the Law Commission to examine this question.

99. It was suggested that this could cover (a) protection of the right to safe drinking water and the right to an environment that is not harmful to one's health or well being; and (b) power to have the environment protected for the benefit of present and future generations so as to: (i) prevent environmental pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Pollution) Act, and on the appellate authorities constituted under the various Rules of the 1986 Environment (Protection) Act.

In the process of demystifying the concerted quest for specialized environmental courts, it must be noted that environmental dispute settlement is not a mere mechanical exercise of applying hard core legal principles to resolve competing claims. In fact, it could be regarded as an effort to develop a legal order conducive to issues of social justice and a concern for sound environmental management, as well as to affect an institutionalized mechanism to trace the sustainable developmental process, as understood in each country. It could also necessitate realization of the need for judges to have the right values and attitudes in giving effect to constitutional and legal rights and ensures the tools and techniques to develop preventive jurisprudence to avert irreversible environmental damage.

Thus, the explicit recommendations of the Law Commission of India also provided a somber reminder that it could not muster enough courage to provide for independence of the proposed court from the executive, as well as give the court teeth to enforce its decisions. It became a matter of concern especially in view of the delayed response of the executive in the implementation of environmental law in India.

Quest for Specialized Environment Courts

Following in the footsteps of the recommendations of the Supreme Court, and subsequently the Law Commission, the Union Parliament announced initiatives to combat further degradation of the environment. In this respect, there have been several successive efforts to establish such specialized environment courts in India (see **Table II**). The progress has been very slow due to reservations about the proposal that such special courts be comprised not only of judicial members, but also technically-qualified experts. The idea for a specialized court was not new in the Indian legal system, as it has been long practiced in areas such as income tax and customs matters. The effort, with the initial suggestion of the Supreme Court in the five-judge Constitution Bench judgment in the *Delhi Oleum Gas Leakage* case (1986), has spanned almost twenty-five years and has been subject to twists and turns, as well as half-hearted efforts such as the

National Environment Tribunal Act (NETA) (1995) and the National Environmental Appellate Authority Act (NEAA) (1997). It finally culminated in the relatively progressive step of the National Green Tribunal Act (NGT Act) (2010) that received assent of the President of India on June 2, 2010, and was quickly notified (unlike NETA that was never notified for a full fifteen years) on October 18, 2010.¹⁰⁰

Table II: Comparative Picture of Evolution of Indian Environment Courts

Characteristic	NETA, 1995	NEAA, 1997	NGT, 2010
Nature of Complaints	Application for the claim of compensation	Only appeals from orders granting environmental clearances by the MoEF	Initial complaints as well as appeals against any order or decision or direction or determination.
Composition	Chairperson; such number of vice-chairperson, judicial and technical members as the Central Government may deem fit.	Chairperson, Vice-Chairperson and such other members not exceeding three as the Central Government may deem fit.	Chairperson; Not less than 10 but maximum 20 full time judicial as well as expert members (in both cases).
Scope	Liability to pay compensation where death of or injury to any person (other than a workman) or damage to any property or environment resulting from any accident; as per the 14 heads as specified in the Act.	To hear appeals with respect to restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards under the Environment Protection Act, 1986, and for matters connected therewith or incidental thereto.	All civil cases involving substantial question relating to environment; arising from implementation of the seven enactments specified in <i>Schedule I</i> of the Act: (i) Water (Prevention and Control of Pollution) Act, 1974 (ii) The Water Cess Act, 1977 (iii) The Forest (Conservation) Act, 1980 (iv) The Air (Prevention and Control of Pollution) Act 1981 (v) The Environment (Protection) Act 1986 (vi) The Public Liability Insurance Act 1991 (vii) The Biological Diversity Act 2002.
Locus Standi	Any person who has (a) sustained injury (b) by the owner of the property to which the damage has been caused; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; (d) by any agent duly authorized (e) by any representative body or organization, functioning in the field of environment and recognized in this behalf by	Any person aggrieved by an order granting environmental clearance	Any person, owner, legal representative, agent, representative body or organization central or state government or authorities under their control aggrieved by any order, decision or direction or determination can appeal to the Tribunal.

100. The National Green Tribunal Act, No. 19 of 2010, available at see <http://moef.nic.in/downloads/public-information/NGT-fin.pdf>.

	the Central Government or (f) by the Central Government or a State Government or a local authority.		
Relief	Compensation/damages for death of or injury to a person and damage to property and the environment	Orders as the Authority may deem fit	Relief for damage suffered, compensation and ordering measures to remedy the damage.
Penalty	Failure to comply with an order; imprisonment up to three years and/or fine up to ten lakh Rupees or both.	Failure to comply with an order; imprisonment up to seven years and/or fine up to one lakh Rupees or both.	Failure to comply with an order; up to three years of imprisonment and/ or fine of ten crore Rupees or both for individuals; up to twenty-five crore Rupees for the companies.
Procedure	Not bound by procedure laid down in the Code of Civil Procedure, 1908; guided by principles of natural justice and Indian Evidence Act, 1872.	Not bound by procedure laid down in the Code of Civil Procedure; guided by principles of natural justice and Indian Evidence Act.	Guided by principles of natural justice; not bound by the Indian Evidence Act or the Code of Civil Procedure.

National Environment Tribunal Act

This statute provided for *strict liability* for damages arising out of any accident occurring while handling any hazardous substance, and for the establishment of the tribunal for “effective and expeditious disposal of cases arising from such accident, with a view to giving relief and compensation for damages to persons, property and the environment and for matters connected therewith or incidental thereto.”¹⁰¹ Liability under the act is based on the “no fault” principle.

The composition included a chairman and such members as vice-chairpersons/judicial members and technical members, as the central government deemed fit. The chairman was to be a person who is, or has been, a judge of the Supreme Court or High Court, or has at least has been vice-chairman for two years. A vice-chairman was to be a person (a) who is or has been a judge of a High Court or was a secretary to the government of India for at least two years, or has held any other post in the central or state government, carrying a scale of pay which is not less than that of a secretary to the government of India, or (b) held the post of additional secretary in the government of

101. National Environment Tribunal Act, No. 27 of 1995 (Preamble), available at <http://www.envfor.nic.in/legis/others/tribunal.html>.

India for five years and has acquired knowledge of, or experience in, legal, administrative, scientific or technical aspects of the problems relating to the environment or has at least three years experience as a judicial member or a technical member; or (c) a judicial member must be one who is, or has been, qualified to be a judge of a High Court or has been a member of the Indian Legal Service, and has held a post in grade I of that service for at least three years. A technical member was defined as a person who has adequate knowledge of, or experience in, or capacity to deal with, administrative, scientific or technical aspects of the problems relating to the environment.

It is ironic that this important legislation was never notified due to the sheer neglect and/or lack of political will to take the risk on the part of the executive to pave the way for the establishment of such a specialized environment tribunal. Further, it had a very narrow scope in that it was authorized only to grant compensation in cases involving accidents that occurred during the handling of hazardous substances. Additionally, there was no power given to it to enforce its decisions. Thus, this half-hearted initiative remained on paper and did not see the light of day. The advent of the National Green Tribunal Act (2010) has officially given it a decent burial by repealing it from the statute book.¹⁰²

National Environment Appellate Authority Act

The rationale behind this act was to provide for the establishment of a National Environment Appellate Authority (NEAA) to "hear appeals with respect to restriction of areas in which any industries, operation or process (or class of industries, operation or processes) were to be carried out or were not to be carried out subject to safeguards under the 1986 Environment (Protection) Act and for matters connected therewith or incidental thereto."¹⁰³

The Appellate Authority was to consist of a chairperson, a vice-chairperson and such other members not exceeding three, as the

102. The National Green Tribunal Act § 38(1) (repealing the National Environment Tribunal Act); see Ministry of Environment and Forests, Government of India, <http://www.envfor.nic.in>.

103. National Environment Appellate Authority Act, (No.22 of 1997) (Preamble), available at <http://www.envfor.nic.in/legis/others/envapp97.html>; see The Green Tribunal Act (repealing the National Environment Appellate Authority Act).

central government deemed fit. The chairperson was to be a judge of the Supreme Court or the chief justice of a High Court. The vice-chairman was required to have held the post of secretary to the government of India for two years, or any other post under the central/state government carrying a scale of pay which is not less than that of a secretary to the government of India, and have expertise or experience in administrative, legal, management or technical aspects of problems relating to environmental management law or planning and development.

Though this appellate authority was effectuated, it dealt with very few cases and after expiry of the term of the first chairman, no further appointment was made. The NEAA's failure could be attributed to the ill-conceived and piecemeal nature of the legal reform vis-à-vis environment protection, as well as the slackness and indifference shown by the administrative machinery. The NEAA also was repealed by the new NGT Act.¹⁰⁴

National Green Tribunal Act

Following the previous two dismal attempts to establish green courts, the NGT Act was finally notified¹⁰⁵ on October 18, 2010, and Justice Lokeshwar Singh Panta, then judge of the Supreme Court, was appointed its first chairperson.¹⁰⁶ The NGT marks the first time a tribunal has been established with a broad mandate exclusively

104. The National Green Tribunal Act § 38(1) (repealing the National Environment Tribunal Act); see Ministry of Environment and Forests, Government of India, <http://www.envfor.nic.in> (last visited Nov. 25, 2010).

105. Press Release, Ministry of Environment & Forests, Government of India, Launch of the National Green Tribunal (Oct. 19, 2010), available at <http://moef.nic.in/downloads/public-information/ngt-launch-press-note.pdf> (stating, "The National Green Tribunal marks the first time a tribunal exclusively dedicated to environmental issues has been set up. This Body, established by an Act of Parliament (being the National Green Tribunal Act of 2010) will have circuit benches across the country to try all matters related to and arising out of environmental issues. The Tribunal which shall also consist of members who are experts in the field of environmental and related sciences, has been empowered to issue directions for the compensation and restitution of damage caused from actions of environmental negligence. In doing so, this is the first body of its kind that is required by its parent statute, to apply the polluter pays principle and the principle of sustainable development").

106. See *id.*; see also Jairam Ramesh launches National Green Tribunal, TIMES OF INDIA, Oct. 20, 2010, <http://timesofindia.indiatimes.com/videos/news/Jairam-Ramesh-launches-National-Green-Tribunal/videoshow/6778625.cms>.

dedicated to environmental issues. This initiative is taken by the Union Ministry of Environment and Forests (MoEF). The NGT Act (2010) was drafted and introduced in the Parliament in response to the recommendations of the Supreme Court and the Law Commission, especially in view of the pendency of a large number of environment related cases throughout India. Significantly, the NGT Act will result in the repeal of the National Environment Tribunal Act (1995) as well as the National Environment Appellate Authority Act (1997). Furthermore, the new tribunal will have *circuit benches* across the country to try all matters related to and arising out of environmental issues.

The preamble to the act sets out objectives for the effective and expeditious disposal of cases relating to environment protection and conservation of forests and other natural resources. Moreover, it seeks to provide for enforcement of any legal right relating to the environment, giving relief and compensation for damages to persons, property, and environment. In a sense, its scope is quite broad compared to the previous NETA (that was never brought into force), as well as the NEAA (that hardly heard any cases).

The act has sought to restrict access to justice in environmental matters by taking away an individual right.¹⁰⁷ Once the environment has been recognized as part of Article 21, any issue relating to the environment could fall within the public domain. As such, every person would have a duty to protect the environment, as well as a corresponding right to question the adverse impact on environment and human health. Further, there is no straightjacket formula to ascertain the gravity of damage to the environment and public health. The “environmental consequences” under the act are not restricted to either “specific activity or to a point source of pollution,”¹⁰⁸ because

107. Section 2(m) provides:

“substantial question relating to environment” shall include an instance where;

(i) is a direct violation of a specific statutory environmental obligation by a person by which:

(A) the community at large other than an individual or group of individuals is affected or likely to be affected by the environmental consequences; or (B) the gravity of damage to the environment or property is substantial; or (C) The damage to public health is broadly measurable;

(ii) the environmental consequences relate to a specific activity or a point source pollution...

108. *Id.*

non-point sources and a bundle of industrial activities are also major contributors to pollution. Such an approach to environmental questions and affected persons seems to be quite unethical and parochial.

The composition¹⁰⁹ of the tribunal will include appointed retired judges and bureaucrats as judicial and expert members.¹¹⁰ In that sense, it is questionable how much dynamism and zeal such members (mostly retired at the age of sixty or sixty-five) would have to steer the tribunal toward effective green initiatives. The subtle inequality between judicial and expert members is also palpable.¹¹¹ Instead of making such unfair differentiation, the act could have rather prescribed more rational criteria, for example, that “no judicial or expert member can hold office for more than five years or an age of seventy years, whichever is earlier.”

The government does not seem to have learned adequate lessons from earlier attempts that miserably failed to realize a set objective to usher in an era of “green courts” in India. Interestingly, a person with administrative experience of fifteen years in environmental matters can be appointed as an expert member. Had people with such experience been eager and willing to act with their competence, the government departments/institutions where they served would have been instrumental in rising to the occasion of protecting the environment. It is this lack of a professional approach, as well as

109. Section 4(1) provides:

The Tribunal shall consist of: (a) a full time Chairperson; (b) not less than ten full time Judicial Members as the Central Government may, from time to time, notify; (c) not less than ten full time Expert Members as the Central Government may, from time to time, notify.

(2) The Chairperson of the Tribunal may, if considered necessary, invite any one or more person having specialised knowledge and experience in a particular case before the Tribunal to assist the Tribunal in that case.

110. Section 5(1) of the NGT provides for appointment of the chairperson or judicial member from the pool of a serving or retired judge of the Supreme Court of India or Chief Justice of the High Court. As per the prevailing practice, such an appointment, generally, takes place only *after* the retirement, i.e., either 65 years (in case of the Supreme Court) or 62 years (in case of the High Court.)

111. Section 7 provides that the expert member cannot hold office as a member of the NGT after attaining the age of 65 years whereas the judicial member could hold office until the age of 70 years (for a retired Supreme Court judge) or 67 years (for a retired High Court judge).

inadequacy and ineffectiveness of institutionalized processes, that have resulted in the handling of environmental matters in a casual and non-serious manner.

In fact, the MoEF (if one does not talk about the concerned ministries and departments at the State level) is critically dependent upon a professional approach, i.e., the willingness to induct non-official experts in the policy-making process of the ministry, the efficiency and broad-mindedness of the MoEF secretary as well as the farsightedness and assertiveness of the Union Environment Minister. Whenever either or both of the top MoEF functionaries (the secretary and the minister) have been firmly in place, the ministry has been able to deliver better results. The very fact that the NETA was not notified for fifteen years, and it took twenty-five years for the first full "green court" to see the light of day, underscores the problem of outdated mindsets as well as the malaise that has set in. Moreover, the provision of inclusion of expert members of a technical and scientific background has failed to include experts with relevant experience from fields such as public health and environmental law.

With regard to the NGT's *jurisdiction*, the act sets out a time period of six months, when it will be determined whether or not environmental and public health damage has taken place. Furthermore, the act stipulates that application for a grant of compensation or relief, or restitution of property or environment has to be made within a period of five years. Environmental damage is a continuous process. As shown in the case of the horrific tragedy of the *Bhopal Gas Leakage*, the adverse effects of asbestosis, radiation exposure, climate change, desertification, loss of biodiversity, etc., could take more than five years to manifest itself. The new law needs to take cognizance of this issue of public health and safety of the citizens, and the long term environment damage.

The legislators have watered down the effect of this act by making every offense under it *non-cognizable*. The seriousness of environment-related crimes has been literally mashed and the idea of justice seems to have been thwarted. This is a matter of concern even as India is rapidly making big strides to harness nuclear energy. Use of radioactive substances and nuclear waste, as well as the risks flowing from them, could increase manifold in the years to come. Cumulatively, these considerations call for taking not only the policy and lawmaking seriously, but also for ensuring a fair, speedy and

effective dispute settlement mechanism.

There are genuine concerns as regards the increase in chances of man-made disasters like the Bhopal gas leakage (1985) and the Delhi Oleum gas leakage (1984). How “green,” as well as how effectively and expeditiously the NGT may deliver justice when it is confronted with a Bhopal type case, is open to question.¹¹² Similarly, the act requires the tribunal to apply the principle of “no fault” in an accident case. Interestingly, since contours of the “no fault” principle have not yet been fully subjected to a test, the act could have adopted the principle of “strict and absolute” liability, which was laid down by the unanimous verdict of the five-judge Constitution Bench in the *Delhi Oleum Gas Leakage* case,¹¹³ and reaffirmed (rejecting the argument that the law stated therein was *obiter*) in the *Indian Council for Enviro-Legal Action* case.¹¹⁴ There also is no apparent justification for the omission of the “public trust” doctrine — laid down by the Supreme Court in the *M.C. Mehta v. Kamal Nath* (1997) case¹¹⁵ — in this progressive piece

112. See generally Bharat H. Desai, *The Bhopal Gas Leak Disaster Litigation: An Overview*, 3 ASIAN Y.B. INT’L L. 163 (providing a detailed analysis of the Bhopal gas leakage disaster litigation).

113. See *M.C. Mehta v. Union of India* (Delhi Oleum Gas Leakage case), A.I.R. 1987 S.C. 1086.

114. See *Indian Council for Enviro-Legal Action v. Union of India* (Bichhri case), A.I.R. 1996 S.C. 1446, 1465.

115. See *M.C. Mehta v. Kamal Nath* (Beas River Case: Imposition of Exemplary Damages), A.I.R. 2002 S.C. 1515, available at <http://www.elaw.org/node/1360> (India). In this case, the Supreme Court gave landmark directions as follows: “(1) The public trust doctrine, as discussed by us in this judgment is a part of the law of the land. (2) The prior approval granted by the Government of India, Ministry of Environment and Forest by the letter dated 24.11.1993 and the lease deed dated 11.4.1994 in favour of the Motel are quashed. The lease granted to the Motel by the said lease deed in respect of 27 bighas and 12 biswas of area, is cancelled and set aside. The Himachal Pradesh Government shall take over the area and restore it to its original-natural conditions. (3) The Motel shall pay compensation by way of cost for the restitution of the environment and ecology of the area. The pollution caused by various constructions made by the Motel in the riverbed and the banks of River Beas has to be removed and reversed... (4) The Motel through its management shall show cause why pollution fine in addition be not imposed on the Motel. (5) The Motel shall construct a boundary wall at a distance of not more than 4 metres from the cluster of rooms (main building of the Motel) towards the river basin... The Motel shall not

of legislation. In fact, its inclusion could have provided a ray of hope for effective "green justice," and served as a deterrent against any administrative, as well as ministerial, indiscretion in failing to protect the public interest and the environment as a "sacred trust" for the people of India.

Conclusion

The genesis of the development of international environmental law underscores the marathon regulatory process at work. The sheer diversity of the issues, including the concern for national interest of the sovereign states, uncertainties of science, past colonial exploitation of natural resources, environment-development interface, as well as growing complexities in the multilateral lawmaking process, has set the stage for a flurry of international environmental disputes. There are already some suits being dealt with by existing structures for international environmental dispute settlement. Without going into the merits or inadequacies of these structures, it is noteworthy that a movement is afoot for the establishment of an International Environment Court (IEC). Our preliminary study underscores the fact that there is a need to take international environmental dispute settlement more seriously. The best way to do so could be to provide an appropriate forum for a specialized environment court for that purpose.

The growth and thickening of the web of multilateral regulatory tools has gradually had its effect at the national level too. As a result, a large number of states have put into place policies, legislation and enforcement agencies. In view of the perennial quest and struggle to strike a balance between developmental requirements and environmental considerations, there has been a huge increase in environment-related litigations at the national level and it seems that a large number of countries have made an effort to deal with this litigation. How environmental cases are treated varies from country to country, ranging from designation of a special judge or a bench, to a fixed-day hearing in environmental matters, to the constitution of a special court

encroach/cover/utilize any part of the river basin...The river bank and the river basin shall be left open for the public use. (6) The Motel shall not discharge untreated effluents into the river." See also *M.C. Mehta v. Kamal Nath* (1997) 1 S.C.C. 388 (India).

or tribunal.

Still, there are very few countries that have sought to establish specialized environment courts. It appears that the momentum is moving towards such specialized forums to handle the increasing volume of environmental cases. India is the latest to join this movement with a special “green tribunal,” created after the failure of two earlier efforts. This tribunal is the culmination of the emphatic suggestion of the Supreme Court of India in 1986. This quest for “green courts” in India has been premised upon the bedrock of a sound legal jurisprudence, laid down by the apex court, as well as a substantial body of environmental policies and legislations, and enforcement machinery. The advent of the National Green Tribunal (with the notification of October 18, 2010) *prima facie* provides reason to cheer, in spite of its shortcomings. At a minimum, it could be described as a *first step* in an effort to take environmental dispute settlement more seriously. How “green” the NGT turns out to be — in terms of providing effective justice as well as rising to the occasion to remove existing cobwebs — remains to be seen. In order to set the NGT firmly on the path of rendering fair and just adjudication of environmental disputes, existing gaps, and shortcomings in the law will need to be quickly filled. It is a good beginning for the quest for environment courts in India and a trend setter for the global quest for such specialized environmental dispute settlement forums. However, it will require a concerted effort to make it work effectively.

THE ROLE OF COURTS IN ENVIRONMENTAL LAW — NORDIC PERSPECTIVES

Helle Tegner Anker and Annika Nilsson ***

Introduction

This article presents results of a comparative study of the role of courts in environmental law in Denmark, Finland, Norway and Sweden – focusing on the Swedish and Danish experiences.¹ The purpose of the comparative study was to examine the extent to which differences in court systems may affect the application and enforcement of environmental law, focusing on general courts versus more specialized courts or administrative tribunals. Environmental law in Nordic countries is dominated by a public law perspective and the study focuses on judicial review of administrative decisions of environmental issues.

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1. The article is based on Helle T. Anker, Ole K. Fauchald, Annika Nilsson & Leila Suvantola, *The role of courts in environmental law – a Nordic comparative study*, NORDIC ENVTL. L.J. 9-33 (June 2009), available at www.nordiskmiljoratt.se. Iceland is also a Nordic country, but was not included in the comparative study. The study was carried out as a primarily quantitative study of environmental court cases during a ten year period (1996-2005) in Norway and Denmark and a five-year period (2001-2005) in Finland and Sweden.

Environmental protection is mainly the responsibility of public authorities in accordance with public law. Civil law and civil law disputes play a minor role in this field. In addition, environmental law is defined broadly to include not only pollution control, but also water management, nature conservation, land use and planning.² Thus, environmental legislation in the Nordic countries vests public authorities with wide responsibilities and broad discretionary powers in environmental matters.

Despite similarities in environmental law there are major differences in the Nordic court systems and their role in environmental law. The most significant differences concern the structure of the court systems, and the relationship between administrative decision-making, administrative appeal and court review. Denmark, Finland, and Sweden all have judicial or quasi-judicial specialization in review of administrative decisions concerning environmental issues. The main differences lie in whether the specialization is part of the administrative system (Denmark), the administrative court system (Finland) or both the general and administrative court systems (Sweden).³ In Norway, which has no specialized judicial or quasi-judicial review of environmental issues, environmental cases may be appealed to either the general administrative authorities or to the general courts.⁴

Systematic comparison of the different court systems is difficult because of differences in the ways in which these systems are organized. Nevertheless, the study findings enhance understanding of the design and interaction of court and administrative systems and how they are affected by the nature of environmental legislation.

2. For a general introduction to the Scandinavian legal tradition, see LESTER BERNHARD ORFIELD, *THE GROWTH OF SCANDINAVIAN LAW* (The Lawbook Exchange 2002) (1953) and Jacob W.F. Sundberg, *Civil law, Common Law and the Scandinavians*, 13 *SCANDINAVIAN STUD. L.* 179 (1969). In a Danish context see Ellen Margrethe Basse & Jørgen Dalberg-Larsen, *The Danish Legal System*, in *LEGAL SYSTEMS AND WIND ENERGY: A COMPARATIVE PERSPECTIVE* 61 (Helle Tegner Anker et al. eds., Kluwer Law International 2008). In a Swedish context see Stig Strömholm, *General Features of Swedish Law*, in *THE SWEDISH LEGAL SYSTEM 1* (Nordstedts Juridik 2010) and Annika Nilsson, *Environmental Law*, in *THE SWEDISH LEGAL SYSTEM* 467 (Nordstedts Juridik 2010).

3. See Anker et al., *supra* note 1, at 15.

4. For further details on the Norwegian system, see Ole Kristian Fauchald, *Environmental Justice in Courts – a Case Study from Norway*, *NORDIC ENVTL. L.J.* 49-68 (2010:1).

The Nordic Court Systems

Looking at the Nordic court systems two key distinctions appear. The first relates to the distinction between general courts and administrative courts. The second relates to the distinction between general courts and specialized courts or tribunals.

Norway and Denmark have general courts only, while Finland and Sweden have dual court systems, consisting of general courts and administrative courts. The general courts in Denmark and Norway review all types of cases – administrative, civil and criminal – while the general courts in Finland and Sweden normally review civil and criminal cases. The explanation for this difference is largely to be found in each nation's legal history.

Sweden first established an administrative court (Chamber Court) in 1799 when Finland was still a part of Sweden.⁵ Denmark and Norway, which was part of the Danish Kingdom from 1523 to 1814, never established administrative courts although the 1849 Danish Constitution explicitly provides a legal basis for doing so.

More differences among the Nordic countries emerge when the uses of general or specialized courts or tribunals in environmental law are examined.⁶ Norway and Denmark do not have specialized environmental courts. However, Denmark has two specialized administrative environmental appeals tribunals – the Nature Protection Board of Appeal and the Environmental Protection Board of Appeal,⁷ which will be merged into one Nature and Environmental Protection Board of Appeal in January 2011.⁸ The merged appeal tribunal will, however, have two separate configurations: one composed of a legally-trained chair, two Supreme Court judges and political appointees; the other including one legally-trained chair and two to four appointed experts. Decisions of Denmark's administrative environmental appeals tribunals can be appealed to the general courts. Norway's administrative environmental decisions are appealed to a superior administrative authority or to the general

5. Rune Lavin, *Domstol och administrativ myndighet* [Courts and Administrative Authorities] 24, 26 (Norstedts förlag 1972).

6. For further details, see Anker et al., *supra* note 1.

7. On the background and history of the appeal boards, see Ellen Margrethe Basse, *Ankenævn på miljø- og naturområdet*, in: *FAST EJENDOMS RET – SYNVSINKLER OG SYNSPUNKTER 209* (Lars Ramhøj ed., Økonomforbundets Forlag 2007).

8. See Act No. 483 of May 11, 2010 (Den.) concerning the Nature Protection and Environmental Protection Appeal Board.

court.

Finland has one administrative court – the Administrative Court of Vaasa – which specializes in environmental and water permit appeals. Sweden has chosen greater specialization within its general court system. Sweden has five environmental courts and one Environmental Court of Appeal dealing with a wide range of environmental cases.⁹ The Swedish environmental courts hear appeals from administrative decisions and also serve as a first instance body in some environmental permit trials.¹⁰

Scope of Review and Composition of Courts

Environmental protection and environmental law in the four Nordic countries studied are to a large extent based on administrative authorities being in charge of the primary application of law, with relatively broad discretionary powers. The role of the court or tribunal in such a system depends on whether the power of the court or tribunal to review administrative decisions is expansive or limited.

Although the general courts in Norway and Denmark have the power to conduct a full review of administrative environmental decisions, they focus on evaluating legality, leaving substantial discretion to the administrative authorities.¹¹ On the other hand, the administrative courts in Finland and Sweden generally review cases in full, examining both legality and merits. Similarly, Denmark's

9. The present system, on which the Swedish part of the comparative study is based, was introduced in 1999 together with the Environmental Code. The Environmental Courts replaced the Environmental Licensing Board (Koncessionsnämnden för miljöskydd), an administrative tribunal with, largely, the same construction as the Environmental Courts and, partly, with corresponding tasks. In spring 2010, the Swedish Government proposed an amended court system which will combine environmental and planning and building appeals. See Proposition [Prop.] 2009/10:215 Mark- och miljödomstolar [government bill] (Swed.). The amendments would not significantly affect the matters covered by the comparative study.

10. The Swedish Environmental Courts are also discussed and analyzed in Jan Darpö, *Environmental Justice through Environmental Courts? Lessons Learned from the Swedish Experiment*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 176 (Jonas Ebbesson & Phoebe Okowa eds., Cambridge University Press 2009).

11. The Danish Constitution in Sec. 63 ascribes the courts a right to decide any question relating to the scope of the administrations authority. For further information on the review of administrative decisions in a Danish context, see Ellen Margrethe Basse & Helle T. Anker, *Denmark*, in ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE EU 149, 156 (Jonas Ebbesson ed., Kluwer Law International 2002) and Basse & Dalberg-Larsen, *supra* note 2, at 71.

administrative appeals tribunals generally perform a full review including discretionary matters.

We believe that differences in the scope of review between general courts on the one hand and the administrative or specialized courts or tribunals on the other can be explained by the greater expertise and experience on specific elements of administrative law and environmental law in the specialized courts and tribunals. Members of the specialized courts and tribunals in Sweden and Denmark bring scientific, political or governmental expertise to the process.

For example, the Swedish Environmental Court includes a legally-qualified district court judge, an environmental adviser and two expert members. The environmental adviser shall have technical or scientific training and experience of environmental issues. One expert member must have expertise regarding the responsibility of the Swedish Environmental Protection Agency. The other expert member has a specialty in industry or local government.¹²

The new Danish Nature and Environmental Protection Appeal Board will have two distinctly different boards: one drawing on the judicial-political "lay" composition of the Nature Protection Appeal Board and the other fashioned after the judicial-expert composition of the Environmental Protection Appeal Board. The "lay" board will be composed of one legally-trained chairman, two Supreme Court judges and seven members appointed by the Parliament. The "expert" board will be composed of one legally-trained chairman and two or four expert members appointed by the Minister for the Environment based on proposals from a number of business and environmental organizations. Though formally and organizationally established under the Ministry for the Environment, the tribunal operates independently from the Ministry.

Access to the Nordic Courts

Access to courts is a key issue in environmental law.¹³ However,

12. The judge and the environmental adviser are employees of the court. The two experts are appointed from case to case, depending on which type of expertise is requested. (The Environmental Court has listed experts in various areas, who have accepted to take such tasks.)

13. Convention on Access to Information, Public Participation in Decision-

formal access might not be the only prerequisite to ensure proper access to courts. Accordingly, it is important to distinguish between *de jure* access as stipulated by law or precedent and *de facto* access as limited by high court fees or other obstacles.

Norway and Denmark provide relatively broad *de jure* access to the general courts, including access by individuals and by non-governmental organizations (NGOs). Access to courts is stipulated by law in Norway. In Denmark, access to the administrative appeal tribunals is stipulated by law and the courts generally grant access to the same group of persons or organizations that have access to administrative appeal.¹⁴ In Finland, access to administrative courts is stipulated by law for individuals and for NGOs, whereas the general courts apply a narrower requirement of having an individual and significant legal interest. In Swedish environmental law the standing requirements vary depending on the type of interest. Regulation of environmentally hazardous activity is regarded as protecting human health and the environment, and so people affected by the potentially hazardous activity have standing. Nature conservation is seen as a task for authorities, and so, standing is limited to directly affected individuals (but including NGO's to a certain extent). The European Court of Justice has ruled that the previous Swedish regulation, stipulating that NGOs must have 2,000 members to have legal standing, was too narrow compared to Article 10a of the Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.¹⁵ Consequently, the Swedish regulation has been amended so that starting September 1, 2010, NGOs with 100 members have standing.

Court fees and cost-shifting requirements can be *de facto* obstacles to access. Fees are relatively low in Denmark, Finland and Sweden, and quite high in Norway.¹⁶ In addition, in Norway and in

Making and Access to Justice in Environmental Matters, June 28, 1998, 2161 U.N.T.S. 447, 38 I.L.M. 517. See also JONAS EBBESSON ED., ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE EU (Jonas Ebbesson ed., Kluwer Law International 2002).

14. Basse & Anker, *supra* note 11, at 157.

15. Case C-263/08, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun*, 1 C.M.L.R. 36 (2009). Council Directive 85/337/EEC, art. 10a, 1985 O.J. (L 175). Note that Council Directive 2003/35/EC, art. 3(7), 2003 O.J. (L 156) amended Council Directive 85/337/EEC by inserting article 10a with the purpose of implementing the obligations arising under the Aarhus Convention.

16. Anker et al., *supra* note 1, at 18-19. Examples of low court fees are 41 EUR (Swedish environment court), 82 EUR (Finnish administrative court), 67 EUR

Denmark the losing side may be required to pay litigation costs of the opponent. These *de facto* limitations seem to impact the number of environmental cases presented to the courts. In Norway, the number of environmental court cases is quite low (108 cases from 1996-2005 – a majority were criminal cases). Denmark also has a fairly low number of environmental court cases (260 cases from 1996-2005 – excluding criminal cases).¹⁷

NGO Cases

NGOs bring relatively few environmental cases to the Nordic courts. The share of NGO cases in the superior courts ranges from 1.5% in Denmark between 1996 and 2005¹⁸, to 2% in Sweden between 2001 and 2005, 7.4% in Norway between 1996 and 2005 and 8% in Finland from 2000 to 2005. It is difficult to explain this relatively low share of NGO cases in environmental matters. Perhaps the NGOs, at least in Denmark, Sweden and Finland, rely on the relatively easy and cheap access to lower level administrative/environmental courts and administrative tribunals. Notably, the share of NGO cases brought to Denmark's administrative tribunals is estimated to be significantly higher than NGO cases brought to the courts. In Sweden, NGOs did not have standing before the Environmental Code 1999 and thereafter only a rather limited access. So, there is not yet a fully established tradition of NGOs appealing cases. Another explanation might be that NGOs have other means than the right to appeal to act in an environmental case. According to the Swedish constitution, documents received by an authority including, for example, permit applications are accessible to anybody asking for them. Moreover, the court/authority is responsible for conducting a sufficient investigation in environmental cases. As a result, NGOs have often been able to present their arguments to the court/authority without being a formal party.

(Danish adm.. appeal boards/general courts), whereas the higher costs in Norway starts at 480 EUR with a rapid increase.

17. The Norwegian and Danish figures are not entirely comparable. Neither are the Danish figures comparable to the Swedish and Finnish figures as cases brought to the Danish administrative appeal tribunals were not included in the study.

18. This figure represents four cases between 1996 and 2005. In addition, three court cases dealing with the question of access only were recorded in the period.

Our study also analyzed the NGO success rate.¹⁹ These data should be approached with caution due to the low number of cases and the differences in court structure in the four countries. We found the highest NGO success rate at 58% in Finland, followed by 50% in Denmark, 25% in Norway and only 7% in Sweden. It appears that successful cases mainly relate to procedural issues, e.g., environmental impact assessment requirements, but also to some extent to strong substantive rules as reflected, for example, in the EU Habitats Directive.²⁰

Outcome of Environmental Court Cases

Evaluating effectiveness of environmental court cases is difficult and requires some subjective judgement.²¹ Moreover, it is difficult to make meaningful comparisons across countries and legal systems.

Nevertheless, we did attempt to assess whether Nordic courts' review of administrative decisions favors the environment. The main criteria for determining whether a ruling would favor the environment was to assess whether a court ruling that changed an administrative decision could to some extent be seen to further environmental interests, e.g., limiting pollution or safeguarding nature protection or landscape interests. We concluded that the general courts in Norway and Denmark did not favor the environment to any great extent. In Denmark, 25% of the rulings that change administrative decisions could be labelled favoring the environment. However, most of these "positive" rulings addressed traditional compensation claims relating to such issues as noise from roads, thus reflecting traditional safeguarding of economic interests rather than protection of broader environmental interests. In Finland,

19. For further analysis and reference to the relevant cases see Anker et al., *supra* note 1, at 29-30.

20. Council Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora, OJ L 206 (1992). The Habitats Directive in Art. 6 establishes not only a procedural requirement to perform an impact assessment, but also a strong substantive requirement that activities which may negatively affect protected species and habitats cannot be allowed.

21. See GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

the rulings of the Supreme Administrative Court can be described as environmentally friendly since 65% of the court's rulings seem to further environmental interests. The complex jurisdiction of Sweden's environmental courts made it impossible, within the framework of this study, to draw conclusions concerning the "environmental friendliness" of the Environmental Court of Appeal.²²

Conclusions

Although the Nordic countries share a number of similarities in environmental legislation, there are some major differences in the role of courts in applying environmental law. In Norway and Denmark the courts have not been assigned an important role in the environmental law systems. In Denmark, a specialized administrative appeal system deals with environmental matters. In Finland, the existence of administrative courts has encouraged some degree of specialization in environmental matters, while Sweden's specialized environmental courts deal specifically with environmental cases and have a broad competence.²³

There is reluctance by the general courts in Norway and Denmark to fully review administrative decisions, whereas, administrative courts in the course of ordinary appeals in Finland pave the way for more in-depth review in environmental matters. In Sweden, this has expanded to the establishment of dedicated environmental courts within the general court system.

Our study revealed that the distinction between general courts and specialized courts or tribunals was more important than the distinction between general and administrative courts. However, the function of specialized courts or tribunals depends upon several things. First, it is dependent upon the system within which they are placed, e.g., within the general court systems as in Sweden or within the administrative system as in Denmark. Second, it is dependent upon the expertise of the members sitting on the courts or tribunals. Third, a relatively easy, cheap and expedient access to review is important. Although broad *de jure* access to courts may be established by law, *de facto* access may be limited, with Norway as a clear example

22. Anker et al., *supra* note 1, at 29.

23. The proposed amendment in Proposition [Prop.] 2009/10:215 Mark- och miljödomstolar [government bill] (Swed.) aims, inter alia, at further extension of the courts competence to other areas related to the environment.

of limited *de facto* access due to high litigation fees.

The environmental outcome of court rulings may depend not only on the specific expertise of the courts, but also on the nature of environmental legislation

When designing environmental law systems it is important to consider both the nature of environmental legislation and the role that courts or tribunals should play as part of the environmental law system. Consequently, attention must be paid to what court structure would be most appropriate to meet those demands. The structure and functions of courts and quasi-judicial appeal bodies or tribunals is an important component of any legal system. In addition, effective access to courts is a key element that should be addressed in any system aimed at safeguarding environmental interests.

GREEN COURTS INITIATIVE IN THE PHILIPPINES

Hon. Hilario G. Davide Jr.
and Sara Vinson***

Introduction

The Global Judges Symposium, held in Johannesburg in August 2002, resulted in the creation of the “Johannesburg Principles on the Role of Law and Sustainable Development.”¹ These principles called for, “. . .(b) the improvement in the level of public participation in environmental decision-making, access to justice for the settlement of environmental disputes and the defense and enforcement of environmental rights, and public access to relevant information.”²

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The authors would like to acknowledge the assistance of John Boyd, Fellow, Center for Environmental Legal Studies, Pace University School of Law.

1. UNEP Global Judges Symposium, Johannesburg, S. Afr., Aug. 18-20, 2002, *The Johannesburg Principles on the Role of Law and Sustainable Development*, available at <http://www.unep.org/law/symposium/Principles.htm>.

2. *Id.* at 4.

Many nations over the last several years have come to realize the importance of these principles and have begun developing their own environmental courts and tribunals to make improvements.³

These courts and tribunals have become especially important in recent years with an increase in complex environmental regulations, as well as an overall increase in environmental litigation.⁴

During the last decade, over 350 environmental courts, in forty-one countries around the world, have been created.⁵ One of the most recent, and most successful initiatives has been in the Philippines. In 2008, a network of 117 environmental courts was created,⁶ and in 2010, groundbreaking rules of procedure were promulgated.

Philippines' Courts

The Philippines' Supreme Court is granted its power from Article VIII of the 1987 Constitution.⁷ Section I provides that, "The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law."⁸ The 1987 Constitution also states that:

"Judicial power includes the duty of the courts of justice to settle actual controversies involving rights, which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government."⁹

Other provisions within Article VIII of the 1987 Constitution

3. GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

4. Gabriel Nelson, *Study: Last Decade Saw Boom in Environmental Courts, Tribunals*, N.Y. TIMES, Apr. 20, 2010, <http://www.nytimes.com/gwire/2010/04/20/20greenwire-study-last-decade-saw-boom-in-environmental-co-74053.html>.

5. *Id.*

6. Leila Salaverria, *SC designates 117 environment courts*, PHIL. DAILY INQ., Jan. 14, 2008, http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080114-112156/SC_designates_117_environment_courts; Jay B. Rempillo, *Court News Flash January 2008: SC Names Environmental Courts* (Jan. 29, 2008), available at <http://sc.judiciary.gov.ph/news/courtnews%20flash/2008/01/01290802.php>.

7. CONST. (1987), Art. VIII (Phil.).

8. *Id.* § 1.

9. *Id.*

dictate the powers and authority of the Supreme Court. These provisions speak to the court's jurisdiction, composition, and powers of appeal and review.¹⁰ Article VIII, Section 5, also provides that the Court may promulgate any rules it deems necessary for the protection of constitutional rights.¹¹

Section 16 of Article II of the Constitution states that: "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."¹² In addition, Section 15 of Article II provides that "The State shall protect and promote the right to health of the people and instill health consciousness among them."¹³ The Supreme Court, in protecting this right to a healthy environment, has taken steps to "address delays in the resolution of environmental cases, lack of information, stringent requirements in litigation, lack of environmental ("green") courts and other barriers to environmental justice."¹⁴

Emerging Environmental Courts in the Philippines

Former Chief Justice Reynato S. Puno has previously stated that he believes the Philippines to be one of the worst victims of environmental degradation, citing many cases of deforestation, degradation of resources, air and water pollution, contamination of water resources, conversion of farmland into industrial and residential land, and waste disposal issues.¹⁵ As a result of the degraded state of the Philippines, and the Supreme Court's desire to protect the right to a healthy environment, the court, in January 2008,

10. *Id.* §§ 2-5.

11. *Id.* § 5(6).

12. CONST. (1987), Art. II, § 16 (Phil.).

13. *Id.* § 15.

14. Phil. S.C., Forum on Environmental Justice: Upholding the Right to a Balanced & Healthful Ecology, Apr. 16-17, 2009, *Forum Guide 2*, available at sc.judiciary.gov.ph/publications/.../FOEJ_final_forum_guide.pdf. There is delay in resolving many cases in the Philippines since at present, there are only 1,659 appointed judges in 2,187 courts. E-mail from Ria Berbano-Ablan, Attorney, Philippines Judicial Academy, to John Boyd, Fellow, Center for Environmental Legal Studies, Pace University School of Law (Aug. 9, 2010) (on file with author). This is a very low number compared to a country population of over 90 million. In order to more effectively resolve environmental cases, the number of judges will need to be increased in the future.

15. Justice Oswaldo D. Agcaoili (ret.), Phil. Jud. Acad., "Role of the Philippine Judicial Academy in Environmental Law Dissemination, Enforcement and Adjudication," Presentation at the Forum on Environmental Justice: Upholding the Right to a Balanced and Healthful Ecology (Apr. 16-17, 2009), available at sc.judiciary.gov.ph/publications/ejforum/day2/.../agcaoili.pdf.

issued 1 Administrative Order Re: Designation of Special Courts to Hear, Try and Decide Environmental Cases. The order created 117 environmental courts to hear cases involving violations of legislation aimed at protecting the nation's environment and natural resources.¹⁶ The courts hear cases involving violations of a non-exhaustive list of environmental laws, including the Revised Forestry Code, Marine Pollution, Toxic Substances and Hazardous Waste Act, Philippine Fisheries Code, Clean Air Act, Clean Water Act, and the Wildlife Conservation & Protection Act.¹⁷

Within the 117 newly designated environmental courts, there are eighty-four Regional Trial Courts (RTCs) spread across twelve judicial regions, and the national capital judicial region.¹⁸ There are also seven Metropolitan Trial Courts, and twenty-six Municipal Trial Courts across twelve regions.¹⁹

Education for Environmental Courts

The Philippine Judicial Academy (PHILJA), the education sector of the Supreme Court, was created by Republic Act No. 8557 in February 1998.²⁰ PHILJA conducts seminars, workshops and other training programs on a variety of topics "to upgrade the legal knowledge, moral fitness, probity, efficiency, and capability of members of the Bench, court personnel, and lawyers aspiring for judicial posts."²¹ Since its creation, PHILJA has conducted more than

16. Administrative Order Re: Designation of Special Courts to Hear, Try and Decide Environmental Cases, S.C., No. 23-2008 (2008) (Phil.). In addition, the judges will not exclusively hear environmental cases, but rather will handle a normal load of cases on a variety of topics, but will in addition have specialized knowledge of environmental law. E-mail from John Boyd, Fellow, Center for Environmental Legal Studies, Pace University School of Law, to Sara Vinson, Summer Research Scholar, Center for Environmental Legal Studies, Pace University School of Law (Aug. 3, 2010, 04:44:00 EST) (on file with author).

17. *Id.* at 1.

18. *Id.* at 1-4.

19. *Id.* at 4-5.

20. See Justice Oswaldo D. Agcaoili (ret.), Phil. Jud. Acad., Role of the Philippine Judicial Academy in Environmental Law Dissemination, Enforcement and Adjudication, Presentation at the Forum on Environmental Justice: Upholding the Right to a Balanced and Healthful Ecology 4 (Apr. 16-17, 2009), available at sc.judiciary.gov.ph/publications/ejforum/day2/.../agcaoili.pdf; see also An Act Establishing the Judicial Academy, Defining its Powers and Functions, Appropriating Funds Therefor, and for Other Purposes, Rep. Act No. 8557 (1998) (Phil.).

21. Justice Oswaldo D. Agcaoili (ret.), Phil. Jud. Acad., Role of the Philippine Judicial Academy in Environmental Law Dissemination, Enforcement and Adjudication, Presentation at the Forum on Environmental Justice: Upholding the

1,000 training programs.²²

PHILJA recommended the establishment of environmental courts²³ and has thus conducted various specialized environmental law training programs in order to ensure effectiveness of adjudication and management of environmental cases.²⁴ In addition, training programs serve as a tool to update judges on developments in environmental laws and rules, so that they can provide well-informed and intelligent decisions.²⁵ An example of a past program on environmental law is the Judiciary Workshop on Wildlife Crime and Prosecution, which was held by PHILJA, in cooperation with the Association of Southeast Asian Nations' Wildlife Enforcement Network (ASEAN WEN), the Asian Environmental Compliance and Enforcement Network (AECEN), and the U.S. Agency for International Development (USAID).²⁶ PHILJA has also held several convention-seminars and international conferences, such as the 2007 Asian Justices Forum on the Environment.²⁷ In addition, PHILJA has conducted a survey to ascertain the needs of judges in environmental litigation. The database created from the survey results serves as a basis for PHILJA's development of further training programs.²⁸

In June 2010, PHILJA held the seminar, Pilot Multi-Sectoral Capacity Building on Environmental Laws and the Rules of Procedure for Environmental Cases.²⁹ Participants included several judges, branch clerks of court, and prosecutors. Among other sectors represented at the seminar were the Public Attorney's Office, Department of Environment and Natural Resources, United Nations Environment Programme, and Asian Development Bank.³⁰

In addition to environmental law training, public availability of

Right to a Balanced and Healthful Ecology 4-5 (Apr. 16-17, 2009).

22. *Id.* at 5.

23. *Id.* at 9.

24. *Id.* at 7.

25. *Id.* at 5.

26. *Id.* at 7.

27. *Id.* at 8.

28. *Id.* at 9.

29. Philippine Judicial Academy (PHILJA), Seminars, <http://philja.judiciary.gov.ph/seminar.htm> (last visited Aug. 17, 2010).

30. See E-mail from John Boyd, Fellow, Center for Environmental Legal Studies, Pace University School of Law, to Sara Vinson, Summer Research Scholar, Center for Environmental Legal Studies, Pace University School of Law (Aug. 15, 2010, 04:12:00 EST) (on file with author) (referring to Preliminary Report of the Academic Affairs Office of PHILJA on the "Pilot Multi-Sectoral Capacity Building on Environmental Laws and the Rules of Procedure for Environmental Cases")

environmental laws helps ensure access to justice. The Environmental Management Bureau, as well as the Department of Environment and Natural Resources, provide online copies of several environmental laws on their websites.³¹ There are also several other websites that provide electronic copies of the environmental laws.³²

Environmental Court Procedures

In April 2009, the Supreme Court held a “Forum on Environmental Justice: Upholding the Right to a Balanced & Healthful Ecology.”³³ The objectives of the forum were “(1) To validate the draft Rules of Procedure for Environmental Cases; (2) To discuss the need for a mechanism/structure that will address the need to monitor environmental cases or issues and monitor compliance threat; and (3) To identify best practices of some agencies/units and replicate in a particular situation.”³⁴

As a result of the forum, on April 29, 2010, the innovative “Rules of Procedure for Environmental Cases” were put into effect.³⁵ These rules are the very first of their kind and were promulgated to enforce the constitutional right to a “balanced and healthful ecology.”³⁶ In addition to the preservation of a constitutional right, the main objectives of the rules are:

(b) To provide a simplified, speedy and inexpensive procedure for the enforcement of environmental rights and duties recognized under the Constitution, existing laws, rules and regulations, and

31. See Environmental Management Bureau, <http://www.emb.gov.ph/laws.htm>; see also Republic of the Philippines: Department of Environment and Natural Resources, <http://www.denr.gov.ph/section-policies/>

32. See, e.g., Chan Robles Virtual Law Library, <http://www.chanrobles.com/legal9.htm>

33. Phil. S.C., Forum on Environmental Justice: Upholding the Right to a Balanced & Healthful Ecology, Apr. 16-17, 2009; ADB, *Asian Judges: Green Courts and Tribunals, and Environmental Justice*, LAW & POL’Y REFORM, Brief No. 1 (Apr. 2010). The forum was supported by several international organizations including the Asian Development Bank (ADB), American Bar Association-Rule of Law Initiative (ABA ROLI), the Hanns Seidel Foundation, the United Nations Development Program (UNDP), the United States Agency for International Development (USAID), the United States Department of Interior, and the World Bank. Abigail T. Sze, Court News Flash April 2010: SC Unveils Landmark Rules of Procedure for Environmental Cases (Apr. 14, 2010), available at <http://sc.judiciary.gov.ph/news/courtnews%20flash/2010/04/04141001.php> (Phil.).

34. Phil. S.C., *supra* note 14, at 2.

35. Phil. S.C., Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC.

36. CONST. (1987), Art. II, § 16 (Phil.).

international agreements;

(c) To introduce and adopt innovative and best practices ensuring the effective enforcement of remedies and redress for violation of environmental laws; and (d) To enable the courts to monitor and exact compliance with orders and judgments in environmental cases.³⁷

The rules include provisions for: (1) citizen suits, (2) consent decrees, (3) environmental protection orders (EPOs), (4) *Writ of Kalikasan* (Nature), (5) Writ of Continuing Mandamus, (6) Strategic Lawsuits against Public Participation (SLAPP), and (7) Precautionary Principle.³⁸

The important citizen suit provision “liberalizes standing for all cases filed enforcing environmental laws.”³⁹ With regard to consent decrees, the rules allow for parties to agree to settlement terms rather than take the litigation route.⁴⁰ This provision aids in limiting the number of cases that go to court, keeping those cases out that may not necessarily require litigation for a fair resolution.⁴¹ The court may issue environmental protection orders (EPOs) to either direct a party to take action, or refrain from taking action, in order to protect the environment.⁴² The rules also contain a provision to allow for the issuance of temporary environmental protection orders (TEPOs), in a situation of “extreme urgency” where the party “will suffer grave injustice and irreparable injury.”⁴³ The court may convert a TEPO into an EPO if necessary.⁴⁴ The writ of continuing mandamus is used when a government agency, or entity, fails to perform a duty “in connection with the enforcement or violation of an environmental law or regulation or right therein.”⁴⁵ The writ allows for the court to command the agency to perform its duty. The writ of continuing mandamus is, procedurally, similar to an ordinary writ of mandamus;

37. Phil. S.C., Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, Pt. 1, R. 1 § 3.

38. Phil. S.C., Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (Apr. 29, 2010).

39. *Id.* Pt. 2, R. 2 § 5; *Sze*, *supra* note 33.

40. Phil. S.C., Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC Pt. 2, R. 3 § 5.

41. *Sze*, *supra* note 33.

42. Phil. S.C., Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC Pt. 2, R. 5 § 3.

43. *Id.* Pt. 2, R. 2 § 8.

44. *Id.* Pt. 2, R. 5 § 3.

45. *Id.* Pt. 3, R. 8 § 1.

however, “the issuance of a Temporary Environmental Protection Order is made available as an auxiliary remedy prior to the issuance of the writ itself.”⁴⁶ A strategic lawsuit against public participation (SLAPP) allows for a pre-emptive defense for those parties engaged in enforcing environmental laws, against whom a legal challenge may be made.⁴⁷ Finally, the rules include a provision on the precautionary principle, which allows the court to bridge the gap between evidence and injury in cases where there is a “lack of full scientific certainty in establishing a causal link between human activity and environmental effect.”⁴⁸

Perhaps the most innovative provision found within the new rules, designated as a “Special Civil Action,” is the writ of *kaliksan*, or the writ of nature.⁴⁹ The rules state:

The writ is a remedy available to a natural or juridical person, entity authorized by law, people’s organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice life, health, or property of inhabitants in two or more cities or provinces.⁵⁰

The *Writ of Kalikasan* is immediate in nature and the rules provide specific remedies, which include:

- (a) Directing respondent to permanently cease and desist from committing acts or neglecting the performance of a duty in violation of environmental laws resulting in environmental destruction or damage;
- (b) Directing the respondent public official, government agency, private person or entity to protect, preserve, rehabilitate or restore the environment;
- (c) Directing the respondent public official, government agency,

46. *Sze*, *supra* note 33.

47. *Sze*, *supra* note 33; Phil. S.C., Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC Pt. 2, R. 6.

48. *Sze*, *supra* note 33; Phil. S.C., Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC Pt. 5, R. 20.

49. Phil. S.C., Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC Pt. 3, R. 7.

50. *Id.* § 1.

private person or entity to monitor strict compliance with the decision and orders of the courts;

(d) Directing the respondent public official, government agency, or private person or entity to make periodic reports on the execution of the final judgment; and

(e) Such other reliefs which relate to the right of the people to a balanced and healthful ecology or to the protection, preservation, rehabilitation or restoration of the environment, except the award of damages to individual petitioners.⁵¹

The writ is expected to increase the efficiency of resolving environmental cases.⁵² It was developed as a result of the April 2009 forum on environmental justice.⁵³ At this forum, former Chief Justice Reynato S. Puno identified the three main issues that affect prosecution in environmental cases.

These issues were:

(1) whether to relax the rule on 'locus standi' to encourage more citizens to file suits involving violations of the country's environmental laws;

(2) the delay in the disposition of pending environmental cases; and

(3) the problem of procuring evidence and crafting effective remedies."⁵⁴

Overall, the writ, along with the other rules of procedure, was primarily created to preserve the constitutional right to a clean environment.

First Petition for *Writ of Kalikasan*

Antonio Oposa, an environmental pro bono lawyer representing Global Legal Action on Climate Change (GLACC), has filed the first petition for a *Writ of Kalikasan*.⁵⁵ The organization is asking the Supreme Court to compel various government agencies to implement

51. *Id.* § 15.

52. "*Writ of Kalikasan*" will strengthen environmental courts – Puno, *DATLINE PHIL.*, Jan. 31, 2010, available at <http://dateline.ph/?p=5685>.

53. *Id.*

54. *Id.*

55. Purple S. Romero, TrustLaw, Pro bono lawyer leads landmark court challenge in Philippines, <http://www.trust.org/trustlaw/pro-bono/news-and-analysis/detail.dot?id=5975e714-5b5e-46f1-bb42-57a5e3a0b4b5> (last visited July 20, 2010).

two already existing laws, Republic Acts 6716 and 7160.⁵⁶ Under these laws, the government is required to provide rainwater collectors and complete other related flood control projects.⁵⁷ Flooding is a common problem in the Philippines and is expected to become an even larger problem with the increasing effects of climate change.⁵⁸ If the Supreme Court grants the petition, several government agencies would be commanded to fund and oversee the development of at least 100,000 rainwater collectors throughout the Philippines.⁵⁹

Conclusion

The development of the environmental court system in the Philippines has largely been seen as a great success in the realm of global environmental governance. The Philippines have taken a great step forward in promoting the Johannesburg Principles, by ensuring access to justice and the protection of the environment. It is certain that many countries around the world will turn to the Philippines as an example of a successful environmental court system, upon which they may model their own. Former Chief Justice Reynato S. Puno will likely be remembered for his great efforts in the protection of the Philippines' environment.⁶⁰ In realizing the need for environmental courts, Puno stated, "All efforts will be undertaken so that the newly designated environmental courts will be manned by "green judges" — skillful judges who not only master environmental laws, but also understand the philosophy of environmentalism and ecologism."⁶¹ Due to Puno, and the Supreme Court's efforts in general, the

56. *See id.*; *see also* Alcuin Papa, *Forgotten law never enforced can solve water crisis, floodings*, PHIL. DAILY INQ., July 25, 2010, <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100725-282989/Forgotten-law-never-enforced-can-solve-water-crisis-floodings>.

57. *Id.*; *see also* An Act Providing for the Construction of Water Wells, Rainwater Collectors, Development of Springs and Rehabilitation of Existing Water Wells in All Barangays in the Philippines, Rep. Act No. 6716 (1989) (Phil.); An Act Providing for a Local Government Code of 1991, Rep. Act No. 7160, § 15(b) (1991) (Phil.).

58. Romero, *supra* note 55.

59. *Id.*

60. Genalyn Kabling, *Green advocates honor, thank Puno*, MANILA BULL. PUB. CORP. (May 27, 2010), *available at* <http://www.mb.com.ph/articles/257706/green-advocates-honor-thank-puno> (Phil.).

61. USAID, Success Story: Philippines' Green Benches To Deliver Environmental Justice, Specialized Courts and Judges Appointed to Resolve Environmental Disputes, Aug. 26, 2008, *available at* www.usaid.gov/.../RDMA_SS_AECEN_Green_Benches082608.pdf.

Philippines are pioneering the way for environmental courts and tribunals worldwide.

THE JUDICIARY AND ENVIRONMENTAL GOVERNANCE IN SINGAPORE

*Lye Lin Heng**

Introduction

Singapore is one of the smallest and most densely populated countries in the world, with a land area of only 710 square kilometers¹ and a population of just over five million in 2010 (a density of some 7,100 persons per square kilometer).² Strategically situated at the tip of the Malay Peninsula, it is at the crossroads of Southeast Asia. It is a secular, multi-racial, multi-religious community of Chinese, Malays, Indians and other races, with a per capita income that is the highest in Asia, having overtaken that of Japan.³

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1. Statistics Singapore, <http://www.singstat.gov.sg/stats/keyind.html#popnarea> (last visited Nov. 17, 2010). Singapore has added to its land area by reclamation of land from the sea. Its land area was 581.5 square kilometers (224.5 sq mi) in the 1960s; see Singapore Facts & Figures, http://edb.gov.sg/edb/sg/en_uk/index/why_singapore/singapore_facts_and_figures.html (last visited Nov. 17, 2010).

2. Statistics Singapore, <http://www.singstat.gov.sg/stats/keyind.html#popnarea> (last visited Nov. 17, 2010).

3. In 2010, the per capita GDP was SGD\$53,143 (US \$40,879 at S\$1.3 to US \$1.00). Singapore Statistics, <http://www.singstat.gov.sg/stats/keyind.html> (last visited Nov. 17, 2010). See also Coutry Comparison: GDP – Per Capita (PPP), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html> (last visited Nov. 17, 2010).

Historically, Singapore was a crown colony, achieved self government in 1959, was part of Malaysia for a brief while, and became a sovereign state on August 9, 1965. It has since been governed by the same political party that won the first elections, the People's Action Party. This has inured to its advantage, as Singapore has the remarkable distinction of moving "from the Third World to the First" in the space of some four decades, as states the title of the autobiography of its first prime minister, Lee Kuan Yew.⁴ Much of this success must be attributed to Lee, who was largely the chief architect of its success and continues to play a significant role as Minister Mentor. Lacking in natural resources, Singapore has built on its strategic location, natural deep harbor, and its people, and developed a strong economy based on trade and services.

In the early years, Singapore faced the same problems that beset developing countries today. These include the lack of proper sewage disposal facilities, highly polluted rivers and river basins, indiscriminate waste disposal leading to land contamination and water pollution, poor health management systems leading to outbreaks of typhoid and cholera, polluted air from old and inefficient gas works, and frequent floods due to poor drainage.

But today, Singapore's air and water quality are well within World Health Organization (WHO) standards.⁵ All inland waters support aquatic life, the coastal waters meet recreational water standards, and the physical environment is one that is "clean and green." All homes receive piped, potable water – indeed, Singapore's water management has won numerous awards. The streets are swept and garbage is disposed of daily. Refuse is collected daily by licensed contractors, incinerated and the ash sent to an off-shore landfill site. Life expectancy averages 81.4 years, and infant mortality is low, at 2.1 percent for every 1,000 live births.⁶ Three-point-eight percent of its GDP is spent on national health care.⁷ Singapore also has one of the best public housing schemes in the world. Eighty-four percent of the

4. LEE KUAN YEW, *FROM THIRD WORLD TO FIRST – THE SINGAPORE STORY: 1965-2000 – SINGAPORE AND THE ASIAN ECONOMIC BOOM* (2000).

5. See NAT'L ENV'T AGENCY (NEA), *ANNUAL REPORT 2008-09* (2009), available at http://web1.env.gov.sg/cms/ar2009/content/nea-annual_report.pdf.

6. Statistics Singapore, <http://www.singstat.gov.sg/stats/keyind.html> (last visited Nov. 17, 2010).

7. See Ministry of Health, "Healthcare System," <http://www.moh.gov.sg/mohcorp/hcssystem.aspx> (last visited Nov. 18, 2010).

population live in government-subsidized public housing, in twenty-six new towns built by the Housing & Development Board (HDB).⁸ These are high-rise apartments purchased from the HDB on ninety-nine-year leases. Singapore also has a highly efficient public transport road and rail system. It applies the “polluter pays principle” in its transportation policies, discouraging the use of private motor vehicles by increasing the costs of motoring through innovative taxes and electronic road pricing.⁹

Singapore’s strict laws and their enforcement have ensured a low crime rate and provided a safe environment for its residents. Sound environmental management policies have secured a “clean and green” physical environment. A “clean” government has ensured that funds are available for the building of an excellent environmental infrastructure. Sound economic and land-use planning policies have ensured the preservation of green areas for nature conservation and recreation. Indeed, in 2009, Singapore was commended for being “one of the cleanest and most welcoming cities in the world” by the World Bank in its World Development Report 2009.¹⁰

So how did Singapore pursue a policy of rapid industrialization while ensuring the cleaning up of its environment? What role did the judiciary play in this? The fact is that a clean and green environment was part of the first Prime Minister Lee Kuan Yew’s strategy in wooing investors in the early years.¹¹ A healthy and pleasant living environment continues to play an important role in ensuring that Singapore remains an attractive place for investors, for talented migrants, and for its own citizens.

Singapore has made full use of the law to control unsociable behavior. It is well known for its draconian anti-litter policy. Littering is an offense that carries a penalty of a fine of up to S\$1,000¹² and the

8. See Housing & Development Board History, <http://www.hdb.gov.sg/fi10/fi10320p.nsf/w/AboutUsHDBHistory?OpenDocument> (last visited Nov. 18, 2010). Only Singapore citizens and permanent residents are allowed to purchase HDB apartments.

9. See Lin-Heng Lye, *Environmental Taxation in the Management of Traffic in Singapore*, in VII CRITICAL ISSUES IN ENVIRONMENTAL TAXATION: INTERNATIONAL AND COMPARATIVE PERSPECTIVES, at 205-225 (Lin-Heng Lye, Janet Milne, Hope Ashiabor, Larry Kreiser & Kurt Deketelaere, eds., Oxford University Press 2009).

10. See WORLD BANK, WORLD DEVELOPMENT REPORT 2009, Overview (2009), available at http://siteresources.worldbank.org/INTWDR2009/Resources/4231006-1225840759068/WDR09_01_Overviewweb.pdf.

11. See Lee, *supra* note 4.

12. *Environmental Protection and Management Act* ((EPMA) § 17, Cap. 95, 2002

possibility of a Corrective Work Order (CWO).¹³ The law even requires that buses provide litter bins.¹⁴ It is the only country that has banned the sale of chewing gum,¹⁵ and imposes a fine for not flushing a public toilet after its use. Acts of vandalism, where the damage to private or public property is done with an indelible substance, carry a maximum fine of S\$2,000 and imprisonment of up to three years, plus mandatory caning (three to eight strokes).¹⁶ There are also laws to protect the natural environment. It is an offense to cut or collect any plant or tree in any nature reserve, national park or public park, or to kill, take or keep any wild animal or bird without a license. All these offenses, and many more, carry a fine of at least S\$1,000. Some offenses carry mandatory jail terms for a second or subsequent offense, such as illegal dumping, or discharging a toxic substance into inland waters.¹⁷ In the case of illegal dumping, the vehicle that was used may also be forfeited.¹⁸

First-time offenders are either let off with a warning or may have their offenses compounded if they are minor. This means that the case may be settled without entering a conviction, if the defendant admits the offense and agrees to pay a reduced fine.¹⁹ Only a few cases relating to the environment appear before the higher courts each year. This saves the prosecution time and effort and also serves to warn the offender against future breaches of the law. These laws have been judiciously applied by the courts, which have often construed them as

Rev. Ed. Sing.) [EPMA]. The exchange rate is approximately S\$1.30 to US\$1.00 as of November 2010.

13. EPMA, §§ 21A – 21E; *Environmental Public Health (Corrective Work Order) Regulations* (2000 Rev. Ed. Sing.) (Corrective Work Orders will be discussed *infra*). It is also an offense to spit.

14. EPMA, § 23.

15. The importation of chewing gum for sale was first prohibited in 1992, with the passing of the *Control of Export and Imports (Chewing Gum) Order*. Singapore has now partially lifted this ban, and from January 1, 2004, has allowed the sale of therapeutic chewing gum; see *Regulation of Imports and Exports (Chewing Gum) Regulations* (S. 632/2003 Sing.; amended S 407/2006), available at http://www.customs.gov.sg/NR/rdonlyres/94D7408B-AC51-406F-A7CD-1A62774443F7/26605/RegulationofImportsandExports_ChewingGum_Regulation.pdf.

16. *Vandalism Act* (Cap. 341, 1985 Rev. Ed. Sing.).

17. EPMA, *supra* note 12, §§ 20, 21.

18. See *Illegal dumping: Seized lorry to be auctioned*, THE STRAITS TIMES, Mar. 11, 2008.

19. See Frequently Asked Questions What Is Composition, http://app.sub.courts.gov.sg/Data/Files/File/criminal_faqs_composition.pdf (last visited Nov. 18, 2010).

imposing strict liability, emphasizing the need for Singapore to have a clean environment. The fact that Singapore is also ranked as the least corrupt country in Asia helps in enforcement.²⁰ Where cases are prosecuted, they are either brought before a magistrate's court or the District Court, depending on the severity of the penalty. The former Chief Justice Yong Pung How took a special interest in criminal appeals and his reported judgments form the main source of reported cases on pollution laws.

This paper examines the role of the judiciary in environmental governance in Singapore. It must be emphasized at the outset, that laws are only a part of environmental governance and management. Indeed, there should be few cases before the courts if the environment is properly managed by the relevant authorities. This is the case in Singapore. Singapore has a well integrated environmental management system that works effectively, particularly in relation to pollution control. Complaints are quickly investigated by officers from the National Environment Agency (NEA), which administers the environmental laws relating to pollution and public health.²¹ The laws vest the authorities with very wide powers of enforcement.²² These powers have not been abused, as the government is honest — government officers who are corrupt are dealt with very severely.²³

Legal Structure

Sources of Law

Singapore has two sources of law. The first is English common law as developed in England and imported to Singapore. Statutory laws passed by Parliament ("primary laws") and regulations, rules,

20. See Political and Economic Risk Consultancy: Singapore March 2010, <http://www.asiarisk.com/subscribe/siindex.html> (last visited Nov. 18, 2010); see *S'pore least corrupt nation*, THE STRAITS TIMES, Mar. 9, 2010). See *Prevention of Corruption Act, Ordinance 39 of 1960*, Cap. 241, 1993 Rev. Ed.

21. These are the Environmental Protection and Management Act (EPMA) and the Environmental Public Health Act (EPHA) and their subsidiary laws.

22. These include the power of entry, search and seizure, as well as the power of arrest. See Part XI, "Enforcement" §§ 41-50, *Environmental Protection and Management Act*, Cap. 94A, 2002 Rev. Ed.; Part X, "Enforcement" §§ 81-88, *Environmental Public Health Act*, Cap. 95, 2002 Rev. ed.

23. This is not to say that there is no corruption, but the few cases that surface are dealt with severely. See *Prevention of Corruption Act, Ordinance 39 of 1960*, Cap. 241, 1993 Rev. Ed.; *Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act, Act 29 of 1992*, Cap. 65A, 2000 Rev. Ed.; see also *Public Prosecutor v. Lim Choong Hiang* [2004] 220, District Court (environmental health officer convicted of three charges under the Prevention of Corruption Act).

orders and notifications (“subsidiary laws”) form the second source.²⁴ Subsidiary legislation is passed by the relevant ministers under enabling legislation and published in the *Government Gazette*.²⁵

Sources of Environmental Law

Environmental law in Singapore comprises statutory law as well as common law principles of tort which serve as constraints on a landowner’s use of his land. There are also “soft laws” such as guidelines, codes of practice, and directions issued by the Ministry of Environment and Water Resources (MEWR) National Environment Agency (NEA), as well as other ministries such as the Ministries of National Development, Law, and Manpower. The “soft laws” issued by the NEA include Codes of Practice on Pollution Control and on Environmental Health, as well as the Revised Singapore Green Plan presented at the World Summit on Sustainable Development in Johannesburg, South Africa, June 2002, and revised in 2006.²⁶

Judicial System

The Judiciary

The judiciary comprises the Supreme Court (composed of the High Court and the Court of Appeal), and the Subordinate Courts (comprising the District Courts, Magistrates’ Courts, Family Court, Juvenile Court, Coroner’s Court and the Small Claims Tribunal).²⁷ Appeals to the Judicial Committee of the Privy Council were abolished in 1994. The jury system was abolished in 1970. A

24. Primary laws may be found at Singapore Statutes Online, <http://statutes.agc.gov.sg/> (last visited Nov. 18, 2010). Subsidiary laws may be found on the website of Lawnet as well as the websites of relevant enforcement authority, such as the NEA’s website at Legislation, http://app.nea.gov.sg/cms/htdocs/category_sub.asp?cid=180 (last visited Nov. 18, 2010). See also LawNet, http://www.lawnet.com.sg/lmrweb/c/portal/layout?p_l_id=1 (last visited Nov. 18, 2010).

25. See HELENA H. M. CHAN, *THE LEGAL SYSTEM OF SINGAPORE* (1995); *THE SINGAPORE LEGAL SYSTEM* (Kevin YL Tan ed., Singapore University Press 2d ed. 1999).

26. MINISTRY OF THE ENV’T & WATER RES., *SINGAPORE GREEN PLAN 2012* (2010), available at <http://app.mewr.gov.sg/web/Contents/Contents.aspx?ContId=1342>. See also MINISTRY OF THE ENV’T & WATER RES., *NEW TARGETS* (2010), available at <http://app.mewr.gov.sg/data/ImgCont/1342/Targets.pdf>.

27. SING. CONST., Part VIII – The Judiciary, Arts. 93-101; Yeo Tiong Min, *Jurisdiction of the Singapore Courts*, in *THE SINGAPORE LEGAL SYSTEM* 249-296; Walter Woon, *The Doctrine of Judicial Precedent*, in *THE SINGAPORE LEGAL SYSTEM* 297-323.

Presidential Council for Minority Rights is established under Part VII of the Constitution. Judges of the Supreme Court enjoy security of tenure and can only be removed in the circumstances set out in the Constitution.²⁸ Judicial commissioners may be appointed to exercise the functions of a judge for short periods of time.²⁹

Jurisdiction for Hearings

Jurisdiction for the different courts varies, depending, in criminal cases, on the maximum sentence for the particular offense, and in civil cases, on the amount of the claim. District and Magistrates Courts have original criminal and civil jurisdiction. District Courts try civil cases for claims of up to S\$250,000, and offenses for which the maximum term of imprisonment does not exceed ten years.³⁰ Magistrates' courts try criminal cases for which the maximum term of imprisonment does not exceed three years, and civil cases where the claim does not exceed S\$60,000.³¹ They also conduct preliminary inquiries into offenses with a view to committal for trial by the High Court. The Juvenile Court deals with offenses by children who are sixteen years old or younger. The High Court has unlimited jurisdiction in both civil and criminal cases, but all criminal cases carrying the death penalty must be tried by the High Court. The Court of Appeal is the final appellate court of Singapore. It hears appeals, whether civil or criminal, from the High Court, and determines questions of law reserved for its decision by the High Court.

As the laws that protect the environment usually carry fines not exceeding S\$20,000 and imprisonment not exceeding two years, infringements of these laws are heard by the Magistrates' Courts. Fines of up to S\$100,000 can be imposed for serious breaches of the law and these cases will be heard by District Courts (e.g., Section 17 Environmental Protection and Management Act – discharge of toxic substances into water courses – fine up to S\$100,000 for a second or subsequent offense plus imprisonment from one month to twelve months). Hefty fines of up to S\$1 million can be imposed on cases

28. SING. CONST., *supra note 27*, art. 98.

29. *Id.*, arts. 94(4), 95.

30. The Subordinate Courts (Variation of District Court Limit) Order 1997, S 333/97.

31. The Subordinate Courts (Variation of Magistrate Court Limit) Order 1999, S 263/99.

involving pollution of the marine environment by oil under the Prevention of Pollution of the Sea Act (PPSA).³² Offenses carrying such heavy penalties would normally be heard by the High Court, but Section 32 of the PPSA expressly empowers District and Magistrates' Courts to try these offenses.³³

ENVIRONMENTAL LAW AND GOVERNANCE IN SINGAPORE

The Singapore Constitution does not contain any provision relating to the environment and is silent on environmental rights.³⁴ While the common law tort actions of nuisance, negligence, trespass and the rule in *Rylands v. Fletcher* continue to apply,³⁵ comprehensive statutory laws have been passed to govern pollution control³⁶ and protect the natural environment³⁷ as well as public health.³⁸

Environmental Challenges

Unlike nations which have large land space with considerable natural resources and indigenous populations, Singapore is a tiny city state with a largely urban population. It is largely dependent on the external world for food supplies, with little of its food grown locally. In other jurisdictions, the exploitation of natural resources has given rise to many environmental and social problems, and has prompted the courts to examine the fundamental principles of environmental law, and to apply these principles in appropriate cases. These

32. Act 18 of 1990, Cap. 243, 1999 Rev. Ed.

33. It should be noted that the Muslim community is governed by a separate system of law in relation to family matters, administered by separate courts and judicial officers under The Administration of Muslim Law Act. This establishes the Syariah Court and its Appeal Board. See *The Administration of Muslim Law Act*, Act 27 of 1966, Cap 3, 1999 Rev. Ed. See also Syariah Court Singapore, http://app.syariahcourt.gov.sg/syariah/front-end/SYCHome_E.aspx (last visited Nov. 18, 2010).

34. In contrast, see CONST. (1987), Art. II, (Phil.), "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." See also INDIA CONST. art. 48A, "The State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of this country." Article 51A(g) provides "It shall be the duty of every citizen of India to protect and preserve the natural environment including forests, lakes, rivers, and wildlife, and to have compassion for living creatures." INDIA CONST. art. 51A(g).

35. *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868).

36. See, e.g., The Environmental Protection and Management Act; Prevention of Pollution of the Sea Act.

37. See generally Parks and Trees Act, National Parks Act, Wild Animals and Birds Act, Endangered Species (Import and Export) Act.

38. Environmental Public Health Act.

principles include:

- the polluter pays principle;
- the precautionary principle;
- inter-generational and intra-generational equity;
- the principles of sustainable development;
- the need for public participation;
- the requirement for environmental impact assessments.

Thus, the Philippines Supreme Court, in recognition of the principles of inter-generational equity, has pushed the borders of *locus standi*,³⁹ allowing an action to stop the logging of forests to be brought on behalf of present and future generations of Filipino children.⁴⁰

Courts from the Indian sub-continent have even gone further. They have taken cognizance of environmental problems and applied the precautionary principle, as well as the polluter pays principle, in many cases. They have recognized that non-government organizations may have *locus standi* to bring actions relating to the environment (as in the case of the Bangla-Desh Environmental Lawyers Association (BELA)). They have pushed for an interpretation of fundamental principles such as the right to life, to encompass the right to a healthy life, free from pollution.⁴¹

Singapore's courts have not been faced with such challenges, due largely to the fact that Singapore has a good environmental management system. The cases that have come before the Singapore courts and which are reported in the law reports, relate mainly to littering and illegal dumping of wastes; the cleansing of public toilets; noise pollution; pollution of the marine environment; and trade in endangered species. Each of these will be considered briefly in turn.

While Singapore has not seen a single citizen's suit in regard to

39. See also the cases in Chapter 11, *Judicial Decisions and Alternative Dispute Resolution in 1 CAPACITY BUILDING FOR ENVIRONMENTAL LAW IN THE ASIAN PACIFIC REGION, APPROACHES AND RESOURCES* 705-804 (Donna Craig, Nicholas A Robinson & Koh Kheng-Lian, eds., Asian Development Bank 2002).

40. See *Minors Oposa v. Dep't of Env't & Nat. Res.*, G.R. No. 101083, July 30, 1993, reprinted in 33 *ILM* 1993.

41. See *Shela Zia v. W.A.P.D.A.*, P.L.D. 1994 SC (Supreme Court of Pakistan) 693; *Dr Mohuiddin Farooque v. Bangladesh & Ors.*, 17 BLD (AD) 1997, Vol. XVII, 1-33; *M.C. Mehta v. Kamal Nath*, (1977) 1 S.C.C. 388; and other cases and materials in Chapter 11, *Judicial Decisions and Alternative Dispute Resolution, CAPACITY BUILDING FOR ENVIRONMENTAL LAW IN THE ASIAN PACIFIC REGION, APPROACHES AND RESOURCES*, op. cit.

the environment, it should be emphasized that environmental issues are not without controversy. There have been a few situations involving the state's proposals to develop or reclaim ecologically sensitive areas for purposes of development, which may well have prompted litigation between NGOs or concerned citizens and the state, had they arisen in a different jurisdiction. But in Singapore, they were resolved amicably without litigation and are not within the scope of this paper.⁴²

Littering and Illegal Dumping

Anti-Litter Laws

It is an offense to litter or dump refuse into drains or watercourses (Section 17, Environmental Public Health Act (EPHA)).⁴³ Any person who commits such an offense "may be arrested without warrant by any police officer or authorised officer," charged, and fined up to S\$1,000 (in the case of a first conviction), S\$2,000 (in the case of a second conviction) and S\$5,000 for a third or subsequent conviction.⁴⁴ The offense may be compounded for not less than S\$500, where the penalty is a fine not exceeding S\$5,000 (section 104). These laws are enforced by officers from the National Environment Agency.

In *Public Prosecutor v. Yong Heng Yew*,⁴⁵ the respondent had thrown a cigarette butt onto the floor of a shopping center. He did not deny the act, but asserted that the prosecution was further required to show that it was his intention to walk off without properly disposing of the cigarette butt. He was acquitted by the District Court.

However, on appeal, it was held that the offense of littering is a strict liability offense.⁴⁶ Chief Justice Yong Pung How held that the prosecution had only to show that an accused committed the physical act of throwing away refuse voluntarily and deliberately, not by accident or automatism. Once the act of throwing away refuse was shown to be a deliberate (and not accidental) act, the prosecution need not go further to show the presence of some blameworthy state of mind.

42. See discussion in Lye Lin Heng, *A Fine City in a Garden – Environmental Law and Governance in Singapore*, SING. J. LEGAL STUDIES 68-117, at 108-117 (2008).

43. Act 14 of 1987, Cap. 95, 2002 Rev. Ed.

44. EPHA, § 21(1)(c).

45. [1996] 3 S.L.R. 566, Yong Pung How CJ.

46. See Chan Wing Cheong, *Requirement of Fault in Strict Liability*, 11 SING. ACAD. L.J. 98 (1999).

The Corrective Work Order (CWO)

In 1992, a new punishment, the Corrective Work Order (CWO), was introduced in lieu of a fine for littering.⁴⁷ A CWO can only be imposed on a person who is above sixteen years old and charged with littering or illegal dumping of waste. The work is to be performed under the supervision of a supervision officer and involves the cleaning of a public place.⁴⁸ Prosecutors will seek a CWO if the offending litter is large, such as food wastes, cans, drink cups or tissue paper. An offender with an earlier minor littering offense that was compounded may also be given a CWO.

Chief Judge Yong Pung How, has given a robust interpretation to this law, emphasizing that “[a]s a general rule, it may be said that the more callous or cavalier the offender is in his act of littering, the more culpable he is. Together with factors such as the number of previous offenses and the seriousness of the littering offense, this would be relevant in determining the length of time to which he will be ordered to perform a corrective work order.”⁴⁹ This was the case of *Public Prosecutor v. Lim Niah Liang*, where the accused had pleaded guilty to one charge of throwing a cigarette butt into a drain.⁵⁰ He had committed the same offense four years prior to the instant offense, and that offense had been compounded for S\$200. For this second offense, the prosecution applied for a CWO, contending that he was a “repeat offender.” This was rejected by the magistrate, who took the view that the prosecution had failed to discharge its burden that a CWO should be imposed, as there was only one previous compounded offense committed four years ago.

This was reversed on appeal by Chief Judge Yong who stated that evidence of previous convictions was not a pre-condition for the imposition of a CWO; that the implementation of section 21A(1) depended either on evidence of commission of previous similar offenses, or on evidence that a serious littering offense had been

47. This was initiated in 1992. *Id.*, §§ 21A – 21E; *Environmental Public Health (Corrective Work Order) Regulations* (2000 Rev. Ed. Sing.) [*EPH (CWO) Regulations*]. See *Public Prosecutor v. Lim Niah Liang* [1997] 1 S.L.R. 534 (improperly disposing of a cigarette butt may warrant a CWO if there is evidence of commission of previous offenses).

48. *EPH (CWO) Regulations, id.*, r. 6(2).

49. [1997] 1 S.L.R. 534, at 541, per Yong Pung How, CJ.

50. See *id.*

committed. For the purpose of showing that an offender was “recalcitrant,” it would suffice to rely on evidence that he had previously committed the same offense on at least one occasion. He need not have been convicted of the offense. Chief Judge Yong imposed a two-hour CWO and returned the respondent the fine of S\$300 imposed by the magistrate.

Illegal Dumping

It is an offense to dump or dispose of any refuse, waste or any other articles from a vehicle in a public place or to use a vehicle for the purposes of such dumping (section 20(1) EPHA). Persons may be arrested without warrant by any police officer or public health officer, and fined up to S\$50,000 or imprisoned up to twelve months or both. The vehicle used may also be forfeited. For subsequent offenses, imprisonment is mandatory (from one month to one year) and the fine is doubled to a maximum of S\$100,000.⁵¹

(a) Fines

When it was first passed, the fine was S\$1,000, doubling to S\$2,000 in the case of a subsequent offense. In *Chandra Kumar v. P.P.*,⁵² the appellant was tailed by enforcement officers while driving a motor vehicle. He dumped a load of wood waste. He was convicted and was fined the maximum of S\$2,000, and the vehicle used was forfeited under section 20(4) EPHA. On appeal to the High Court, Chief Judge Yong commented that the maximum fine was “woefully inadequate. A range of fines of up to S\$100,000 would be a better tool in combating illegal dumping than forfeiture. Fines are precise, amenable to variation and therefore more likely to be effective.”⁵³ Soon thereafter, the fine was raised to S\$10,000 in 1996 (Act 2 of 1996), and thereafter, to S\$50,000 in 1999 (Act 22 of 1999) and S\$100,000 for a subsequent offense. It can be surmised that the observations of Chief Judge Yong were clearly noted by the authorities and swift steps were taken to amend the law.

(b) Forfeiture of vehicle used

Motor vehicles in Singapore are very costly, due to substantial

51. These penalties were raised from a S\$1,000 fine to a maximum fine of S\$20,000 in 1996 (Act 2 of 1996, effective February 2, 1996 (S 38/96), and further increased in 1999 (Act. 22 of 1999) to S\$50,000.

52. [1995] 3 SLR 123.

53. *Chandra Kumar v. Public Prosecutor* [1995] 3 SLR 123.

taxes imposed on their importation and use. Chief Judge Yong mentioned that forfeiture of a vehicle worth tens, if not hundreds, of thousands of dollars would be quite wrong when a fine of at most S\$2,000 may be levied. He observed that a comparison between the value of the vehicle and the gravity of the offense would be necessary. Thus, in *Chandra* it was held, on appeal, that forfeiture of the vehicle was not an appropriate punishment for offenses of this nature as “it is an inflexible tool. The illegal dumping of refuse is an offense which is capable of gradations in seriousness.”⁵⁴

It should also be noted that in *Toh Teong Seng v. P.P.*,⁵⁵ notwithstanding that the word “shall” is used in relation to forfeiture, (“a court on convicting any person of an offense. . . shall . . . make an order for the forfeiture of the vehicle”), this was construed as *directory* and not *mandatory*.⁵⁶

Meaning of “public place”

Section 20(1) EPHA requires the illegal dumping to be in a “public place.” So, what is a “public place”? In *Toh Teong Seng v. Public Prosecutor*,⁵⁷ Chief Judge Yong applied section 9A, Interpretation Act, and examined the speeches of the then Minister for the Environment, Dr. Ahmad Mattar, in order to ascertain what was the purpose of section 20 EPHA. He then declared that as the purpose of section 20 is to deter dumping, “whether the public has access to the place or not is not relevant. If the title to the place is in the state, then public funds will have to be expended in removing the rubbish regardless of whether the public has access to the place.”

In *P.P. v. Lim Ah Heng*,⁵⁸ it was held that a military training area which is a protected place, is also a “public place.” Chief Judge Yong stated that any place to which the public had access, whether in fact or in right, was a “public place” for the purposes of section 20(1) EPHA.

54. *Id.*, at para. 35.

55. [1995] 2 S.L.R. 273.

56. It should however be noted that forfeiture clauses are read strictly in other offenses and many finance companies had their motor vehicles forfeited, the courts declaring that the onus was on the corporation to check their customers. See also *Volkswagen Financial Services Singapore Ltd. v. Public Prosecutor* [2006] 2 S.L.R. (R) 539 (vehicle used to commit robbery, theft and snatch theft); *Public Prosecutor v. Mayban Finance (Singapore) Ltd.* [1997] 3 S.L.R. (R) 216 (vehicle used to transport illegal workers).

57. *Toh Teong Seng v. Public Prosecutor* [1995] 2 S.L.R. 273.

58. [1999] 1 SLR 827.

Therefore, it followed that a place could qualify as a “public place” even if the public did not have a right of access, as long as it was established that they did in fact go there.⁵⁹

Public Health – Clean Public Toilets

In July 1989, laws were passed to ensure clean toilets, making it an offense not to flush a public toilet after its use, and requiring public toilets to be kept clean and provided with adequate amounts of soap and toilet paper.⁶⁰ NEA officers conduct regular inspections of public toilets to ensure they are clean. But continued policing for toilet flushing has not been found to be necessary, particularly as automatic flushing sensors are now installed in public toilets. Enforcement is targeted instead, at the managers of buildings that provide toilets for the public.

It has been held (again, by Chief Judge Yong) that the duty to maintain public conveniences in a building under section 58(2) EPMA (now section 55) is one of strict liability and non-delegable.⁶¹ Thus, the management corporation of a building cannot absolve themselves of liability by employing cleaners to clean the public conveniences and by implementing a regular cleaning scheme. The offense is committed once the conveniences are not maintained to the requisite standards.

Noise

Singapore has passed laws to control noise from factories,⁶² construction sites,⁶³ and traffic.⁶⁴

Noise pollution from construction sites is regulated by the EPMA and the EPM (*Control of Noise at Construction Sites*)

59. *Public Prosecutor v. Lim Ah Heng* [1999] 1 S.L.R. 827; *Chandra Kumar v. Public Prosecutor* [1995] 3 S.L.R. 123; *Ang Poh Chuan v. Public Prosecutor* [1996] 1 S.L.R. 326.

60. *Environmental Public Health (Public Cleansing) Regulations* (2000 Rev. Ed. Sing.), r. 16, 16A. See Simon Tay, Chairman, Nat'l Env't Agency, Address at the World Toilet Summit 2004, Beijing, China: “The Horizontal Society: Citizens, Civility and Public Toilets” (2004) (available at <http://app.nea.gov.sg/cms/htdocs/article.asp?pid=2469>).

61. *M.C. Strata Title No. 641 v. Public Prosecutor* [1993] 2 S.L.R. 650.

62. EPMA, *supra* note 12, §§ 28-30; *Environmental Protection and Management (Boundary Noise Limits for Factory (Premises) Regulations* (S. 156/99 Sing.).

63. *Environmental Protection and Management (Control of Noise at Construction Sites) Regulations* (2008 Rev. Ed. Sing.).

64. *Environmental Protection and Management (Vehicular Emissions) Regulations* (S. 291/99 Sing.).

*Regulations.*⁶⁵ Under the *EPMA*, the Director of Pollution Control may, by written notice, specify the plant or machinery that can or cannot be used, the hours during which the works may be carried out, and the level of noise or vibration which may be emitted from the premises (or at any specified part of those premises) during specified hours. Failure to comply entails a daily fine of up to S\$10,000, or imprisonment of up to three months, or both.⁶⁶

The Regulations specify the allowable noise standards that can emanate from a construction site. These standards were amended on October 1, 2001,⁶⁷ and again on October 1, 2007,⁶⁸ to provide for more stringent noise limits for noise generated at night for construction sites that are within 150 meters of residential premises. These regulations do not require that all construction work cease at night, but they do require that contractors schedule their construction activities such that they comply with the permissible noise limits at all times.

Most complaints about noise relate to construction sites. A few cases on noise have come before the District Courts. In *Public Prosecutor v. China Construction (South Pacific) Dev. Co. Pte Ltd.*,⁶⁹ the defendant company faced two charges for failing to ensure that noise emitted between 10 p.m. and 11 p.m. was within the permissible limit. The noise meters had recorded the noise limits at 59.8 decibel adjusted (dBA) and 58.3 dBA on two occasions, when the permissible limit was 55.0 dBA. The district judge rejected the argument of *de minimis non curat lex*, saying:

Parliament has deliberately made it an offense for any owner or occupier of a construction site to exceed the maximum permissible limit prescribed by the regulations. It would lead to an absurd result if the *de minimis* principle can be applied to exempt an offender from being convicted of an act which has been made an offence by Parliament. . . . As Singapore becomes more built up, construction activities are increasingly located nearer to residential sites. . . . Contractors must actively ensure that their site activities do not give rise to public health problems. . . . As such, contractors must take appropriate steps to minimize nuisance to residents. . . . Therefore, a clear signal must be sent out

65. 2008 Rev. Ed. Sing.

66. *EPMA*, *supra* note 12, § 28.

67. S. 276/2001 Sing.

68. S. 145/2007 Sing.

69. [2006] SGDC 100.

to reflect the seriousness of complying with the regulations.⁷⁰

However, a plaintiff who sought an injunction and damages against a construction company for excessive noise lost her case in a trial that lasted six days, and was made to pay costs at S\$45,000 plus reasonable disbursements. The defendant was building an underground train station for the MRT (Mass Rapid Transit). The district judge said:

...The construction ... is undeniably a massive project involving extensive piling and excavation works. Inevitably, some inconvenience will be caused to residents in the vicinity by the generation of noise and dust. Inconvenience, however, is not and cannot be equated with an actionable nuisance. I am of the view that the Plaintiff has not proved on a balance of probabilities that she has a cause of action in nuisance against the defendants. . .

Was the court more influenced by the fact that this was a public project? Would the burden on a plaintiff have been easier to discharge if the facts involved an activity that had little public benefit? The fact is that the law allows construction work to proceed day and night, every day of the week, subject to permissible noise limits. The plaintiff had stated unequivocally at the trial that she wanted the defendants to stop work on Sundays and public holidays even if the noise emitted during these times was within the permissible limits. It is, therefore, clear that an action in nuisance cannot be maintained so long as the noise is within the permissible limits set by the law.

Trade in Hazardous Substances

In *Public Prosecutor v. Sinsar Trading Pte Ltd.*, a company was charged with selling 114,187.50 kg of hazardous substances (glacial acetic acid) of more than 98% concentration in 525 drums without a license, in breach of section 22(1) EPCA.⁷¹ These drums were being loaded onto a ship for export to North Korea. It was not disputed that pure glacial acetic acid was a hazardous substance, nor was it disputed that the company did not possess a license under the EPCA. What was disputed was whether a "sale" had taken place, as defined

70. *Id.*

71. [2005] S.G.M.C. (Magistrates Court). *See also* *Public Prosecutor v. Sinsar Trading* [2004] S.G.H.C. 137 (High Court) (relating to sentencing, per Yong Pung How, CJ).

by the EPCA and various arguments were made regarding the wording of the EPCA as well as the Poisons Act. On the assertion that section 22(1) was only intended to regulate the importation of chemicals into Singapore which could lead to pollution of the Singapore environment, and that it could not have been the intention of Parliament to control the export of hazardous substances that were transhipped through Singapore with the goods never landing in Singapore, the magistrate disagreed. Taking a responsible, global view, Magistrate Adriel Loh said:

I accept that the Parliamentary Debates are silent on this. However, given the close and inter-related world in which we live and the impact of the actions in one country on another, I am of the view that there is a pressing and recognizable need for co-operation and comity among nations. Therefore I cannot exclude the possibility that this consideration had operated on the mind of the draftsman and that it was within the consideration of Parliament to also regulate, where possible, polluting substances being exported from Singapore.

The company was found guilty and fined S\$5,000.

Food Safety

It has also been held that the possession of food unfit for human consumption, in breach of section 40(1) of the EPHA, is an offense of strict liability. In *P.P. v. Teo Kwang Kiang*,⁷² Teo was found in possession of a basket of snow peas which were contaminated and unfit for human consumption, but had not yet been inspected. He pleaded that he would not sell them until they had been inspected by the health inspector and found fit for human consumption. The prosecution claimed that section 40(1) is a provision imposing absolute liability and *mens rea* was not required to be proved. The lower court however, disagreed, and he was acquitted. This decision was overturned on appeal by the public prosecutor. In convicting the respondent, Judge Rajendran held that while there was a presumption that *mens rea* was required for the conviction of a criminal offense, this presumption could be displaced “where the statute is concerned with an issue of social concern and public safety where it can be shown that the creation of strict liability will be effective to promote the objects of

72. [1992] 1 S.L.R. 9.

the statute by encouraging greater vigilance to prevent the commission of the prohibited act.”⁷³ Declaring that, “[t]he policy of the act is quite clearly the protection of the public: it is designed to prevent the sale of food for human consumption where the food is dangerous to human health . . . ,”⁷⁴ the learned judge took the view that “approval or otherwise by the ministry is an irrelevant consideration. The offense is committed if the respondent has in his possession any article of food intended for human consumption which is unfit for such purpose.”⁷⁵

Pollution of the Marine Environment

As the world’s busiest port in terms of shipping tonnage, and a major importer of crude oil for its refineries, pollution of the marine environment, particularly from oil and chemical spills and collisions at sea, is a serious concern for Singapore. The Straits of Malacca and the Straits of Singapore are extremely busy waterways. Despite the large traffic volume and the increase in ship fueling and bunkering operations there are few cases of marine pollution by oil or garbage thrown from ships at sea in Singapore.⁷⁶

A host of laws and regulations govern pollution from oil tankers and from ships at sea. The Prevention of Pollution of the Sea Act (PPSA) was passed in 1980,⁷⁷ with numerous subsidiary laws. It is administered by the Maritime and Port Authority. It prescribes measures to prevent pollution of Singapore waters, from both land-based sources and apparatus as well as from dumping from ships.

Through the years, an efficient emergency response plan has been instituted to deal with such incidents. The concerted actions of the NEA, Singapore’s National Water Agency (PUB), the Maritime and Port Authority (MPA) and the Singapore Civil Defence Force (SCDF) ensure that oil and other spills are dealt with quickly to limit and contain the environmental pollution that arises. The oil companies also have their emergency response plans, as has Jurong

73. *Id.* at 11.

74. *Id.* at 13.

75. *Id.* at 14.

76. A system of waste collection from ships is in place. Barges collect garbage from ships at sea daily. These are taken to incineration facilities onshore, and the ash thereafter is taken on barges to the off-shore landfill at Pulau Semakau. See Chia Joshua Yeong Jia, *Pulau Semakau*, NAT’L LIBRARY BD. SING., Oct. 12, 2007, http://infopedia.nl.sg/articles/SIP_1008_2010-03-22.html.

77. Cap. 243, 1999 Rev. Ed. Sing.

Island. Exercises are held at regular intervals.⁷⁸ The Oil Spill Response and East Asia Response Limited (OSR/ EARL) run special courses for dealing with such emergencies.⁷⁹

In *Jupiter Shipping Pte Ltd. v. Public Prosecutor*,⁸⁰ an accidental overflow occurred while a ship was receiving fuel oil from a bunker barge. The resulting oil slick covered an area of some 1,500 square meters. Although they were first offenders and had pleaded guilty, Jupiter was fined S\$10,000, which was significantly higher than the usual range of fines for the offense. They appealed, arguing that the sentence was manifestly excessive. It was common ground between the parties that the offense under section 7 was one of strict liability, in their case merely requiring proof of a discharge of oil from a ship into Singapore waters. While pleading guilty to the offense, the appellants also argued that the spillage had been caused through no fault of theirs; that the unlawful discharge had occurred because the bunker barge supplying the fuel oil had done so at a rate faster than that requested by the Hudson Bay crew, and one that the ship's tanks were unable to handle. Chief Judge Yong confirmed that the fine was "not manifestly excessive but perfectly reasonable," observing that Singapore had undertaken obligations under international law to ensure that her seas and environment be kept clean and free of pollution. "In the light of growing awareness of the damaging effects of oil pollution on a national as well as a global scale, and in order to combat this, it is imperative that the courts regard offenses of pollution with the utmost gravity. Parliament has evinced its concern for the seriousness of these offenses by making them ones of strict liability."⁸¹

Endangered Species

Singapore ratified the Convention on International Trade in Endangered Species (CITES) in 1986, and passed the Endangered

78. See, e.g., MPA, "International Chemical and Oil Pollution Conference and Exhibition (Icopce) 2005 to Focus on Opportunities and Challenges in the Oil, Chemical and Gas Industries," http://www.mpa.gov.sg/sites/global_navigation/news_center/mpa_news/mpa_news_detail.page?filename=nr050926.xml (last visited Nov. 18, 2010).

79. See Oil Spill Response, http://www.oilspillresponse.com/prepared_training.html (last visited Nov. 18, 2010) (oil spill response courses at operational, supervisory or managerial level).

80. [1993] 2 S.L.R. 69.

81. *Id.*

Species (Import and Export) Act (ESA) in 1989.⁸² It prohibits trade in endangered animals, plants and their by-products, unless with a permit from the Agri-Food and Veterinary Authority (AVA), which is the agency that implements this law. The 1986 Act was criticized for its poorly drafted penalties, particularly as they were on a “per species” basis and not on a “per specimen” basis.⁸³ The maximum fine was S\$5,000 per species, doubling to S\$10,000 for a second or subsequent offense, and/or imprisonment of up to twelve months.

In the early days, courts were lenient in their sentences. Offenders without a prior record were often given less than the maximum penalty. Thus, a businessman who attempted to smuggle some 16,000 eggs of the highly-endangered sea turtle (Appendix I of CITES) was only fined S\$2,000, after he pleaded guilty.⁸⁴ As they were all of the same species, there was only one charge and the maximum penalty was S\$5,000 for a first offender. However, a steady progression can be discerned in the attitude of the courts in viewing such offenses more severely. By the late 1990s, first-offenders were often fined the maximum of S\$5,000.⁸⁵ By 2002, courts imposed the maximum fines as well as custodial sentences on offenders, and also required them to pay for the cost of upkeep and repatriation of the animals. Thus, a man who smuggled 1,000 star tortoises was fined the maximum of S\$5,000, jailed for eight weeks, plus was ordered to pay S\$10,820 for the cost of upkeep and repatriation of the tortoises.⁸⁶

In *Public Prosecutor v. Kuah Koh Choon*,⁸⁷ Chief Justice Yong Pung How gave a robust interpretation to the act, convicting a young man, Kuah, of possession of two Lear’s Macaws without a permit. As Chief Judge Yong noted, these birds are native to Brazil, and are extremely

82. Cap 92A, 2000 Rev. Ed.

83. See Lye Lin Heng, *The Implementation of the Convention on International Trade in Endangered Species (CITES) in Singapore*, 21 J. Int’l Wildlife L. & Pol’y 46-63 (1999).

84. See *PPD foiled bid to smuggle 16,000 turtle eggs*, THE STRAITS TIMES, Jan. 17, 1996. The turtles were estimated to have a value of S\$6,400 based on the price offered by restaurant owners for fresh turtle eggs. They were partially cooked and none could be saved.

85. In 1997, some 500 star tortoises (protected under Appendix II, CITES) were seized from a small supermarket. The company and its manager were each fined S\$5,000 the maximum under the Act for first offenders. *Endangered tortoises seized from mini-mart*, THE STRAITS TIMES, June 5, 1997.

86. See *Jail and fine for smuggling 1,000 tortoises*, THE STRAITS TIMES, Aug. 3, 2002. See also the writer’s letter to the press commenting on this case, *Tighten law on endangered species*, THE STRAITS TIMES, Aug. 10, 2002.

87. [2001] 1 S.L.R. 292.

rare. With a population of only 130 in the wild, they are on the brink of extinction. The birds were found in Kuah's premises.

Kuah's defense was that the birds were bought before the act came into force, and they could not therefore have been imported in contravention of the act. The prosecution adduced expert evidence to establish that the birds were younger than eight years of age in 1998, when they were examined. The trial judge held that the evidence of the expert witness was unreliable, as his method of determining the age of the birds was unproven. Kuah was thus acquitted. Despite his acquittal, the trial judge exercised his discretion to forfeit the two birds. The prosecution appealed against the acquittal and Kuah appealed against the forfeiture of the birds.

The High Court allowed the appeal against acquittal and dismissed the appeal against forfeiture. The accused was sentenced to the maximum one year's imprisonment and the maximum fine of S\$10,000 for possession of two Lear's Macaws without a permit. Chief Judge Yong held that the prosecution need only prove three elements for a charge to be made out under the act: (1) possession, (2) of a scheduled species, (3) which must have been imported in contravention of the act. There is no requirement for the prosecution to establish when the birds were imported. Chief Judge Yong pointed out that:

The prosecution committed a grave error by conceding at the trial below that it had the burden to prove that the Lear Macaws were imported after the act came into force. A plain reading of the relevant provisions of the act shows that for a charge under § 4(2) to be made out, there is never a requirement to show *when* the birds were imported. The trial judge was clearly misled by this concession of the prosecution, which led to his misinterpretation of the law.⁸⁸

Chief Judge Yong also emphasized that the charge pertained to possession and not import.

"As long as possession of a scheduled species, on a date after the act came into effect, is proved, the offense is made out if there has been no requisite import permit. The great emphasis on expert evidence to prove the age of the birds, during the lengthy trial was totally irrelevant since the charge had already been proven."

88. *Id.* at 296-297.

Next, Chief Judge Yong considered the appropriate sentence to impose on Kuah. The prosecution gave evidence of his past offenses which involved attempts to smuggle various endangered species, use of forged permits, and possession of illegally acquired wildlife. Counsel for Kuah pleaded that these offenses were committed when he was a young boy, that the forfeiture of the birds was already a penalty, and that he should not be punished any further.

Chief Justice Yong noted that the birds were extremely rare and on the brink of extinction. He also noted from Kuah's past acts, that Kuah was obviously not an amateur — he had extensive knowledge of birds, had papers published in international journals on aviculture and ornithology, and he had some 600-800 birds in his residence at the time of the discovery of the Lear's Macaws. Chief Judge Yong emphasized that:

... a deterrent sentence had to be imposed to reflect how seriously Singapore regards its obligations under CITES. Singapore has committed itself to cooperating with other countries to preserve their endangered species and Kuah's actions went against this spirit of cooperation. Therefore, I felt that youth was no excuse for Kuah's contravention of the act. He was clearly cognizant of his actions and committed crimes of a similar nature repeatedly without any semblance of repentence. ... a fine would be grossly inadequate in the circumstances. The maximum fine would hardly have any punitive effect whatsoever since one Lear's Macaw alone could be worth more than \$10,000. Therefore, to underline the seriousness of the offense, I imposed the maximum sentence of one year's imprisonment and a fine of \$10,000 with six months' imprisonment in default therefore.

The 1989 act was repealed in 2006 and replaced with a new Endangered Species (Import and Export) Act 2006.⁸⁹ This new law raises the maximum fine to S\$50,000 for each scheduled species (but not to exceed in the aggregate S\$500,000), or to imprisonment for a term not exceeding two years or to both fine and imprisonment. The new law also applies to specimens in transit. Officers from AVA have wide powers of enforcement including powers to investigate and powers of entry, search, and seizure. Infringements have declined substantially since the passing of this new act.

89. Act 5 of 2006, coming into operation on Mar. 1, 2006, amended by S 290/2006, S 103/2007, S 152/2007.

Conclusion

In conclusion, it is submitted that the paucity of cases relating to the environment is testimony to Singapore's sound environmental management system. From the few cases that have appeared before the courts, it is clear that the judiciary is aware of environmental concerns and is mindful of responsibilities even beyond our shores. In the interpretation of environmental statutes, the courts have applied the "purposive" interpretation, and emphasized that these laws provide for strict liability. Singapore's courts have, however, not yet been challenged by the environmental tensions that have plagued larger countries with considerable natural resources. There may yet be a case in the future, brought by an individual or a non-government organization, to challenge a proposed development project on grounds of damage to the environment. It remains to be seen how far the judiciary will go in implementing the principles that have since developed in this "new" field called environmental law.

SOME BRIEF OBSERVATIONS ON FIFTEEN YEARS OF ENVIRONMENTAL RIGHTS JURISPRUDENCE IN SOUTH AFRICA

Louis J. Kotzé and Anél du Plessis***

Introduction

South Africa has recently celebrated its fifteenth year of democracy. The country has achieved much during this period in terms of realizing and upholding the founding democratic values espoused in the opening sections of the *Constitution of the Republic of South Africa, 1996* (Constitution); including, among others: human dignity, the achievement of equality, the advancement of human rights and freedoms, constitutional supremacy, and the rule of law.¹ At the same time, the inclusion of an enforceable substantive environmental right in the Constitution² has sparked unprecedented development of the domestic environmental law and governance framework.

Section 24 of the Constitution entrenches a substantive environmental right, providing that:

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1. See Constitution section 1 (S.A.).

2. Constitution section 24. See discussion below.

Everyone has the right:

(a) To an environment that is not harmful to their health or well-being; and

(b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

(i) Prevent pollution and ecological degradation;

(ii) Promote conservation; and

(iii) Secure ecologically-sustainable development and use of natural resources while promoting justifiable economic and social development.

When section 24 is read with section 7(2) of the Constitution which provides that “the state must respect, protect, promote and fulfil the rights of the Bill of Rights,” it is clear that whilst everyone in South Africa must respect this right; the state incurs the additional duty to take positive action towards its fulfilment. However, the nature and scope of these duties depend on the way in which section 24 is interpreted and applied. The evolution of constitutional environmental law heavily relies on the ability of, and opportunity for the courts to concretize the (often elusive) meaning of all rights that may have a bearing on the environment. Accordingly, it is necessary for an independent and impartial judiciary to use its power to interpret, apply and “enforce” the substantive environmental right. The added benefit of the courts dealing with such a right, at least in the South African context, is that it creates a body of environmental rights jurisprudence that could guide the efforts of all authorities and others to respect, protect, promote and fulfill a right which aims to ensure protection and enjoyment of the environment and the health, well-being and quality of life for this and future generations.

Although South Africa has witnessed an array of interesting and significant environmental cases based on the common law and statutory law, this contribution focuses mainly on the role that the courts (the Constitutional Court and others) have played in the development of constitutional environmental rights jurisprudence since 1996.³ The limited scope of this contribution does not, however,

3. See for a more extensive discussion on the role of the South African judiciary in the country's environmental governance, LOUIS J. KOTZÉ & ALEXANDER R. PATERSON, *South Africa, in THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES* 557-595 (Louis J.

detract from the validity of our observations with regard to the development of environmental jurisprudence in South Africa, generally. Due to the supremacy of the Constitution and the ensuing value attached to jurisprudence that deals with constitutional rights, environmental rights jurisprudence serves as a benchmark for the way in which South African courts approach (and should approach) all environmental cases. We are of the opinion that the role of the courts in the development of environmental rights jurisprudence in South Africa could be reminiscent of the role of the courts in the development of the country's environmental jurisprudence, generally. This is supported by the Constitutional Court's view that "[w]here legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging the legislation as falling short of the constitutional standard."⁴ This provision encourages litigants and courts, where the facts and circumstances allow, to make use of environmental laws, as opposed to the constitutional environmental right, in litigating environmental cases. In addition, since most of South Africa's existing environmental laws stem from the constitutional (section 24) mother clause, broadly seen, the role of the courts in the development of environmental rights jurisprudence can be determined from rights-based jurisprudence per se, but indirectly, also from cases that involve laws that have developed subsequent to the inception of the constitutional environmental right.

In this respect, our hypothesis is that the role of the courts, generally, is four-fold: first courts "uphold" the law in practice by weighing rights and interests and then (hopefully) making reasonable, just, lawful and equitable findings; second, courts solve environmental disputes between parties by interpreting and then applying the law and in this sense they give practical effect to one of the most basic functions of law, namely, that of social control and maintaining social order;⁵ third, while executing all their functions in

Kotzé and Alexander R. Paterson eds, Kluwer Law International 2009). To the extent that overlap may occur between parts of the latter chapter and this contribution, we wish to acknowledge the valuable contribution and input of Prof. Alexander Paterson.

4. South African National Defence Union v. Minister of Defense, (2007) (5) S.A. 400 Par. 51, 52 (C.C.).

5. The social function of law can be understood in terms of Hart's explanation that: "...where there is law, there human conduct is made in some sense non-optional or obligatory." In this sense: "[T]he principal functions of the

terms of the previous two roles, courts simultaneously contribute, through analysis, interpretation and explanation, to a sounder and more useful, or refined, comprehension, and therefore, deepening of the environmental law discourse; and fourth, by doing so, the courts contribute to law-making.

In an effort to evaluate the role that the South African courts have played in the development of constitutional environmental rights jurisprudence during the past fifteen years, this contribution commences with an introductory overview of the structure and function of the courts, with specific reference to their general role in environmental governance. The discussion subsequently turns to South Africa's constitutional environmental right (section 24 of the Constitution), and to a succinct review of a selection of judgments in which the courts have engaged with this provision.⁶

The Judiciary: Foundation, Hierarchy and Access to Courts

The Constitution sets out the South African court structure and procedures for the administration of justice.⁷ It specifically prescribes that:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.⁸

Noticeably, these provisions emphasize: the independence of the courts; the separation of powers doctrine; the supremacy of the

law as a means of social control are ... to be seen in the diverse ways in which the law is used to control, to guide, and to plan life..." H.L.A. HART, *THE CONCEPT OF LAW* 40 (2d ed. Clarendon Press, Oxford, 1994).

6. Due to length limitations and the scope of this contribution, a selection of significant cases is explored. In similar vein, we do not engage in detailed analyses. The reader is however referred to additional material where applicable.

7. See Constitution chapter 8.

8. Constitution section 165.

Constitution which should guide judicial action; and the fact that both the state and citizens are subject to the judgments of the courts.

South Africa's hierarchy of courts include: the Constitutional Court; the Supreme Court of Appeal; High Courts; Magistrates' Courts; and any other court established or recognized in terms of an act of Parliament.⁹ The Constitutional Court is the highest court in all constitutional matters.¹⁰ The Supreme Court of Appeal is the highest court in all appeal matters, with the exception of constitutional matters.¹¹ High Courts can generally decide any constitutional matter except a matter that only the Constitutional Court may decide; and any other matter not assigned to another court by an act of Parliament.¹² There are currently thirteen divisions of the High Court established in South Africa. Magistrates' Courts may decide any matter determined by the Magistrates' Court Act 32 of 1944, but have no jurisdiction to hear constitutional matters.¹³ In most instances, environmental matters are decided by the Constitutional Court, the Supreme Court of Appeal and the High Courts and disputes related to environmental rights *per se*, by the Constitutional Court and High Courts.

Regrettably, neither the Constitution, nor any other act of Parliament provides for a specialized environmental court in South Africa. In 2003, an Environmental Court was established in the Western Cape Province (Hermanus) and despite a fairly successful track record,¹⁴ it was shut down in 2006 "due to the unwillingness of

9. Constitution section 166. South African law employs the law of precedent or *stare decisis*, in that "lower" courts are bound by the decisions of "higher" courts unless the decision was subject to a material error.

10. Section 167(7) of the Constitution provides that "[A] constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

11. Constitution section 168.

12. Constitution section 169.

13. There are approximately 250 Magistrates' Courts established in South Africa. The jurisdiction of the Magistrates' Courts is currently in the process of significant expansion in relation to civil matters. See MAGISTRATES' COURTS AMENDMENT BILL (January 15, 2010) available at http://www.pmg.org.za/files/bills/100212magcourtamendBill_0.pdf (accessed June 23, 2010).

14. It has been estimated that during its three year tenure (2003-2006) more than 400 cases were disposed of and eight out of ten cases resulted in a conviction. Most were abalone related but other environmental crimes were also prosecuted. F. CRAIGIE, P. SNIJMAN & M. FOURIE, *Environmental Compliance and Enforcement Institutions*, in ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN SOUTH AFRICA: LEGAL PERSPECTIVES (Alexander R. Paterson & Louis J. Kotzé eds. Juta, 2009).

the Department of Justice and Constitutional Development to continue to provide extra personnel and facilities for a specialized court that was not mandated by specific legislation.”¹⁵ Another such court was created in the Eastern Cape (Port Elizabeth) in 2007, but was also recently shut down for reasons similar to those advanced for the dismantling of the Western Cape court. Even though these two courts had a fairly high success rate, they only dealt with environmental crimes (mostly abalone poaching), and not environmental matters generally. In a sense, they therefore only functioned as specialized criminal courts which focused on environmental crimes. “General” and non-criminal environmental matters relating to, for example, environmental rights and justice, did not fall under the purview of the two environmental courts’ jurisdiction. While the contribution of these courts to the advancement of environmental enforcement and prosecution of environmental crimes should not be underestimated, their contribution to the advancement of environmental rights jurisprudence has been negligible.¹⁶

Access to justice is a cornerstone of the South African constitutional state. Access to courts and *locus standi* provisions are, therefore, constitutional imperatives and are further supported in the environmental context by statutory law provisions which aim to establish, extend and promote access to environmental justice. The Constitution provides extensive rights with respect to access to courts and *locus standi*. Section 34 states: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

15. *Id.*

16. There have recently been some indications by the Department of Water and Environmental Affairs that the reinstatement of ‘green courts’ is again in the cards. It seems that the renewed talks relating to the environmental courts have been prompted by the alarming findings on the state of environmental compliance and enforcement in South Africa in the recent DEAT NATIONAL ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT REPORT 2008/2009 available at <http://www.info.gov.za/view/DownloadFileAction?id=112932> (accessed June 24, 2010). Despite there being no concrete plans to date to actually set up these institutions, it seems that there is some commitment from government, at least at policy level, to reconsider and re-establish these institutions. In the meantime, however, adjudication of environmental matters, including environmental rights, remains primarily with the ‘ordinary’ court structure discussed above. See in this respect R. Munshi, *It’s back to Green Courts*, FINANCIAL MAIL (July 3, 2009) available at <http://secure.financialmail.co.za/09/0703/features/> (accessed June 24, 2010).

The Constitution also provides for the requisite *locus standi* for those seeking to institute proceedings in a court of law.¹⁷ In the pre-constitutional dispensation, the common law still regulated legal standing; a person who approached the court for relief had to show that he or she was personally harmed by the action that was being challenged¹⁸ or that his or her legal rights were affected.¹⁹ Public interest litigation, which is characteristic of environmental disputes and litigation, was accordingly nearly impossible during this period. The current approach is far more liberal as the Constitution provides that:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) Anyone acting in their own interest;
- (b) Anyone acting on behalf of another person who cannot act in their own name;
- (c) Anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) Anyone acting in the public interest;
- (e) And an association acting in the interest of its members.²⁰

As a result of this liberal approach to *locus standi*, an almost non-exhaustive list of persons now has the requisite standing to approach a court for relief, opening up the opportunity for public interest litigation by allowing for the first time for class actions²¹ as well as the opportunity to act on behalf of an unidentifiable class, or group of persons, with respect to the protection and enforcement of their

17. Constitution section 38.

18. See *Patz v. Greene and Co.*, 1907 T.S. 427; *Director of Education Transvaal v. McCagie*, 1918 A.D. 616; *Milani v. South African Medical and Dental Council*, (1990) (1) S.A. 899 (T), and *Laskey and Another v. Showzone CC and Others*, (2007) (2) S.A. 48 (C).

19. See *Dalrympie v. Colonial Treasurer*, 1910 T.S. 372; *Bamford v. Minister of Community Development and State Auxiliary Services* (1981) (3) S.A. 1054 (C).

20. Constitution section 38.

21. However, to date, there have been no environmental class action suits in South Africa.

environmental rights.²²

The above constitutional provisions on standing, however, only apply to instances where a right in terms of the Bill of Rights (chapter 2 of the Constitution) has allegedly been infringed. It would typically apply in a matter that involves the section 24 environmental right. However, the more restrictive common law position still applies to matters falling “outside” the Bill of Rights.²³ Mindful of the foregoing and the need for broadened *locus standi* in “non-Bill of Rights” environmental matters, the *National Environmental Management Act 107 of 1998 (NEMA)*²⁴ subsequently amended the common law position by granting the same array of persons and institutions (including those acting in the “environmental interest”) standing to approach the courts for appropriate relief with respect to any breach or threatened breach of environmental laws. Section 32 states in this respect that:

- (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources;
 - (a) In that person’s or group of person’s own interest;
 - (b) In the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
 - (c) In the interest of or on behalf of a group or class of persons whose interests are affected;
 - (d) In the public interest; and
 - (e) In the interest of protecting the environment.²⁵

These provisions mirror the constitutional provisions related to *locus standi* discussed above, but differ in a significant respect: they also allow anyone to seek judicial recourse where that person or persons act *on behalf of the environment*. It would, accordingly, be possible in terms of section 32(1)(e) to literally act on behalf of or for

22. L.A. FERIS, *Environmental Rights and Locus Standi*, in ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN SOUTH AFRICA: LEGAL PERSPECTIVES (A.R. Paterson and L.J. Kotzé eds. Juta, 2009).

23. *Id.*

24. NEMA is South Africa’s primary environmental framework law and provides generic provisions (including environmental management principles) regulating all environmental media and sectors and all public and private actions which may affect the environment.

25. Constitution section 32.

the environment; not only on behalf of oneself or other persons where their environmental interests are being affected. NEMA's *locus standi* provision, therefore, seems to follow a more eco-centric, as opposed to a strictly anthropocentric, approach to the enforcement of environmental interests.

In summary, it is evident that an array of South African courts have jurisdiction to hear environmental cases and that these courts have very little discretion to deny people legal standing in the event of environmental disputes generally, and more specifically, disputes which concern environmental rights. It merits at this point to show how the courts have thus far interpreted and applied the country's first substantive and enforceable constitutional environmental right. For this purpose, section 24 is briefly discussed, followed by an overview of a selection of cases that involved this provision.

The Environmental Right

As was indicated above, South Africa's constitutional transformation marked the birth of constitutional protection of peoples' environmental interests as set forth in section 24 of the Constitution. The literature dealing with the scope and meaning of section 24 abounds²⁶ with most authors agreeing that this provision imposes both negative and positive obligations on the state.²⁷ Even so, continuous judicial interpretation and clarification of the obligations and deeper meaning of this right are invaluable to guide environmental governance on the part of the authorities and to direct conduct in the private sphere. To date, domestic judicial guidance in this respect has been limited inasmuch as only in a few cases have the courts directly engaged with the substantive meaning of section 24(a) and (b).

26. See J. GLAZEWSKI, ENVIRONMENTAL LAW IN SOUTH AFRICA 67-68, 72-81 (2d ed. LexisNexis Butterworths, 2005); M. KIDD, ENVIRONMENTAL LAW 18-23 (Juta, 2008); I. CURRIE & J. DE WAAL, THE BILL OF RIGHTS HANDBOOK 521-530 (5th ed. Juta, 2005); L. FERIS, *The Socio-Economic Nature of Section 24(b) of the Constitution – Some thoughts on HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism (HTF)* 23 SA PUBLIEKREG / PUBLIC LAW [SAPR/PL] 194-207 (2008); L. FERIS and D. Tladi, *Environmental Rights*, in D. BRAND AND C. HEYNS, SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA 249-266 (Pretoria University Press, 2005); KOTZÉ ET AL., *supra* note 3, at 560-562, 572-579; and A.A. DU PLESSIS, FULFILMENT OF SOUTH AFRICA'S CONSTITUTIONAL ENVIRONMENTAL RIGHT IN THE LOCAL GOVERNMENT SPHERE 239-254 (Wolf Legal Publishers, 2009).

27. As was indicated above, these duties arise from an inclusive reading of sections 24 and 7(2) of the Constitution.

The entire South African environmental law and governance framework is premised on the environmental right. This right is therefore the rationale behind, justification for, and foundation and impetus of environmental governance in South Africa. Section 24(a) of the Constitution is exceptionally broad and the notions of “environment,” “health” and “well-being” as they appear in section 24(a) are each loaded with probable meaning. The statutory definition of “environment” as it appears in section 1 of the NEMA shows that the environment transcends mere ecological interests and also includes, for example, the socio-economic and cultural dimensions of the inter-relationship between people and the natural environment.²⁸ “Health” in the context of the environmental right refers to health to the extent that it can be negatively affected by external factors and causes including, for example, pollution or exposure to hazardous substances. Moreover, it is generally understood that health should be broadly viewed to include both mental and physical integrity²⁹ as well as quality of life. “Well-being” seems to refer to a person’s welfare³⁰ and is intended to cover those environmental interests which do not necessarily have health implications.³¹ “Well-being” implies that people must be protected against environmental harm which may impact on their ability to be content and at ease; it has a spiritual and psychological meaning.³² It can similarly cover the built environment,³³ the enjoyment of a sustainable livelihood,³⁴

28. See KIDD, *supra* note 26, at 20.

29. See Feris & Tladi, *supra* note 26, at 260; L. Feris *Environment in*, I. CURRIE AND J. DE WAAL THE BILL OF RIGHTS HANDBOOK 526 (5 ed. Juta, 2005); J.C. MUBANGIZI, PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA A LEGAL AND PRACTICAL GUIDE 128 (Juta, 2004); and L.J. Kotzé, *The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection*, 16 REVIEW OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW 300 (2007).

30. In this context, welfare should be understood as a contented state of being happy and prosperous.

31. A.A. Du Plessis, *Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa’s Environmental Right to Catch Alight*, 15 SOUTH AFRICAN JOURNAL OF ENVIRONMENTAL LAW AND POLICY [S.A.J.E.L.P.] 65 (2008).

32. See L. Collins, *Are We There Yet? Revisiting the Right to Environment in International and European Law*, 3 MCGILL INT’L J. SUSTAINABLE DEV. L. & POL’Y 150 (2007) (Can); J.C. MUBANGIZI, PROTECTION OF HUMAN RIGHTS IN SOUTH AFRICA A LEGAL AND PRACTICAL GUIDE 128 (Juta, 2004); J.B. COBB, POSTMODERNISM AND PUBLIC POLICY 122 (Suny Press, 2002); M. Kidd, *Suburban Aesthetics and the Environmental Right* 4 *South African Journal of Environmental Law and Policy* [SAJELP] 257, 260-262 (1997); GLAZEWSKI, *supra* note 26, at 77; Feris & Tladi, *supra* note 26, at 260.

33. See, generally, GLAZEWSKI, *supra* note 26, at 77; J. McConnachie

environmental benefit-sharing or the cultural and/or religious value that people attach to natural resources such as forests or lakes.³⁵ Knowledge or reasonable anticipation or fear of a threat to humans' environment and natural resources anywhere (environmental vulnerability) could also impact on human well-being.³⁶

Section 24(b) (i)-(iii) lists a number of positive state obligations such as the duty to prevent pollution and ecological degradation. Whilst the language is less ambiguous than in the case of section 24(a), the obligations themselves are void of any explanatory detail. For example, what does it mean for authorities in three different spheres of government to take "reasonable and legislative measures to secure ecologically sustainable development?" What would be "reasonable" in this instance and further, how should "ecological sustainable development" be understood in a country in transition known for its abundance of minerals but limited water resources and great disparities in wealth?

The meaning, scope and reach of section 24 are clearly very broad. This results in endless possibilities for "everyone" to seek judicial recourse where it is believed that any aspect, entitlement or guarantee under the environmental right has been infringed. It will be up to the courts to decide in each instance whether or not environmental interests related to health, well-being or any of the positive obligations listed in section 4(b) are at stake and merit judicial action. However, the "vastness" of section 24 also means that until the courts clarify its meaning, scope and reach, it is up to law-, policy- and decision-makers to try and make sense on their own of their obligations in terms of this provision. Unless and until the courts direct otherwise, organs of state can only undertake such activities

Environmental Conservation in South Africa – Its Application to the Built Environment 5 SOUTH AFRICAN JOURNAL OF ENVIRONMENTAL LAW AND POLICY 99, 104-109 (1998), the supporting observations of the court in *Director: Mineral Development, Gauteng Region, and Another v. Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) 715 and the minority judgment of Sachs J. in the case of *Fuel Retailers Association of Southern Africa v. Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province and Others* 2007 (10) BCLR 1059 (CC) par 116.

34. For a definition of sustainable livelihood see R. Chambers and G. Conway, *Sustainable Rural Livelihoods: Practical Concepts for the 21st Century* INSTITUTE OF DEVELOPMENT STUDIES DISCUSSION PAPER 296 (1991) 6 available at <http://www.smallstock.info/reference/IDS/dp296.pdf> (accessed 23 June 2010).

35. See Du Plessis, *supra* note 31, at 66.

36. See also Kidd, *supra* note 26, at 21.

which they believe satisfy the section 24(b) obligation to protect the environment through “reasonable and other measures...” In a similar vein, until such time as it is shown otherwise, the legislature can only pass legislation which it believes satisfies the section 24(b) obligation to “take reasonable legislative” action and which sufficiently covers the substantive protection envisioned by the environmental right.

In short, therefore, the environmental right is sufficiently comprehensive and all-encompassing to provide “everyone” in South Africa with the possibility of seeking judicial recourse in the event that any of several potential aspects related to the right or guarantee derived therefrom is infringed.³⁷ Together with broad legal standing in environmental cases, this environmental right should go a long way in encouraging aggrieved parties to approach courts in their pursuit of environmental justice. Also, as we have shown, section 24 seems to be comprised of multiple layers of potential meaning due to the comprehensive scope of notions such as health and well-being. Therefore, in line with our earlier hypothesis, it seems as if the value of environmental rights jurisprudence transcends the courts’ upholding of the law and the weighing of different rights and interests in deciding constitutional environmental matters.

Environmental rights jurisprudence can go a long way in providing the people in South Africa and especially organs of state, with a sounder, more useful and refined comprehension of the substantive meaning of section 24. It can indeed also deepen the domestic environmental law discourse and indirectly contribute to the design of environmental law and policy so that it is consistent with the values espoused in the Constitution, as well as the environmental right itself. Also, environmental rights jurisprudence is necessary to establish a more definite standard against which to judge the environmentally relevant behavior and activities of, for example, organs of state. Moreover, in as far as several national constitutions currently provide for an environmental right or directive principle of state policy, it is also possible for the South African courts’ interpretation of section 24 to guide foreign courts in the interpretation and analysis of the environmental provisions in their own domestic constitutional law. Further, the wording of section 24 is

37. The scope of possible claimants under the right is extended by the constitutional and statutory provisions on *locus standi* and access to courts that were discussed above.

largely reminiscent of the wording in article 24 of the African Charter on Human and Peoples' Rights,³⁸ which also makes it possible for rights-based decisions of the South African courts to (in bottom-up fashion) guide the African Commission or, once it is established, the African Court on Human and Peoples' Rights, in its interpretation and application of the regional environmental right. The potential role of the environmental rights jurisprudence of South Africa in comparative constitutional or human rights law, however, is beyond the scope of this contribution and is not further explored here. The following sections briefly review and comment on a selection of cases where the South African courts have reflected on the meaning and relevance of the environmental right.

The Judiciary and the Environmental Right

The benefits of having an enforceable constitutional environmental right in deciding environmental cases of different sorts is a reality which may, unfortunately, take longer than a mere fifteen years to thoroughly settle in judicial thinking. Nevertheless, in light of increased environmental stresses and impacts in South Africa,³⁹ the importance of recognizing and upholding a person's constitutional entitlement to an environment that is not detrimental to health or well-being cannot be neglected or circumvented by the legislature, the executive or the judiciary. In a number of cases that have thus far been decided by the courts, it seems as if the courts have not taken the opportunity to concretize section 24 and have "neglected" to interpret the environmental right where the facts and circumstances begged for this right to be applied in a concrete way. Examples of such cases are *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another*⁴⁰ and *Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Others*.⁴¹ However, in at least three decisions of the

38. African (Banjul) Charter on Human and Peoples' Rights (African Charter), June 27, 1981.

39. Evidenced by the government's recent publication of, inter alia, the DEAT *National Environmental Compliance and Enforcement Report 2008/2009* available at: <http://www.info.gov.za/view/DownloadFileAction?id=112932> (accessed June 24, 2010), the *Blue Drop Report on South African Drinking Water Quality Management Performance* (2010) and the *Green Drop Report on South African Water Quality Management Performance* (2009) both available via: <http://www.dwaf.gov.za> (accessed June 25, 2010).

40. 1996 (3) SA 155 (NPD). For a brief discussion of this case see KOTZÉ & PATERSON, *supra* note 3, at 572.

41. 2001 (3) SA 1151 (CC). available at <http://www.saflii.org/za/cases/>

courts since 1996, the judiciary took on the opportunity to grapple (albeit to a limited degree) with the substantive content of section 24.

In *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation and Land Affairs*⁴² (decided by the High Court) the matter concerned the application for a permit to establish a new petrol/gas filling station. Subsequent to having considered the statutorily prescribed environmental impact assessment procedure, the environmental authority turned down the application. It based its decision on various decision-making guidelines some of which were of a socio-economic as opposed to a strictly environmental nature. The applicant was of the view that the authority's mandate was limited to a consideration of environmental issues. The authority, on the other hand, relied on the constitutional environmental right and NEMA to argue that its mandate extended to cover both socio-economic *and* environmental issues. In deciding this case, the court confirmed that environmental authorities had a constitutional duty to give effect to section 24 and this duty included the "taking of reasonable legislative and other measures" – and the design and application of decision-making guidelines. The court reiterated that apart from being reasonable, these measures must also contribute to the progressive realization of the right concerned. Accordingly, the court approved of the environmental authority's decision to refuse the environmental authorization sought in this matter.

The *BP* court proceeded to analyze the importance of sustainable development in the South African legal order and confirmed that it will "...play a major role in determining important environmental disputes in future."⁴³ It was regarded by the court as the "fundamental building block" around which South African environmental legal norms have been designed. In its frequently quoted *dictum*, the court stated that:

Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its

ZACC/2001/19.html (accessed June 24, 2010). For a brief discussion of this case See KOTZÉ PATERSON, *supra* note 3, at 578.

42. *BP* case, 2004 (5) SA 124 (WLD) available at <http://www.saflii.org/za/cases/ZACC/2007/25.html> (accessed June 23, 2010).

43. *Id.* par A at 144.

environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, *inter alia*, socio-economic concerns and principles.⁴⁴

The contribution that the *BP* court has made in relation to an understanding of section 24 lies in its a) confirmation of the socio-economic factors in the relationship between people and the environment; b) view that the entire environmental right must be interpreted in the context of inter-generational environmental protection and within the context of sustainable development; c) emphasis on the fact that the positive duties that the state incurs in terms of the environmental right require an integrated approach which takes into consideration environmental concerns as well as socio-economic concerns and principles; d) recognition that constitutional environmental protection requires the balancing of different rights and interests; and e) acknowledgement that there is an undeniable link between the environmental right and sustainable development in that a rights based-approach to environmental governance elevates the status of environmental governance to a constitutional level, which should enable the achievement of sustainability.

In *HTF Developers (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*⁴⁵ (also decided by the High Court) the court dealt to some degree with the substantive content of both section 24(a) and section 24(b). The case concerned the legality of an administrative directive issued by a provincial environmental authority. The applicant had secured approval from the local government for the subdivision and development of residential units on an untransformed ridge comprising of a sensitive environment. The applicant commenced with the clearing and conducting of earthworks

44. *Id.* par B-D at 144.

45. *HTF Developers* case, 2006 5 SA 512 (T) available at: <http://www.saflii.org/za/cases/ZAGPHC/2006/132.html> (accessed June 23, 2010). For a critical analysis of the case see Feris L 'The Socio-Economic Nature of Section 24(b) of the Constitution – Some thoughts on *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* (HTF) 23 *SAPR/PL* (2008) 194-207.

on the site in preparation for the proposed development. In response to complaints received from the public, the provincial authority stepped in and issued a directive that the applicant immediately cease clearing the site and cease its construction activities on the site, and design and implement a plan for the land's rehabilitation. The authority argued that the applicant's activities on the site were illegal, since it had failed to secure the necessary provincial authorization prior to commencing its activities. The applicant challenged the legality of the directive, *inter alia*, on the basis that the activity was not covered by existing regulations. In the interpretation and application of the relevant legislation and policies, the court turned to the environmental right which it described as consisting of two parts. In relation to section 24(a), the court confirmed that it guarantees the fundamental right of everyone to an environment that is not harmful to their health or well-being. The court confirmed that the term "well-being" is open-ended and "manifestly incapable of precise definition."⁴⁶ The potential challenge of this interpretation comes to the fore in the court's subsequent remark that "[n]evertheless, it (the term well-being) is critically important in that it defines for the environmental authorities the constitutional objectives of their task."⁴⁷

The *HTF* court, however, fails to provide an original description or analysis of how the notion "well-being" should be interpreted in this case. The court is further of the view that section 24(b) imposes programmatic and positive obligations on the state to protect the environment. The court, however, wrongly interprets section 24(b) as being reminiscent of an "aspirational" constitutional directive principle as opposed to an enforceable environmental right. Nevertheless the court, in approving of the existence and content of the authority's ridges policy (which is premised on the view that the ecological and socio-cultural value of ridges in the Gauteng Province must be conserved), interprets section 24(b) as conferring upon authorities a stewardship role, whereby "the present generation is constituted as the custodian or trustee of the environment for future generations."⁴⁸

The *HTF* court, in our view, contributes to a deeper understanding of section 24 by showing that a) the content of section

46. *HTF Developers* case par 18.

47. *Id.*

48. *Id.*

24(a) cannot necessarily be separated from the positive obligations contained in section 24(b); b) constitutional environmental protection raises issues of inter-generational equality which imply a stewardship role on the part of the state; and c) the rights and interests of certain individuals may have to be limited in order to realize and protect the constitutional environmental right.

In *Fuel Retailers Association of South Africa (Pty) Ltd v. Director-General Environmental Management Mpumalanga and Others*,⁴⁹ the Constitutional Court for the first time thoroughly dealt with the environmental right. This case, similar to the *BP* case, dealt with the nature and scope of the environmental authority's obligation to consider the social, economic and environmental impact of the proposed establishment of a petrol filling station, as well as whether the environmental authority complied with that obligation. The Constitutional Court confirmed that the need to protect the environment and the need for social and economic development, as well as "their impact on decisions affecting the environment and obligations of environmental authorities in this regard, are important constitutional questions."⁵⁰ With reference to section 24 of the Constitution, the Court also confirmed that socio-economic development had to be balanced against environmental protection.⁵¹ In an attempt to balance social, environmental and economic concerns, the Court *inter alia* stated that: "[p]romotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked."⁵² The court also embarked on a lengthy analysis of relevant scholarly writing and international jurisprudence pertaining to "sustainable development," and concluded that where decision-makers are guided by the concept of sustainable development they will ensure socio-economic development that is ecologically rooted.⁵³ The court further concluded that the obligation

49. 2007 (10) BCLR 1059 (CC) (*Fuel Retailers* case) available at <http://www.saflii.org/za/cases/ZACC/2007/13.html> (accessed June 24, 2010). See for a discussion of the knowledge gaps that remain in relation to the meaning and scope of application of section 24 despite the *Fuel Retailers* case, Du Plessis, *supra* note 31, 58-84.

50. *Fuel Retailers* case par 41.

51. *Id.* at par 44-45.

52. *Id.* at par 44 at 25.

53. *Id.* at par 58 at 33 and par 79 at 45-46.

to ensure that the essence of sustainability is reflected in the governance processes of environmental authorities is primarily that of the judiciary.⁵⁴ It reiterated that the courts: “. . . have a crucial role to play in the protection of the environment. When the need arises to intervene in order to protect the environment, they should not hesitate to do so.”⁵⁵

The main contribution of the Constitutional Court in the *Fuel Retailers* case seems to have been its detailed analysis of “sustainable development” and the evident importance the court attributed to this ideal. Perhaps, the decision’s most important contribution, however, has been the confirmation that the judiciary plays a very important role in upholding the rule of environmental law, and that courts will not hesitate to intervene where questions of sustainability and environmental rights arise. Unfortunately, and in spite of the inspiring observations of the court, as in the case of the *BP* and *HTF* cases, it failed to give new insight into the substantive meaning and scope of the environmental right itself.

Conclusion

The superiority, impartiality, independence, and ability of the South African judiciary to uphold the Constitution and the rule of law are prerequisites for a successfully functioning constitutional state. This is even truer when considering the country’s racial discriminatory past under the apartheid regime; a regime which effectively eroded all confidence and trust in justice and the rule of law. The Constitution, the current statutory framework, the judiciary, and the executive authority, generally speaking, have done much to restore faith in the South African legal process during the past fifteen years of democracy. While environmental law is still in its infancy when compared to other legal disciplines in South Africa, it can reasonably be expected that the courts will, apart from their work in other areas of law, increasingly uphold, develop and further enrich the environmental law discourse (including rights-based jurisprudence) by means of its adjudicative responsibilities. It is similarly hoped that as part of the ongoing process of learning and development, the Department of Justice and Constitutional Development will actively

54. *Id.* at par 102 at 56-57.

55. *Id.* at par 104 at 58.

pursue endeavours to reinstate specialized environmental courts and continue to “green the judiciary” by investing in environmental training, for example.

We have argued that environmental rights jurisprudence is important for an improved understanding and subsequent strengthening of the environmental protection afforded by section 24 of the Constitution. We have also argued that the courts’ interpretation and application of section 24 may, by virtue of the status of the Constitution, be of significant theoretical value for the subsequent design, amendment, implementation and interpretation of South African environmental law, generally. We have also shown that the elusive wording of section 24(a) and the ambiguity of the positive duties listed in section 24(b) still leave room for speculation about the scope of protection afforded by the environmental right. In this regard, the possibilities and options are legion; the courts have a clean slate since no court has yet attempted to expound on the meaning of a significant part of the environmental right. The review of the *BP, HTF Developers* and *Fuel Retailers* cases showed that in most cases the courts, to date, only have confirmed the generally accepted meaning of section 24(a) and (b). In relation to the limited number of cases that thus far have attempted to engage in the illumination of the deeper meaning of section 24, we agree with and uphold the concerns that were raised by authors such as Feris, before.⁵⁶

It is therefore concluded that the role that the courts have played in the development of constitutional environmental rights jurisprudence since 1996 has been minimal. However, given the impact that environmental rights-based decisions could have, the potential role that the courts could play in the future, is significant. This is not to say that South Africa necessarily needs a large number of environmental rights cases; it is not an issue of quantity. A single flagship decision on the meaning and scope of section 24 could have a momentous impact on the quality of subsequent environmental decisions.

Having said this, we also acknowledge that the potential impact and role of the courts with respect to the development of

56. See, for example, L. Feris, ‘Constitutional Environmental Rights: An Underutilised Resource’ Unpublished Paper presented at the 5th Annual IUCN Academy of Environmental Law Colloquium, Parati, Brazil, June 2007 at 2 (source on file with authors); KOTZÉ & PATERSON, *supra* note 3, at 579.

environmental rights jurisprudence does not solely lie in the hands of the courts. To be able to play a more dynamic role, the courts depend on the institution of cases by claimants that would allow the application and interpretation of section 24. The courts, in other words, rely on people making use of their environmental right and *locus standi* to protect different environmental interests in different types of contexts. The courts also rely on properly formulated, correct and comprehensive arguments in environmental cases that invite the constitutional environmental right to the litigation arena. Courts cannot invent facts or speak on behalf of any of the parties; they can only pronounce on what is before them. Seen this way, the role of the courts in developing environmental rights jurisprudence depends to a great extent on the contribution and involvement of many other parties and factors. For the courts, therefore, to be able to play an increasingly active role in the development of environmental rights jurisprudence, it may be further necessary to look beyond the obvious. It seems necessary to take several steps back and ask, for example, what is the role of environmental education and rights awareness, an environmentally pro-active society with the necessary *locus standi*, the quality of environmental lawyers that appear in environmental cases and the contribution of institutions in charge of training, capacitating and sensitizing South Africa's judiciary and other sectors of the legal fraternity with respect to environmental issues. Despite these myriad challenges and remaining questions, we are nevertheless excitedly anticipating the manner in which environmental rights jurisprudence and for that matter, environmental jurisprudence, generally, is going to unfold before this country's courts in the next fifteen years.

EXPERIENCES OF SWEDEN'S ENVIRONMENTAL COURTS

*Ulf Bjällås**

The Environmental Code

Swedish law is to a large extent codified. Sweden has four fundamental acts,¹ which together make up the Constitution. One of them is the Instrument of Government which determines how regulations of various kinds are enacted.²

The Instrument of Government includes a general provision about environmental matters stating that public institutions shall promote sustainable development leading to a good environment for present and future generations.³ The same article protects the right to health.⁴

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1. Successionsordningen [SO] [Constitution] (Swed.); Tryckfrihetsförordningen [TF] [Constitution] (Swed.); Yttrandefrihetsgrundlagen [YGL] [Constitution] (Swed.).

2. Regeringsformen [RF] [Constitution] (Swed.).

3. Chapter 1, Article 2.

4. Regeringsformen [RF] [Constitution] 1:2 (Swed.).

The Environmental Code (Code) which came into force in 1999, is Sweden's most important piece of environmental legislation.⁵ The overall purpose of the Code is to promote sustainable development that will assure a healthy and sound environment for present and future generations.

The Code applies in principle to all human activities that may harm the environment or human health. The Code is comprehensive legislation giving environmental courts both civil and administrative jurisdiction and a range of enforcement powers.

The Code is a framework law containing rules from sixteen previous Acts. For example, there are rules on land and water management,⁶ nature conservation,⁷ protection of plant and animal species,⁸ and control of environmentally hazardous products and waste.⁹ The Code covers nature conservation, activities harmful to the environment, and protection of health and water resources.¹⁰ The Code includes special chapters concerning chemicals (how to use them) and waste (how to take care of and get rid of it). In addition, there are provisions about emissions (e.g., use best available techniques (BAT), but do not exceed a reasonable cost) and about energy use (do not use more than is necessary). It also provides for damages.¹¹

Sweden's other laws of importance to the environment such as the Forestry Act, the Mineral Act, and the Act on Planning and Building are linked to the Code.¹² The Code includes references to these acts and covers environmental law, civil law, administrative law and criminal law as well as procedural rules for the environmental courts. The Code covers a full range of important principles, policies and goals, including:

- Sustainable development
- The polluters pay principle

5. Miljöbalk [MB] [Environmental Code] (Swed.).

6. Miljöbalk [MB] [Environmental Code] 3 (Swed.), available at <http://www.sweden.gov.se/content/1/c6/02/28/47/385ef12a.pdf>.

7. *Id.* at 7.

8. *Id.* at 8.

9. *Id.* at 9.

10. *Id.* at 10-15.

11. *Id.* at 31-32.

12. See Miljöbalk [MB] [Environmental Code] (Swed.), available at <http://www.sweden.gov.se/content/1/c6/02/28/47/385ef12a.pdf>.

- The precautionary principle
- The prevention principle
- The burden of proof
- The best available techniques
- The location of activities
- Reuse and recycling
- Cost-benefit balancing.¹³

A characteristic feature of this legislation is that it is very general. Because of its very general nature, many guidelines for implementation and enforcement are issued by public authorities. Though not legally binding, these guidelines suggest how the legislation should be applied and can be a good reference for judges when applying the general principles of the Code.

The Licensing System

Compliance with the general rules in the Environmental Code is ensured by requiring licensing of many environmentally hazardous activities.¹⁴ There are about 5,000 activities or operations for which permits are compulsory under the Code or in an ordinance. These permitted activities and operations are divided into two classes: A and B. An environmental court must issue the license and set permit conditions for the 300-400 Class A activities. A regional or a local authority is responsible for permitting Class B activities.

The licensing authority decides if the activity is permissible under the Code. When granted, the license states the conditions under which the permitted activity may be carried out.¹⁵ The licensing authority considers impacts on land, air, and water. Permits and permit conditions must benefit the aims of the Code ensuring that the requirements of its general rules are fulfilled.

The conditions specified in a permit may concern every aspect of the activity including how it is performed and what steps must be taken to protect the environment and surrounding community. Permits can cover: the purpose and scope of the operation, specific

13. See generally MINISTRY OF THE ENV'T, THE SWEDISH ENVIRONMENTAL CODE (2000), available at <http://www.sweden.gov.se/content/1/c6/02/05/49/6736cf92.pdf>. (includes mention of the principles, policies and goals).

14. Miljöbalk [MB] [Environmental Code] 9:8 (Swed.).

15. *Id.* at 24.

emissions limit values, management of chemicals, energy efficiency measures, waste management, control of traffic to and from the site and in the neighbourhood of the site, measures to prevent accidents, measures to restore the site after the cessation of activities, and financial guarantees.¹⁶

The Environmental Courts

There are five regional environmental courts which are connected to the five district courts of the civil justice system. There is one superior environmental court, the Environmental Court of Appeal. The regional courts are connected to district (civil) courts and the Environmental Court of Appeal is a division of the Court of Appeal in Stockholm. The environmental legal system also includes twenty regional boards and about 250 local environmental bodies. The decisions of the regional boards and local bodies can be appealed to the appropriate regional environmental court.

Environmental courts have legal jurisdiction over both land use and environmental areas incorporating civil and administrative but not criminal powers. The courts have power to review and rule on both the legality and the merits of decisions made by regional boards and by local authorities. Beginning in May 2011, the Environmental Courts will become Land and Environment Courts and also decide cases that arise from the application of the Act of Planning and Building,¹⁷ including review of local land use plans and building permits.

Regional Environmental Courts

The Code provides that each regional environmental court have a panel consisting of one law-trained judge, one environmental technical advisor, and two lay expert members. The judges are appointed by the Minister of Justice. The judge and the technical advisor are employed by the court and work full time as environmental judges.¹⁸ All four members of the panel are equals in its decision-making process.

16. See MINISTRY OF THE ENV'T, THE SWEDISH ENVIRONMENTAL CODE 35-36 (2000), available at <http://www.sweden.gov.se/content/1/c6/02/05/49/6736cf92.pdf>.

17. This pending bill from the Swedish government is currently before the Riksdag (the Swedish Parliament).

18. Miljöbalk [MB] [Environmental Code] 20:4 (Swed.).

The regional environmental courts hear appeals coming from regional boards¹⁹ involving issues such as: permits and conditions for hazardous activities, disposal of waste, and orders to clean up.²⁰ With regard to public health, an authority can order a company to do something, or not to do something to avoid affecting public health or the health of an individual. This decision can be appealed to a court. These courts also hear appeals concerning nature conservation and the special conditions applied to protected areas.

As a court of first instance the regional environmental court deals with:

- Permits for environmentally hazardous activities with a severe impact on the environment (A-class);²¹
- Permits for water undertakings, including buildings in water such as hydro-electricity operations and reservoir construction; and
- Claims for damages or compensation which may be made by individuals, groups, NGO's or government.²²

The Environmental Court of Appeal

The Environmental Court of Appeal hears appeals from the five regional environmental courts. The Court of Appeal is comprised of four law-trained judges. One of them can be replaced with a judge who has technical training in the substantive area at issue in the appeal, if appropriate.²³ Three law-trained judges participate in deciding applications for leave to appeal which are granted in about 20-30% of the appealed cases.

The Environmental Court of Appeal is the final instance in cases where a local or a regional board made the first decision. The Supreme Court of Sweden is the final instance if the environmental

19. *Id.* at 20:9.

20. *Id.* at 20:2, 17:1.

21. Some have proposed to the Swedish government that instead of environmental courts, regional boards should issue all kinds of permits. Sweden had water courts long before they were replaced by the environmental courts in 1999. Water courts issued permits for water undertakings, and they also ruled on compensation to land owners when their land was put under water. While it is an odd system for a court to issue permits, it was convenient that the court ruled on compensation at the same time. See Water Law (1983:291) (Swed.), available at <http://www.ielrc.org/content/e8301.pdf>.

22. *Id.*

23. *Id.* at 20:11.

court was the first instance.²⁴ Leave to appeal is given by the Supreme Court if the case is of great interest from a principle judicial point of view.

A hearing of the Environmental Court of Appeal is more like a general meeting than like an appellate court proceeding. Often the hearing takes place in a conference room and testimony is taken informally at a conference table. The court normally travels to the site in dispute. The parties and the people living close to the site are allowed to give comments to the court. They are all allowed to represent themselves without attorneys. The court can require the responsible local, regional and central authorities to give comments on the case. The court can also require independent technical institutes to comment on the case.

The hearing is conducted in a relaxed atmosphere not typical of a court proceeding. The court normally sends an agenda to everyone before the hearing. The chairing judge normally starts by going through the agenda. Then it is up to the chairing judge to see that everyone sticks to the agenda. Like all of Sweden's judges, judges of the Environmental Court of Appeal do not wear robes or wigs. The participants do not have to stand when they address the court.

Benefits of the Swedish Environmental Court System

As a result of many years experience in Sweden's environmental protection efforts, I have concluded that the Environmental Courts have high credibility and are fully accepted both by The Federation of the Swedish Industry and by NGOs focusing on environmental protection. The decision to move appeals concerning the Act on Land and Planning, away from administrative courts and to the soon to be renamed Land and Environmental Court is a testament to the Environmental Court's success.²⁵

Before Sweden adopted the environmental courts system there was a National Licensing Board for Environmental Protection which functioned like a court of justice. The chairman of the board and his deputies were legally trained judges coming from an Appellate Court. In addition there were five water courts. All six of these entities were replaced by the environmental court system established by the Code.

24. *Id.* at 20:1.

25. Plan-och bygglag (Svensk författningssamling [SFS] 1987:10) (Swed.).

The licensing board's most important task was taken over by the environmental courts, namely to balance different interests against each other: for instance, weighing the harm to individuals against the economic benefits of the enterprise causing the harm and trying to find the balance point. This is a very important — and difficult — task for a judge in an environmental dispute. The court's decisions often have impacts far beyond those of the parties directly involved. Technical expertise and trained judges make it easier to find the correct balance point.

The following points help to explain the credibility of Sweden's Environmental Court System:

- The Code allows the court to adopt an integrated and holistic approach when ruling on a case.²⁶

By placing the permit system for polluting activities in the regional courts in the first instance, we have created a "one stop shop," thereby avoiding two-step administrative — followed by judicial — proceedings. The Code's procedural rules are specially adapted to the management of environmental cases.²⁷

- There are no filing fees.

The Code also includes special rules covering costs.²⁸ Both first and second instance environmental courts include technical experts. This is very important as the court has the power to rule both on the legality of a decision and on the merits. Technical judges working together with legal judges give the court and the public confidence in the court's decisions.

- The courts have more power than do ordinary civil courts to prioritize very urgent cases.

26. *Id.*

27. *Id.*

28. The loser normally does not pay the winner's costs. A litigant who appeals the conditions in a permit saying that they are too lenient, and loses, doesn't have to pay the company's costs. But a litigant who sues the company for compensation has to pay, if he loses the case. Normally, when a case starts in an authority the loser doesn't have to pay the cost for the winner. This is an old tradition carried over from the water courts where, continuing today, the water company must pay both sides' procedural costs in cases where an individual objects to water undertakings. *See* Miljöbalk [MB] [Environmental Code] 25:2 (Swed.).

When an urgent case impacting the environment is submitted to the Environmental Court of Appeal a hearing date is usually set within six to eight months and is usually made within two months.

I have travelled all over Sweden for many years, chairing hearings and listening to appealing enterprises, to central, regional and local bodies, to NGOs and to people living close to sites in dispute. My general opinion is that an open and user-friendly hearing is one example of good environmental governance that gives access to justice. People in general are grateful that the court has come to the site to look and listen. They are grateful that they have been allowed to address the judges and argue for what they think is right. "Thank you for coming and listening to us," I have heard many times during the years.

I am sometimes asked, "What is the difference between judging an environmental case and judging a criminal case?" I usually say that the criminal judge looks backward trying to find out what has been proved about what happened, while the environmental judge looks forward asking what will happen in the future as a result of my decision.

THE UNITED STATES' ENVIRONMENTAL ADJUDICATION TRIBUNAL

Anna L. Wolgast, Kathie A. Stein** and
Timothy R. Epp****

The Environmental Appeals Board (Board or EAB) serves as the United States Environmental Protection Agency's (EPA) final adjudicator of administrative cases arising under the laws that EPA administers. The EAB is the only U.S. federal adjudicatory tribunal devoted exclusively to appellate review of pollution control cases, including appellate review of both administrative penalties imposed by an administrative law judge and permits issued by EPA's regional program offices. The EAB has also often been invited to share its expertise with developing nations and nations in transition seeking to strengthen environmental protection through judicial training or creation of a specialized environmental tribunal or court.

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This international assistance has grown out of the EAB's expertise in domestic environmental penalty and permitting cases, with priorities and initiatives established by other U.S. government organizations principally responsible for international relations and assistance.

Why the EAB was Created

EPA Administrator William K. Reilly created the Board in 1992 for pragmatic reasons and to give greater credence to, and inspire confidence in, the final adjudicatory decisions of the EPA.¹ Before the Board's creation, Congress amended the Clean Water Act and the Clean Air Act to expand the agency's authority to seek civil penalties in the administrative forum. In addition, the agency was receiving a greater number of challenges to permit decisions. Together, these changes presaged an expanded docket of administrative appeals, which in turn put greater burdens on the EPA administrator. At that time, Administrator Reilly was deciding to permit appeals with the aid of recommendations from the chief judicial officer. However, the expanded civil penalty authority required more resources to be devoted to penalty appeals, which were handled solely by the chief judicial officer. Creation of the Board, in part, was designed to alleviate these adjudicatory burdens.

Further, Administrator Reilly, in delegating his authority to the Board to decide appeals, also sought to strengthen EPA's administrative penalty and permitting programs. To achieve this end, the Board was formed through the appointment of three judges drawn from the highest ranks of EPA career attorneys serving in the senior executive service.

As the rulemaking establishing the Board explained, the creation of the Board as a permanent body comprised of senior career attorneys was designed to "allow for a broader range of input and perspective in administrative decisionmaking" and "lend greater authority to the agency's decisions."² To ensure neutrality, and to strengthen confidence in the independence of appellate proceedings, the administrator formally separated his enforcement authority from

1. William K. Reilly served as Administrator of the EPA from 1989 to 2003.

2. Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5321 (February 13, 1992).

his adjudicatory authority by delegating the latter to the Board.³ The Board was, therefore, designed as a permanent, independent body exercising the full authority of the administrator in deciding administrative appeals under the environmental statutes.

EAB's Jurisdiction and Rules Governing Procedure

The Board's nationwide jurisdiction includes appeals arising under all of the major pollution control laws, such as the Clean Air Act,⁴ Clean Water Act,⁵ Safe Drinking Water Act,⁶ Solid Waste Disposal Act (also referred to as the Resource Conservation and Recovery Act or RCRA),⁷ Toxic Substances Control Act,⁸ the Federal Insecticide, Fungicide, and Rodenticide Act,⁹ and the Comprehensive Environmental Response, Compensation, and Liability Act (also referred to as Superfund).¹⁰ While the Board hears a wide array of appeals arising under these statutes, the Board's docket is principally comprised of two types of cases: 1) appeals from initial decisions¹¹ in administrative civil penalty enforcement cases; and 2) petitions to review permit decisions made by EPA program offices or by a delegated state authority setting emission limitations for industrial sources regulated by the federal environmental statutes. In addition, the Board hears petitions from private parties to recover costs they incurred in cleaning up sites under the Superfund law¹² as well as some other categories of cases.

The Board is an administrative tribunal within the executive branch of the U.S. government and, therefore, is governed by the Administrative Procedure Act (APA),¹³ and the procedural requirements specified in the specific statutes EPA administers. The APA

3. *Id.* at 5322.

4. 42 U.S.C. §§ 7401-7671q (2006).

5. 33 U.S.C. §§ 1251-1387 (2006).

6. 42 U.S.C. §§ 300f - 300j26 (2006).

7. 42 U.S.C. §§ 6901-6992k (2006).

8. 15 U.S.C. §§ 2601-2962 (2006).

9. 7 U.S.C. §§ 136-136y (2006).

10. 42 U.S.C. §§ 9601-9675 (2006).

11. An initial decision is issued by a presiding officer in an enforcement proceeding, the outcome of which determines liability and may assess an appropriate administrative civil penalty. The decision becomes final only after no appeal to the Board is filed, or after the Board has declined to review the decision on its own initiative, or *sua sponte*.

12. 42 U.S.C. § 9606(b)(2).

13. 5 U.S.C. §§ 500-596 (2006).

divides adjudication into two distinct types: formal and informal adjudication. Formal adjudication involves a trial-like hearing before a decision-maker not previously involved in the matter, with witness testimony, opportunity for cross-examination, a written record (including a transcript of the hearing), and a final written decision based only on the record established through the formal process. The APA requires federal agencies to use formal adjudication when Congress specifies in the statute (i.e., Clean Air Act or Clean Water Act) that the particular decision is to be made “on the record after an opportunity for an agency hearing.”¹⁴ The APA does not spell out specific procedural rules applicable to informal adjudication.

EPA has elaborated on the APA’s requirements by adopting two sets of procedural rules that apply to adjudications for which the EAB’s appellate review serves as the agency’s final decision. EPA has adopted formal trial-like procedures at 40 C.F.R. Part 22, which govern the assessment of administrative civil penalties for violation of environmental protection statutes.

The EPA Part 22 regulations establish consolidated rules for adjudicatory hearings in administrative enforcement actions.¹⁵ Under these administrative practice regulations, a case is commenced when EPA’s enforcement office files a complaint, which must state with specificity the factual basis of the complaint, the environmental law or regulation violated, any request for corrective action, and any proposed civil penalty.¹⁶ Any response to the complaint must be filed within thirty days, must admit or deny the allegations in the complaint, and state any defense to the action.¹⁷ The presiding officer then issues an order directing the parties to file a “pre-hearing exchange” of information. Specifically, the order directs both parties to file a statement that includes the names of any witnesses that the party intends to call, a brief narrative of their expected testimony, and any documents that the party expects to enter into evidence at the evidentiary hearing. In addition, the EPA enforcement office must file a statement explaining how any proposed penalty was calculated, and the private individual, or company, responding to the complaint has an opportunity to explain why that calculation is in error, or

14. 5 U.S.C. § 554(a).

15. 40 C.F.R. §§ 22.01-22.45 (2008).

16. *Id.* §§ 22.13-.14.

17. *Id.* § 22.15.

otherwise should be reduced or eliminated.¹⁸ In addition, persons other than the complainant and respondent may move to intervene in the proceeding. To do so, the interested party must show that a final order in the case may impair his or her interest and that this interest is not adequately represented by the existing parties to the action.¹⁹ Prior to the hearing in a case, the presiding officer may direct the parties to appear at a conference to discuss the potential for settling the case.²⁰ If the case is not settled, the case proceeds to hearing where the presiding officer hears testimony under oath, and admits relevant documents into evidence. This testimony and documentary evidence become the record of the proceeding. This record serves as the basis of the presiding officer's initial decision.²¹

Once a presiding officer has issued an initial decision under Part 22, any party may appeal that decision to the Board within thirty days following service of the decision. The appeal must describe the alleged factual and legal errors in the initial decision, and a written response to the appeal must be filed within thirty days of service of the appeal.²² Parties have a right to file a cross appeal within twenty days.²³ In the event neither party appeals, the Board may review the initial decision on its own initiative or *sua sponte*.²⁴

In reviewing a presiding officer's decision under the Part 22 rules, the Board generally analyzes the judge's factual findings, conclusions of law and any allegation of procedural error. This review is conducted *de novo*. Allegations of legal error are scrutinized to ensure that the legal conclusions are consistent with the underlying environmental statute, its implementing regulations, and applicable EPA guidance. The presiding officer's factual findings are also reviewed by the Board *de novo*; however, the Board has long held that it will give deference to the presiding officer's factual findings based on witness testimony, since that judge heard the witnesses' testimony at trial, and therefore is in the best position to make determinations of witness credibility.²⁵ In reviewing an initial decision, the Board may

18. *Id.* § 22.19.

19. *Id.* § 22.11.

20. *Id.*

21. *Id.* §§ 22.21-.26.

22. *Id.* § 22.30.

23. *Id.* § 22.30(a)(2).

24. *Id.* § 22.30(b).

25. *In re* Chippewa Hazardous Waste Remediation & Energy, Inc., 12 E.A.D. 346, 356 (EAB 2005); *In re* Friedman, 11 E.A.D. 302, 314 n.15 (EAB 2004) (quoting

adopt, modify or set aside the factual findings or legal conclusions of the presiding officer, and may assess a penalty that is higher, or lower, than that assessed in the initial decision. Further, the Board may adopt, modify, or set aside any corrective action order included in the initial decision.²⁶

EPA has adopted less formal procedures at 40 C.F.R. Part 124 that govern the agency's decisions to issue, modify, or revoke permits under the environmental protection statutes administered by the EPA. Under these rules, the Board reviews permit decisions made by the EPA²⁷ that arise under RCRA, the Underground Injection Control Program of the Safe Drinking Water Act, the Clean Air Act's Prevention of Significant Deterioration (PSD) Program (which regulates permits for emissions from new sources or significant modifications to existing sources), the Clean Air Act's outer continental shelf program (governing both major and minor sources of air pollution from certain exploratory activities located on the outer continental shelf of the United States), and the Clean Water Act's point source permitting program in states where such permitting is administered by EPA.²⁸

Cases under Part 124 requesting Board review of EPA or delegated state permit decisions may be brought within thirty days following notice of the issuance of a permit. Review may be requested by any person who filed comments on the draft permit or participated in the public hearing on the draft permit, including the regulated entity seeking the permit.²⁹ The term "person" is defined broadly and includes individuals, associations, partnerships, corporations, municipalities, and state, federal or tribal agencies.³⁰ In filing a petition to review a permit condition, the petitioning party must show that the permit condition at issue is based on a finding of fact or conclusion of law that is clearly erroneous, or that the condition is based on "an exercise of discretion or an important policy consideration" that the Board in its discretion should review.³¹

In re Ocean State Asbestos Removal, Inc., 7 E.A.D. 522, 530 (EAB 1998)).

26. Appeal from or review of initial decision, 40 C.F.R. § 22.30(f).

27. In certain instances the Board reviews permitting decisions made by states or other governmental entities that have received delegated authority to issue federal permits.

28. Purpose and Scope, 40 C.F.R. § 124.1 (2008).

29. *Id.* § 124.19.

30. *Id.* § 124.2.

31. *Id.* § 124.19(a)(1),(2).

Further, the Board may decide on its own initiative to review a permit decision.³²

EAB's Organization and Operations

The Board is currently comprised of four judges,³³ nine attorneys who serve as counsel to the Board, and three administrative professionals. Appeals received by the clerk of the Board are randomly assigned to a panel of three judges and one attorney. While case assignment is random, a judge will not be assigned to a matter in which he or she participated prior to joining the Board. Further, a judge will not be assigned to a case that involves a particular matter in which the judge (or his or her spouse) has a financial interest "if the particular matter will have a direct and predictable effect on that interest."³⁴ The procedural rules establishing the Board contain additional limitations.³⁵ In addition, other requirements also ensure the integrity and fairness of the Board's review process. By regulation, presiding officers and Board judges are prohibited from engaging in *ex parte* communication about the merits of the proceeding with any interested person outside the agency, any agency personnel serving in a prosecutorial or investigatory role, or any representative of such a person.³⁶ The applicable rule further provides that any such *ex parte* communication shall be considered argument on the merits and distributed to the parties with an opportunity for response.³⁷

Once a Board panel has been assigned, a "lead judge" is designated. At the outset of an appeal, the lead judge works with the assigned attorney to determine whether the case is properly within the scope of the Board's jurisdiction and has been timely filed, and if not, whether the case should be dismissed on jurisdictional grounds without an adjudication of the merits. For the vast majority of appeals, the case proceeds to briefing.

Following review of the petitioner's brief and the response brief, the lead judge and the attorney assigned to the case determine whether the Board's review of the case would be aided by oral

32. *Id.* § 124.19(b).

33. *See* 63 Fed. Reg. 67779 (Dec. 9, 1998).

34. 18 U.S.C. § 208(a) (2006); Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.402.

35. Staff Offices, 40 C.F.R. § 1.25(e).

36. *Ex parte* discussion of proceeding, 40 C.F.R. § 22.8.

37. *Id.*

argument. A recommendation is then made to the panel as a whole, and if the panel determines that oral argument is appropriate, an argument is scheduled to be held in the Board's courtroom in Washington, D.C. In a typical oral argument, all three judges assigned to the panel participate. The process is structured so that each party will have thirty minutes to present their argument, starting with counsel for the petitioning party, who generally argues his or her case for twenty-five minutes; followed by thirty minutes of argument from counsel for the responding party; and a short, five-minute rebuttal by the petitioning party. The panel members ask questions of counsel throughout the argument. Counsel for the petitioning and the responding parties may refer to evidence in the record, their briefs, and applicable precedent. In the event a party does not choose to appear in person, the Board offers video conferencing technology by which counsel may argue their case from a remote location. In addition, the Board's video conferencing capability allows clients of parties to witness the oral argument from a remote location. All Board oral arguments are open to the public. Following oral argument, the panel meets to discuss how the argument affected their thinking about the direction of the case.

Regardless of whether oral argument is held, the lead judge in any case is responsible for working with the attorney assigned to the matter to produce a draft opinion that is circulated to the panel members for review and comment. The lead judge and attorney then work with the panel members to produce a final decision. The panel works collaboratively, often circulating several drafts of the opinion, in order to come to a consensus decision. That decision constitutes the final action of the EPA and serves as precedent in future EPA cases. Although consensus is the Board's objective, Board members may choose to write a concurring or dissenting opinion in lieu of joining the majority opinion.

The Board's decisions are published in bound volumes, titled the *Environmental Appeals Decisions* (E.A.D.). In addition, Board decisions are published on the Board's internet website.³⁸ Parties or interested citizens can access Board decisions, as well as briefs and pleadings that have been filed with the Board, in any pending case.³⁹ The

38. EPA.gov, EAB Decisions, http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Board+Decisions?OpenPage (last visited Nov. 6, 2010).

39. Special disclosure rules apply to documents that parties claim are

Board's website represents a model of government transparency since every document that the Board considers in making its decision on a particular case is made available for the public to view and copy via the internet. The Board also allows electronic filing of appeals and appellate briefs, which in some cases eliminates the need for mailing paper copies to the Board.

The Board's decisions are considered to be the final action of EPA. Once the Board has issued its final decision, there is no appeal to the administrator, nor is there any provision for the administrator to undertake review on his own initiative (i.e., *sua sponte*).⁴⁰ The Board may choose to refer a matter to the administrator, but the preamble to the regulations delegating the administrator's authority to the Board makes clear that this will be done "only in exceptional circumstances,"⁴¹ and the Board has not yet encountered a case where use of this authority was appropriate. As detailed more fully below, the Board's decisions may be appealed to a United States federal court, either to district court or to the appropriate court of appeals, depending on the terms of the environmental statute at issue.

Review of EAB Decisions in the Federal Courts

During its nearly twenty years of existence, the Board has developed a substantial body of environmental administrative decisional law that carries precedential weight. Under the Administrative Procedure Act, a federal court will only review the Board's decision to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁴² Further, "[t]o the extent that the EAB's decision reflects a gloss on its interpretation of the governing EPA regulations, a reviewing court must also afford those policy judgments substantial deference, deferring to them unless they are arbitrary, capricious, or otherwise 'plainly'

"confidential business information." See ENVTL. APPEALS BD., ENVTL. PROT. AGENCY, PRACTICE MANUAL 31-32 (2010), available at [http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/48c5111c16c4125a852577920044ffc5/\\$FILE/PracticeManual%202010.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/48c5111c16c4125a852577920044ffc5/$FILE/PracticeManual%202010.pdf).

40. The one limited exception is in cases involving other federal agencies where the head of such agency can request to confer with the Administrator following an EAB decision. Final Order, 40 C.F.R. § 22.31(e).

41. Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. at 5321.

42. 5 U.S.C. § 706(2)(A); *Catalina Yachts, Inc. v. EPA*, 112 F. Supp. 965, 966 (C.D. Cal. 2000).

impermissible.”⁴³

The EAB’s decisions have usually been dispositive of the matters at issue. Although non-EPA litigants generally have a statutory right of appeal from the EAB’s decisions to the federal courts, they infrequently elect to appeal. Moreover, in cases where a federal court has resolved an appeal from an EAB decision, it has generally upheld the EAB. Specifically, approximately ten percent of the Board’s decisions have been appealed to a federal court, and only about two percent of the Board’s decisions have been reversed by a federal court in whole or in part. Thus, for the vast majority of cases, the Board’s decision has served as the final resolution of the case at issue.

The EAB has been adjudicating cases for almost twenty years. In that time, the Board’s track record indicates that a properly constructed administrative appeals tribunal can effectively serve as a body capable of resolving a significant number of complex environmental matters that otherwise would proceed to lengthier and far costlier litigation in federal court.

EAB’s International Assistance

The EAB’s creation in March 1992 preceded what has, in recent years, become a world-wide “amazing growth in environmental courts and tribunals.”⁴⁴ This growth has its roots in the United Nations’ Conference on Environment and Development held in June 1992, just a few months after the EAB was created.

At the United Nations’ Conference, known as the first Earth Summit, the 178 participating countries adopted the Rio Declaration on Environment and Development.⁴⁵ Ten years after the Rio

43. *Howmet Corp. v. EPA*, No. 09-5360, Slip op. (D.C. Cir. Aug. 6, 2010); *Pepperell Assoc. v. EPA*, 246 F.3d 15, 22 (1st Cir. 2001); *see also* *Howmet Corp. v. EPA*, Civ. Action No. 07-1306 (EGS) at 4 (D.D.C. Sept. 23, 2009) (Memorandum Opinion) (referring to “the EAB’s persuasive and comprehensive analysis”).

44. GEORGE PRING & CATHERINE PRING, *GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009)*, available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

45. Principle 10 of the Rio Declaration affirms the importance of the public’s “opportunity to participate in decision-making processes” and the need for “[e]ffective access to judicial and administrative proceedings, including redress and remedy.” Conference on Environment and Development, June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev. 1 (June 13, 1992), (reprinted in 31 I.L.M. 874).

Declaration, at the World Summit on Sustainable Development⁴⁶ in Johannesburg, South Africa in 2002, judges from around the world presented the Johannesburg Principles on the Role of Law and Sustainable Development,⁴⁷ which had just been adopted at the Global Judges Symposium on the Role of Law and Sustainable Development. The judges symposium began by affirming the Rio Declaration and went on to “affirm that an independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting” good governance.⁴⁸ The Global Judges Symposium and the Johannesburg Principles catalyzed the international effort to enhance judicial capacity to adjudicate environmental cases. By 2010, over 350 environmental courts or tribunals had been created in forty-one countries.⁴⁹

Because of its nearly twenty years of experience in adjudicating environmental cases, the EAB has often been viewed as a repository of knowledge and expertise on the challenges facing environmental courts and has been invited to participate in international seminars and conferences to share the Board’s insights. The EAB’s participation in these events is often paid for and supported by funds provided by the U.S. State Department and U.S. Agency for International Development (USAID).⁵⁰ The EAB’s international work supports the EPA’s international priorities, which specifically include working with other countries “to develop and support the promotion of good governance, improve judicial and legal structures and design the regulatory systems necessary for effective environmental protection around the world.”⁵¹

46. The summit was held in Johannesburg, South Africa on August 26 - September 4, 2002.

47. The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium held in Johannesburg, South Africa, on August 18-20, 2002, reprinted in *JOURNAL OF ENVIRONMENTAL LAW* 15(1) at 107-110 (2003).

48. *Id.*

49. PRING & PRING, *supra* note 44, at xiii.

50. See, e.g., STATE DEPT. & U.S. AID, FY 2007 JOINT PERFORMANCE SUMMARY at 150-51, 158 (2007) (identifying EPA as a partner in advancing its “Integrating Environmental Protection and Trade” initiative under the Economic Prosperity and Security Performance Goal).

51. Press Release, U.S. EPA, “Administrator Jackson Announces EPA’s

In the early years, the EAB largely participated in various international conferences and workshops. For example, in 2003 through 2005, the EAB participated in a number of meetings organized by the United Nations' Environment Programme specifically focused on the judicial role in environmental protection. In 2006, the EAB also partnered with the U.S. Department of Justice and the Judicial Academy of Chile to deliver a judicial workshop to judges in Chile. The EAB also participated in the first and second Asian Judges Forums in 2006 and 2007, organized by the Asian Environmental Compliance and Enforcement Network (AECEN) with funding provided by USAID and Asia Regional Development Mission.

As the number of requests kept increasing, and as the EAB observed repeated interest in particular topics, the EAB undertook to draft an off-the-shelf, exercise-based workshop for judges new to environmental litigation. The EAB completed its first draft of this project in 2008. The EAB sent its materials out for peer review by academics and judges world-wide. After completing the peer review process, the EAB has successfully used all or portions of its materials in partnerships with a number of judicial training schools. In 2008, the EAB partnered with the Philippine Judicial Academy to train approximately thirty newly-appointed environmental bench judges. In 2009, the EAB partnered with the U.S. Department of Justice (DOJ), the Central America Commission on Environment and Development (CCAD), El Salvador's Supreme Court, and El Salvador's Judicial Training Institute to train thirty-seven El Salvadoran judges. Also in 2009, the EAB worked with DOJ, CCAD, and Costa Rica's Judicial Training Institute to deliver an information exchange for thirty-eight Costa Rican judges and agency representatives. In October 2009, the EAB delivered a judicial training in partnership with the ABA Rule of Law Initiative and the Environmental and Resources Law Institute (ERLI) of Zhongnan University of Finance and Political Science in Wuhan City, China. In December 2009, the EAB partnered with Jordan's Ministry of the Environment, the Judicial Institute of Jordan, and Jordan's Ministry of the Environment to work with approximately thirty-five judges, prosecutors, and investigators. In

International Priorities/Agency to work with other countries to curb pollution at home and abroad" (Aug. 17, 2010).

2010, working with the Guatemala Judicial School, the EAB again partnered with the DOJ to deliver training to thirty-five Guatemalan judges, prosecutors, representatives of NGOs, and judicial training instructors.⁵²

The EAB course is premised on the shared characteristics of global environmental problems. These common characteristics include: 1) potential impacts on large numbers of people; 2) a potentially significant time and space separation between cause and effect; 3) small or seemingly insignificant actions having catastrophic impacts; 4) the significant cumulative impact of many smaller acts; 5) the harm to a resource that is inherently owned collectively (e.g., air, rivers, lakes); and 6) pollutants transported by multiple media (e.g., pollutants released to the air may have the greatest impact when deposited in surface water, or pollutants deposited on soil may leach into surface or groundwater, etc.). These shared environmental problems have resulted in substantive and procedural law changes in many countries.⁵³

The EAB's materials are designed to provide tools for adjudicating specific issues that commonly arise in environmental cases. The topics included common features of environmental statutes, such as permitting systems, health-based standards, product standards, ambient standards, and environmental impact assessment. The materials also cover party standing, preliminary remedies to stop the harm as soon as possible, techniques for dealing with the complexity of scientific and technical evidence, as well as case management methods for cases involving multiple parties or other complexities. In addition, the course materials address factors to

52. The EAB continues to participate in conferences, workshops and information exchanges. For example, in 2008, the EAB participated in the first meeting of the heads of judicial educational institutions in Central America and the Caribbean. The EAB also has participated in a number of round-table discussions and seminars in China organized by Vermont Law School and various Chinese institutions, including the China University of Political Science and Law in Beijing and Sun-Yat Sen Law School in Guangzhou. The EAB also led sessions and presented papers at the July 2010 Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice, which was organized by the Asian Development Bank, and participated in a workshop planned by the USAID-supported Asian Environmental Compliance and Enforcement Network to improve court policies and practices on the environment in Thailand in September 2010.

53. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (U. Chi. Press 2004); Robert Percival, "The Globalization of Environmental Law," 26 *PACE ENVTL. L. REV.* 451 (2009).

consider in drafting remedial orders, including continuing jurisdiction to oversee cleanup orders, and orders for natural resource damage assessments. The materials also include factors a court may wish to consider in arriving at an appropriate penalty assessment, including the important need to recapture economic advantage obtained through non-compliance with environmental laws. While the course is not drafted to be specific to any particular domestic law — as the EAB and its DOJ colleagues have delivered the workshop in specific countries — local legal experts have been engaged to identify specific local laws applicable to each topic.

In preparing its materials, the EAB joined EPA's general move away from lecture-only formats to interactive exercises as a means to enliven discussion and reinforce the concepts.⁵⁴ Because adults learn best when they are able to relate new information to their already existing body of knowledge, the EAB workshop is designed to be highly interactive, allowing many opportunities for discussion and application of concepts through small group exercises. These activities, although time-consuming, are critical opportunities for the seminar participants to struggle with the ideas and clarify with each other how the ideas might apply under the local law and context and, in this way, the participants become teachers to each other as they lead each other to a shared understanding. Because environmental problems are constantly evolving as scientific, technological, and economic activities change, judges must learn to be problem-solvers in applying law in new and ever-changing contexts in order to achieve just adjudication in specific cases. The exercises are designed to encourage the participant judges to explore a problem-solving approach to their decisions. Judges do not make law, but instead must apply existing law consistently in the cases that come before the courts in a way that takes into account the facts and circumstances of the particular case. In the environmental context, the court's decision, to be fair, just, and proportionate, must take into account the

54. See, e.g., ENVTL. PROT. AGENCY, PRINCIPLES OF ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT TRAINING (2002); ENVTL PROT. AGENCY, PRINCIPLES OF EFFECTIVE ENVIRONMENTAL LAWS AND ENFORCEMENT (2006). The EAB also drew on the materials it helped create for UNEP. See UNEP.org, Judicial Training Modules on Environmental Law, http://www.unep.org/DEC/Information_Resources/globaljudgesprog.asp (last visited Nov. 6, 2010) (an excellent training course); DINAH SHELTON & ALEXANDRE KISS, UNEP, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW (2005), available at http://www.unep.org/law/PDF/JUDICIAL_HBOOK_ENV_LAW.pdf.

underlying environmental problem, and resolve the disputes between the parties in a manner that accounts for the societal goals of pollution prevention and sustainable development.

Conclusion

Since the 1970s, the United States has been a global leader in environmental protection. The EPA's creation of the EAB was yet another innovation in U.S. environmental legal protection and governance. The judicial training materials the EAB has created are now field-tested and a proven vehicle for improving environmental adjudication. In addition to providing a means for increasing judges' awareness of environmental problems and the law, workshops using these materials have served to identify both gaps in existing legal structures and opportunities for improving procedural and substantive rules. For example, after the EAB partnered with the Philippine Judicial Academy in a judicial training in 2008, the Philippine Supreme Court created a set of procedural rules specifically applicable to environmental cases. Those rules went into effect in the spring of 2010, dramatically altering the national framework for environmental adjudication. The EAB's training slides have now been translated into Spanish, Mandarin, Arabic, and Bhasa Indonesian. While the EAB's international work – in providing environmental law training of judges – supports EPA's international priorities, the EAB nevertheless remains primarily focused on its domestic work, hearing and deciding the U.S. EPA penalty, permitting, and other administrative appeals that has given the EAB the experience sought by other countries struggling with environmental problems.

THE VERMONT ENVIRONMENTAL COURT

*Judge Merideth Wright**

This article presents some of the experience of the state of Vermont for the past twenty years with a state-wide specialized environmental court within the judicial branch.¹ I believe it is still the only American state with such a system. In the saying “think globally, act locally,” this is the “act locally” side of the equation. I hope that the Vermont experience may be useful to other jurisdictions interested in specialized environmental courts.²

*Judge Merideth Wright is one of the two environmental judges for the State of Vermont; she was appointed to the Vermont Environmental Court at its creation in 1990. Judge Wright has also worked at the United States Environmental Protection Agency, and for many years in the environmental division of the Vermont Attorney General’s Office.

1. As of July of 2010, Vermont has adopted a unified trial court system in which all of the trial courts (civil, criminal, family, probate, and environmental) have become divisions of a single Superior Court, the trial court named in the Vermont Constitution. It is now officially called the Environmental Division of the Superior Court; however, this article will use its former name to avoid confusion. The organization and jurisdiction of the Court have not changed, and it continues to operate on a statewide basis, with two environmental judges. Vermont is a small state in the northeast of the United States. It has a land area of 24,923 sq. km., approximately the land area of FYR Macedonia, Belize, Rwanda, or Wales, and a population of approximately 622,000.

2. I may be reached for further discussion by email on these topics through IJIEA@law.pace.edu or at envj.wright@gmail.com.

The Vermont Environmental Court is a trial-level judicial branch court that was created in 1990.³ It is a court of record, with all of the authority of the general civil court within its specialized subject-matter jurisdiction. The court may issue injunctive orders and stays, and may analyze local ordinances and state statutes for constitutionality in the context of cases within the court's jurisdiction. Vermont has no intermediate-level appellate court, so that any appeals from decisions of the Vermont Environmental Court go directly to the Vermont Supreme Court. The court handles approximately 300 cases filed per year. Trials are held throughout the state, in a courtroom in the area where the case arises, so that the litigants do not have far to travel.

I was appointed⁴ to the court in 1990 and was responsible initially for developing the jurisprudence and procedures for the newly-created court, along with conducting all the judicial work of the court until 2005.⁵ The Environmental Court's second judge, Judge Thomas S. Durkin, was appointed in January of 2005. Both he and I attend continuing judicial education courses to maintain and develop our competency in our ability to understand the specialized environmental laws and to assess scientific and technical evidence.⁶

3. See VT. STAT. ANN. tit. 4, §§ 1001–04 (2010), available at <http://www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&2.0>. See generally Vermont Rules for Environmental Court Proceedings, V.R.E.C.P. (now being restyled – see note 7 *infra*), available at <http://www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&2.0>. The court was created as part of the Uniform Environmental Enforcement Act adopted in the 1989 legislative session, 1989, No. 98, § 2; however, that statute provided that it would not take effect until the Agency of Natural Resources adopted regulations governing the administrative assessment of monetary penalties (which occurred in July of 1990) and the environmental judge was appointed (which occurred on November 2, 1990). The applicable statutes and court rules are available through VermontJudiciary.org, www.vermontjudiciary.org (last visited Nov. 18, 2010).

4. In Vermont, all trial court judges are appointed by the governor and are confirmed by a vote in the legislature. Every six years after a judge is appointed, a legislative committee holds hearings on that judge and makes a recommendation to the entire legislature, which votes whether to retain the judge in office for another six-year term.

5. From 1992 to 2001, I was also assigned to sit as a judge in the civil and criminal courts, as well as handling all the work of the Environmental Court. Prior to the addition of municipal land use appeals in 1995, the environmental enforcement work of the court did not require a full time position. However, from 1995, handling the work of the Environmental Court in addition to the other assigned work involved far more hours than a single full time position.

6. On this point, it is important to note that it is not necessary for the judges themselves to be trained professionally in the underlying scientific or engineering fields, although there are successful environmental courts, notably in Sweden and

From 1990 through about 1996 only a single part-time administrative clerk provided the support staff of the court; by about 2002 the staffing of the court was expanded to a full-time court manager, an administrative docket clerk, and a part-time law clerk. Since a major statutory change in 2005, the staff of the court has consisted of a court manager, two administrative docket clerks, and a case manager, as well as two law clerks who directly assist the two judges. The court's procedures are governed by the Vermont Rules for Environmental Court Proceedings.⁷

Jurisdiction has been added to the Vermont Environmental Court over time, so that the court's jurisdiction now covers essentially four main types of cases:⁸ 1) enforcement of Vermont's state environmental laws; 2) appeals of all the municipal planning and zoning (land-use) decisions state-wide; 3) appeals from decisions of the state environmental agency (Agency of Natural Resources) issuing a myriad of state environmental water discharge, air emissions, waste disposal, stormwater, heavy logging and other environmental permits;⁹ and 4) appeals from decisions of the regional district environmental commissions and district coordinators under Vermont's state land-use law, informally known as Act 250 (10 V.S.A.

in New South Wales, that use technically trained judges as well as law-trained judges. Rather, the law-trained judges need to have a certain facility or level of comfort with scientific and technical evidence. This distinction resembles the difference between an artist, on the one hand, compared with a connoisseur of art, on the other. It is not that a judge needs to be able to actually do the engineering or the hydrogeology or the organic chemistry, but it is extremely important that the judge be able to hear the expert testimony with a critical ear, not just to weigh the testimony according to the credentials of the particular expert. Deputy Chief Justice Adel Omar Sherif of the Supreme Constitutional Court of Egypt referred to this — in a 2004 conference at Pace Law School—as having “fluency” in the language of science and scientific principles. *See also* The Advanced Science and Technology Adjudication Resource Center (ASTAR), www.einshac.org/ (last visited Nov. 17, 2010).

7. Although, after the July 2010 judicial reorganization, the Rules are now referred to in the statute (VT. STAT. ANN. tit. 4, § 30(a)(1)(D) (2010)) and in the Reporter's Notes as the “Vermont Rules for Environmental Proceedings,” Rule 7 of the Rules themselves still gives the Rules' title as the “Vermont Rules for Environmental Court Proceedings” and the official abbreviation as “V.R.E.C.P.”).

8. The Environmental Court also has jurisdiction over permits issued by the state Agency of Agriculture, Food and Markets, covering the animal waste produced by certain farm operations, pursuant to VT. STAT. ANN. tit. 6, §§ 4855, 4861 (2010); and of various original enforcement actions listed in Vt. R. Env'tl. Court Proceedings 3. For a period of time in the early 1990s, it also had jurisdiction of landfill closure extension orders, during the phasing out of unlined landfills. *See* VT. STAT. ANN. tit. 10, § 8008a (2010).

9. For the complete list, *see* Vt. Stat. Ann. tit. 10, § 8503(a) (2010).

ch. 151).¹⁰

Environmental Enforcement Jurisdiction

The Environmental Court was initially created to improve the enforcement of Vermont's state environmental laws, including its state land use law. Vermont has had strong environmental and state land use laws since the late 1960s and early 1970s, but the enforcement of such laws was uneven for at least two reasons. First, each of the different laws had different enforcement provisions: some provided for criminal prosecution but not for civil injunctions, and some allowed the state environmental agency to issue orders, but provided no mechanism to enforce those orders. Some allowed the Attorney General to apply to the civil court for court orders or injunctive relief, but did not provide for monetary penalties to be imposed in those proceedings. There was no explicit linkage in any of these provisions between the economic gain to the violator and the appropriate amount of the penalty. Nor was there even any specific linkage between the magnitude of the environmental or public health harm or the risk of harm, and the appropriate amount of penalty.

Second, the inspection and prosecution of cases differed from any one of the environmental laws to another, due to the uneven workload of the environmental inspectors. The uneven enforcement or lack of clear and certain enforcement led to differences in treatment between one environmental violator and another that were perceived as unfair. Those who spent money to bring their operations into compliance with the laws, or to seek a permit prior to beginning operation, felt at an economic disadvantage if others were able to violate the law without being penalized. Because of this, there was support among the regulated community, as well as from governmental agencies and citizen groups, for a more uniform and predictable approach to environmental enforcement. The Uniform Environmental Enforcement Act was enacted in 1989 to create an

10. International readers should bear in mind that, due to constitutional requirements providing the right to a jury trial, a higher standard of proof, and various protections including against self-incrimination, the Vermont Environmental Court was not allocated jurisdiction over criminal environmental cases; these remain within the jurisdiction of the general criminal court. Similarly, due to the right to a jury trial in civil damages cases for private compensation for environmental harm, such cases remain within the jurisdiction of the general civil court.

environmental enforcement system that is meant to foster both the existence of and the public awareness of even-handedness, consistency, and predictability in the system.¹¹

The purposes of the Uniform Environmental Enforcement Act are to enhance the protection of environmental and human health, to prevent the unfair economic advantage obtained by persons who operate in violation of environmental laws, to provide for more even-handed enforcement of those environmental laws, to foster greater compliance with, and deter repeated violation of those laws, and to establish a fair and consistent system for assessing penalties.¹²

Under the Uniform Environmental Enforcement Act, the Agency of Natural Resources was given new authority to issue unilateral administrative enforcement orders that could contain monetary penalties as well as remedial provisions.¹³ The statute also provided new inspection authority,¹⁴ and provided for the issuance of emergency orders,¹⁵ for the filing of consent orders (called “assurances of discontinuance” from an earlier statute) that become court orders,¹⁶ and for enforcement of final administrative orders.¹⁷

To balance this new and increased administrative power, the statute created the Environmental Court in the judicial branch of government,¹⁸ distinct from the executive branch agency responsible for issuing the initial orders, and provided for an unusually prompt hearing to be held on the merits of the order in the independent, judicial branch court. By establishing a specialized court within the judicial system for these hearings, the legislature wanted to ensure fair treatment for the respondent in court, and also to ensure consistency from one part of the state to another. It is important to understand that this is not an appeal of the administrative enforcement order; rather, the statute provides a right to an evidentiary trial on the merits of the order, in which the environmental agency must present

11. Uniform Environmental Law Enforcement Act, VT. STAT. ANN. tit. 10, ch. 201 (2010).

12. *See id.* § 8001.

13. *Id.* § 8008.

14. *See id.* § 8005.

15. *See id.* § 8009.

16. VT. STAT. ANN. tit. 10, § 8007.

17. *Id.* § 8014.

18. The statute initially named it the Environmental Law Division (of the Judiciary); however, that name caused confusion as to whether it was a division of an executive branch agency. The legislature renamed it the Environmental Court in 1995.

evidence and prove its case in the first instance. That is, a respondent who receives an administrative order and who wishes to contest either the remedial provisions of the order or the amount of a monetary penalty files a “notice of request for hearing;” within thirty days of receipt of the notice the court is obligated to hold the hearing on the merits of the order.¹⁹ In these types of cases, the hearing is *de novo*, and the court can assess a monetary penalty anew, applying the penalty factors provided for in the statute.²⁰ The court also has authority to affirm, modify, or reverse some remedial orders, but for other, more technical remedial orders, the court has authority only either to affirm the order or to vacate and remand it to the agency if it is not reasonably likely to achieve the intended result. This provision recognizes the technical expertise of the state’s environmental agency in formulating the remedial requirements of an enforcement order.

One of the most interesting aspects of the court’s environmental enforcement jurisdiction is the methodology for assessing a penalty by applying the statutory factors.²¹ Because an important purpose of the statute is to prevent the unfair economic advantage obtained by those who violate the state’s environmental laws, the court has authority to set a penalty amount to remove or recapture the economic benefit resulting from a violation, in addition to the penalty amount assessed under the other statutory factors.²² The environmental enforcement statute thus recognizes that effective environmental enforcement depends on accounting for the economics of the violation from the point of view of the violator. The principle is to create an economic incentive for compliance, that is, to make it more expensive to commit a violation of the laws and regulations than to comply with them.

The other statutory factors the court must consider in assessing a penalty include not only the actual harm to the environment or to public health, safety or welfare resulting from the violation, but also the potential for such harm even if it did not occur or has not yet occurred. Other factors in setting a penalty include the length of time the violation has existed, the respondent’s record of compliance, and

19. In fact, respondents rarely are prepared to have the hearing scheduled this rapidly after the case is filed; in the pretrial conference held shortly after the case is filed, the judge assigned to the case determines whether the respondent wishes to extend this time period.

20. VT. STAT. ANN. tit. 10, § 8010(b),(c) (2010).

21. *See id.*

22. *Id.* § 8010(c).

whether the respondent knew or should have known that the violation existed. The court is directed to consider the state's actual costs of enforcement, but also to consider any mitigating factors, including whether the state delayed unreasonably between the violation and seeking enforcement.

Municipal Land Use (Zoning and Planning) Permit and Enforcement Jurisdiction

The Vermont Environmental Court was expanded in 1995 to handle all municipal land use and planning appeals and enforcement cases. Since that time, the highest volume of the work of the court has been to handle appeals from local land use permitting decisions.²³ Almost all the cases are heard *de novo*, meaning that the court does not review what the administrative or permit-issuing body has done, but instead hears the evidence in a trial and decides the matter itself. However, the statute allows municipalities to opt for more formal procedures at the local level, which then allows appeals to the court to be reviewed on the record.²⁴ Only about twelve municipalities have so far opted to use the more formal process and to have review on the record; two have relinquished those procedures and gone back to the *de novo* appeals process.

In order to bring an appeal, appellants are required to have participated in the proceeding at the municipal level. The scope of any appeal is governed by the statement of questions filed by the appellant at the outset of the case, so that a *de novo* trial, if necessary, is limited to the issues in the appeal.

Cases to enforce municipalities' zoning ordinances may be brought by the municipality under 24 V.S.A. §§ 4451, 4452. Enforcement of decisions of the municipal zoning boards, planning commissions, and development review boards, however, may be brought by the municipality or by any interested person under § 4470(b).²⁵

State Environmental and Land Use (Act 250)²⁶ Permit Appeals

23. See VT. STAT. ANN. tit. 24, § 4471, 4472.

24. VT. STAT. ANN. tit. 24, § 4471(b) (2010); The Municipal Administrative Procedure Act, VT. STAT. ANN. tit. 24, § 1201 et seq. (2010); Vt. R. Env'tl. Court Proceedings 5(h).

25. See VT. STAT. ANN. tit. 24, § 4470(b) (2010).

26. VT. STAT. ANN. tit. 10, ch. 151 (2010).

The jurisdiction of the court was expanded again, effective in January of 2005, to handle state land use and environmental permit appeals.²⁷ This most recent addition of jurisdiction represented an effort on the one hand to consolidate and streamline the various permit application appeals processes, and on the other hand, to increase the participation of all affected parties at the earliest stages of a proposed project. The purposes of this Consolidated Environmental Appeals statute are stated in 10 V.S.A. § 8501.²⁸ It enables the court to coordinate or consolidate proceedings involving all the municipal and state permits required for any particular project — so-called one-stop shopping. Similarly to the municipal land use cases, for state land use (Act 250) cases it encourages public participation before the district environmental commission proceedings by requiring such prior participation as a prerequisite for bringing an appeal. Although the numbers of Act 250 and state environmental appeals brought to the court are not as great as the municipal appeals, these cases tend to be far more complex and time-consuming for the court. All of these cases are heard *de novo*, limited to the issues raised in the Statement of Questions. The court applies the substantive standards that were applicable before the tribunal appealed from.²⁹

Case Management – the Work of the Court

The work of the court would not be possible without a strong case management system, tailored to the needs of the individual cases, in which the judges, the case manager, the court manager, and the administrative staff of the court all play important roles.³⁰

After a case is filed at the court, a docket number is assigned and the case is entered into the computer database system. Each judge is assigned an equal number of cases in each area of the state, so that litigants cannot predict which judge will be assigned to any particular case. As related cases are filed they are, of course, assigned to the judge who was assigned the first case appealed on a particular project.

In appeals, the appellant must file a Statement of Questions defining the issues on appeal, and must notify other potential parties of the filing of the appeal, so that they may enter their appearances in

27. See VT. STAT. ANN. tit. 10, ch. 220 (2010).

28. VT. STAT. ANN. tit. 10, § 8501.

29. See Vt. R. Env'tl. Court Proceedings 5(g).

30. See generally Vt. R. Env'tl. Court Proceedings 2.

the case. Many of the cases involve several different parties: for example, the developer of a project, the neighbors or people who may be affected by the project, possibly other people who support or oppose the project for various economic or environmental reasons, and the municipality or state agency responsible for regulating the project. It is therefore not necessarily easy to determine the way in which litigants' interests are aligned with one another.

Litigants may be represented by an attorney, but there is no requirement for attorney representation. People may and do represent themselves; in fact, most of the court's cases involve at least some self-represented parties, appearing without a lawyer. We have developed several forms to explain procedure to self-represented litigants.³¹ Several of the forms we use to explain procedure to self-represented litigants are referenced in the appendix to this article. The challenge for the judges in handling cases with self-represented litigants is both to accommodate their need for procedural information and, at the same time, to treat them the same as represented parties with respect to the merits or substance of the case.

In this regard, it is worth noting that disputes involving litigants' homes, property, and surroundings may be extremely emotional. For this reason, I have sometimes referred to the Environmental Court, only partly in jest, as "family court for neighbors." In fact, in some respects, these disputes can be more problematic than the level of emotion in family court, because the participants in family court can get a divorce and move away and put the dispute behind them. But the environmental court litigants, unless they move away, will have to continue to live next to each other or next to the project on into the future, whether they have succeeded in the litigation or not. For this reason, it is very important to maintain a level of civility in the process, especially because, for many people, their experience in the

31. The forms used by the court in working with self-represented litigants may be found through the Vermont Judiciary website and the IJIEA website. See Vermont Judiciary Forms – Environmental Division, <http://www.vermontjudiciary.org/MasterPages/Court-Forms-Environmental.aspx> (last visited Nov. 17, 2010). These forms include the self represented entry of appearance, notice to interested parties, and supplemental sheets. See also VermontJudiciary.org, <http://www.vermontjudiciary.org/gtc/environmental/MasterDocumentLibrary/pro%20bono%20flyer.pdf> (last visited Nov. 17, 2010) (pro bono program information); Environmental Division – Mediation, <http://www.vermontjudiciary.org/GTC/Environmental/mediation.aspx> (last visited Nov. 17, 2010) (offering guidance on mediation); IJIEA, www.law.pace.edu/ijiea (last visited Nov. 19, 2010) (summary judgment explanation).

courtroom with these cases will be their only experience with the court system.

Within about a month and a half from the case filing, after all the parties have come into the case, an initial pretrial conference is held with the judge assigned to the case or group of related cases. Almost all of these conferences are held by telephone, recorded on audio tape. The purpose of these conferences, governed by V.R.E.C.P. 2, is to give each case its appropriate scheduling,³² to require mediation in appropriate cases, and to establish an appropriate sequence for related cases, including whether they should be scheduled together for a single hearing, or whether some cases should be placed on inactive status pending resolution of other related cases. The conference also covers any setting of schedules for any necessary pretrial motions, including motions for summary judgment to resolve legal issues, discovery issues, and an estimate of the time required for trial and when it should be scheduled.

The conference results in a written scheduling order prepared by the case manager and signed by the judge setting deadlines for all the steps discussed at the conference. A follow-up conference may be set with the judge or the case manager. The court staff monitors deadlines and calls lawyers and self-represented parties as needed.

Approximately two to three weeks before trial, the case manager holds a final pretrial conference with the parties, to make sure everything is prepared for trial. The case manager's conferences are held by telephone and are not recorded. This conference covers issues such as the marking of exhibits, whether any prefiled evidence will be submitted, and whether a site visit is needed and whether it can be scheduled on a trial day. If prefiled testimony of a witness is submitted, the witness must appear in court at the trial to answer questions on cross-examination. The final pretrial conference may include a schedule for the parties to file any requests for findings or legal memoranda at trial; otherwise, time is allowed for those filings to be made shortly after trial.

The cases that go to trial are heard by the judge sitting alone,

32. A schedule, so that each case gets its appropriate and timely consideration, may be expedited, but it can also be appropriate to postpone a case to achieve efficiency. For instance, if an applicant is going back to submit a revised application to the local authority, it may make sense to put the initial appeal on hold, so that the revised application and the initial one could be heard together, instead of holding two separate trials on largely the same evidence.

without a jury. They are recorded either by an audio or video electronic system, or by a trained court stenographer. Unless the parties prefer to have the trial scheduled for the courtroom at the Environmental Court's building in central Vermont, it will be scheduled in a courthouse near the area where the case arises. Trials are conducted like any other civil non-jury trial.³³ Under the so-called American rule as to litigation costs, each party bears its own costs of litigation.

Because no record is made at a site visit, a site visit can only be illustrative of evidence presented in court. However, the judges conduct site visits in almost every case that goes to trial, because they are so useful in fully understanding the parties' testimony, plans, and photographs. Depending on the available time, the season of the year, and the nature of the case, the site visit may be conducted on the day of trial, or may be conducted in advance of or after the trial. For example, in cases in which the nature of vegetative screening of a project is at issue, it may be necessary to take two site visits, one at a time at which leaves are present on the deciduous trees, and another when the trees are bare.

Although it can be efficient to rule from the bench at the close of trial, most of our decisions after trial must be issued in writing. The environmental enforcement decisions are required by statute to be in writing.³⁴ Most of the permit-related appeals must be issued in writing as well, so that the parties and their contractors and, later, people searching titles of the involved properties, can know what permit constraints and conditions affect a particular property.

At the conclusion of the trial, a schedule is set for the filing of any post-trial memoranda, usually within a short time of trial. However, in complex cases in which a great deal of evidence has been presented, the parties may request a more extended schedule to file these documents. When self-represented parties are involved, the

33. It is not generally recognized by people familiar with the civil-law-based systems that judges in U.S. jurisdictions may question witnesses. *See, e.g.,* Vt. R. Evid. 614(b); Fed. R. Evid. 614; Unif. R. Evid. 614. My personal practice is to wait until after the parties or their lawyers have presented their evidence and have asked all the questions they wish to ask of a particular witness, and then to ask any additional question that is necessary in order to carry out the court's task under the particular ordinance or statute. Then I allow any follow-up questions from any of the parties, not limited by the usual rules of direct- and cross-examination questions.

34. *See* VT. STAT. ANN. tit. 10, § 8012(c) (2010).

judge may explain at trial that this is an opportunity to make any arguments in writing about “what you want the court to decide in this case, and why.”

Written Published Decisions

When the Vermont Environmental Court began in 1990, it was not the custom, at least in Vermont, for any trial court decisions to be published. That is, although many decisions on motions for summary judgment and on the merits of non-jury trials were issued in writing by the trial judge, they were not generally made available to the public. However, I felt very strongly that, for this new court, it would be particularly important to make apparent to all observers of the system what the reasoning is for any given decision — a feature that is sometimes called the system’s “transparency.” The transparency of the rationale for each decision and the clarity of language in which it is written, is particularly important so that the decision can be understood by the litigants themselves, not only by their lawyers, and by members of the community who may not have been following the ongoing litigation.

From the beginning, therefore, the Environmental Court has issued its decisions in writing and published them electronically,³⁵ as well as providing them to the parties in the particular case and maintaining chronological binders of the decisions at the court’s offices. Approximately 1,600 written decisions, amounting to nearly 11,000 pages, have been issued by the court since November of 1990. These published decisions include important decisions resolving legal

35. Initially they were provided on disk, quarterly, at cost, to anyone who wished a copy, and to the two law libraries in the state: at the state reference library in Montpelier, and at the Vermont Law School library. The Lexis commercial service also published them in its Vermont database. Currently, one can access many of these opinions at [VermontJudiciary.org](http://www.vermontjudiciary.org), <http://www.vermontjudiciary.org/GTC/Environmental/Opinions.aspx> (last visited Nov. 17, 2010). We are working towards making all the Court’s written decisions back to 1990 available in searchable form through the Judiciary website, and conveniently organized and accessible through the major legal databases. The Vermont Department of Libraries had posted the Court’s decisions in the 1990s, but a complete series is not now available through that site. Of the commercial services, Lexis carries all the Court’s decisions. Before January of 2005, Westlaw did not carry the Environmental Court decisions, although it did carry the administrative Act 250 decisions of the former Environmental Board. Since that time, Westlaw has added some of the Environmental Court decisions, but has combined them in a database together with the former Environmental Board decisions, making it difficult to distinguish the sources.

issues in motions for summary judgment, motions to dismiss, and other dispositive pretrial motions, as well as decisions on the merits of cases. The fact that the Environmental Court's decisions are published and are available in electronic form has greatly assisted the development of consistency and predictability in the areas of the law within the court's jurisdiction.

It is important to understand that the usefulness of a body of published decisions is not restricted to a common-law legal system, and, in any event, that the jurisdiction of the Vermont Environmental Court is primarily in the realm of statutory and regulatory public law, rather than judge-made doctrine. The body of Environmental Court decisions is important not because it is precedential, but because the reasoning is persuasive or useful in future cases. That is, to the extent that the decisions as a whole present the rationale of particular recurring topics, the body of decisions functions like a persuasive treatise on those areas of the law.

Mediation

Although the Environmental Court had some success with mediation on a voluntary and occasional basis prior to the 2005 expansion, the revised rules as of 2005 gave the Environmental Court the authority to require the parties to mediate. Mediators are not provided by the court, and therefore the parties may use any mediator, not only the ones on the roster of mediators who have taken the court's training about Environmental Court jurisdiction and procedures.

Of the cases filed in calendar year 2009, the most recent year for which statistics are complete, the judges ordered mediation in over 36% of active disputes, that is, in cases that were not filed as consent orders or settled between filing and the judges' initial conference with the parties. Of the cases in which mediation was ordered, nearly 79% resolved through mediation, so that over a quarter (28.44%) of the active disputes that otherwise would have required judicial action, through motions or trial, were resolved through mediation.

Mediation is not only an important case management tool, but also provides an opportunity for the litigants to air and possibly resolve important issues that are beyond the scope of the case before the court. Once the litigants understand that mediation may provide an opportunity to resolve these underlying issues, it can be successful

in the most contentious and surprising cases.

Conclusion

I have tried to reflect on some of the most salient features that have been — and continue to be — critical for the overall success of the Environmental Court. Although there is always room for improvement and continued development, we all try our utmost to maintain a court characterized by the fairness and respect with which all litigants are treated, one that is closely tailored to the many unique exigencies and complexities of environmental litigation. This is important not only for the procedural fairness in any particular case, but for the fundamental respect for the rule of law that develops with the consistent experience of fairness in the environmental court system. It is my sincere hope that new environmental courts throughout the world may find the experience of the Vermont Environmental Court useful as they develop their own procedures tailored to their own needs.

THE CASE FOR AN INTERNATIONAL COURT FOR THE ENVIRONMENT

*Stephen Hockman QC**

The Nature of the Problem

In his foreword to the *Principles of International Environmental Law* by Philippe Sands, Sir Robert Jennings QC, visiting Whewell Professor of International Law at the University of Cambridge, and former president of the International Court of Justice (ICJ), wrote: "It is a trite observation that environmental problems, although they closely affect municipal laws, are essentially international; and that the main structure of control can therefore be no other than that of international law."¹

Jennings wrote those words in 1995, many years before the potential effects of climate change had transformed public perceptions of this topic.

And yet, even today, after all the thousands of publications written on the subject of climate change and its causes and consequences, many may think that we are hardly any further forward in establishing, in Jennings' words, a "structure of control."²

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1. PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 187 (Cambridge University Press 2d ed. 2003)(1995).

2. *Id.*

Indeed, Jennings' observation that the problem is mainly to be solved by legal means might now seem, not so much "trite,"³ as unorthodox, bold, or even eccentric.

Of course, no one doubts the scale of the problem. When Jennings wrote in 1995, the problems were perceived mostly in terms of major cases of environmental pollution that were regarded as having international implications. Perhaps the most infamous case of environmental liability on the part of a transnational corporation occurred on December 2, 1983, in Bhopal, India, when Union Carbide, a multinational company incorporated in the United States, released forty tons of toxic methyl isocyanate from its plant, killing 3,500 people and affecting over 200,000 others.⁴ Proceedings brought in the United States courts having failed, the injured parties settled the ensuing litigation in the Indian courts for some \$470 million (an average of about \$15,000 per deceased person).⁵

Scroll forward to 2010, and the potential effects of climate change have of course been given an altogether new and critical focus by a number of recent developments, including reports by the Intergovernmental Panel on Climate Change and by Nicholas Stern on behalf of the United Kingdom Government.⁶ Few now deny the urgency of a solution to these problems, though even fewer claim to have in hand a serious and comprehensive set of solutions. Statements emanating from international summits only confirm the diplomatic efforts involved in attaining linguistic (not to mention policy) consensus.

In these circumstances, it seems at least timely (a) to review those international legal instruments which already exist to facilitate a solution to the problem, and (b) to suggest that the creation of a new instrument deserves consideration.

I do entirely acknowledge that to many distinguished international environmental lawyers this idea is still heterodox. Indeed, I understand that Jennings himself may have disclaimed

3. *Id.*

4. Mark Magnier and Anshul Rana, *India Convicts 7 In 1984 Bhopal Gas Disaster*, L.A. TIMES, June 7, 2010, available at <http://articles.latimes.com/2010/jun/07/world/la-fg-bhopal-verdict-20100608/2>.

5. *Id.*

6. *Global Emissions Only 'Few Billion Tonnes' Short Of Targets, Says Stern*, THE GUARDIAN, Dec. 3, 2009, available at <http://www.guardian.co.uk/environment/2009/dec/03/nicholas-stern-copenhagen-pledges>.

support for the idea. On the other hand, Jennings himself in the foreword which I have already mentioned pointed out that what is urgently needed today is a more general realization in the contemporary global situation of the need to create a true international society. And if the inspiration of the former president of the (ICJ) is insufficient, let me also cite the views of our last and perhaps most distinguished Senior Law Lord, Lord Bingham of Cornhill, who in his recent book, *The Rule of Law*, lamented the fact that the compulsory jurisdiction of the ICJ is accepted by only a minority of member states of the United Nations (U.N.), and by only one of the five permanent members of the Security Council (namely the United Kingdom).⁷ Lord Bingham states: “[I]f the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order.”⁸

Dispute Resolution Systems

I now turn to review some of the existing provisions and mechanisms for dispute resolution. The oldest legal institution dedicated to resolving international disputes is the Permanent Court of Arbitration (PCA), established at The Hague by inter-governmental agreement in 1899.⁹ The PCA has jurisdiction over disputes when at least one party is a state (or an organization of states) and when both parties to the dispute expressly agree to submit their dispute for resolution. It has been suggested in the past that the PCA might be an interim forum for resolving international environmental disputes.¹⁰ In 2001, the PCA adopted some “optional rules” for arbitration of disputes relating to the environment and/or natural resources. However, as already indicated, at least one party to any dispute must be a state, the court has no compulsory jurisdiction and, importantly, its decisions are not, as I understand, made available for public

7. THOMAS BINGHAM, *THE RULE OF LAW* 128-129 (Penguin Books 2010).

8. *Id.*

9. Permanent Court of Arbitration: About Us, http://www.pca-cpa.org/showpage.asp?pag_id=1027 (last visited Nov. 22, 2010).

10. *Id.*

inspection.¹¹

Turning to the ICJ, this was established (as a successor to the earlier Permanent Court of International Justice) in 1945.¹² Jurisdiction depends on whether two or more states have consented to its jurisdiction. While the ICJ may accept cases that are environmentally related, only states have standing.¹³ The ICJ established within its structure in 1993 a chamber specifically to deal with environmental matters.¹⁴ However, no state has ever submitted a dispute to that environmental chamber and the chamber has now been disbanded.¹⁵ On rare occasions, the ICJ has heard a case in an environmental context, including most recently the case of the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, in which Argentina brought proceedings against Uruguay based upon the allegedly unlawful construction of two pulp mills on the river Uruguay which are said to jeopardize conservation of the river environment.¹⁶ The case has been fully argued (with British counsel on both sides) and a decision is awaited.

In 1992, representatives from 176 states and several thousand non-governmental organizations (NGOs) met in Brazil for the United Nations Conference on Environment and Development.¹⁷ At this Conference, often referred to as the Earth Summit, there was adopted the Rio Declaration on Environment and Development, Principle 10 of which provides that: "States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be available."¹⁸

11. *Id.*

12. U.N. Charter art. 92-96.

13. U.N. Charter art. 93.

14. Press Release, ICJ Composition of the Chamber of Enviro Matters (Mar. 4, 2002) (available at <http://www.icj-cij.org/presscom/index.php?pr=106&p1=6&p2=1&search=%22%22Composition+of+the+Chamber+for+Environmental+Matters%22%22>).

15. *Id.*

16. ICJ, SUMMARIES OF JUDGMENTS: CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY (ARGENTINA V. URUGUAY) (April 20, 2010), available at http://untreaty.un.org/cod/ICJsummaries/documents/english/177_e.pdf.

17. U.N. Conference on the Environment and Development 1992, <http://www.un.org/geninfo/bp/enviro.html> (last visited Nov. 20, 2010).

18. U.N. Conference on Environment and Development, Rio de Janeiro, Brazil, June 3-14, 1992, *Rio Declaration on Environment and Development*, A/CONF.151/26, available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

The Rio Declaration of 1992 (and accompanying Framework Convention on Climate Change) famously led to the Kyoto Protocol signed in Japan on December 11, 1997. This protocol, for the first time, contained international obligations requiring countries to reduce their greenhouse gas emissions below specified levels.¹⁹ It had been agreed that the Kyoto Protocol would only come into force when countries emitting 55% of the world's carbon dioxide had proceeded to ratification. The 55% trigger was finally met in February 2005, after ratification by Russia. The protocol was ratified by Australia in December 2007, leaving the United States of America as the only developed nation not to have ratified. However, constraints upon enforcement remain, in the view of many, a significant weakness.

Another important method of dispute resolution is international arbitration. An environmental treaty can provide for the submission of disputes to arbitration by mutual consent of the relevant parties, and cases like the *Trail Smelter* case in 1935 reflect the historical importance of arbitration in inter-state cases in the development of international environmental law.²⁰ Also relevant is the International Tribunal for the Law of Sea (ITLOS) regime.

At the European level, the European Union has, for many years, legislated on environmental matters; compliance with European environmental law is regulated by the European Commission, with disputes being referable to the European Court of Justice in Luxembourg.²¹ Within the European Union, there was established from January 2005 an emissions trading scheme, based on the allocation and trade of carbon allowances throughout the Union.²² Significantly too, in 1998, a number of states, principally European, entered into the so-called "Aarhus Convention on Information, Public Participation in Decision-making and Access to Justice in Environmental Matters," ratified by the UK in February 2005.²³

19. Kyoto Protocol, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Nov. 22, 2010).

20. *Trail Smelter Case Parties United States of America and Canada, Convention of Ottawa*, Apr. 15, 1935, available at http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

21. Implementation of Community Environmental Legislation, http://ec.eur-opa.eu/environment/legal/implementation_en.htm (last visited Nov. 22, 2010).

22. Emission Trading System, http://ec.europa.eu/environment/climat/emission/index_en.htm (last visited Nov. 22, 2010).

23. See Introducing the Aarhus Convention, <http://www.unece.org/env/pp/> (last visited Nov. 22, 2010).

Recent studies (including, for instance, a report by a working group under the chairmanship of Jere Sullivan) suggest that a number of member states within the European Union may not be fully in compliance with Aarhus' requirements concerning access to justice. The Aarhus Compliance Committee has recently heard just such a complaint against the UK.²⁴ Moreover, the Aarhus Convention of course only applies to its signatory states. There is no global equivalent.

An important dispute resolution mechanism not directly relating to the environment arises under the procedures of the World Trade Organization (WTO), created by an inter-governmental conference in 1994 for the purpose of furthering free trade and facilitating implementation and operation of international trading agreements. Under these arrangements, difficult questions have arisen as to whether the WTO can regulate issues that do not themselves involve trade, but which have a direct impact on conditions of trade, for example, the establishment of health, safety or environmental standards for goods or agricultural produce traded internationally. As the authors point out in *International Law and the Environment*, in these areas, other international bodies with primary responsibility for international regulation already exist, and there are no hard and fast jurisdictional boundaries between these organizations and the WTO.²⁵ It is therefore possible, they say, to advance policy arguments both for and against the WTO taking on a more expansive role in regard to the regulation of such matters.²⁶ As the authors state, it might well make sense to link negotiations on trade issues with setting standards for reducing CO₂ emissions and promoting energy efficiency, since it is far from obvious why a country which subsidizes pollution by failing to take action on climate change should reap the benefits of free trade.²⁷ In a fascinating lecture at the Spring 2009 Commonwealth Law Conference in Hong Kong, Professor Gillian Triggs of the University of Sydney showed how the internal WTO dispute resolution mechanism, including its appellate body based in

24. Press Release, U.N. Econ. Comm'n for Europe, The Aarhus Convention's Compliance Committee receives 50th Communication (June 22, 2010) (*available at* http://www.unece.org/press/pr2010/10env_p19e.htm).

25. PATRICIA BIRNIE, ALLAN BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW AND THE ENVIRONMENT* 79 (Oxford University Press 3d ed. 2009).

26. *Id.*

27. *Id.*

Geneva, grapples with these issues. There is, however, no provision for panels adjudicating environmental cases to have specific environmental expertise, although there is a requirement that panels adjudicating financial matters should have the necessary financial services expertise.

Institutional Reform

There is no doubt that the notion of international reform and restructuring is now beginning to gather momentum. Even before the recent Copenhagen Summit held under the United Nations Framework Convention on Climate Change (UNFCCC),²⁸ German Chancellor Angela Merkel, and French President Nicolas Sarkozy, in a letter to the U.N. secretary general, called for an overhaul of environmental governance, and asked for the Copenhagen climate talks to further the creation of a World Environmental Organization (WEO). More recently, in April 2010, ministers and officials from more than 135 nations converged on the Indonesian island of Bali for the United Nations Environment Program (UNEP) annual meeting. UNEP was established by the U.N. General Assembly in 1972, with headquarters in Nairobi, in order to enhance cooperation in environmental matters. Its Executive Director, Achim Steiner, has stated that environmental governance reform was a key part of the discussions at this annual meeting and that governments raised the possibility of a WEO. He said that a high level ministerial group had been established to continue the process with greater focus and urgency and that “the status quo . . . is no longer an option.”²⁹ This ministerial group is chaired by representatives from Kenya and Italy.³⁰ The group’s discussions were reflected in a co-chair’s summary entitled: “Belgrade Process: Moving Forward with Developing a set of Options on International Environmental

28. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

29. Sunanda Creagh, *UN Meeting Moots WTO-style Environment Agency*, REUTERS, Feb. 26, 2010, available at <http://uk.reuters.com/article/idUKJAK99428>.

30. Governing Council of the U.N. Env’t Programme, International environmental governance: outcome of the work of the consultative group of ministers or high-level representatives, U.N.E.P./GCSS.XI/4 (Dec. 2, 2009), available at www.unep.org/gc/gcss-x/download.asp?ID=1120.

Governance.”³¹

As Philippe Hugon has said in *After Copenhagen: An International Environmental Agency Needed*, a WEO might unite four parties in its drive to advance the environmental cause: scientists, entrepreneurs, governments, and environmental organizations.³² The scientific community needs a forum where it can voice its concerns and recommendations. Participation by business enterprises is equally important since they have to put into practice the recommendations made by the scientists. A third party at the conference table would obviously consist of the respective governments which have to put in place the requisite legislative and tax-related measures to protect the environment. Finally, a WEO would also do well to integrate existing environmental organizations, which have done much to promote environmentally-conscious thinking worldwide.

Those of us who support the case for an International Court for the Environment (ICE) do not in any way exclude the notion that an ICE could sit alongside or be part of a WEO. Mr. Steiner said that a WEO could be modeled on the WTO which, as already mentioned, has its own dispute resolution mechanisms.³³ The same point was made some months ago by former Euro-Commissioner Lord (Leon) Brittan. A WEO might be granted jurisdiction to refer cases to an ICE for consideration and investigation as a forum for resolution/enforcement mechanism for the WEO.

The topic of international governance arrangements in the environmental and sustainable development fields seems likely to feature strongly on the agenda for the forthcoming conference in 2012 “Rio +20” at which I hope the ICE coalition will be represented.

A New Proposal

In these circumstances, it may be thought that the establishment of ICE is a valuable goal that would add to the body of jurisprudence

31. Co-chair’s Summary of the first meeting of the Consultative Group of Ministers or High-Level Representatives on International Environmental Governance, <http://www.unep.org/environmentalgovernance/LinkClick.aspx?fileticket=7RzudGTFKRI%3D&tabid=341&language=en-US> (last visited Nov. 6, 2010).

32. Philippe Hugon, *The Need for an International Environmental Agency*, IRIS, Feb. 2010, available at http://www.atlantic-community.org/index/items/view/The_Need_for_an_International_Environmental_Agency.

33. Sunanda Creagh, *UN Meeting Moots WTO-style Environment Agency*, REUTERS, Feb. 26, 2010, available at <http://uk.reuters.com/article/idUKJAK99428>.

in international environmental law and provide a forum both for states and for non-state entities. Ideally, as explained in more detail below, the arrangements for such a court would include (i) an international convention on the right to a healthy environment, with broad coverage; (ii) direct access by NGOs and private parties as well as states; (iii) transparency in proceedings; (iv) a scientific body to assess technical issues; and (v) a mechanism (perhaps to be developed by the court itself) to avoid forum shopping.

Let me acknowledge that this is not a wholly new idea. Such a proposal was mooted as long ago as 1999 at a conference in Washington, D.C., sponsored by a foundation which had been set up to investigate the establishment of an international court for the environment.³⁴ The proposals then considered defined the functions of the court as including:

- (i) adjudicating significant environmental disputes involving the responsibility of members of the international community;
- (ii) adjudicating disputes between private and public parties with an appreciable magnitude (at the discretion of the president of the court);
- (iii) ordering emergency, injunctive and preventative measures as necessary;
- (iv) mediating and arbitrating environmental disputes;
- (v) instituting investigations, where necessary, to address environmental problems of international significance.

A similar proposal has been under consideration by a foundation based in Rome.³⁵

Moreover, it may be thought that the potential benefits of an international court for the environment, particularly for the global business community, would include:

- (i) a centralized system accessible to a range of actors;
- (ii) the enhancement of the body of law regarding international environmental issues;
- (iii) consistency in judicial resolution of international

34. George Washington Univ. & Int'l Court of the Env't Found., *"Is There a Need for a Body to Resolve International Environmental Disputes?"*, Washington, D.C., Apr. 15-17, 1999 (supported by the U.S. EPA).

35. See generally International Court of the Environment Foundation, http://www.icef-court.org/base.asp?co_id=15 (last visited Nov. 22, 2010).

environmental disputes;

(iv) increased focus on preventative measures;

(v) global environmental standards of care; and perhaps also

(vi) facilitation and enforcement of international environmental treaties.

The establishment of such a court might be thought particularly appropriate at the present time, just as the public generally is becoming so much more aware of environmental problems and of the culpability of those who cause them. As Michael Mason has said, “[I]t is the intersection of individual rights and responsibilities with interstate obligations that offers concrete possibilities for citizen participation in global decision-making.”³⁶

Such a court could also influence the world business community to develop risk management programs and improve present practices which would produce a corresponding reduction in the risk of environmental catastrophe.

As to the feasibility of any such proposal, I will say more in a moment, but an encouraging precedent is surely the establishment, after sustained pressure by NGOs and others, of the International Criminal Court, different though that is from the notion of an ICE as we have been developing it to date.

36. Michael Mason, *Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law*, 12 GLOBAL GOVERNANCE 283 (2006).

Possible Objections

I would like next to discuss some of the objections to this proposal which have been raised in the course of this discussion reflecting the fact that "there is yet no international environmental court, and none is likely to emerge in the foreseeable future."³⁷ I would classify these objections under three headings. First, what law would be applied by such a body? Second, why is it necessary for there to be a new body when existing juridical or dispute resolution institutions already exist to undertake the role envisaged for an ICE? Thirdly, what would be the point of establishing a new international judicial body such as an ICE if it was unable to enforce its decisions?

As to the first question, my tentative submission would be that international law is already sufficiently developed to enable the court itself to decide upon the appropriate law to apply to a dispute. Clearly, if the dispute arises in an area to which a specific bilateral or multilateral treaty relates, then the terms of that treaty will be influential or decisive, but on other issues one might expect, and indeed hope, that the court itself would develop the law. I refer again to the approach to the future of international relations advocated by Sir Robert Jennings and by Lord Bingham, and venture to suggest that the objectives that they have identified are too important to be left solely to the grindingly slow process of inter-state discussion. As to the second issue, I do not in any way rule out the idea that one or more of the existing institutions grappling with some of these problems might enlarge its role. Indeed, as I have indicated, the WTO appellate body has moved in this direction. But it seems doubtful to me that any individual existing institution will be able to assume a role of the kind which we envisage for an ICE. Appropriately and understandably, an international institution such as the ICJ, with an established and hugely distinguished reputation, is content to rest upon its established jurisdictional limits and does not feel it necessary or appropriate to argue for or even consider a possible expansion of those limits.

As to the third issue, there is an interesting answer to this objection in the textbook which I used in Cambridge in 1966, called *An Introduction to International Law*, by J. G. Starke:

37. SANDS, *supra* note 1, at 214.

Assuming however that it be a fact that international law suffers from the complete absence of organised external force, would such circumstance necessarily derogate from its legal character? In this connection, there is a helpful comparison to be made between international law and the canon law, the law of the Catholic Church. The comparison is the more striking in the early history of the law of nations when the binding force of both systems was founded to some extent upon the concept of the "law of nature." The canon law is, like international law, unsupported by organised external force, although there are certain punishments for breach of its rules, for example, excommunication and the refusal of sacraments. But generally the canon law is obeyed because as a practical matter the Catholic society is agreeable to abide by its rules. This indicates that international law is not exceptional in its lack of organised external force. . . In other words the problem of the binding force of international law ultimately resolves itself into a problem no different from that of the obligatory character of law in general.³⁸

The Early Stage ICE

I now turn to consider how one might move toward the establishment of an ICE. I acknowledge that establishing a court at the international level will be a difficult task which will almost certainly require an international treaty. To get to that stage will also likely require a campaign over a number of years. To that end, there has been established the ICE Coalition, a company limited by guarantee, to which many enthusiasts, young and old, have already lent their support.

There are two points, however, to make in relation to this first stage of the effort. The first is as to the work already done in this field; the second is as to how, ahead of reaching the ultimate goal of a court, the ICE proposal might be advanced in the meantime.

As to the first point, it is worth taking note of the considerable work already done in this field by other organizations with aims broadly similar to or consistent with the ICE Coalition. For example, an organization called the International Court for the Environment Foundation (ICEF), in Rome, has for a number of years been looking at the possibility of creating an ICE.³⁹ It is to be hoped that cooperation with organizations such as ICEF and with other sympathetic bodies

38. J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 28-29 (Butterworths 5th ed. 1963).

39. See *supra* note 35.

will enable the ICE campaign to move forward swiftly. I have recently spoken at an ICEF event in Rome – alongside the Rt Hon. Lord Justice Robert Carnwath, perhaps our most distinguished environmental lawyer at the judicial level – on this very subject.⁴⁰

As to the second point, one possibility to consider is that, en route to the ultimate goal, the ICE is constituted as something less than a fully mandated international court, more akin to an arbitral tribunal, providing declaratory relief and dispute resolution services to those who agree to submit to its jurisdiction. It is envisaged that, with this approach, the ICE would from the outset be able to perform the role of an arbitral tribunal – providing declaratory clarification and adjudication and general dispute resolution to those who agree on an ad hoc basis, or by prior agreement, to submit to its jurisdiction. States, NGOs, corporations and individuals would all be able to agree to use and have access to the ICE. This role requires no international treaty; it merely requires the establishment of the body, it being proffered to potentially interested parties as a means of resolving disputes in environmental matters, and their agreement to use it. The ICE might well sit at a number of different locations.

It is also envisaged that this straightforward arbitral tribunal model would be able to perform a valuable role as the dispute resolution institution of choice under specific international agreements. For example, Article 14 of the UNFCCC, adopted also *mutatis mutandis* in the Kyoto Protocol, provides that dispute resolution is to be by way of reference of the dispute to the ICJ or by arbitration by a procedure to be agreed upon by the parties. A problem with this is that, as discussed earlier, the ICJ allows only states to have standing. As to the arbitration option under Article 14, there has been no agreement explaining what the arbitration procedure should be. The ICE Coalition envisages the ICE as being able to fill this gap in the legal architecture of the climate change agreements, including any successor agreement reached in Mexico or subsequently.

40. Stephen Hockman QC, Address at the ICEF Global Environmental Governance International Conference: The case for an International Court for the Environment (ICE) (May 20-21, 2010).

The Ultimate Goal

Ultimately, it is envisaged that the ICE might be mandated as the international environmental tribunal. On the basis that the ICE will, on the interim approach set out above, be offering its services to a wide cross-section of the international governmental, non-governmental and business communities, and on the basis that this creates a positive view of the ICE in the policy debate, the final step of mandating the ICE as the international environmental tribunal might not be so controversial a step as it would otherwise seem to be. It may indeed be that the ICE, by that stage, has become in any event, the default port of call for the resolution of international environmental issues requiring clarification or in dispute. However, this is of course a best case scenario, and it could be on the other hand, that the preparatory effect of an “interim” ICE is minimal.

The ICE, as an international court, could, on this longer term view, sit above and adjudicate disputes arising out of the U.N. “environmental” treaties, including the U.N. Convention on Biological Diversity 1992,⁴¹ and the UNFCCC 1992,⁴² the Kyoto Protocol (and any successor text to Kyoto and addition or amendment to the UNFCCC that is agreed at the post-Copenhagen Conference of the Parties (COP) in 2010),⁴³ the U.N. Convention on the Law of the Sea 1982,⁴⁴ any other applicable U.N. environmental law and, in addition, customary international law. The aim might be for it to incorporate all of the work of the existing tribunals under the existing U.N. environment treaties (e.g. the Kyoto Protocol Enforcement Branch). However, to the extent that any such incorporation is not possible or not possible to start with, there could be a “carve out” of the ICE’s jurisdiction so as to prevent overlap with these existing bodies. The aim would be, ultimately, to achieve one single court dealing with all U.N. environmental law. The additional aim would be for the consolidation of the various environment-related treaties to be

41. United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, available at <http://www.cbd.int/convention/convention.shtml>.

42. United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

43. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22, available at http://unfccc.int/kyoto_protocol/items/2830.php.

44. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at <http://www.un.org/Depts/los/index.htm>.

incorporated into one single document, the interpretation of which would be within the ICE's jurisdiction.

In addition, it is envisaged that the ICE could provide a judicial review function in respect of environmental decisions made by bodies involved in the interpretation of international environmental obligations, e.g., the Kyoto Enforcement Branch, or any successor or replacement institution established by the COPs under the UNFCCC Kyoto processes; the WTO; and the International Finance Corporation (IFC) and its interpretation of the Equator Principles.⁴⁵

A possible additional feature of the ICE might be the establishment of specialist panels, e.g., relating to aviation or shipping or extractive industries. This feature could be present in both the interim (arbitral tribunal) version and in the final version of the ICE.

Depending on the views of signatory states, there might be a restriction to investigate only the "most serious" breaches — in line with a similar restriction upon the International Criminal Court's jurisdiction. Equally, there might well be a restriction of the remedies available to non-state actors purely to declaratory relief.

The sanctions imposed could include declaratory relief, fines and, along the lines of the EU Environmental Liability Directive, sanctions of restoration and rehabilitation of damaged habitats. The ICE could also be empowered to hand down declarations of incompatibility as regards signatory state legislation where it conflicts with the U.N. environmental rules. In addition, it could sanction signatory states for failures to permit enforcement of judgments. There would also be provision for interim measures, specifically, injunctions, enforceable in signatory states.

It is suggested that the ICE would produce a half-yearly or annual report listing its activities and possibly naming and shaming wrongdoers (be they those who have breached the law or signatory states which permit failures to enforce judgments). It is also suggested that the ICE have a panel of environmental experts to assist it.

45. Benedict Kingsbury, Nicole Kirsch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 69 *LAW & CONTEMP. PROBS.* 15 (2005), available at [http://www.law.duke.edu/shell/cite.pl?68+Law+&+Contemp.+Probs.+15+\(summer+autumn+2005\)](http://www.law.duke.edu/shell/cite.pl?68+Law+&+Contemp.+Probs.+15+(summer+autumn+2005)).

Conclusion

The proposals set out above have been the subject of considerable discussion over the past few years, including at a symposium on *Climate Change and the New World Order* in November 2008, at the British library, hosted by my chambers at 6 Pump Court, Temple – and a seminar on *A Case for an International Court for the Environment*, hosted by the ICE Coalition and Global Policy, and chaired by Lord Anthony Giddens at the London School of Economics in November 2009. More recently, the ICE Coalition has met with the legal counsel to the U.N. secretary general in New York. It has also lobbied and made a presentation at the 15th annual U.N. Climate Change Conference, also known as the 15th Conference of the Parties or COP 15 in Copenhagen in December 2009. I was fortunate enough to have the opportunity to talk about the project in the 8th Steinkraus Cohen lecture to the United Nations Association in London, UK on March 8, 2010, and in a presentation to the World Bar Conference in Sydney, Australia, on April 4, 2010 (where the proposal received the endorsement of Justice Brian Preston, chief judge of the Land and Environment Court of New South Wales). A draft protocol setting out the “constitutional rules” of an ICE is in the course of preparation.

Many may feel that some of these ideas are ultimately idealistic. Yet, one hundred years ago, the same would have been said of the idea of the U.N. itself. It is to be hoped that widespread and unequivocal support for this cause will be forthcoming. Indeed, the very survival of our species and our planet depends upon it.

For further details of the ICE Coalition, please see www.environmentcourt.com.

AMERICAN INDIAN TRIBAL COURTS AS MODELS FOR INCORPORATING CUSTOMARY LAW

*Elizabeth Ann Kronk**

Introduction

Two men from the same community fought bitterly; one man survived the fight. The community met to decide the future of the murderer and the murdered man's family according to the community's customs and traditions. Because of an emerging threat from an alien, dominant society, the community had to work together, and, therefore, retaliatory justice was not preferred. Peaceful co-existence was necessary for the survival of the community. It was ultimately decided that the murderer should provide compensation to the murdered man's family. The community considered the matter resolved.

The new, dominant society, however, did not agree with how the community resolved the matter. This society found these developments deeply troubling. After all, how could a known

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murderer be allowed to live openly in the community? The dominant society acted swiftly to ensure that such an event would not occur again.

This particular tale is an American story.¹ Yet, on a summer day in 2010, an Afghani judge told a remarkably similar story of events that had recently occurred in his own home country to a captivated audience in a small meeting room. His story underscored the difficulties of developing an Anglo-styled justice system in a country such as Afghanistan, where tribal customs and traditions play a substantial role in the administration of justice.

In the audience in that small meeting room, were American Indian tribal judges, including the author, who were startled by the familiarity of the tale, as this is the story of *Ex Parte Crow Dog*,² a famous federal Indian law case from the nineteenth century.³ For the American Indian tribal judges, hearing that the events underlying *Ex Parte Crow Dog* were essentially repeated in Afghanistan, underscored the similarity between the American Indian historical experience and the experience of many communities in the modern developing world. Like American Indians, many of the indigenous communities of the developing world view traditions and customs as important to the administration of justice.⁴ Moreover, as experienced by American Indians in the nineteenth and twentieth centuries, many of these modern communities are struggling with the imposition of an Anglo-styled justice system⁵ by a new dominant society. This trend can

1. Specifically, this is the story of *Ex Parte Crow Dog*, 109 U.S. 556 (1883). Here, Kan-Gi-Shun-Ca (Crow Dog) killed Sin-ta-ge-le-Scka (Spotted Tail). Both men were members of the Brule Sioux Band of the Sioux Nation and the killing occurred within the exterior boundaries of the Band's reservation. Crow Dog was punished according to the law of the Brule Sioux Band. The federal government also sought to prosecute Crow Dog, as it determined that the punishment Crow Dog received under tribal law was inadequate. In *Ex parte Crow Dog*, the U.S. Supreme Court held that under the then-existing law federal law was not applicable to crimes that occurred between Indians and arose solely within the confines of Indian country.

2. 109 U.S. 556 (1883).

3. For more information on *Ex Parte Crow Dog*, see SIDNEY HARRING, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* 100–101 (Cambridge University Press, 1994); see also B.J. Jones, *Role of Indian Tribal Courts in the Justice System*, 3 (March 2000), available at: <http://www.icctc.org/Tribal%20Courts-final.pdf>.

4. Johanna Gibson, *The UDHR and the Group: Individual and Community Rights to Culture*, 30 *HAMLIN J. PUB. L. & POLICY* 285, 310–311 (Fall 2008).

5. The use of "Anglo-style justice system" refers to the dominant system of rules and procedures in place in American state and federal courts. ed. note.

currently be seen around the world in places like Africa and Asia.⁶

As explained below, American Indian tribal courts have developed within the dominant, Anglo-styled justice system of the United States of America. Because of the similarities between the American Indian experience of the nineteenth and twentieth centuries and the realities currently facing traditional communities around the world, it is helpful to look to the development of American Indian tribal courts for guidance on how to marry traditional and Anglo-styled justice systems. In other words, when developing new court systems, it is not necessary to “reinvent the wheel” – as examples of American Indian court systems incorporating customary law with law and procedure used in the federal and state court systems abound throughout the United States. Those looking to develop new court systems may therefore look to American Indian tribal courts as models for the incorporation of customary law.

The purpose of this article is to briefly highlight American Indian tribal courts as potential models for court development in the developing world. As a starting point, this article concisely explains why the incorporation of indigenous customary law is preferred when developing new court systems in nations where indigenous populations have traditionally relied on customary law to resolve disputes. To begin an examination of American Indian tribal courts as models for the incorporation of customary law specifically, this article next explores American legal developments that led to the emergence of modern American Indian tribal court systems. The article then examines current external and internal values applied to these court systems. An examination of such values and related perceptions is helpful in determining whether or not the marriage of customary law with Anglo legal traditions within some American Indian tribal court systems has been successful. The article concludes that, while acknowledging that American Indian tribal court systems are by no means perfect, they provide an example of how indigenous traditions and customary law and court systems may be merged with the now dominant Anglo-styled court systems of the American state and federal legal systems. American Indian tribal court systems may, therefore, be a model for future court development where there is a

6. See Brynna Connolly, *Non-State Justice Systems and the State: Proposals for a Recognition Typology*, 38 CONN. L. REV. 239 (Winter 2005).

need to merge indigenous customary law into new, dominant court systems.

The Role of Customary Law in Modern Court Development

This article assumes that the incorporation of traditional and customary law and systems of indigenous communities is crucial to the development of new court systems. Although a full discussion of the benefits of such incorporation is beyond the scope of this article, a brief examination of the merits of incorporating customary law into new court systems superimposed on indigenous justice systems is helpful. First, indigenous communities may be slow to trust a new, foreign centralized legal system, either because of a history of oppressive application of that system and its substantive legal rules, or simply because those rules do not reflect the norms of the indigenous community.⁷ Similarly, long-standing traditional dispute resolution systems may be difficult, if not impossible, to replace entirely.⁸ Additionally, many traditional beliefs and customs are interwoven with political, social and economic spheres of indigenous communities, and it is impossible to disassemble one area or deal with a single aspect of societal life without affecting another.⁹ It is therefore unrealistic to believe communities will abandon local customs because of an edict from the new, central government.¹⁰ Moreover, attempts to discontinue customary law abruptly can often cause resentment among communities that have traditionally relied on customary law.¹¹ This in turn may be disruptive to national unity.¹²

In addition to incorporating traditional law into new legal systems, the local, customary courts themselves may be preferable for logistical reasons.¹³ Customary courts are accessible to people in rural areas and can provide services in the local language, while many formal state systems often do not have the capacity to reach rural populations, nor do court officials tend to speak the indigenous

7. *Id.* At 240.

8. *Id.* at 260.

9. Laurence Juma, *Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes*, 14 ST. THOMAS L. REV. 459, 485 (Spring 2002).

10. See Lynn Berat, *Customary Law In a New South Africa: A Proposal*, 15 FORDHAM INTL. L. REV. 92, 100 (1991/1992).

11. *Id.*

12. *Id.*

13. Connolly, *supra* note 6, at 243.

language.¹⁴ Customary courts can also be highly efficient and economical as dispute resolution often happens faster than in state-run courts.¹⁵ Generally speaking, therefore, this article assumes it is better to incorporate existing customary law and legal structures into new court systems rather than imposing an entirely new legal system on the indigenous population.

Overview of Federal Indian Law Related to American Indian Tribal Court Development

American Indian tribal court systems, in many instances, are just such an example of the incorporation of customary law and legal structures into Anglo-styled justice systems. American Indian tribal court systems exist in the United States as systems of justice outside of the American state and federal justice systems. Some tribal courts resemble courts usually seen in Anglo-styled justice systems, while other tribal courts are quite traditional.¹⁶ This section briefly reviews the development of federal Indian law relevant to the creation of current American Indian tribal court systems.¹⁷

As previously explained, American Indian tribal courts exist as entities separate from state and federal justice systems. A myriad of historical legal developments led to the separateness of American Indian tribal courts. First, it is notable that American Indian tribes are extra-constitutional, meaning that tribes exist outside of the United

14. *Id.* at 243, 259.

15. *Id.* at 243.

16. A variety of American Indian tribal courts currently exist within the United States. Melissa Tatum, *Tribal Courts: The Battle to Earn Respect Without Sacrificing Culture and Tradition in HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE AND RESISTANCE* at 83 (Larry Cata Backer ed.) (Carolina Academic Press 2007) (explaining that “tribal courts are as diverse in structure and practice as the cultures they serve” as some tribes have retained traditional courts, some Department of Interior Courts of Indian Offenses, and others have chosen to mirror state and federal courts). There are over 300 tribal courts currently in existence; *see also* Jones, *supra* note 3 at 1. (“Many tribal justice systems evolved from courts set up by the Bureau of Indian Affairs on reservations in an attempt to assimilate Native people into the predominant Anglo legal system. As a result of this, many Indian tribal courts mirror the justice systems that exist in states and the federal system and use very similar procedures and rules. Other Indian tribal courts have attempted to bring back traditional dispute resolution techniques by adding these methods into their court systems. As a result, these courts and their procedures may differ dramatically from the procedures of a state or federal court.”).

17. Given the limited nature of this article, it is not possible to fully discuss the development of federal Indian law that helped to create modern American Indian tribal court systems.

States Constitution.¹⁸ In the early nineteenth century, the U.S. Supreme Court affirmed the separateness of American Indian tribal nations. In *Cherokee Nation v. Georgia*,¹⁹ the U.S. Supreme Court held that American Indian tribes were “domestic dependent nations,” highlighting their separateness from both state and federal governments. In *Worcester v. Georgia*,²⁰ the U.S. Supreme Court further clarified the separateness of American Indian tribes, finding that the laws of the states shall have “no force or effect” within the exterior boundaries of American Indian tribal nations. However, in the late nineteenth century, the absolute authority of the federal government over American Indian tribal nations was articulated by the U.S. Supreme Court in *United States v. Kagama*,²¹ where the Court held that Congress has plenary authority over American Indian tribal nations. As an expression of its plenary authority over Indian country, on June 18, 1934, Congress passed the Indian Reorganization Act (IRA),²² with the partial purpose of increasing local tribal self-government.²³

Following passage of the IRA, American Indian tribal courts

18. Scholars have noted that “tribal sovereignty is both pre-constitutional and extra-constitutional.” Ann Tweedy, *Connecting the Dots Between the Constitution, The Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 656 (Spring 2009), citing Gloria Valencia-Weber, *The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 417 (2003).

19. 30 U.S. 1 (1831).

20. 31 U.S. 515 (1832).

21. 118 U.S. 375 (1886).

22. Pub. L. No. 73-383, 48 Stat. 984 (1934).

23. *Mescalero Apache v. Jones*, 411 U.S. 145, 152 (1973) (“The intent and purpose of the Reorganization Act was ‘to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.’”) (quoting H.R. Rep. No. 73-1804, at 6 (1934)); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801, n. 40 (June 2008) (“Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. § 461 (2000), which had as its purpose the need to craft measures ‘hereby Indian tribes would be able to assume a greater degree of self-government.’”) (citing *Morton v. Mancari*, 417 U.S. 535, 542 (1974)); Honorable Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 1 (1998), available at: <http://www.icctc.org/CC%20manual/Lessons%20From%20the%20Third%20Sovereign.pdf> (“Passage of the Indian Reorganization Act allowed the tribes to organize their governments, by drafting their own constitutions, adopting their own laws through tribal councils, and setting up their own court systems.”)

began to proliferate²⁴ throughout Indian country.²⁵ As the Honorable Sandra Day O'Connor has noted, "Most of the tribal courts that exist today date from the Indian Reorganization Act of 1934. Before the Act, tribal judicial systems were based around the Courts of Indian Offenses, which were set up in the 1880's by the federal Office of Indian Affairs."²⁶

As American Indian tribal courts began to spread throughout Indian country, fears within the dominant society arose regarding application and enforcement of tribal law.²⁷ Perhaps in reaction to these fears, Congress and the U.S. Supreme Court took steps to limit

24. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 835 (June 2007) ("There are a growing number of tribal courts in place to hear disputes--between both members and non-members--that arise on the reservation. Tribal courts vary widely in their structure: trial courts, appellate courts, Peacemaker courts, talking circles, drug courts, and specialized courts for domestic violence or child custody matters can all be found in Indian country.") (citing Nell Jessup Newton, *Tribal Courts Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 294 (1998)).

25. "Indian country" is defined at 18 U.S.C. §1151, which states that "[e]xcept as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

26. Honorable Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 1 (1998), available at: <http://www.icctc.org/CC%20manual/Lessons%20From%20the%20Third%20Sovereign.pdf>.

27. For example, in testimony related to what became known as the Indian Civil Rights Act, U.S. Senator Quentin Burdick stated, "in many cases the tribal courts are 'kangaroo courts.' One of the basic reasons for my statement is that the method of selecting tribal judges insures that an Indian appearing before tribal court, in too many cases, will not get fair treatment." Testimony of Senator Quentin Burdick, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 87th Cong. 88 (1962). More recently, in her comments on the pending Tribal Law and Order Act of 2009, the Honorable Theresa Pouley indicated that concerns still seem to remain regarding the effectiveness of American Indian tribal courts. "At the hearing last month on the draft Tribal Law and Order Act, representatives from the Departments of Justice and Interior expressed concerns to this Committee regarding the extension of tribal court sentencing authority. DOJ and BIA expressed concerns as to whether tribal courts would adequately protect the rights of criminal defendants. DOI expressed similar concerns, and also raised issues regarding increased costs of longer detentions and possibly an increase in habeas petitions." Prepared Statement of Hon. Theresa M. Pouley, Judge, Tulalip Tribal Court; President, Northwest Tribal Court Judges Association, 33-34 (July 24, 2009).

American Indian tribal court authority.²⁸ As a result of these developments, American Indian tribal courts have limited authority over non-Indians, as they have no authority over non-Indian criminal defendants²⁹ and restricted authority over non-Indians involved in civil matters.³⁰ Today, the majority of matters handled by American Indian tribal courts tend to include property and family law.³¹ This is consistent with the general policy of the American federal government to leave issues related to American Indian tribal members solely within the inherent tribal sovereignty of tribal governments.³²

As seen above, the American federal government has played a significant role in the development of American Indian tribal court systems. As a result of this historical relationship, many American Indian tribal court systems have come to incorporate various aspects of Anglo-styled justice systems.

Current Perceptions of American Indian Tribal Courts

Having determined how modern American Indian tribal court systems came into existence, it is now helpful to consider the success of such systems as judged by external and internal constituencies. This section will consider how tribal courts are currently functioning in relation to other justice systems, as perceived by both external and internal communities. The current perception of American Indian tribal justice systems is an important piece in understanding the effectiveness of the existing system. In other words, can a justice

28. *See, e.g.*, the Indian Civil Rights Act of 1968, which applied many of the protections of the U.S. Constitution to Indian country as well as limiting American Indian tribal court punishment authority to \$5,000 and/or one year in prison. Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-03. *See also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (holding that American Indian tribal courts did not have authority over non-Indians in criminal matters).

29. *Oliphant* at 435 U.S. 191 (1978).

30. *See* Plains Commerce Bank v. Long Family Land & Cattle, 554 U.S. 316 (2008) (holding that although American Indian tribal courts have jurisdiction to regulate conduct on tribal lands, that power is lost once the land is transferred to non-Indians); *see also* Montana v. United States, 450 U.S. 544 (1981) (holding that American Indian tribal courts possess civil jurisdiction over non-Indians when the non-Indians either enter into a consensual relationship with the plaintiff allowing for tribal court jurisdiction or when the non-Indians' activities threaten the health, welfare, economic security or political integrity of the tribe).

31. Newton, *supra* note 24 at 308.

32. *See generally* Worcester v. Georgia, 31 U.S. 515 (1932) (holding that the laws of Georgia did not have any effect within the Cherokee Nation's territory); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that tribes have the power to determine tribal membership).

system exist within the United States that incorporates indigenous traditions and customary law to varying degrees? As explained below, the answer appears to be “yes” in some instances.

Because American Indian tribal courts exist outside of American state and federal justice systems, they are subject to both external and internal values: external values of non-tribal communities, such as the U.S. Congress, U.S. Supreme Court and even non-Indian communities living near Indian country, regarding the “legitimacy” and effectiveness of such tribal court systems,³³ and internal values of the local American Indian tribal community over which the tribal court system has authority.³⁴ Accordingly, both the external and internal “validity” of an American Indian tribal court system, as determined by these external and internal value systems, must be considered when attempting to ascertain the current perceptions of American Indian tribal court systems. Understanding current perceptions is helpful in making conclusions regarding the effectiveness of American Indian tribal court systems.

External Perceptions of American Indian Tribal Court Systems

As previously explained, during the late twentieth century, Congress and the U.S. Supreme Court reacted to concerns regarding the extension of American Indian tribal court jurisdiction by limiting tribal court civil jurisdiction and eradicating criminal jurisdiction over non-Indians. Additionally, Congress enacted the Indian Civil Rights Act in 1968 to extend the majority of the protections of the U.S. Constitution over all individuals living in Indian country, regardless of race. During this time, many additional federal laws were passed that explicitly extended to Indian country.³⁵ As a result, a close relationship between the federal government and American Indian tribes developed, and “[t]he extent of tribal court jurisdiction is a

33. See, e.g., Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 842 (March 2006) (explaining that tribes live with criminal laws that reflect the values of an external community).

34. See, e.g., Washburn, *supra* note 33, at 841 (explaining that there should be an alignment between the legal system having authority over the community and the community’s values for there to be effective law enforcement).

35. For example, see the Clean Water Act, 33 U.S.C. §1251, *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. §6901, *et seq.*; the Clean Air Act, 42 U.S.C. §7401, *et seq.*; the Endangered Species Act, 16 U.S.C. §1531, *et seq.*; the National Environmental Policy Act, 42 U.S.C. §4321, *et seq.*; and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601, *et seq.*

matter of federal as well as tribal law, involving as it does issues at the heart of the relationship between the federal government and Indian tribes.”³⁶ Even when a tribal court applies customary or tribal law, the typical practitioner will likely find the resulting decision to be familiar.³⁷ Additionally, the types of cases typically found on a tribal court docket are similar to those cases that would be found on a state or federal court docket.³⁸ Furthermore, modern American Indian tribal courts are more accessible than they have been previously.³⁹

These recent developments suggest that American Indian tribal court justice systems may be increasingly acceptable to external communities. Although it is difficult to generalize regarding the external perceptions of American Indian tribal justice systems as

36. Newton, *supra* note 24, at 320.

37. Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 N.M. L. REV. 225, 250 (1994) (“The legal reasoning based on custom can also result in outcomes facially indistinguishable from those based on federal or state law. One must distinguish external form from internal substance to appreciate how the outwardly similar is not so.”). See also Newton, *supra* note 24, at 304-305 (discussing the Navajo Supreme Court’s decision in *Castillo v. Charlie* and how the Court’s application of tribal law resulted in a decision that utilized fact-finding and decision-making methods similar to those employed in state court).

38. Newton, *supra* note 24, at 298-99 (Dean Nell Jessup Newton read 85 cases published in the Indian Law Reporter from the year 1996. Of the cases she read, she determined that the majority raised jurisdictional and procedural questions, although there were a few property, tort and family law cases).

39. Dean Nell Jessup Newton explained that many lack knowledge about tribal courts in part because “most tribal court opinions are not widely distributed.” Newton, *supra* note 24, at 289. Recent publication developments may therefore have a significant impact on the accessibility and familiarity of external constituencies with modern American Indian tribal courts. Tatum, *supra* note 16, at 92 (“Some tribal court decisions are available online in traditional legal databases, such as Westlaw and VersusLaw, or even posted on websites maintained by tribal courts themselves, and some tribes have also chosen to publish their decisions in book format. The Navajo Nation has long published its decisions in paper, and other tribes such as the Mashantucket Pequot and Muscogee (Creek) Nation are also opting for this approach.”). Notably, Westlaw recently developed databases for 13 tribes and two more expansive tribal court reporters, West’s American Tribal Law Reporter and Oklahoma Tribal Court Reports. Additionally, a new board of authors and editors is updating on a regular basis COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, the foremost treatise of federal Indian law, making recent developments in the field more accessible. Furthermore, many tribal judges are now actively participating in academic and public discourse regarding their decisions. Tatum, *supra*, at 92. (“[T]ribal judges have begun actively speaking at conferences and publishing articles. Those speeches and articles cover topics ranging from how a particular court works to complex, theoretical analyses of specific legal issues. Tribal judges have also begun seeking out their state colleagues at meetings and conferences to put a public face on the tribal courts. Many states now have joint state/tribal court judicial conferences and training sessions.”).

perceptions may differ widely at regional and local levels, recent developments suggest that the common perception may be improving. For example, there is a general lack of cases challenging tribal court authority in federal court after the exhaustion of tribal court remedies, suggesting that those parties subject to tribal court authority are content with tribal court decisions.⁴⁰ Furthermore, the percentage of Bureau of Indian Affairs (BIA)-funded tribal judicial systems receiving an acceptable rating dramatically increased in 2008, when the percentage of tribal courts receiving this rating increased to 22 percent from 0.01 percent in 2004.⁴¹

The recent enactment of the Tribal Law and Order Act of 2010, however, is perhaps the best indicator regarding the national perception of the adequacy of American Indian tribal courts.⁴² Signed into law in July 2010, the Tribal Law and Order Act grants American Indian tribes the option of increasing their tribal court punishment authority from up to one year in prison and/or \$5,000 to up to three years and/or \$15,000 in cases involving tribal felonies.⁴³ The availability of increased tribal court punishment authority is conditioned on the American Indian tribe's adoption of certain measures designed to provide added protections for the defendant. For example, the American Indian tribe wishing to increase its court's punishment authority must provide a right of effective counsel and the assistance of a licensed defense counsel where the defendant is indigent.⁴⁴ Furthermore, the American Indian tribe must ensure that tribal judges adjudicating matters where the defendant may be subject to increased punishment are also licensed attorneys.⁴⁵ Finally, the tribe must make its criminal laws and procedure publically available and keep a record of the proceedings. On the whole, adoption of the Tribal Law and Order Act of 2010 suggests that the federal government has enough confidence in existing American Indian tribal court systems to allow for the expansion of tribal court punishment

40. Newton, *supra* note 24, at 328.

41. *Detailed Information on the Bureau of Indian Affairs – Tribal Courts Assessment* (Jan. 9, 2009); available at: <http://www.whitehouse.gov/omb/expectmore/detail/10001091.2003.html> (last accessed March 31, 2010).

42. Pub. L. No. 111-211, 124 Stat. 2258 (2010).

43. Section 304, Pub. L. 111-211. Before enactment of the Tribal Law and Order Act of 2010, American Indian tribal court punishment authority was limited to up to a \$5,000 fine and/or one year in prison. 25 U.S.C. §§ 1301-03.

44. 124 STAT. at 2280.

45. *Id.*

authority, but not without provisions in place that the federal government deems necessary for the administration of justice.

Internal Perceptions of American Indian Tribal Court Systems

Like external perceptions of American Indian tribal courts, it is difficult to make broad generalities about internal or local community perceptions of American Indian tribal courts. This problem is compounded by the existence of hundreds of different American Indian tribal court systems,⁴⁶ and each community will have a different perception of the court system having authority over it. Although it is impossible to consider the internal perceptions of all of these individual American Indian tribal court systems in this article given existing space limitations, the internal perceptions of one tribal court system, the court system of the Sault Ste. Marie Tribe of Chippewa Indians, may be instructive.

Located in the Upper Peninsula of Michigan,⁴⁷ the Sault Ste. Marie Tribe of Chippewa Indians is composed of 29,000 enrolled members,⁴⁸ but the majority of the membership does not live within the exterior boundaries of the Tribe's reservations. The Sault Ste. Marie Tribe of Chippewa Indians was federally recognized in 1972.⁴⁹ Its tribal court system is composed of a trial court and an appellate court. The Tribe's court system has jurisdiction over tribal members and handles both criminal and civil matters. A full-time Chief Judge, part-time associate judge and part-time magistrate judge adjudicate matters at the trial court level.⁵⁰ A part-time associate judge also oversees the Tribe's drug court.⁵¹ The Tribe's Court of Appeals is

46. In 2001, the number of tribal courts exceeded 350. Nancy Carol Carter, *American Indians and Law Libraries: Acknowledging the Third Sovereign*, 94 *LAW LIB. J.* 7, 26 n. 20 (Winter 2002).

47. Sault Tribe of Chippewa Indians, available at: <http://www.saulttribe.com/> (last accessed August 27, 2010).

48. Sault Tribe of Chippewa Indians, Enrollment Department, available at: http://www.saulttribe.com/index.php?option=com_content&task=view&id=31&Itemid=151 (last accessed August 27, 2010).

49. Sault Tribe of Chippewa Indians, Sault Tribe History, available at: http://www.saulttribe.com/index.php?option=com_content&task=view&id=29&Itemid=205 (last accessed August 27, 2010).

50. Both the full-time chief judge and part-time associate judge of the Sault Ste. Marie Tribe of Chippewa Indians trial court are attorneys licensed to practice law in the State of Michigan. The part-time magistrate judge is not a licensed attorney, but is a member of the Tribe. The part-time magistrate judge also serves as full-time court administrator for the entire tribal court system.

51. The part-time drug court judge is also licensed to practice law in the State

composed of five permanent appellate judges and two reserve appellate judges, who serve when one of the permanent appellate judges is unable to serve.⁵² Judges at both the trial and appellate court levels are appointed by the Tribe's Board of Directors, which is composed entirely by members of the Tribe. Tribal judges are appointed to serve for a period of years. For example, the current Chief Appellate Judge was appointed for a four-year period that began in February 2008. Trial and appellate judges may be removed by the Board of Directors. The Board of Directors is elected by the tribal membership.

As with many other tribal courts, the Sault Ste. Marie Tribe of Chippewa Indians' tribal court system has been successful in marrying Anglo-styled norms of justice with tribal traditional law, where appropriate. For example, in March 2008, the Tribe's Court of Appeals rendered an opinion in a matter involving the ability of a former tribal chairman to run for election.⁵³ The matter before the

of Michigan.

52. Two of the permanent appellate court judges, including the Chief appellate judge, are licensed to practice law in the State of Michigan. The remaining permanent appellate court judges are members of the Tribe and non-attorneys. One of the reserve appellate judges is licensed to practice law in the State of Michigan and the other is a non-attorney member of the Tribe.

53. In re Janet Liedel and Betty Freiheit, APP-08-05 (March 25, 2008) ("The present matter involves the claims of two tribal members, Petitioners, that their rights under tribal and federal law were violated as a result of the Election Committee's decision not to certify Bernard A. Bouschor as a Unit One candidate for the Tribal Board of Directors ("Tribal Board"). On February 11, 2008, Bouschor filed the required materials to be certified as a Unit One candidate for the Tribal Board. Tribal Code Section 10.110(2) provides that:

No individual may run for election to office who is currently a Defendant in Chippewa County Circuit Court Case No: 04-7606-CC, in which the Tribe is pursuing civil litigation against the Defendants, including claims involving fraud, breach of lawful authority, breach of fiduciary duties owed to the Tribe, and conversion of over \$2.6 Million until such litigation has been finally resolved.

Given that Bouschor is currently a defendant in Chippewa County Circuit Court Case No: 04-7606-CC, the Election Committee determined that it could not certify Bouschor as a Unit One candidate due to the prohibition contained at Tribal Code Section 10.110(2)...Accordingly, on March 17, 2008, Petitioners appealed the Election Committee's refusal to ratify Bouschor as a Unit One candidate....Petitioners contend that Tribe Code Section 10.110(2), which precluded the certification of Bouschor as a Unit One candidate, violates their fundamental First Amendment rights to vote and freedom of political association under the Tribal Constitution, Article VII, the U.S. Constitution, the protections of which are incorporated into the Tribal Constitution through Article VII, and the Indian Civil Rights Act. Petitioners also allege that the Tribal Board violated Article IX of the Tribal Constitution by failing to obtain the affirmative vote of

tribal Court of Appeals, however, was raised by two members of the Tribe and not the former chairman himself. As a result, whether the two tribal members had standing to appeal the Election Committee's decision was before the Court of Appeals. In determining that the two tribal members did have standing, the Court of Appeals looked to the tribal code and the U.S. Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Notably, the Court of Appeals also considered the customs and traditions of the tribe. In relevant part, the Court of Appeals explained that:

[i]t is our understanding that historically the leaders of our Tribe welcomed the feedback from all tribal members on the wisdom of the decisions of tribal leaders. It would therefore be consistent with this tribal custom to allow any tribal member to challenge the decisions of the Election Committee, as decisions of the Election Committee are fundamental to the internal governance of the Tribe.⁵⁴

The Court of Appeals' decision in this matter is therefore an example of how a tribal court may incorporate tribal traditions into tribal court opinions.

Given that the tribal court described above appears to be functioning and successfully incorporating tribal customs and traditions into its decisions, it is helpful to determine the internal validity of the court system as established by the community it serves. In determining the internal validity of such American Indian tribal court systems, one measure of the tribal community's perception of the tribal court system may be the community's confidence in the tribal court judges. For example, in recent years, there have been few calls from the local Sault Ste. Marie community for the removal of any tribal court judge. To this author's knowledge, no tribal judge with the Sault Ste. Marie Tribe of Chippewa Indians has been removed in the last two years in response to requests from the tribal community. However, should concerns about the tribal judge's performance exist at the time the tribal judge is considered for re-appointment, the tribal judge may not be re-appointed. In the last two years, only one tribal appellate court judge was not re-appointed due to apparent concerns

seven Tribal Board members. Finally, Petitioners allege that Tribal Code Section 10.110(2) constitutes an illegal bill of attainder.”).

54. *Id.* at 3.

regarding her performance. The foregoing, suggests that the Sault Ste. Marie Tribe of Chippewa Indians tribal community, or at least the tribe's board of directors, is generally satisfied with the performance of the tribal court system.

Inherent in most tribal court systems are mechanisms for the removal of inadequate tribal court judges, whether through the election or appointment process.⁵⁵ Accordingly, as seen in the example of the Sault Ste. Marie Tribe of Chippewa Indians, concerns regarding the tribal court systems, and performance of the tribal court judges in particular, may be managed at the local, tribal level.⁵⁶ These mechanisms lend further support for the proposition that the internal perception of tribal court systems is generally positive within the local, tribal communities they serve.

While it cannot be assumed that all American Indian tribal court systems are functioning at equal levels or equally accepted by external and internal constituencies, the systems seem to be working. Such systems may therefore be appropriate models for court development in other regions facing the challenge of incorporating indigenous traditions and customary law into new court systems.

Conclusion

When European explorers landed in what is now the United States, they brought with them new food, new clothes, new language – and new legal systems. In the intervening centuries, those new legal systems have developed into what are now American federal and state court systems. As a result, American Indian tribal governments that pre-existed the formation of the United States of America have worked in many instances to merge tribal traditions and customary law with Anglo-styled justice systems similar, if not the same, as those used in American federal and state court systems. As a result, modern American Indian tribal court systems have emerged, and, while not perfect, these systems do appear to be largely accepted and perceived

55. *See, e.g.*, Sault Ste. Marie Tribe of Chippewa Indians Tribal Code Sections 80.102; 82.103; *available at*: http://www.saulttribe.com/index.php?option=com_content&task=view&id=406&Itemid=592 (last accessed September 1, 2010) (providing that tribal judges are appointed by the Board of Directors for a set term).

56. Notably, some concerns the tribal community may possess, such as the lack of tribal court punishment authority or criminal jurisdiction over non-Indians, are matters of federal law, as explained above, and therefore outside of the authority of the local tribal community to remedy.

as adequate by external and internal communities. As other nations face the challenge of merging indigenous customary law with Anglo-styled justice systems, American Indian tribal court systems may be used as a model for future court development.

A JUDGE'S PERSPECTIVE ON USING SENTENCING DATABASES*

*The Hon. Justice Brian John Preston***

This paper examines the features of the online environmental crime sentencing statistics database launched by the Judicial Commission of New South Wales in 2008 as a component of its Judicial Information Research System. The Hon. Justice Preston highlights the outcome and process benefits delivered by this database to sentencing judges, and more generally to the criminal justice system in New South Wales.

Introduction

The foremost sentencing database in Australia is the Sentencing Information System, a component of the Judicial Information Research System (JIRS), maintained by the Judicial Commission of New South Wales.

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JIRS is an online source of primary, secondary and statistical reference material for judicial officers, the courts, the legal profession and government agencies that play a role in the justice system.

JIRS contains case law, legislation, principles of sentencing, sentencing statistics and other information. In April 2008, JIRS was extended to include sentences for environmental crimes.¹ In so doing, the functions and capabilities of the JIRS sentencing database were considerably enhanced. The enhanced sentencing database yields benefits for the criminal justice system and for the sentencing judge in relation to both sentencing outcomes and the process of sentencing. This paper highlights the outcome and process benefits of the environmental crime sentencing database and illustrates its contribution to more consistent and transparent sentencing decisions.

JIRS and the Environmental Crime Sentencing Database

The environmental crime sentencing database of JIRS contains data concerning sentences imposed by the Land and Environment Court of New South Wales (NSWLEC) and other courts in New South Wales for environmental offenses since January 1, 1998. The data includes:

- the case name, its medium neutral citation and matter number;
- the class of jurisdiction in the NSWLEC;
- the principal offense and any other offenses;
- the penalty type; and
- the variable characteristics of the offense and offender.

Data is collected on the statutory provision constituting the offense. Where there is more than one offense, the most serious or principal offense is selected by the person entering the sentencing statistics on the database after the court has imposed the sentence. Usually, the most serious or principal offense is that which attracts the largest penalty. Where there are multiple counts, they are also

1. See B.J. Preston & H. Donnelly, *Achieving Consistency and Transparency of Sentencing for Environmental Offenses*, in RESEARCH MONOGRAPH NO. 32 (Judicial Commission of New South Wales, Sydney, 2008), also available at B.J. Preston & H. Donnelly, *The Establishment of an Environmental Crime Sentencing Database in New South Wales*, 32(4) CRIM L.J. 214 (2008).

recorded in the database. The latter matter is, of course, relevant to whether the totality principle has been applied in sentencing.

In New South Wales, the types of penalties imposed by the sentencing court usually are those provided for in the Crimes (Sentencing Procedure) Act.² Fines as a penalty type fall under each environmental statute or regulation, and the maximum penalty is generally set by the statute or regulation that makes the act or omission an offense. Apart from full-time imprisonment and alternative forms of imprisonment (suspended sentences, home detention and intensive correction orders), the penalties that fall under the Crimes (Sentencing Procedure) Act include:

- dismissal of the charge;³
- dismissal of the charge on condition that the offender enter into a good behavior bond;⁴
- conviction with no other penalty;⁵
- conviction and the imposition of a good behavior bond, with or without supervision, as an alternative to imprisonment;⁶
- imposition of a community service order as an alternative to imprisonment;⁷ and
- different forms of fines.⁸

The court may impose a fine with additional orders or additional orders in place of a fine under the Protection of the Environment Operations Act,⁹ under the Environmental Planning and Assessment Act¹⁰ and/or the National Parks and Wildlife Act.¹¹

The additional orders include:

- orders for restoration and prevention;¹²
- orders for payment of costs, expenses and compensation;¹³

2. Crimes (Sentencing Procedure) Act, 1999 (Austl.).

3. Crimes (Sentencing Procedure) Act § 10.

4. *Id.*

5. *Id.* § 10A.

6. *Id.* § 9.

7. *Id.* § 8.

8. *Id.* §§ 14-17.

9. Protection of the Environment Operations Act, 1997, §§ 245-250 (Austl.).

10. Environmental Planning and Assessment Act, 1979, § 126(3) (Austl.).

11. National Parks and Wildlife Act 1974, 1974, §§ 200 – 205 (Austl.).

12. Protection of the Environment Operations Act § 245; Environmental Planning and Assessment Act § 126(3).

13. Protection of the Environment Operations Act §§ 246-247.

- orders to pay investigation costs;¹⁴
- monetary benefit orders;¹⁵
- publication orders;¹⁶
- environmental service orders;¹⁷
- environmental audit orders;¹⁸
- payment into an environmental trust;¹⁹
- orders to attend a training course;²⁰
- orders to establish a training course;²¹ and
- orders to provide financial assurance.²²

The variable characteristics that are included in the sentencing database are based on traditional sentencing objective and subjective characteristics, supplemented by the matters specified in relevant environmental legislation,²³ along with other principles involving aggravating or mitigating factors. These variable characteristics match the sentencing considerations for environmental offenses.²⁴ The objective characteristics relate to the objective seriousness or gravity of the offense that has been committed. They include:

- whether there were financial reasons for, or advantage gained in, committing the offense;
- whether there was foreseeable harm to the environment;
- whether there were practicable measures which may have been taken to avoid the foreseeable harm;
- whether there was control over the causes of the offense;
- the state of mind of the offender in committing the offense;
- the environmental harm caused by the commission of the offense;
- whether the offense was committed under a supervisor's orders, and

14. *Id.* § 248(1).

15. *Id.* § 249.

16. *Id.* § 250(1)(a)-(b).

17. *Id.* § 250(1)(c).

18. *Id.* § 250(1)(d).

19. *Id.* § 250(1)(e).

20. *Id.* § 250(1)(f).

21. *Id.* § 250(1)(g).

22. *Id.* § 250(1)(h).

23. Protection of the Environment Operations Act § 241; National Parks and Wildlife Act § 194.

24. See B.J. Preston, *Principled Sentencing for Environmental Offenses — Part 2: Sentencing Considerations and Options*, 31(3) CRIM L.J. 142, 142–157 (2007).

- the maximum penalty for the offense.

In addition, there is a variable expressing the overall conclusion of the objective seriousness of the offense, taking into account all of the other objective characteristics.

The subjective characteristics relate to the particular offender. These include:

- the prior criminal record of the offender;
- whether the offender provided cooperation and assistance;
- whether the offender has expressed contrition and remorse;
- whether the offender had a prior good character;
- whether the offender pleaded guilty and the timing of the plea;
- whether costs are to be awarded against the offender and the quantum of costs;
- the offender's means to pay any fine imposed; and
- where there are multiple offenses and/or counts, whether the totality principle is applicable.

The data relating to these variables, both the objective and subjective characteristics, have been captured and entered in the sentencing database. Most data is available to be displayed graphically for users of JIRS. Data relating to maximum penalty, however, is not displayed, as this information is available from the statute creating the offense.

The sentencing database also contains the full reasons for the sentencing decision underlying each of the sentences captured in the database. Users are able to access the sentencing judgment after making inquiry of the data. This capability to access directly the sentencing remarks is an important feature of the environmental crime sentencing database and is not currently available for other crimes on the JIRS database.

A principal objective of a sentencing database is to improve consistency of approach to sentencing. Consistency of approach involves two aspects, one concerned with outcomes and the other with process.

Outcome Benefits of a Sentencing Database

In relation to consistency of outcomes, what is desired is not to

achieve “uniformity in outcome”²⁵ — that would be impossible²⁶ — but rather to reflect the notion of equal justice. In *R v. Jurisic*,²⁷ Chief Justice Spigelman quoted Lord Bingham of Cornhill who said that: “[i]t is generally desirable that cases which are broadly similar should be treated similarly and that cases which are broadly different should be treated differently.” In *Lowe v. The Queen*, Justice Mason J stated:

Just as consistency in punishment — a reflection of the notion of equal justice — is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.²⁸

This aspect of consistency of approach is promoted: “. . .if sentencers are aware of, or have ready access to, clear information of the sentences imposed by other sentencers in similar cases.”²⁹

A sentencing database, such as is provided by JIRS, collects and disseminates information about sentences to sentencing judges and the legal profession. As Chief Justice Gleeson noted in *Wong v. The Queen*,³⁰ providing “knowledge of what is being done by courts generally will promote consistency.” The sentencing database of JIRS not only provides the results of sentencing, but also, in the case of the environmental crime sentencing database, information on the objective and subjective circumstances of the offense and offender taken into account by the sentencer in reaching each result. Furthermore, in the case of the environmental crime sentencing database, there is the capability of identifying the underlying decision for each sentence result and accessing the sentencing remarks

25. *R v. Bibi* (1980) 1 W.L.R. 1193 (Eng.).

26. See *Wong v. The Queen* (2001) 207 C.L.R. 584, para. 6 (Gleeson, C.J.) (Austl.).

27. *R v. Jurisic* (1998) 45 N.S.W.L.R. 209, 221 (Spigelman, C.J.) (Austl.).

28. *Lowe v. The Queen* (1984) 154 C.L.R. 606, 610–611 (Mason, J.) (Austl.). See also *Everett v. The Queen* (1994) 181 C.L.R. 295, 306 (McHugh, J.) (Austl.).

29. SENTENCING COMMISSION FOR SCOTLAND, *THE SCOPE TO IMPROVE CONSISTENCY IN SENTENCING*, at 35 (2006).

30. *Wong v. The Queen*, *supra* note 26, at para. 7.

explaining the facts and reasoning for reaching that sentencing result. The capability of accessing the sentencing remarks enables the sentencing judge to better ascertain the comparability of prior sentences to the case at hand. Over time, by reason of the process benefits of the sentencing database discussed below, the sentencing remarks of judges for sentences entered in the database will become more helpful and improve the sentencer's ability to ascertain the similarities and differences between different cases.

The other aspect of consistency of approach involves the consistent application of established sentencing principles.³¹ This aspect of consistency is discussed below in relation to the process benefits of sentencing databases. Another outcome benefit of a sentencing database is that the sentencing data indicates *a range* of sentences for a particular offense, but they do not determine *the range* or, more accurately, *the permissible range* for the case at hand. A sentencing database records, as a historical fact, the general pattern of sentencing at that particular time. Sentencing judges may properly have regard to that general pattern when imposing sentences in the particular case.³²

A further outcome benefit of a sentencing database is assisting appellate review. Sentencing statistics assist appeal courts to discharge their supervisory function. In *R v. Maguire*,³³ the New South Wales Court of Criminal Appeal said that statistics could assist the day-to-day function of appeal courts responsible for determining whether a sentence was manifestly excessive in a severity appeal and manifestly inadequate in a Crown appeal. This view is reiterated by Chief Justice Spigelman in *R v. Bloomfield*³⁴ and by Justice Winneke, in *R v. Giordano*.³⁵

Finally, a reliable record of sentences imposed enables an appeal court to monitor lower courts and, sometimes, express disapproval of sentencing practices. There are numerous examples of the New South Wales Court of Criminal Appeal registering its disapproval on

31. See *R v. Rushby* (1977) 1 N.S.W.L.R. 594, 597 (Austl.).

32. See *R v. Lawson* (1997) 98 A. Crim. R. 463, 465 (Austl.); *Wong v. The Queen*, *supra* note 26, at para 19; *R v. Whyte* (2002) 55 N.S.W.L.R. 252, 280 (Austl.).

33. *R v. Maguire*, (N.S.W.C.C.A. Aug. 30, 1995) (unreported).

34. *R v. Bloomfield* (1998) 44 N.S.W.L.R. 734, 739 (Spigelman, C.J.) (Austl.).

35. *R v. Giordano* (1998) 1 V.R. 544, 549 (Winneke, P.) (Austl.). See also *R v. Bangard* (2005) 13 V.R. 146, paras 11, 29 and 30 (Austl.). Justice Winneke was at the time of this judgment the President of the Court of Appeal of Victoria.

sentencing patterns using the JIRS statistics.³⁶

Process Benefits of a Sentencing Database

As stated above, one aspect of consistency of approach to the sentencing task involves the consistent application of established sentencing principles. Chief Justice Street stated in *R v. Rushby* that “. . . the doctrines and principles established by the Common Law in regard to sentencing provide the chart that both relieves the judge from too close a personal involvement with the case in hand, and promotes consistency of approach on the part of individual judges.”³⁷ Justice Mahoney elaborated on the role of sentencing principles in *R v. Lattouf*:

General sentencing principles must be established, so that the community may know the sentences which will be imposed and so that sentencing judges will know the kind and the order of sentence which it is appropriate that they impose.³⁸

A sentencing database which collects and disseminates information based on sentencing principles can promote this consistency in approach. The environmental crime sentencing database of JIRS contains data on relevant objective and subjective circumstances of the environmental offense and the offender, the sentencing orders and the sentencing remarks. Such data are components of “the chart” of sentencing doctrines and principles that the sentencer needs to apply in the sentencing task. The sentencing database thereby provides a helpful aide/mémoire of matters relevant to the sentencing task and enables comparison with prior sentencers’ evaluations of the same matter in reaching their sentencing decisions. Consistency is promoted by facilitating a consistent approach to sentencing.

The capacity of a sentencing database to collect and disseminate information on the objective and subjective circumstances of each offense and offender also facilitates the achievement of individualized justice. As Chief Justice Spigelman said in *R v. Whyte*:

36. See *R v. Henry* (1999) 46 N.S.W.L.R. 346, 371 (Austl.). See also Preston & Donnelly, *supra* note 1, at 16–17.

37. *R v. Rushby*, *supra* note 31, at 597 (Street, C.J.).

38. *R v. Lattouf*, (N.S.W.C.C.A. Dec. 12, 1996) (Mahoney, ACJ) (unreported) (Austl.).

The maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offense and the offender are taken into account. Sentences must be individualised.³⁹

Similarly, Mahoney said in *R v. Lattouf*: “If a sentencing process does not achieve justice, it should be put aside. As I have elsewhere said, if justice is not individual, it is nothing.”⁴⁰ The environmental crime sentencing database of JIRS captures the sentencer’s consideration of the individual circumstances of the offense and the offender. Again, the existence of these circumstances as variables in the sentencing database serves as an aide/mémoire, facilitating the individualization of sentences.

Many of the database variables require a sentencing judge to evaluate where on a scale of seriousness the circumstances of the offense and the offender fall. For example, environmental harm, the most common manifestation of the objective harm caused by an environmental offense, requires an evaluation of the seriousness ranging from none, through low, medium to high.

One of the database variables requires the sentencing judge to form a conclusion about the overall objective seriousness of the offense. Such a conclusion is reached after consideration of the objective circumstances of the offense, which are other variables in the database. It is well established that the objective seriousness of the offense sets the limits of proportionate punishment, both the upper limit⁴¹ and the lower limit.⁴² So as to understand these limits, a conclusion needs to be drawn by the sentencer as to the objective seriousness of the particular offense. The presence of this variable in the database reminds the sentencer of the task of consideration of the objective seriousness of the offense and better enables comparison with other sentences by reference to the conclusion of objective seriousness in those other sentencing decisions.

The environmental crime sentencing database of JIRS also

39. *R v. Whyte*, *supra* note 32, at para. 147.

40. *R v. Lattouf*, *supra* note 38.

41. See *Veen v. The Queen (Veen II)* (1988) 164 C.L.R. 465, 472, 485–486, 490–491 & 496 (Austl.); *Hoare v. The Queen* (1989) 167 C.L.R. 348, 354 (Austl.).

42. See *R v. Dodd* (1991) 57 A. Crim. R. 349, 354 (Austl.); *R v. Whyte*, *supra* note 32, at para. 156–158; *R v. McNaughton* (2006) 66 N.S.W.L.R. 566, para. 15 (Austl.).

implicitly facilitates consideration of the purposes for which sentences may be imposed. In New South Wales, the purposes for which a court may impose a sentence on an offender are those set out in section 3A of the Crimes (Sentencing Procedure) Act. Those purposes are reflected in the various objective and subjective sentencing considerations that are variables in the sentencing database. Furthermore, the various sentencing options that are available in sentencing for environmental offenses reflect the purposes of sentencing.⁴³

For example, orders that an offender publicize the offense, including the circumstances of the offense, and its environmental and other consequences, and the other orders made against the offender, serve the sentencing purpose of general deterrence; orders for restoration of the environment harmed by commission of the offense and for prevention of continuing harm serve the sentencing purpose of restoration; and orders for the payment of compensation and reimbursement of costs and expenses serve the sentencing purpose of reparation.

The environmental crime sentencing database, by recording the various sentencing orders made, and allowing search and retrieval of information on orders made in prior sentencing decisions, facilitates effective attainment of the purposes of sentencing by enabling judicious selection from the sentencing options available for the offense in question. It also enables sentencers to see how prior sentencers have used the sentencing options available and, by being able to access the sentencing remarks, see the circumstances in which those sentencing options were used and the terms of the sentencing orders made.

The environmental crime sentencing database of JIRS, by providing information on the objective and subjective circumstances of the offense and offender, the sentencing orders made, and the sentencing remarks, promotes a more principled and “systematically fair”⁴⁴ approach to sentencing. It reduces the risk that the outcome of discretionary sentencing decision-making depends on the identity of the sentencing judge who happens to hear the case.⁴⁵

43. For a description of sentencing options available for environmental crime and case examples of usage, see Preston, *supra* note 24, at 157–163.

44. Wong v. The Queen, *supra* note 26, at para. 6.

45. *Id.*

By sentencing judges referring to the same sentencing principles and considerations, and articulating their evaluation of those principles and considerations in the individual circumstances of the offense and offender in their sentencing remarks, and the subsequent capture of this information in the sentencing database, accessibility and transparency of sentencing decisions are improved. As the High Court noted in *Markarian v. The Queen*: "The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public."⁴⁶ Statistical information captured in the environmental crime sentencing database improves the accessibility and transparency of the sentencing decisions.

Conclusion

The sentencing database for first instance environmental crime cases in the NSWLEC and other courts of New South Wales has had and is likely to continue to have an influential effect on environmental sentencing both in Australian jurisdictions and in other countries. The database is the first of its kind, meshing the traditional JIRS sentencing database approach with an approach specifically tailored to environmental offenses in New South Wales.

In summary, the environmental crime sentencing database of JIRS:

- provides centralized data on sentences for environmental offenses imposed by the NSWLEC and other courts of New South Wales;
- reveals the key objective and subjective considerations of the sentencing court in determining the sentence imposed;
- reveals the different components of the total penalty imposed including fines, other orders and costs orders;
- covers the elements devoted to such matters as remediation, removal of economic gains and cost saving, restitution to communities and moral blame, by revealing the sentencing considerations, the penalties imposed and the reasons for sentence;
- reveals how the purposes of sentencing are being achieved, by reason of the foregoing matters and the ability to access the reasons for sentence addressing the purposes of sentencing in section 3A of the Crimes (Sentencing Procedure) Act; and

46. *Markarian v. The Queen* (2005) 228 C.L.R. 357, para. 39 (Austl.).

- provides a public register of sentences accessible on the internet and searchable by offense, nature of offender, objective and subjective characteristics, and penalties, which register supplements the internet register of judicial decisions available on Caselaw NSW and AustLII.

The sentencing database, because of these features, should assist in: improving consistency in sentences; balancing individualized justice and consistency; improving accessibility and transparency of sentencing decisions; indicating a range of sentences; facilitating appellate review and monitoring; and if appropriate, registering disapproval by appellate courts of sentencing patterns.

The usefulness of the sentencing database should be evident both now and in the future as it will shape the way judges sentence offenders and how they go about arriving at a decision about what penalty to impose and, if it is a fine, how much is reasonably appropriate to the situation. While some of the drawbacks of using a sentencing database may be that it cannot capture all of the detail of a case and may be seen as a formulaic way of sentencing, it is a useful tool in assisting judges in sentencing by reminding them what characteristics need to be considered as well as a tool for policy development and legislative reform.

NEW METHOD WITH EXPERTS – CONCURRENT EVIDENCE

*Hon. Justice Peter McClellan**

The title of this journal captures two certainties: first, that no court system is perfect; second, that through joint endeavors, we are better placed to reach perfection. The launch of the International Judicial Institute for Environmental Adjudication provides a unique opportunity for judges, practitioners and academics to share insights from their own court systems and to benefit from hearing those of their overseas counterparts.

The New South Wales Land and Environment Court

The New South Wales Land and Environment Court (Court) was established under the Land and Environment Court Act 1979 (N.S.W.). At the time of its inception, the Court was described as “a somewhat innovative experiment in dispute resolution mechanism.”¹ The Court provides a specialized forum for the determination of land, environmental and planning disputes and has jurisdiction over judicial and merits reviews, civil and criminal enforcement and

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1. P. Ryan, *Court of Hope and False Expectations: Land and Environment Court 21 Years On*, 14(3) J. ENVTL. L. 301 (2002) (U.K.) (citing N.S.W. Parliamentary Debates, Legislative Council, 21 Nov 1979, 3349-50 (Hon. D.P. Landa).

appeals.

When conducting merits reviews, the Court is not bound by the rules of evidence. Rather, Section 38(2) of the Land and Environment Court Act provides that the Court “may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.” In merits appeals, both judges and commissioners (who have specialized expertise in relevant environmental fields) preside to determine the matters that come before the Court.

Problems with Expert Evidence in the Land and Environment Court

The Land and Environment Court Act made plain Parliament’s intention that the Court should not be bound by conventional adversarial principles in its operation. Initially, discomfort and, on occasion, resistance from within the legal profession hampered the implementation of this intention but over time these have diminished. The debate is reflected in two differing opinions of the New South Wales Court of Appeal.² Public concern about the operation of the Court became so intense that in 2001 the Hon. Jerrold Cripps QC, a former Chief Judge of the Court, was asked to conduct a public review of the Court’s procedures and make recommendations for change (known as the “Cripps Inquiry”).³ Following issuance of the “Cripps Inquiry” report, some procedural changes were implemented while other concerns remained unaddressed.⁴ Many of the unaddressed concerns related to the handling of expert evidence in proceedings. Duplication of evidence, and inefficient and unnecessary cross-examination were common. Similarly, as with many common law jurisdictions, there were legitimate concerns regarding the impartiality and integrity of expert evidence.⁵

Difficulties with the integrity and reliability of expert evidence have been recognized by many commentators over a long period. Learned Hand challenged the accepted utility of expert evidence and

2. *Residents Against Improper Dev. Inc v. Chase Prop. Investments Pty. Ltd.* [2006] NSWCA 323; *cf. Hunter Dev. Brokerage Pty. Ltd. v. Cessnock City Council* (No 2) [2006] NSWCA 292.

3. Report of the Land and Environment Court Working Party (Sept. 2001).

4. See also McClellan CJ at CL, *Land and Environment Court – Achieving the Best Outcome for the Community*, Paper presented at the EPLA Conference, Newcastle, N.S.W. (Nov. 28-29, 2003).

5. McClellan CJ at CL, *Problems With Evidence*, Speech delivered at the Government Lawyers’ Annual Dinner, N.S.W. (Sept. 7, 2004).

the procedures by which it was received in court in his well-known article written in the *Harvard Law Review* in 1901:

No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best. In early times, and before trial by jury was much developed, there seemed to have been two modes of using what expert knowledge there was: first, to select as jurymen such persons as were by experience especially fitted to know the class of facts which were before them, and second, to call to the aid of the court skilled persons whose opinion it might adopt or not as it pleased. Both these methods exist at least theoretically at the present day, though each has practically given place to the third and much more recent method of calling before the jury skilled persons as witnesses. No doubt, there are good historical reasons why this third method has survived, but they by no means justify its continued existence, and it is, as I conceive, in fact an anomaly fertile of much practical inconvenience.⁶

The article contains a comprehensive discussion of the history and use of experts in the common law system, and the perceived difficulties. These difficulties include the expectation that in the adversary system the expert becomes the hired champion of one side. These problems have been acknowledged by many commentators, including myself.⁷

Learned Hand was writing at a time when the complexity of litigation and the issues to be decided were significantly less than today. The growth in complexity has of course been accompanied by an enormous increase in the available knowledge in all areas of intellectual endeavor, not least in the environmental sciences. Environmental courts and tribunals are required to resolve disputes between experts with respect to a large catalogue of other complex matters, including the impact of past and future development on the natural and built environment, the causes and consequences of

6. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1901).

7. See, e.g., McClellan CJ at CL, *Recent Changes and Reforms at the Land and Environment Court*, Speech delivered to the Local Government Association of N.S.W. (July 27, 2004); McClellan CJ at CL, *Expert Witnesses: the recent experience of the Land and Environment Court*, 17 JUD. OFFICERS BULL. 83 (2005) (N.S.W.); McClellan CJ at CL, *Environmental Issues: How Should We Resolve Disputes?*, 1 NAT'L ENVTL. L. REV. 36 (2005) (Austl.); McClellan CJ at CL, *Problems with Evidence*, *supra* note 5.

pollution and contamination, and the related social and financial issues. The resolution of these matters may significantly impact the experts' reputations and, consequently, have significant financial consequences.

The Process of Change in the Land and Environment Court

In response to these concerns, the Land and Environment Court began modifying its Practice Directions to clarify the duties and expectations of expert witnesses. In 1999, it introduced a pre-hearing conference that required experts to meet prior to the hearing to discuss those matters upon which they agreed and to identify the points on which they disagreed. Although this proved beneficial, notwithstanding the expectations in the Land and Environment Court Act, the adversarial nature of the proceedings continued to underpin the "culture" of the Court.

In a speech to the National Conservation Council of New South Wales in 1999, one former chief judge stated:

First, the Court is a court. The hearings conducted in it involve the traditional hallmarks of a court, that is, an adversarial proceeding at the end of which the judge or commissioner reaches a decision on the evidence adduced during the hearing, and in the result there will be a winner and a loser.⁸

By the time I commenced as chief judge, it was plain that further change was necessary. Public concerns about the adversary process and its perceived failure to provide for the most desirable community outcomes from a dispute led to the "Cripps Inquiry." Personally, I was concerned that the Court's continued focus on the traditional winner versus loser dichotomy conflicted with its public function. Most importantly, in a specialized environmental court, community outcomes must be given appropriate emphasis, generally beyond the interests of the private litigants. To address these concerns, during my term as chief judge, the Court altered many of its procedures including changes designed to increase the integrity and efficiency of expert evidence. One such procedural change was the introduction of a presumption in favor of court-appointed single experts, adopted by

8. Hon. Mahla L Pearlman AM, *The Role and Operation of the Land and Environment Court*, 37 L. SOC'Y J. 58, 58-59 (1999) (N.S.W.).

the Court in March 2004. I have spoken of the benefits of this change elsewhere.⁹

The most significant procedural change however was the introduction of the concurrent method of receiving expert evidence. Adopted by many other courts, concurrent evidence is one of the most important recent reforms in the civil trial process in Australia. It was first used in a few cases in the Australian Trade Practices¹⁰ and Administrative Appeals Tribunals. Apart from its use in the Land and Environment Court,¹¹ concurrent evidence is now utilized extensively in the Common Law Division of the New South Wales Supreme Court,¹² the Queensland Land and Resource Tribunal, the Federal Court of Australia,¹³ and, to a lesser extent, in many other Australian courts and tribunals.

To facilitate the use of concurrent evidence, provision has been made in the Uniform Civil Procedure Rules 2005 (N.S.W.). Those rules apply to all courts in New South Wales. In the Land and Environment Court, concurrent evidence is now the default procedure for all matters requiring evidence from more than one expert in the same field.¹⁴ The same is true of the Common Law Division of the Supreme

9. See, e.g., McClellan CJ at CL, *Expert Witnesses – The Experience of the Land & Environment Court of New South Wales*, Paper presented at the XIX Biennial LAWASIA Conference, Gold Coast (Mar. 20-24, 2005).

10. The Australian Trade Practices is now known as the Australian Competition Tribunal.

11. See, e.g., *Jamison Investments Pty Ltd v. Penrith City Council* [2010] NSWLEC 1194; *Scarf v. Randwick City Council* [2010] NSWLEC 1205; *Reavill Farm Pty Ltd v. Lismore City Council* [2010] NSWLEC 1207; *Marana Developments v. Botany Bay City Council* [2010] NSWLEC 1237; *Berringer Road Pty Ltd v. Shoalhaven City Council* [2010] NSWLEC 1140; *O’Keefe v. Water Administration Ministerial Corporation (No 2)* [2010] NSWLEC 89.

12. See, e.g., *Harris v. Bellemore* [2010] NSWSC 176; *Thompson v. Haasbroek* [2010] NSWSC 111; *Hollier v. Sutcliffe* [2010] NSWSC 279; *Reeves v. State of New South Wales* [2010] NSWSC 611; *Wallace v. Ramsay Health Care Ltd* [2010] NSWSC 518; *Konstantopoulos v. R & M Beechey Carriers Pty Ltd* [2010] NSWSC 753; and *SW v. State of New South Wales* [2010] NSWSC 966.

13. See, e.g., *Seven Network Limited v. News Limited* [2007] FCA 2059; *Ackers v. Austcorp International Ltd* [2009] FCA 432; *Peterson v. Merck Sharpe & Dohme (Austl.) Pty Ltd & Anor* [2010] FCA 180; *Strong Wise Ltd v. Esso Austl. Resources Pty Ltd* [2010] FCA 240; *Danisco A/S v. Novozymes A/S* [2010] FCA 995.

14. See, e.g., Land and Environment Court of New South Wales, *Practice Note – Class 1 Development Appeals*, 14 May 2007, [56]; Land and Environment Court of New South Wales, *Practice Note – Classes 1, 2 and 3 Miscellaneous Appeals*, 14 May 2007, [44]; Land and Environment Court of New South Wales, *Practice Note – Class 3 Compensation Claims*, 14 May 2007, [39]; Land and Environment Court of New South Wales, *Practice Note – Class 3 Valuation Objections*, 14 May 2007, [48]; Land and Environment Court of New South Wales, *Practice Note – Class 4 Proceedings*, 14

Court of New South Wales.¹⁵

Concurrent Evidence: How does it Work?

Concurrent evidence is essentially a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a cooperative endeavor to identify the issues and arrive where possible at a common resolution of them. Where resolution of issues is not possible, a structured discussion, with the judge as chairperson, allows the experts to give their opinions without the constraints of the adversarial process and in a forum which enables them to respond directly to each other. The judge is not confined to the opinion of one advisor but has the benefit of multiple advisors who are rigorously examined in public.

How does concurrent evidence work? Although variations may be made to meet the needs of a particular case, concurrent evidence requires the experts retained by the parties to prepare a written report in the conventional fashion. The reports are exchanged and, as is now the case in many Australian courts, the experts are required to meet without the parties or their representatives to discuss those reports. This may be done in person or by telephone. The experts are required to prepare a bullet-point document incorporating a summary of the matters upon which they agree, but, more significantly, matters upon which they disagree. The experts are sworn together and, using the summary of matters upon which they disagree, the judge settles an agenda with counsel for a “directed” discussion, chaired by the judge, of the issues in disagreement. The process provides an opportunity for each expert to place his or her view on a particular issue or sub-issue before the court. The experts are encouraged to ask and answer questions of each other. The advocates also may ask questions during the course of the discussion to ensure that an expert’s opinion is fully articulated and tested against a contrary opinion. At the end of the discussion, the judge will ask a general question to ensure that all of the experts have had the opportunity to fully explain their positions.

Some Personal Reflections on the Use of Concurrent Evidence

May 2007, [48]; Land and Environment Court of New South Wales, *Practice Note – Class 2 Trees*, 23 July 2010, [43].

15. Supreme Court of New South Wales, *Practice Note – SC CL 5*, 5 Dec. 2006.

I have utilized the process of concurrent evidence on many occasions, both when I was in the Land and Environment Court and in the Supreme Court. In 2006, I presided over a trial involving an eighteen-year-old male who had suffered cardiac arrest, resulting in catastrophic and permanent brain damage.¹⁶ He sued his general practitioner. The claims required expert testimony regarding the defendant doctor's duty of care to the plaintiff as well as a major cardiological issue.

Five general practitioners were called to give expert opinion and they gave their evidence concurrently. Sitting together at the bar table for a day and a half, they discussed in a structured and cooperative manner the issues falling within their expertise. Prior to this courtroom discussion, the doctors had conferenced together for some hours and prepared a joint report which was tendered to the Court. In all likelihood, if the expert evidence had been received in the conventional manner, it would have taken at least five days. More importantly, the Court would not have had the benefit of the questions which the experts asked of each other, and, of even greater value, the responses to those questions.

Four cardiologists also gave evidence together – one by satellite from the United States, the others sitting in the courtroom at the bar table. This evidence took one day. Under the conventional adversary process, it would probably have taken at least six. The doctors were able to distill the cardiac issue to one question which they identified and, although they held different views, their respective positions on that question were clearly stated. Later discussion with the advocates indicated that the process was welcomed by both the doctors and the parties' advocates.

Concurrent evidence provides the means by which the decision-making process conventionally adopted by professionals can be utilized in the courtroom. If a person suffered a life-threatening injury which required hospitalization and the possibility of major life-saving surgery, a team of doctors would come together to make the decision as to whether or not to operate. The team would include a surgeon, anesthetist, physician, and other related specialists who had a professional understanding of the particular problems. They would meet, discuss the situation and the senior person would ultimately

16. Halverson v. Dobler [2006] NSWSC 1307.

decide on the appropriate response. It would be a discussion in which everyone's views were put forward, analyzed and debated. The hospital would not set up a court case, much less an adversarial contest. If this is the conventional decision-making process of professionals, why should it not also be the method adopted in the courtroom?

Experience shows that, provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and the advocates, there is no difficulty in managing the hearing. Although not encouraged, very often the experts, who will be sitting next to each other, address each other informally by first names. Within a short time of the discussion commencing, you can feel the release of the tension, which infects the conventional evidence-gathering process. Those who might normally be shy or diffident are able to relax and contribute fully to the discussion.

I have had the opportunity of speaking with many witnesses who have been involved in the concurrent process and with counsel who have appeared in cases where it has been utilized. Although counsel may be hesitant about the process initially, I have heard little criticism once they have experienced it. The change in procedure has been met with overwhelming support from the experts and their professional organizations. They find that they are better able to communicate their opinions and, because they are not confined to answering the questions of the advocates, are able to more effectively convey their own views and respond to those of the other experts. Because they must answer to a professional colleague rather than an opposing advocate, experts readily confess that their evidence is more carefully considered. They also believe that there is less risk that their evidence will be unfairly distorted by the advocate's skill. Additionally, the process is significantly more efficient than conventional methods. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as twenty percent of the time which would otherwise have been required.

Under concurrent evidence, the number of experts who can effectively give evidence together varies. The most common number

is four but I have had eight witnesses at one time¹⁷ and know of a case where there were twelve.¹⁸ From the decision-maker's perspective, the opportunity to observe the experts in conversation with each other about the matter, together with the ability to ask and answer each others' questions, greatly enhances the capacity of the judge to decide which expert to accept. Rather than have a person's expertise translated or colored by the skill of the advocate, and as we know the impact of the advocate can be significant, the experts can express their views in their own words. There also are benefits which aid in the decision-writing process. Concurrent evidence allows for a well-organized transcript because each expert answers the same question at the same point in the proceeding.

I am often asked whether concurrent evidence favors the more loquacious and disadvantages the less articulate witnesses. In my experience, this does not occur. Since each expert must answer to their professional colleagues in their presence, the opportunity for diversion from the intellectual content of the response is diminished. Being relieved of the necessity to respond to an advocate, which many experts see as a contest from which they must emerge victorious, rather than a forum within which to put forward their reasoned views, the less experienced, or perhaps shy person, becomes a far more competent witness in the concurrent evidence process. In my experience, the shy witness is much more likely to be overborne by the skillful advocate in the conventional evidence gathering procedure than by a professional colleague with whom, under the scrutiny of the courtroom, they must maintain the debate at an appropriate intellectual level. Although I have only rarely found it necessary, the opportunity is of course available for the judge to intervene and ensure each witness has a proper opportunity to express his or her opinion.

Conclusion

As increases in "scientific" knowledge are expected to accelerate, it seems likely that courts will have to reconsider whether professionals, assessors or advisers should be available to assist the

17. *Ironhill Pty Ltd v. Transgrid* [2004] NSWLEC 700; *Attorney-General (NSW) v. Winters* [2007] NSWSC 1071.

18. Note that the case referenced here was settled, and consequently, no citation is available.

judge's understanding of the "scientific" evidence to provide greater public confidence in the decision-making process. Concurrent evidence is a significant innovation which moves in that direction, by providing a more efficient process to receive expert evidence and improve its quality. It has many advantages for the parties, the witnesses and the decision-maker.

HISTORY OF ENVIRONMENTAL COURTS AND UNEP'S ROLE

Lal Kurukulasuriya and Kristen A. Powell***

Since the late 1960s, widespread public awareness of environmental issues has resulted in a growing number of movements that aim to confront environmental degradation. However, most environmental problems and challenges are transboundary, regional, or global in scope. Successful solutions therefore require the participation of all members of society and the formation of global partnerships. The judiciary plays a vital role in implementing and enforcing these solutions and has begun to recognize that the boundaries of environmental law are expanding rapidly and that the protection of the environment is an urgent priority. Judges are also becoming increasingly aware of their roles and responsibilities to uphold the rule of law and to promote environmental governance through judgments and declarations.

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The International Union for the Conservation of Nature (IUCN), founded in 1948, established its Environmental Law Programme in 1965 to promote sustainability through legal concepts and instruments.¹ The Environmental Law Programme operates through several subdivisions, such as the Commission on Environmental Law (CEL).² The CEL is a network of environmental law and policy experts, from all regions of the world, who volunteer their knowledge and services to IUCN activities.³

In 1992, many heads of state met in Rio de Janeiro, Brazil for the first international United Nations Earth Summit.⁴ The summit was convened to address urgent problems of environmental protection and socio-economic development. By the end of the summit, 178 governments had adopted the Rio Declaration.⁵ Importantly, Principle 10 of the Rio Declaration recognizes that environmental issues are best addressed with “the participation of all citizens,” “appropriate access to information,” “the opportunity to participate in decision-making processes,” and “effective access to judicial and administrative proceedings, including redress and remedy.”⁶

In 1996, the United Nations Environment Programme (UNEP) recognized the central role the judiciary plays in promoting environmental governance by developing and implementing a program to engage the judiciaries of all countries in the pursuit of the rule of law in the area of environmental and sustainable development.⁷ Furthermore, over the past several years, UNEP has partnered with several other groups, such as the IUCN, to develop environmental resources for the judiciary.

From 1996 to 2002, UNEP collaborated with the IUCN to convene six regional symposia on the judiciary’s role in promoting

1. International Union for the Conservation of Nature, *About the Environmental Law Programme*, http://www.iucn.org/about/work/programmes/environmental_law/elp_about/ (last visited Aug. 16, 2010).

2. *Id.*

3. *Id.*

4. UN.org, U.N. Conference on Environment and Development (1992), <http://www.un.org/geninfo/bp/enviro.html> (last visited Nov. 6, 2010).

5. See LAW AND THE ENVIRONMENT: A MULTIDISCIPLINARY READER 366 (Robert V. Percival & Dorothy C. Alevizatos eds., 1997); Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (June 14, 1992) [hereinafter Rio Declaration].

6. Rio Declaration, princ. 10.

7. U.N. ENV’T PROGRAMME, UNEP GLOBAL JUDGES PROGRAMME vi (2004), available at www.unep.org/law/PDF/UNEP_Global_Judges_Prog_New.pdf.

sustainable development.⁸ Chief justices and judges from countries in different regions met in Mombasa, Colombo, Manila, Mexico City, St. Lucia, and Brisbane.⁹ Two additional judges' symposia were held in Kuwait and London, also in collaboration with the IUCN.¹⁰ Participants at these regional symposia made presentations discussing their home countries' national environmental legal systems in an attempt to exchange viewpoints, knowledge, and experience in order to promote further development and implementation of environmental law in each region. Participants reviewed the role of the courts in promoting the rule of law in the area of sustainable development, discussed recent trends in the development of environmental jurisprudence, and examined contemporary developments and important judgments, in the fields of both national and international environmental law.

In August 2002, UNEP convened the Global Judges Symposium on Sustainable Development and the Role of Law, along with the World Summit on Sustainable Development in Johannesburg, South Africa.¹¹ The symposium drew over 120 judges from more than sixty developed and developing countries.¹² The judges found that, "the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law" at the national and local levels.¹³ To address such concerns, attendees pledged to improve environmental laws and to challenge environmentally damaging developments in order to fulfill their duties to defend human rights, public health, and the environment. To improve online access to judicial resources, participants also helped launch the UNEP-IUCN Judicial Portal.¹⁴ The Chief Justice of South Africa, Arthur Chaskalson, announced, "Laws are ineffective unless they are implemented, and much environmental law exists but has not been enforced."¹⁵ The participant's pledge to

8. *Id.* at 18.

9. *Id.* at 11.

10. *Id.*

11. *Id.* at 13.

12. *Id.*

13. *Id.* at 14.

14. *Id.* at 11

15. Paul Brown, *Judges Pledge to Champion Environment*, THE GUARDIAN, Aug. 28, 2002, available at <http://www.guardian.co.uk/environment/2002/aug/28/worldsummit2002.internationalnews1>.

commit to the principles of the rule of law was embodied in the Johannesburg Principles on the Role of Law and Sustainable Development (the Johannesburg Principles), signed and adopted by acclamation by the judges, and presented to the then Secretary-General of the United Nations, Mr. Kofi Annan, and presented at the World Summit on Sustainable Development.¹⁶

The Johannesburg Principles are founded on the premise that an independent judiciary should act as the “guardian of the Rule of Law. . .to implement and enforce applicable international and national laws. . . ensuring that the inherent rights and interests of succeeding generations are not compromised.”¹⁷ These principles call on the international community to develop strategies to remedy the deficiency of relevant skills and information, which prevent the effective implementation of environmental law.¹⁸ They also emphasize the need to provide legal stakeholders with the requisite skills and information to cope with the persistent evolution of international agreements, constitutions and statutes concerned with environmental protection.¹⁹ To help achieve these goals, the principles designate UNEP’s Executive Director to lead efforts to improve the implementation of environmental law.²⁰ These principles have served as a rationale and a template for many subsequent international judicial capacity-building efforts.

In January 2003, twenty-five judges from around the world gathered for a follow-up meeting, in Nairobi, Kenya, to focus on capacity-building in the area of environmental law.²¹ These judges helped UNEP develop and implement the Global Judges Programme in an attempt to achieve more effective application and enforcement of domestic environmental law.²² Since then, UNEP’s Global Judges Programme has been working to develop a series of environmental law training materials which encourage national efforts to strengthen the role of the judiciary in securing environmental governance, adherence to the rule of law, and effective implementation of national

16. U.N. ENV’T PROGRAMME, *supra* note 7, at 14.

17. *Id.* at 13.

18. *See id.* at 14; The Johannesburg Declaration on Sustainable Development, U.N. Doc A/CONF.199/20 (Sept. 4, 2002).

19. U.N. ENV’T PROGRAMME, *supra* note 7, at 17.

20. *Id.*

21. *Id.* at 19.

22. *Id.*

environmental policies, laws, and regulations, including the national level implementation of multilateral environmental agreements.

In February 2003, the UNEP Governing Council unanimously adopted Decision 22/17 II (A), urging the Executive Director to help improve the capacity of those involved in the process of developing and enforcing national and local environmental law.²³ This decision created a UNEP alliance of chief justices from over 100 countries.²⁴ Members pledged to offer their full support for the UNEP Global Judges Programme, and declared their commitment to carrying out specific capacity-building efforts, such as creating an environmental handbook for judges, establishing a global training centre for judges, and creating judges forums on environmental law. The Environmental Law Branch of the UNEP Division of Policy Development and Law has since been working to respond to the specific needs of each country and to develop capacity-building plans for judges worldwide.

From 2003 to 2005, UNEP held nine regional planning meetings to improve judicial capacity to address environmental degradation. The meetings took place in Thailand, Argentina, Nairobi, Johannesburg, Auckland, Cairo, Jamaica, Rome and Liviv.²⁵ Each of these regional planning meetings resulted in the development of regionally-specific plans to improve judicial capacity to interpret and enforce environmental laws.²⁶ These regional meetings also helped to establish regional judicial networks on environmental law and helped to mobilize collaboration between members of the region and UNEP.²⁷

In April of 2004, UNEP helped organize a meeting between European judges in Luxemburg to establish a European Union Judges Forum for the Environment.²⁸ This resulting organization pledged to exchange experiences on environmental case law, and to increase the capacity of the judiciary to implement and enforce international, European and national environmental law.²⁹ To further these objectives, the organization plans to set up a database to provide access to important environmental legal information and to hold

23. *Id.* at 21.

24. *Id.* at 15.

25. *Id.* at 6-7.

26. *Id.* at 6.

27. *Id.*

28. *Id.* at 60.

29. *Id.*

annual administrative board meetings.³⁰

In May of 2003, UNEP also helped to organize a meeting between Arab judges, which resulted in the establishment of the Arab Judges Union for the Protection of the Environment.³¹ This union aims to deepen the notions of environmental protection among Arab nations, increase the role of judges in bolstering environmental laws, and provide a forum for exchanging knowledge and experiences with environmental law between member states and other similar judicial organizations.³² To achieve these objectives, the union proposed to establish an environmental database and legal library, to suggest draft environmental laws to the member states, and to promote the publication of legal materials regarding environmental protection.³³

Today, more than eighty governments have enacted laws to increase access to environmental information.³⁴ Hundreds of specialized environmental courts and tribunals have been established in over forty countries.³⁵ The Supreme Court of India has taken several measures to hear citizen-enacted public interest environmental cases regarding forest conservation, the illegal felling of trees and waste management issues.³⁶ In Australia, the Land and Environment Court of New South Wales has become a leader in providing effective justice in environmental matters.³⁷ In Brazil, both federal and state environmental trial courts and one appeals court have been put in place.³⁸ The Supreme Court of the Philippines has designated 117 courts for improved environmental adjudication, and has announced plans to partner with the Philippine Judicial Academy (PHILJA) to conduct specialized training for personnel in those courts.³⁹

In the United States, Vermont is the first and only state to

30. *Id.* at 60 .

31. *Id.* at 24.

32. *Id.* at 66.

33. *Id.* at 68-69.

34. GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

35. *Id.*

36. *Id.* at 58.

37. *See, e.g., id.* at 6, 28, 60, 77, 112.

38. *Id.* at 106.

39. *Id.* at 31; see Asian Environmental Compliance and Enforcement Network: Strengthening Asian Judiciaries, <http://www.aecen.org/strengthening-asian-judiciaries> (last visited Nov. 7, 2010).

establish an environmental trial court with statewide jurisdiction.⁴⁰ The court hears appeals from state land use permit decisions, from decisions of the Agency of Natural Resources, from municipal land use zoning, and planning decisions.⁴¹ The court also hears municipal land use enforcement cases, and enforcement actions brought by the Agency of Natural Resources as well as the Natural Resources Board. Almost all cases are heard *de novo*, with an evidentiary trial, and are scheduled for a courtroom in the county in which the case arises.⁴²

In Washington, the Washington State Environmental Hearings Office was established to provide expeditious and efficient resolution of environmental appeals through hearings and alternative dispute resolution processes.⁴³ This court aims to foster a consistent statewide interpretation of Washington's environmental laws in agency decision-making and appeals. It consists of a pollution control hearings board, shorelines hearings board, forest practice appeals board, environmental and land use hearings board, and hydraulics appeals board.⁴⁴ Further, thirteen other states have launched environmental court initiatives at the local government level.⁴⁵ Despite these efforts, many citizens still lack adequate access to environmental justice due to ineffective implementation and development.

In 2009, Pace University School of Law, along with the IUCN and other partners, began the groundwork for the creation of the International Judicial Institute for Environmental Adjudication (IJIEA) to support the judiciary in addressing contemporary environmental issues. IJIEA will be an independent, non-profit research and advocacy organization. Its mission is to advocate international collaboration to further strengthen the environmental Rule of Law and to address many of the concerns raised by the Johannesburg principles. IJIEA will focus on topics such as comparative judicial practices on climate change and other emerging issues; procedural issues and penalties in criminal environmental proceedings; the interface of the Rule of Law and environmental cases, incorporating

40. PRING & PRING, *supra* note 34, at 31.

41. Vermont Superior Court, Environmental Division, <http://www.vermontjudiciary.org/gtc/environmental/default.aspx> (last visited Aug. 16, 2010).

42. *Id.*

43. The State of Washington, Environmental Hearings Office, About EHO, <http://www.eho.wa.gov/AboutEHO.aspx> (last visited Aug. 16 2010).

44. PRING & PRING, *supra* note 34, at 144.

45. *Id.* at 109.

findings from other recent conferences; the ability of courts to encourage and develop scientific understanding of environmental evidence issues; judicial practices and the judge's role in environmental licensing and permitting; procedural innovations in civil law proceedings; development of environmental enforcement techniques which can be adapted and incorporated into any legal systems; and citizen involvement in promoting access to fairness and environmental justice. IJIEA is committed to fostering environmental protection, sustainable development, and access to environmental justice both domestically and abroad through scholarship, research, training, publications, and worldwide discourse in environmental law and policy.

ASIAN JUDGES, GREEN COURTS, AND ACCESS TO ENVIRONMENTAL JUSTICE: AN ASIAN JUDGES NETWORK ON THE ENVIRONMENT

Kala Mulqueeny, Sherielysse Bonifacio,**
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Introduction

Asia is distinguished by unique ecological diversity. Asian countries collectively possess 20% of the world's biodiversity,¹ 14% of the world's tropical forests,² 34% of global coral resources,³

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1. ASEAN Center for Biodiversity, ASEAN's Rich Biodiversity, http://www.aseanbiodiversity.org/index.php?option=com_content&view=article&id=79&Itemid=98.

2. See generally FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS [hereinafter FAO], GLOBAL FOREST RESOURCES ASSESSMENT 2010 (noting also that Asia has had a net forest gain of more than 2.2 million hectares per year from 2000-2010. This was due mostly to China's afforestation program which served to counter the net loss in South and Southeast Asian countries).

3. David Obura & Gabriel Grimsditch, *Coral Reefs, Climate Change and Resilience: An Agenda for Action from the IUCN World Conservation Congress in Barcelona, Spain* 33-34 (Int'l Union for the Conservation of Nature, Working Group Paper No. 6, 2009); See also LAURETTA BURKE & MARK SPALDING, WORLD RES. INST., REEFS AT RISK IN SOUTH EAST ASIA (2002).

and the greatest number of fish and aquaculture in the world.⁴ However, over the last thirty years environmental changes in Asia have been dramatic. These changes are fueled by consistently growing populations⁵ coupled with rapid economic and industrial development to accommodate their needs. As a result, many of Asia's developing economies are now struggling to deal with desertification, deforestation, water scarcity, natural resource exploitation, air and water pollution, and hazardous waste contamination.⁶ Moreover, Asia's contribution to global climate change will significantly increase over the next twenty years,⁷ and the impacts of climate change will be sharply felt in Asia, worsening almost all other preexisting environmental problems. All such environmental problems significantly impact the quality of life of the people of Asia.⁸

The lack of effective environmental governance is central to most environmental problems in Asian countries. Governance failures occur at many levels — regional, sub-regional, national, provincial, and local. Most Asian countries have adopted some environmental laws, but many environmental challenges have not been sufficiently addressed by legislation. Countries may adopt laws, but fail to implement rules and regulations at national, provincial, and local levels. Or, effective implementation, enforcement, and compliance may, nonetheless, continue to present challenges.

4. David Lymer, et al., *Status and Potential of Fisheries and Aquaculture in Asia and the Pacific*, ASIA PACIFIC FISHERIES COMMISSION 14 (2008) (The region is also identified as one of the highest fished in the world). Eighty-six percent of the world's fishers and fish farmers also live in the region. FAO, *THE STATE OF THE WORLD FISHERIES AND AQUACULTURE* 7 (2009).

5. Noeleen Heyzer, Undersecretary General of the United Nations and Executive Secretary of the Economic and Social Commission for Asia and the Pacific (ESCAP), Statement made on the occasion of the International Day for Disaster Risk Reduction and the ASEAN DAY for Disaster Management (Oct. 13, 2010) (where she notes that "the urban population in Asian cities would reach 2.3 billion by 2025 from the current 1.6 billion, with nearly half of the world's urban population living in the Asia-Pacific region.").

6. See generally WORLD BANK, *ENVIRONMENT STRATEGY FOR EAST ASIA AND THE PACIFIC* xv-4 (2005).

7. Toufiq Siddiqi, *The Evolving Role of Asia in Global Climate Change*, 3 EWC INSIGHTS 1 (2008) (Noting that Asian countries are among the highest contributors of greenhouse gases, particularly CO₂, due to rapid industrialization and population growth. It was further observed that 4 out of 10 of the countries with the highest CO₂ emissions are in Asia, with China ranking second, India fourth, Japan fifth and South Korea seventh. Developing countries such as the Philippines and Indonesia also contribute via burning of biomass and changes in land use.)

8. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [HEREINAFTER IPCC], *IPCC FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007*, at 10 ES.

Importantly, those who exploit forests, minerals, or marine resources often do so illegally. National institutions dealing with the environment are weak and fragmented and do not coordinate well. Many institutions lack the fiscal and technical capacity to discharge their mandate. Many citizens lack the capacity to know what is environmentally wrong or when they have the right to bring a legal claim. Corruption is present throughout the process of industrial production, the provision of basic energy and water services, the exploitation of natural resources, and environmental enforcement.

Making environmental law work requires achieving effective compliance and enforcement.⁹ The entire enforcement chain — environmental officials, legal prosecutors, civil society professionals, and members of the judiciary — need to perform their roles effectively, and interact with all other actors in an integrated way. Without law enforcement officials effectively apprehending and prosecuting civil and criminal offenders, the judiciary will be impotent. If members of civil society (including public interest environmental lawyers) do not have the capacity, or the legal right, to bring civil or administrative cases, few environmental cases will come to the attention of the courts.

However, enforcement officers and civil society need to be confident that the outcomes of filing cases in court will be worth the time and expense if they are to effectively play their role. They, and the community as a whole, need to perceive their national judiciary as possessing the integrity and skills to effectively dispose of environmental cases.

In this commentary, we explain ongoing work to improve one aspect of the chain of environmental enforcement: the judiciary. Chief justices and the senior judiciary lead the legal profession in their respective jurisdictions in shaping normative interpretations of legal and regulatory frameworks. They also issue rules and directions to lower courts that affect their priorities. They often play a role in judicial education. Thus, their influence is both direct and indirect. All these influences affect not only the courts, but also the way the legal system operates, stakeholder perceptions of the rule of law, and

9. Durwood Zaelke, Matthew Stilwell & Oran Young, *What Reason Demands: Making Law work for Sustainable Development*, in MAKING ENVIRONMENTAL LAW WORK: ENVIRONMENTAL COMPLIANCE AND SUSTAINABLE DEVELOPMENT (Durwood Zaelke et al. eds., 2005).

the way that sector lawyers, such as environmental, water, and energy lawyers, understand the legal and regulatory frameworks and how they should be enforced. Moreover, all this affects private sector investment in related sectors.

Thus, while the judge's role in enhancing environmental governance and the rule of law depends upon other actors in the environmental compliance and enforcement chain, the judiciary retains a unique and distinct leadership role. We believe strengthening the capacity of Asian judges to decide environmental cases is a key part of improving environmental law enforcement and increasing access to environmental justice in Asia.

Part I of this commentary presents a historical overview of the judiciary in environmental governance at the international level. In Part II, we paint the landscape of environmental jurisprudence within key Asian jurisdictions. In some Asian countries, a growth in public interest environmental litigation has led to more judges with interest and expertise in environmental law and to an innovative and expanding body of environmental jurisprudence. This trend has also led to environmental courts (ECs) in Bangladesh, the Philippines and Thailand, and environmental tribunals (ETs) in India, Pakistan, South Korea, and Japan. But, we argue, substance and form will not necessarily coincide: the existence of an EC or ET, alone, is not evidence of effective environmental decision-making. In some Asian jurisdictions, an EC and/or ET may potentially improve environmental decision-making but a new EC or ET may not always be possible. Nor will it necessarily be the best way of improving environmental adjudication. Without more, it will not be sufficient. Access to environmental justice, path-breaking environmental jurisprudence, and effective routine environmental decision-making and environmental dispute resolution can (or may need to) be facilitated by a range of institutional forms. It affects how and where donors and development partners direct scarce resources to improve environmental adjudication. Part III describes the idea of an Asian Judges Network on the Environment, launched at the Asian Judges Symposium, hosted by the Asian Development Bank (ADB) and the United Nations Environment Programme (UNEP) and supported by participating Asian Judges.¹⁰ Part IV concludes this commentary.

10. The Access Initiative of the World Resources Institute, The Asian

PART I: The Judiciary in International Environmental Governance

Judges play a key role in environmental enforcement and compliance. They can protect environmental rights expressly or impliedly enshrined in a constitution.¹¹ They can introduce international environmental law into national law, and they can make decisions that prevent environmental harm or provide remedies to compensate for it.¹²

Recognizing the judiciary's key role, the UNEP convened the largest gathering of senior judges from around the world at the Global Judges Symposium in Johannesburg, South Africa, in 2002. At this symposium, more than 120 participating judges committed to the Johannesburg Principles on the Role of Law and Sustainable Development ("Principles"). Those Principles saw judges agree to: use the judicial mandate for sustainable development and uphold the Rule of Law and democratic processes;¹³ recognize an urgent need for regional and sub-regional initiatives to educate and train judges on environmental law;¹⁴ and collaborate within and across regions to improve environmental enforcement, compliance, and implementation.¹⁵

Commentators and international organizations have also recognized the important role of the judiciary in environmental governance and sustainable development at the regional level.¹⁶ In the lead-up to this symposium, UNEP had convened regional meetings of judges around the world, including in Asia.¹⁷ To continue

Environmental Compliance and Enforcement Network, The Philippines Supreme Court, and The U.S. Environmental Protection Agency (USEPA) were also supporting development partner hosts.

11. See, e.g., Lal Kurukulasuriya, Chief, Env'tl Law Program, UNEP, *The Role of the Judiciary in Promoting Environmental Governance and the Rule of Law, Global Environmental Governance: the Post-Johannesburg Agenda*, New Haven, U.S., Oct. 23-25, 2003.

12. *Id.*

13. *The Johannesburg Principles on the Role of Law and Sustainable Development*, Principle 1 (2002) (adopted at the Global Judges Symposium, held in Johannesburg, South Africa on Aug. 18-20, 2002), available at <http://www.unep.org/law/Symposium/Documents/RESOLUTION%201-FINAL%2020%20AUGUST.doc>, princ. 1.

14. *Id.*, princ. 3.

15. *Id.*, princ. 4.

16. See, e.g., Brian Preston, *The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific*, 9 ASIA PAC. J. OF ENV. L. 109, 113-14 (2005).

17. Meeting for countries in South Asia, organized in collaboration with the

the momentum, in 2004, four European judges established a European Union Forum of Judges for the Environment to share experiences on environmental law.¹⁸ In Asia, the World Bank Institute, and the Asian Environmental Compliance and Enforcement Network (AECEN) supported several regional judges meetings, enlisting their support for protecting the environment.¹⁹ However, despite some important bilateral work,²⁰ progress towards implementing the principles on the ground has not been rapid. Nor has there been broad regional-cross fertilization of environmental ideas or information amongst Asian judiciaries.

However, in June 2010, the world's largest gathering of judges and other legal stakeholders since the 2002 Global Judges Symposium, was held in Manila, Philippines, at the Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice.²¹ Convened by the ADB and UNEP, over 110 judges,

South Asia Co-operative Environment Programme (SACEP), held in Colombo, Sri Lanka, in July 1997. The meeting for judges from the Southeast Asian countries was held in Manila, Philippines, in March 1999, while a meeting for judges from Pacific Island States was held in February 2002 in Brisbane, Australia. UNEP Executive Director's Background Paper to the Global Judges Symposium on Sustainable Development and the Role of Law, Aug. 18-20, 2002, Johannesburg, South Africa.

18. EU FORUM OF JUSTICES FOR THE ENVIRONMENT, <http://www.eufje.org/> (last visited Nov. 8, 2010).

19. In June 2004, the World Bank Institute convened a gathering for Southeast Asian countries on the Role of the Judiciary in Promoting Sustainable Development, Bangkok, Thailand, (see PAUL STEIN, REPORT ON BANGKOK AND KATHMANDU (2004), available at http://weavingaweb.org/pdfdocuments/LN230704_Bangkok_Nepal.pdf). Subsequently, the Philippines Supreme Court and the Philippine Judicial Academy convened an Asian Justices Forum on the Environment in Manila in July 2007; John Paul P. Galang, *SC Hosts Asian Justices Forum on Environment*, BENCHMARKONLINE 2007, <http://sc.judiciary.gov.ph/publications/benchmark/2007/07/070703.php> (sponsored by AECEN, U.S. Agency for International Development (USAID), U.S. EPA, Asia Pacific Jurist Association (APJA), and the Supreme Court Program Office). A follow-up Forum on Environmental Justice was convened in 2009. Kala Mulqueeny & Sherielysse Bonifacio, *Asian Judges, Green Courts and Tribunals and Environmental Justice*, L. & POL. REF. BRIEF No. 1 (Apr. 2010).

20. AECEN has been instrumental. It established the Asian Justices Forum on the Environment in partnership with the United States Environmental Protection Agency (USEPA), UNEP, the Economy and Environment Program for Southeast Asia (EEPSEA) and the Asia Pacific Jurists Association (APJA). See Asian Environmental Compliance and Enforcement Network, *Strengthening Asian Judiciaries*, <http://www.aecen.org/strengthening-asian-judiciaries> (last visited Nov. 8, 2010).

21. Participants of the Symposium included judges, environmental officials and decision-makers, and civil society representatives from Australia, Bangladesh, Belgium, Brazil, India, Indonesia, France, Japan, Korea, New Zealand, Pakistan,

environmental ministry officials, and civil society participants from Asia, Australia, the United States and Brazil sought to continue where past events had left off.

Prior to this Symposium, in 2009, several senior Asian judiciaries had asked us for information on what judges in other jurisdictions were doing to strengthen their capacity to decide environmental cases and to develop an environmental jurisprudence. The next section sketches a broad response.

PART II: The Asian Landscape of Environmental Jurisprudence

Two key features mark the Asian landscape of judicial and quasi-judicial decision-making on environmental and natural resource issues. First, in many Asian countries, superior courts have developed a relatively sophisticated environmental jurisprudence. For example, judges in South Asia and the Philippines have, expressly or impliedly, interpreted their respective constitutions as affording citizens a right to a healthy environment.²² They have also handed down landmark decisions introducing principles of international environmental law from the Stockholm and Rio Declarations²³ (such as "inter-generational responsibility,"²⁴ "the precautionary principle"²⁵ and "the polluter pays principle"). Such principles have been used to preserve cultural heritage like the Taj Mahal and natural heritage like the Ganges River.²⁶ Notable cases have also introduced innovative

the People's Republic of China, the Philippines, the United States, Sri Lanka, and Thailand who convened to share cutting edge experiences on the evolution of environmental jurisprudence and adjudication in their respective jurisdictions, and learn from prior successes and failures in facing the challenges of achieving effective environmental decision-making. It was supported by key development partners including the UNEP, USEPA, The Access Initiative of the World Resources Institute, the Asian Environmental Compliance and Enforcement Network (AECEN) and the Supreme Court of the Philippines.

22. See, e.g., *Oposa v. Factoran*, G.R. No. 101083 (S.C., July 30, 1993) (Phil.); *M.C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1037, 1045 (1987) (Kanpur Tanneries case); *Farooque v. Bangladesh*, Civil Appeal No. 24 of 1995, 17 B.L.D. (AD) 1, 1-33 1997.

23. Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), U.N. Doc. A/Conf.48/14/Rev. 1(1973), reprinted in 11 I.L.M. 1416 (1972); Rio Declaration on Environment and Development (Agenda 21), UN Doc. A/CONF.151/26 (vol. I) reprinted in 31 I.L.M. 874 (1992).

24. *Oposa*, *supra* note 22.

25. *Mandalawangi case* (2003), Indonesian Supreme Court.

26. *M.C. Mehta v. Union of India* (Taj Trapezium case), A.I.R. 1988 S.C. 1037;

remedies, such as the writ of continuing mandamus (which compels government agencies to clean up pollution and gives the court ongoing jurisdiction to monitor them).²⁷ The doctrine of public trust (whereby the government holds natural resources for the benefit of the public, and preserves their use), has been adopted in Sri Lanka and several other Asian jurisdictions.²⁸ Worth noting is that while many superior courts have begun to develop path-breaking environmental jurisprudence, most trial courts struggle with excessive dockets and the need for increased technical, fiscal, and human capacity in all areas of legal adjudication, making it difficult to direct particular resources to strengthening their capacity to decide environmental and natural resource cases. Second, since the late 1990s, several Asian countries have formally adopted one or more ECs or ETs and this trend seems to be continuing. ECs and ETs are one way of achieving effective environmental adjudication and dispute resolution, and have many advantages.²⁹ In developing Asia, a key advantage is that resources for capacity building and environmental law expertise may be concentrated in a smaller number of judges who are specifically selected for their integrity and expertise.

However, the experience of several Asian ECs and ETs shows that they are not a panacea. Environmental jurisprudence — or the case law reflecting the thinking or ideology behind environmental decision-making — is not synonymous with the institutional form of the decision-making body. Path-breaking environmental jurisprudence can result from generalist courts. To date, general courts, environmental divisions of general courts ("green benches"), ECs, ETs, and grass-roots alternative dispute resolution, or grass roots legal aid outreach, all demonstrate possible ways of adjudicating or resolving environmental disputes and expanding access to environ-

M.C. Mehta v. Union of India (Ganges Pollution case), A.I.R. 1988 S.C. 1115.

27. Vineet Narain v. Union of India, A.I.R. 1996 S.C. 3386 (India); Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802 (India); Concerned Residents of Manila Bay v. M.M.D.A., G.R. Nos. 171947-48, (Dec. 8, 2008) (Phil.).

28. Bulankulama v. Secretary, Ministry of Industrial Development (Eppawela case) Application No. 884/99, Supreme Court of Sri Lanka 243 (Apr. 7, 2000).

29. See GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), at 14-16, available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

mental justice. Establishing ECs and ETs may not be possible in certain jurisdictions or may not be necessary. In any event, alone these courts cannot adequately adjudicate or resolve environmental issues.³⁰ The importance of determining the most effective intervention to promote environmental specialization in a particular context is that it affects how and where donors direct scarce resources.

We provide a brief sketch of environmental jurisprudence and modes of environmental specialization in selected Asian developing countries below. The sketch does not purport to be comprehensive, but it provides a sample of the issues arising in these jurisdictions.

(1) South Asia

a. India

The Supreme Court of India has decided many environmental cases using unique and novel judicial innovations that have served as both national and international landmark precedents. Over the past twenty-five years, it has protected individual rights and the public's interest in environmental protection under the constitution.³¹ It has interpreted the constitution's guarantee of a right to life expansively as including a right to a wholesome and pollution-free environment.³²

Many environmental lawyers remark upon many Indian Supreme Court decisions as progressive and path-breaking. Indian environmental jurisprudence is also marked by relaxing procedural barriers for public interest litigants to facilitate their access to the courts.³³ And the Supreme Court of India has integrated international

30. For example, the European Union has generally not used environmental courts, but has developed a system of environmental jurisprudence and decision-making that is notable. Similarly, the United States rejected the idea of a national environmental court, but has developed strong environmental case law without one (although the Environmental Appeals Board of the USEPA, which reviews appeals on water and air pollution cases, has served as the principal environmental tribunal for these matters, with litigants rarely seeking to appeal its decisions to federal courts.)

31. Geetanjoy Sahu, *Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence*, 4 L. ENV. & DEV. J. 1 (2008), available at <http://www.lead-journal.org/content/08001.pdf>.

32. *M.C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1037, 1045 (1987) (Kanpur Tanneries case).

33. See, e.g., *M.C. Mehta v. Kamal Nath*, A.I.R. 1997 S.C. 388 (the court taking judicial notice of environmental news to initiate a case); *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1988 S.C. 2187, 2189 (allowing litigants to petition the court through a simple letter); *T.N. Godavarman*

environmental law principles into its decisions.³⁴ Yet critics charge that such decisions are "contrary to the traditional legalistic understanding of the judicial function."³⁵ In any event, these decisions evidence a court that, although not being a specialist EC, is responsible for innovative environmental jurisprudence.³⁶

India has also established several ETs. In 1995, the National Environment Tribunal was established to handle hazardous waste cases.³⁷ In 1997, the National Environment Appellate Authority was created to deal with public challenges to environmental clearances issued to the private sector.³⁸ Neither body is currently operating; critics claim that neither of these bodies was ever functional.³⁹

Against that backdrop, in October 2010, India established a National Green Tribunal (NGT),⁴⁰ with broad jurisdiction to expeditiously dispose of civil environmental cases.⁴¹ The Tribunal requires petitioners to come before it prior to going to court.⁴² The Tribunal also restricts those who may file claims,⁴³ introduces a five year time-bar from the start of an environmental problem within which to bring a claim,⁴⁴ and does not allocate responsibility for

Thirumulkpad v. Union of India, W.P. No. 202 of 1995 (Continuing mandamus by providing ongoing supervision of environmental clean-up post decision).

34. See, e.g., *Narmada Bachao Andolan v. Union of India* A.I.R. 2000 S.C. 2751, 3804 (defining "sustainable development"); *Indian Council for Enviro Legal Action v. Union of India*, A.I.R. 1996 S.C. 1446 (adopting the polluter pays principle); *Vellore Citizens Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715, 821[37]–[39] (declaring that the precautionary principle is part of the law of India).

35. Sahu, *supra* note 31, at 4.

36. In 2000, however, the Supreme Court asked the Law Commission of India to consider establishing a specialist environmental court. *A.P. Pollution Control Board v. M.V. Nayudu*, 2001 2 S.C.C. 62. The Law Commission responded in its 186th report with a recommendation to constitute environmental courts. Ishwer Singh, *The National Green Tribunal Act, 2010 - A Step Forward in Environmental Adjudication in India*, available at <http://www.scribd.com/doc/36957172/Ishwer-Singh-The-National-Green-Tribunal-Act-2010-A-Step-Forward-in-Environmental-Adjudication-in-India>.

37. The National Environmental Tribunal Act, No. 27 of 1995.

38. The National Environmental Appellant Authority Act No. 22 of 1997.

39. Armin Rosencranz et al., *Whither the National Environment Appellate Authority?*, 44 INDIA ENVTL. PORTAL 10 (2009), available at <http://www.indiaenvironmentportal.org.in/content/whither-national-environment-appellate-authority>.

40. The National Green Tribunal Act, No. 19 of 2010. The Act was approved in April, and notified by the President in October 2010.

41. *Id.* §§ 3, 14(1), 16, and 22.

42. *Id.* § 22.

43. *Id.* §§ 16, 18.

44. *Id.* § 15(3).

compensation if damage is established.⁴⁵ The government establishes its rules and the Supreme Court can hear appeals.⁴⁶

Critics contend the NGT undermines advances made by the Supreme Court in environmental protection and conserving natural resources.⁴⁷ Some allege that the government sought to constrain the Supreme Court's expansive environmental jurisprudence; other critics argue that the formal rules will make it harder for the poor to bring claims under the NGT because of additional procedural hurdles.⁴⁸ In short, if the NGT makes it harder for petitioners to access environmental rights, it will be a set-back not a step forward, irrespective of its green label.

b. Bangladesh

Innovations in environmental jurisprudence in Bangladesh have occurred in non-specialist courts. As in India (and Pakistan), the Bangladesh courts have interpreted the "right to life" under the constitution to include the "right to protection and preservation of the ecology" and the "right to have a pollution free environment."⁴⁹ It has liberalized standing rules,⁵⁰ and has also given decisions that incorporate the international environmental law principles of sustainable development,⁵¹ the polluter pays,⁵² and precaution⁵³ within its jurisprudence.

As of September 2010, Bangladesh was set to establish new environment courts in sixty-four districts under proposed amend-

45. *Id.* § 15(4).

46. *Id.*

47. Armstrong Vaz, *How Green Will Be the Green Tribunal?*, DIGITAL JOURNAL (Nov. 7, 2010, 9:15PM), <http://www.digitaljournal.com/article/287989>; Meena Menon, *How Green is My Tribunal?*, THE HINDU (Nov. 7, 2010, 9:20PM), <http://www.thehindu.com/opinion/op-ed/article503099.ece?css=print>.

48. Vaz, *supra* note 47; Menon, *supra* note 47.

49. Jona Razzaque, *Access to Environmental Justice: Role of the Judiciary in Bangladesh*, 4 BANGL. L.J. 1 (2000).

50. Mohiuddin Farooque v. Bangladesh, Civil Appeal No. 24 of 1995, 17 B.L.D. (AD) 1, 1-33 1997.

51. *Id.*

52. *Id.*; Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh, Writ Petition No. 1430 of 2003 (pending for hearing).

53. *Id.*; Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh, Writ Petition No. 2224 of 2004 (The High Court division issued a stay order and injunction protecting and conserving the Sunderbans against a development order) (pending).

ments to an existing Environmental Courts Act adopted in 2000.⁵⁴ The existing act provides for three types of ECs. First, Special Magistrate Courts for sixty-four Districts Magistracy and five Metropolitan Magistrates to try petty cases like air pollution by motor vehicles;⁵⁵ second, a divisional EC with jurisdiction over major environmental offenses and disputes,⁵⁶ and third, an EC for appeals from the ECs.

Divisional ECs have been established and are operational in Dhaka (the national capital) and Chittagong (a regional capital). In Sylhet, a judge has been assigned to hear environmental cases that arise in that area.⁵⁷ Although from 2003 to July 2010, the Dhaka EC disposed of 238 of 372 cases filed,⁵⁸ the existing act is not regarded as generally successful. Under that act, citizens are required to file a case with the Ministry of Environment and seek its approval for filing before proceeding against polluters.⁵⁹ The new amendments will remove this requirement: if the ministry does not act within sixty days, then the aggrieved citizen could go to court. However, the amendments will allow the ministry to seek to mediate any case filed before the courts.⁶⁰ Critics claim this right could still be used to defeat the purposes of filing.⁶¹ Hence, Bangladesh illustrates a jurisdiction that has begun to develop an environmental jurisprudence in its superior courts, but does not have a good track record with its ECs. For the new ECs to change that, significant resources will need to follow the formal structural change.

54. The Environment Court Act, 2000 Act No. 12 of 2000 (Bangl.).

55. *Id.* arts. 5 B, 5 C.

56. *Id.* art. 5.

57. Interview with Fowzul Azim, Judge, Dhaka Divisional Environment Court, November 12, 2010.

58. Personal Communication, Fowzul Azim to Sherielysse Bonifacio, July 22, 2010.

59. Gurumia.com, Strong Laws for Safe Climate: Bangladesh to Establish 64 Environment Courts, <http://gurumia.com/tag/bangladesh-environment-courts/>. On July 20, 2010, Bangladesh announced the approval by cabinet and prime ministers of a bill to establish a new environmental court, which would soon be put to Parliament. *Bangladesh plans environment court to jail polluters*, WORLD BULLETIN, http://www.worldbulletin.net/news_detail.php?id=61538.

60. BD CAN, The Environment Court (Amendment) Bill 2010, <http://desheralo.com/news.details.php?news=638> (Aug. 16, 2010).

61. *Id.*

c. Pakistan

As in India and Bangladesh, the Pakistan Supreme Court has expansively interpreted its constitution to include certain environmental rights. In 1992, the Supreme Court appointed a judge to hear environmental public interest cases.⁶² Two years later, the Supreme Court held that the constitution's fundamental right to life included the right to a clean and healthy environment.⁶³ Thereafter, starting with this landmark precedent and under the leadership of the chief justice, an important environmental jurisprudence has begun to evolve.⁶⁴ By way of example, the Pakistan Supreme Court has moved to eliminate procedural barriers to public interest environmental cases⁶⁵ and to reflect international environmental law principles within national law.⁶⁶

In addition, the 1997 Pakistan Environmental Protection Act (1997 Act) established first-instance ETs to handle serious civil and criminal environmental complaints filed by government or individuals (including public interest cases) and to hear appeals against orders of the national or local Environmental Protection Agencies. Appeals from these tribunals go to the High Court and then to the Supreme Court. The 1997 Act, which was adopted in response to civil society and international organization pressure, was not implemented until 1999, when the Supreme Court directed that the ECs and ETs be established.⁶⁷ In Sindh, it was not until 2007 that the EC became operational.

The 1997 Act also established an "environmental magistrate" with jurisdiction to hear criminal and other related offenses at the

62. Jona Razzaque, *Environmental Human rights in South Asia: Towards stronger participatory mechanisms* 4 fn.26, Roundtable on Human Rights and the Environment (Geneva, Mar. 12, 2004), organized by Geneva Environment Network available at http://www.cleanairnet.org/caiasia/1412/articles-58293_Jona.doc.

63. Shehla Zia v. W.A.P.D.A., P.L.D. 1994 SC 693.

64. Parvez Hassan, *Environmental Protection, Rule of Law and the Judicial Crisis in Pakistan*, International Congress on Environmental Law (Rio de Janeiro, Brazil, May 22-24, 2007) (in tribute to Professor Charles O. Okidi).

65. General Secretary, West Pakistan Salt Miners Labour Union v. The Director, Industries and Mineral Development, 1994 S.C.M.R. 2061; In re: Human Rights Case (Environment Pollution in Balochistan), P.L.D. 1994 S.C. 102 (taking notice of news items revealing hazardous waste).

66. See Zia, *supra* note 63 (the precautionary principle).

67. Ashraf Jahan, *Pakistan Country Case Studies for Environmental Courts and Tribunals* (Paper delivered at the Asian Judges Symposium on Environmental Decision-Making, the Rule of Law and Environmental Justice at the Asian Development Bank, Manila) (July 28-29, 2010) (on file with authors).

district court level. All four High Courts in the provinces of Pakistan have empowered environmental magistrates whose decisions can be appealed to the Court of Sessions (the primary criminal trial court) and then to the High Court and the Supreme Court.

(2) People's Republic of China

The People's Republic of China's (PRC) constitution recognizes the state's responsibility to protect and improve the living and ecological environment; to prevent and control pollution and other public hazards; and to organize and encourage forest protection and afforestation.⁶⁸ However, the PRC has experienced significant environmental problems stemming from rapid economic development, which has led to a growing number of environmental disputes, most of which are resolved through the administrative process.⁶⁹

The number of environmental cases filed in courts of general jurisdiction (people's courts) has been steadily increasing. China has a four-level court system: Basic Courts, Intermediate Courts, Provincial High Courts and the Supreme Peoples' Court (SPC). In 2005, the number of environmental disputes heard in the general people's courts reached a record of nearly 700,000, and the average number of environmental disputes has increased by 25% each year since 1998.⁷⁰ Moreover, while public interest litigation is not widespread, the Center for Legal Assistance to Pollution Victims (CLAPV) has had some notable, successful environmental cases.⁷¹ A 2010 ADB report suggested that the efficient and effective resolution of environmental disputes within the general people's courts is hampered by the fact that judges often lack training in environmental laws, refuse to accept environmental cases, or make decisions inconsistent with other precedent.⁷²

Given the foregoing, much foreign and local attention has been placed on the potential for specialist courts in the PRC.⁷³ Established

68. XIANFA art. 26 (1982) (China).

69. Kala Mulqueeny & Sherielysse Bonifacio, *supra* note 19, at 4.

70. TUN LIN ET AL., GREEN BENCHES: WHAT CAN THE PEOPLE'S REPUBLIC OF CHINA LEARN FROM ENVIRONMENT COURTS OF OTHER COUNTRIES? 5 (2009) (hereinafter GREEN BENCHES, 2009).

71. Wang Canfa, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VER. J. OF ENV. L. 159, 178-183 (2006).

72. GREEN BENCHES, 2009, *supra* note 70, at 9-10.

73. The Supreme Peoples' Court has formally recognized specialist maritime

mostly within the last five years and mainly in response to serious environmental pollution accidents, twelve ECs have been created at the city level in three Chinese provinces: Guizhou, Jiangsu, and Yunnan. These courts determine administrative, civil, and criminal cases. Some provinces have further plans for new ECs.⁷⁴ Environmental public interest litigation is not yet widespread in the PRC, meaning that some of these courts may have very limited dockets and may be required to justify their continued existence.

Until July 2010, the Supreme People's Court (SPC) had not authorized these ECs but tolerated them as an experiment. Thus, the ECs' legal power and authority was unclear, and they risked being shut down.⁷⁵ However, in July 2010, the SPC made an announcement encouraging the creation of lower ECs. Subsequently, in November 2010, Beijing's first environmental court opened in Yanqing district.⁷⁶

At least in the short term, however, the impact of these ECs will be localized and limited. The general people's courts will continue to be relevant to the resolution of environmental disputes.

(3) Southeast Asia

a. Philippines

The Philippines Supreme Court has handed down internationally recognized landmark judgments⁷⁷ based upon innovative

courts and forest courts. It held two conferences on judges and water pollution in 2008 and 2009 respectively and called for courts to accept public interest water pollution cases. The Asia Water Project: China, Green Courts: a new case for the environment, <http://www.asiawaterproject.org/regulatory-trends/litigation/>.

74. GREEN BENCHES, 2009, *supra* note 70, at 2. Alex Wang & Jie Gao, Environmental Public Interest Litigation in China, paper prepared for Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice, ADB (Manila, Philippines, July 28-29, 2010) (hereinafter Wang & Gao, 2010).

75. Personal Communication, Xiaohua Peng, Lead Counsel, Asian Development Bank, to author, June 2, 2010 (suggesting that there is no concept of green bench or environmental courts or tribunals under SPC guidance); *see also* Wang & Gao, 2010, *supra* note 74.

76. China Green News, Beijing Opens First Environmental Protection Court, <http://eng.greensos.cn/ShowArticle.aspx?articleId=591>.

77. The starting point for the court is the Philippine's Constitution which recognizes a right to the environment: "[T]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." CONST. (1987), Art. II, § 16 (Phil.).

petitions filed by public interest environmental lawyers.⁷⁸ The Court famously recognized the standing of several minors to sue on their own behalf and on behalf of "generations yet unborn" — the first court worldwide to do so.⁷⁹ In 2008, it borrowed from Indian environmental jurisprudence, in recognizing the remedy of "continuing mandamus," which obliged eleven government agencies to clean up a polluted Manila Bay and allowed the court to continue to monitor the implementation of its decision through a committee.⁸⁰

Specialist courts have been formally adopted. Forestry courts had been designated, but they were never fully operational. In January 2008, the chief justice designated 117 municipal and regional trial courts across the country as ECs (including forty-five former forestry courts).⁸¹ These ECs also retain their general jurisdiction. Presiding judges need not have environmental law expertise. Hence, expansive dockets and limits to technical and resource capacity, present significant challenges to any real advances in trial level environmental decision-making based specifically upon these ECs.

In April 2009, the Philippine Supreme Court initiated work on Rules of Procedure for Environmental Cases (the Rules), which it adopted in April 2010.⁸² The Rules include provisions preventing Strategic Legal Actions Against Public Participation, the Precautionary Principle; a Writ of Continuing Mandamus and a Writ of Kalikasan (or "nature"), which seeks to protect constitutional environmental rights by directing a respondent to perform an act or stop an unlawful act involving certain types of significant environmental damage. The rules also have provisions to expedite hearings, including a one-year period for judges to conclude an environmental case.

The Philippines also has two ETs: the Pollution Adjudication

78. *Director of Forestry v. Munoz*, G.R. No. L-24796 (S.C., June 28, 1968); *Tan v. Director of Forestry*, G.R. No. L-24548 (Oct. 27, 1983); *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120 (March 16, 1994).

79. *Oposa v. Factoran*, G.R. No. 101083 (S.C., July 30, 1993) (Phil.).

80. *Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay*, G.R. No. 171947-48 (S.C., Dec. 18, 2008) (Phil.).

81. Leila Salaverria, *SC Designates 117 Environmental Courts*, PHIL. INQ. NET., Jan. 14, 2008, http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080114-112156/SC_designates_117_environment_courts.

82. Republic of the Philippines Supreme Court, *Rules of Procedure in Environmental Cases*, Effective April 29, 2010, <http://sc.judiciary.gov.ph/Rules%20of%20Procedure%20for%20Environmental%20Cases.pdf>. The authors provided support for this work.

Board (PAB)⁸³ and the Mines Adjudication Board (MAB),⁸⁴ which are both housed within the Department of Environment and Natural Resources (DENR). The PAB is co-equal with a regional trial court⁸⁵ and has original jurisdiction over air and water pollution cases.⁸⁶ The MAB can hear appeals from Panels of Arbitrators in DENR Regional Offices related to mining disputes.⁸⁷ Like the PAB, the MAB can bring any acts before it if they relate to a pending case and could cause grave or irreparable damage to the parties or seriously affect social and economic stability.⁸⁸ Critics charge these ETs with being intolerably slow; some cases have been pending for up to ten years. In short, progressive Supreme Court environmental jurisprudence has led to important structural and procedural reforms. But to make the structural reforms establishing ECs work will require significant investments in capacity building and civil society.

b. Thailand

The Thai Supreme Court of Justice and the Thai Supreme Administrative Courts have both contributed to environmental decision-making. Thailand has four different court systems: the Supreme Courts of Justice, the Supreme Administrative Courts, the Constitutional Court, and the Military Court.

The Thai Supreme Court is the highest court of appeal for civil cases between private entities. Recognizing the increase in environmental litigation, and a need for judicial expertise in the area, it has established eleven green benches. In 2005, it established the first one at the Supreme Court level. Subsequently, in 2007, it established ten

83. Providing for the Organization of the Department of Environment, Energy and Natural Resources; Renaming it Department of Environment and Natural Resources and for Other Purposes, Exec. Ord. 192, Sec.19 (1987).

84. See Panel/MAB Rules – Significant Provisions, <http://www.mgb.gov.ph/Files/Policies/Significant%20Provisions.pdf> (last visited Nov. 21, 2010).

85. Pollution Control Law, And for Other Purposes Rep. Act No. 3931, Pres. Dec. No. 984, § 7 (d) (1976).

86. An Act Creating the National Water and Air Pollution Control Commission, Rep. Act No. 3931 (1964); An Act Providing for a Comprehensive Water Quality Management and for Other Purposes, Rep. Act. No. 9275 (2004); An Act Providing for a Comprehensive Air Pollution Control Policy and for other purposes, Rep. Act No. 8749 (1999).

87. An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation, Rep. Act No. 7942, Sec. 78 (1995).

88. *Id.*, § 79(c)(2).

green benches at the Courts of Appeal level. Green benches at the trial court level are currently being considered. The Thai Supreme Court is also in the process of developing procedural rules for the environment to address standing, evidence, and alternative dispute resolution.

The Thai Supreme Administrative Court's jurisdiction includes environmental cases relating to administrative actions of government officials. It has established one green bench at the trial court level in the Central Administrative Court in Bangkok and has recently established eighteen environmental chambers. The court is also considering a proposal to establish an environmental bench at the Supreme Administrative Court level. The green benches established under the two court systems follow more flexible procedures than ordinary courts and may conduct site visits and on-site fact finding.

Because Thailand is a civil law jurisdiction, judges' interpretations of the constitution and Thai legislation, rather than evolving environmental jurisprudence, are determinative in environmental decision-making. Thailand's constitution lays the framework for broad environmental governance and the individual rights of participation and environmental quality.⁸⁹ During the 1990s, and 2000s, public interest environmental lawyers litigated cases in the Supreme Court⁹⁰ and the administrative courts giving effect to these protections.⁹¹ The Supreme Administrative Court has given effect to principles of "liberalized standing,"⁹² "direct applicability and enforceability of constitutional rights,"⁹³ and "prevention,"⁹⁴ and to applying technical rules flexibly where it would afford substantive justice.⁹⁵

c. Indonesia

The Indonesian judiciary could play a significant role in assisting with the enforcement and compliance of natural resource and

89. Constitution of the Kingdom of Thailand (B.E. 2540) [Thailand], art.67, B.E. 2540 (1977)

90. See, e.g., Klity Creek Judgment, Victory for Local Residents in Kilty Creek Case, <http://www.angkor.com/2bangkok/2bangkok/forum/showthread.php?t=3558>

91. *Id.*

92. Sridhavaravadi Group Case (Order 247/2552 of the Supreme Administrative Court) (Thai).

93. Map Ta Phut Case, Central Administrative Court Ruling, Red Case No. 1352/2553, available at [http://www.thia.in.th/download/05_01_hia_news/Constitution67_decision\(02-09-53\).pdf](http://www.thia.in.th/download/05_01_hia_news/Constitution67_decision(02-09-53).pdf).

94. *Id.*

95. Sakhom Canal Mouth Case, Songkla Administrative Court Order, Black Case No. 16/2551.

environmental laws and has decided some important cases. For example, in the 2003 landmark *Mandalawangi* case, the Supreme Court affirmed the application of the precautionary principle.⁹⁶ However, despite judicial recognition of this key principle of international environmental law, Indonesia continues to have significant environmental problems, with the judiciary currently playing a limited role in environmental protection.

Since about 1998, public interest lawyers, donors, and members of the Ministry of Environment, have sought to foster and develop environmental law specialists. From 1998 to 2005, the Indonesia Center for Environmental Law (ICEL) played an important part in providing short courses on environmental law and training for members of the legal profession, including judges.⁹⁷ Over 1,500 people and about 600 judges received specialized environmental legal training. However, despite apparently successful environmental training, most trained judges are not currently deciding environmental cases.⁹⁸ Neither the court nor donors established a system to ensure that they would be applying their new skills.⁹⁹

The Indonesian constitution conclusively established Indonesia's court structure without an EC, thus preventing an EC being added to the court structure.¹⁰⁰ However, since the early 2000s, ICEL has actively helped the Supreme Court and the Ministry of Environment consider alternative ways of achieving environmental specialization within the judiciary. As a first step, in late 2009, the Ministry of Environment and the Supreme Court entered into a Memorandum of Understanding with two objectives: First, to establish a program to certify judges with environmental law expertise; and second, to develop rules on the handling of environmental cases. As a result, in March 2010, the Chief Justice established a High Level Taskforce

96. Indonesia Supreme Court Verdict No. 1974 K/Pdt/2004 jo.; Bandung High Court Verdict No. 507/Pdt/2003/PT Bdg jo.; Bandung District Court Verdict No. 40/Pdt.G/2003/PN. Bdg jo.

97. AusAID funded these programs.

98. Windu Kisoro, Draft Report to the Asian Development Bank on Judicial Certification, Sept. 2010 (on file with authors).

99. *Id.*

100. Article 24(2) of the Indonesian Constitution 1945. (The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court. General (Administrative and civil/criminal), Religious, Military Courts).

comprised of members of the Supreme Court and senior members of the judiciary and the Ministry of Environment to oversee the program. The group was tasked with developing a program and reporting back by the end of 2010.

The judicial certification scheme seeks to strengthen the capacity of the judiciary to handle environmental cases by certifying judges trained in environmental and natural resource law as experts. Under a technical assistance program, ADB is supporting the certification program and working with the Supreme Court in seeking to institutionalize the systems to ensure that judges trained and certified with environmental expertise actually decide environmental cases.¹⁰¹

ADB's current work is examining the Indonesian judiciary's pre-existing certification programs to determine an appropriate model. Programs already exist for forestry, fisheries, commercial law, anti-corruption, and other specialist areas. Under the environmental certification program, the Supreme Court would certify judges as possessing environmental expertise after they have completed environmental training. Continued certification would be subject to ongoing conditions to retain environmental expert status. If a certified judge breached those conditions, certification could be revoked.

The Indonesian Supreme Court will need to ensure that rules of court are adopted to ensure that certified environmental judges decide environmental cases (and so avoid a repeat of the 1998-2005 experience whereby hundreds of judges were trained in environmental law, but relatively few now decide environmental cases). If such rules of court are adopted, Indonesia would establish a system of environmental specialization and strengthen the capacity of judges to decide environment and natural resources cases that do not depend upon the adoption of ECs or ETs.

d. Malaysia

Malaysian environmental plaintiffs face many challenges in seeking relief in Malaysian Courts.¹⁰² Court decisions have ruled that

101. ADB Regional technical assistance 7474, Strengthening of Judicial Capacity to Adjudicate Upon Environmental Laws and Regulations, <http://pid.adb.org/pid/TaView.htm?projNo=43572&seqNo=01&typeCd=2> (Nov. 8, 2010).

102. But earlier this year, a high court in Sarawak, Borneo, issued an important environmental decision declaring a lease issued for palm oil agriculture illegal. *Court Voids Malaysian Palm Oil Giant's Leases on Native Lands*, ENV'T NEWS SERVICE, Apr. 1, 2010, <http://www.ens-newswire.com/ens/apr2010/2010-04-01-01>.

only persons who can demonstrate sufficient connection with or interest in the subject matter in dispute can seek a judicial remedy.¹⁰³ This connection or interest has not been liberally interpreted, and, accordingly, acts as a barrier to a plaintiff achieving standing.¹⁰⁴ Plaintiffs also have a high burden of proof to establish damages as well as a limited period for filing cases, both of which make it difficult for plaintiffs to seek redress.

Plaintiffs also face challenges in the specialized planning appeal boards established in three of Malaysia's eleven states. These planning boards are quasi-judicial tribunals established at the state level and appointed by state government units. They have authority over land use planning and development decisions of local planning authorities, but are not otherwise ECs or ETs.

The 1974 Environmental Quality Act established an Environmental Quality Appeal Board (EQAB) within the Department of Environment (DOE). The EQAB has been authorized to hear appeals from the DOE Director's license refusals, conditions, revocations, and related negative license decisions. Rules for this tribunal were adopted in 2003.

PART III: An Asian Judges Network on the Environment

Over a decade of scholarly work has documented the faults and virtues of trans-governmental networks. Proposed virtues include strengthening capacity and socializing values (like integrity, justice, and environmental protection).¹⁰⁵ Trans-governmental networks are loosely structured cross-border alliances of government officials with common professional ties, which in their judicial stripe involve "interaction across, above and below borders, exchanging ideas and cooperating in cases."¹⁰⁶ They are touted as a mode of global

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103. ALAN K. TAN, PRELIMINARY ASSESSMENT OF MALAYSIA'S ENVIRONMENTAL LAW. APCEL REPORT: MALAYSIA (1998), available at <http://law.nus.edu.sg/apcel/dbase/malaysia/reportma.html>.

104. See, e.g., *Kajing Tubek v. Ekran Bhd* (1996) 2 M.L.J. 388 (Malay.); *Ketua Pengarah Jabatan Alam Sekitar & Anor. v. Kajing Tubek* (1997) 3 M.L.J. 23 (Malay.).

105. Anne-Marie Slaughter & David Zaring, *Networking Goes Global: an Update*, 2 ANN. REV. L. & SOC. SCI. 211 (2006).

106. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1104 (2000).

governance that can promote environmental enforcement by promoting convergence and socialization of national and international norms, and providing a venue for technical assistance.¹⁰⁷

In the field of environmental governance in Asia, several regional and international global networks have been contributing to improvements in environmental enforcement and compliance. For example, the Association of South-east Asian Nations — Wildlife Enforcement Network (ASEAN-WEN), the world's largest wildlife enforcement network fills in the gaps in national enforcement in Southeast Asia.¹⁰⁸ The Asia Pacific Fisheries Commission (APFIC) promotes the full and proper use of living aquatic resources around the Asia-Pacific by developing and managing fishing and aquatic culture operations.¹⁰⁹ AECEN promotes environmental enforcement through connections among environmental ministries and agencies from around Asia,¹¹⁰ while the International Network on Environmental Compliance and Enforcement is an international network devoted to similar purposes.¹¹¹

However, not all such networks have produced considerable gains. In 2001, forest law enforcement officials entered into a Ministerial Agreement on Forest Law Enforcement and Governance in East Asia (FLEG) that according to the World Bank, has facilitated a dialogue but achieved very little concrete progress.¹¹²

A few judges' networks also serve similar purposes. They share and exchange information on successes and challenges, improve national and regional jurisprudence, and serve as a forum for capacity building and bilateral exchanges. The European Union Forum of Judges for the Environment is one example.¹¹³ LAWASIA also has

107. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L. L. 1 (2002).

108. ASEAN-WEN, Action Update: Major/Model Law Enforcement Actions in Southeast Asia to Protect Threatened Flora and Fauna (Jan.-March 2010).

109. Indo-Pacific Fisheries Commission, *Agreement for the Establishment of the Asia Pacific Fisheries Commission* (Oct. 1996).

110. See generally About AECEN, Asian Environmental Compliance and Enforcement Network, <http://www.aecen.org/about-aecen>.

111. See generally International Network on Environmental, Compliance and Enforcement, <http://www.inece.org/>.

112. ARNOLDO CONTRERAS-HERMOSILLA, WORLD BANK, FOREST LAW ENFORCEMENT AND GOVERNANCE PROGRAM: REVIEW OF IMPLEMENTATION (2007).

113. European Union Forum of Judges for the Environment, <http://www.eufje.org/> (last visited Nov. 7, 2010).

similar goals, but is not exclusively focused on the environment.¹¹⁴

So why an Asian Judges Network on the Environment (AJNE)? What might it do? And what are the challenges to it being effective?

Asian chief justices and judges attending the Asian Judges Symposium in June 2010 have sought to continue the process of collective sharing and capacity building they began there, recognizing they have much to gain by exchanging experiences and working together.¹¹⁵ The Philippines chief justice, for example, observed "a great willingness to create a regional network of judicial institutions" because they "share similar concerns and threats. . .which are at times borderless."¹¹⁶ Indonesia's chief justice proposed hosting a sub-regional round-table of Chief Justices on the Environment from the Association of South-east Asian Nations (ASEAN) in Jakarta in 2011,¹¹⁷ and South-Asian senior judiciaries proposed a similar sub-regional round-table for South-Asian Chief Justices.

Several Asian judges made the point that their shared judicial bond was unique. They offered general support for environmental work done by other arms of government (and other environmental and legal professionals), but made clear that their own professional needs deserved dedicated focus, noting that their professional ties with judges across borders would often be closer than ties with fellow nationals given their shared issues. Indeed, since many nationals appear in court with specific agendas it is sometimes challenging for judges and nationals to engage in honest shared problem-solving.

Overall, participants shared experiences on environmental jurisprudence and mapped a collective agenda on access to justice, ECs and ETs, alternative dispute resolution, capacity strengthening, and promoting integrity, in an effort to achieve more effective environmental decision-making, while advancing the rule of law, and access to justice. This generally shared agenda saw participating judges endorse an AJNE to promote environmental justice.¹¹⁸

114. Lawasia, <http://lawasia.asn.au/> (last visited Nov. 7, 2010).

115. News Release, Asian Development Bank, Asian Chief Justices, Judges Propose Network to Promote Environment Justice (July 30, 2010), <http://www.adb.org/media/Articles/2010/13293-asian-environment-justice/>.

116. Chief Justice Corona, *Asian Judges and the Environment, Capacity Needs and the Potential for a Network*, Asian Judges Symposium, July 28-29, 2010, available at <http://www.scribd.com/doc/37133068/Renato-Corona-Talking-Points-Asian-Judges-and-the-Environment-Capacity-Needs-and-Potential-for-a-Network>.

117. Asian Development Bank, *supra* note 115.

118. Asian Development Bank, *supra* note 115.

So, what might an AJNE do? There are five elements to the agenda abstracted from ideas raised at the Asian Judges Symposium. First, the simple sharing of experiences of current actions, common problems, and challenges would be an important start. While some communication can be through electronic exchanges, nothing substitutes for face-to-face meetings. Such meetings would have to take place at least bi-annually for judges to share national experiences of successes and challenges, set targets and timetables for future milestones, and be accountable for set goals, by having a time-table for ensuring that such goals are met. Reigniting the International Union for Conservation of Nature/UNEP Judicial Portal, a confidential internet-based way for judges to communicate and share environmental information, would be a great way to continue the contacts in between meetings.¹¹⁹ Ultimately, a full internet portal and website could deploy information and allow communication.

Second, an AJNE can widely deploy environmental law resources and training materials, and, in fact, many resources and materials have already been developed. UNEP, ADB, TRAFFIC the USEPA, and others, long ago prepared important training materials and tomes of environmental law that can be easily shared and more widely distributed online.¹²⁰ As a first step, these materials have all been linked to the Asian Judges Symposium website. They would be transferred to an AJNE portal and site in the future.

Third, an AJNE with a shared agenda would encourage donors deploying technical assistance to coordinate more closely to ensure that scarce resources are targeted to their most productive use without duplication. Different donors have different comparative advantages. Developing countries benefit when donors capitalize on these strengths.

Fourth, in a region as large as Asia, an AJNE would need to

119. IUCN, JUDICIAL PORTAL FACTSHEET, http://weavingaweb.org/pdf/documents/DEV09_JudicialPortalFactSheet.pdf. The portal was launched in 2002, but has not been maintained.

120. UNEP, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW CAPACITY BUILDING FOR ENVIRONMENTAL LAW IN THE ASIAN AND PACIFIC REGION: APPROACHES AND RESOURCES - VOLUMES I&II (Donna Craig, Koh Kheng-Lian & Nicholas Robinson, eds., 2002); UNEP, JUDGES AND ENVIRONMENTAL LAW: A HANDBOOK FOR THE SRI LANKAN JUDICIARY (Dinah Shelton & Alexandre Kiss, eds., 2005); UNEP, COMPENDIUM OF SUMMARIES OF JUDICIAL DECISIONS IN ENVIRONMENT RELATED CASES (2004), available at <http://www.unep.org/dec/PDF/UNEPCompendiumSummariesJudgementsEnvironment-relatedCases.pdf>.

promote specific activities at sub-regional and national levels. The proposed ASEAN and South-Asia sub-regional roundtables could inspire chief justices to induce their respective legal professionals to forge common sub-regional agendas within a group of countries whose contexts are even more alike.

Fifth, an AJNE could be a venue for promoting more bilateral exchanges. For example, in December 2009, Indonesian judges visited the Thai and Philippines judiciaries to learn about ECs and environmental specialization. Moreover, AECEN has connected Thai Supreme Court Judges with their counterparts from the Land and Environment Court, New South Wales, Australia in a twinning program to facilitate work on environmental law.¹²¹

Finally, many countries in Asia are vast in size. An AJNE would only be effective at the regional and sub-regional levels if it promoted National Networks of Judges on Environment within large Asian countries. A regional network can lead the handful of participating judges to cross-fertilize ideas and values, but to be of greater import, those judges must widely share those ideas and values at home. Thus, an AJNE would need to promote national champions to lead and advance a national program for judges and the legal profession as a whole.

What challenges are there to establishing a functional AJNE? Three key challenges are ownership, administration, and sustainability. First, to be effective, any network needs to be demand driven: it must be strongly owned by those who would reap its benefits; its agenda needs to be determined by its owners. Donor and partner support should coalesce around that agenda. Establishing a rotating national chair of the AJNE, supported by a small stable secretariat would help resolve the ownership challenge.

Second, even with strong ownership, the capacity of owners to administer the agenda may be hampered by limited time, fiscal and/or human resources. Thus, support for a secretariat or administrative facility must be available initially from donor resources.

Third, a network must be sustainable over time and over changes in individual participants. The virtues of the network — its

121. News Release, AECEN, AECEN Facilitates Thai and Australian Judicial Partnership on the Environment, Mar. 16, 2009, <http://www.aecen.org/aecen-facilitates-thai-and-australian-judicial-partnership-environment>.

informality, loose connections, and flexibility — could also be its downfall. A minimal level of design and structural stability together with fiscal and administrative support needs to be established to ensure its continuity.

Further, participation in an AJNE could not be confined to one or two individuals. The goals and values of the AJNE's agenda must be shared by participating superior national courts, and not just individual participating judges, in order to ensure institutional commitment over time.

Moreover, the network cannot be expensive to run. Though initial budgetary support may be donor-sourced, overtime participants need to be willing to uphold the low cost of participation for it to be self-sustaining. Similarly, administration and management needs to be initially supported, but overall, must not require significant additional administrative resources beyond contributions of time from participants and donors in the longer term.

Part IV. Conclusion

Asia will continue to experience dramatic environmental and climate change over the next twenty to fifty years. These changes in the region compel an immediate and urgent response to implement policies and strategies that will ensure a more sustainable Asia. A holistic look at environmental governance must be a key part of such policies and strategies. Any considerations of architectural redesigning of Asian environmental governance will require the architects of such policies and responses to pay attention to ensuring effective compliance and enforcement of environmental law. In turn, this will require ensuring that the complete environmental compliance and enforcement chain is effective. Judges, among others, play an important role in improving environmental enforcement and, accordingly, must be given some dedicated attention. Moreover, we have argued that the senior judiciary in Asia — as leaders of the legal profession in Asian countries — are important for improving environmental enforcement not only for their direct actions in making environmental decisions, developing environmental jurisprudence, or establishing ECs, but also for championing the cause and leading the rest of the legal profession towards credible rule of law systems that have integrity and promote environmental sustainability

Our survey of the landscape of the work of environmental

judges within key Asian jurisdictions has shown that some superior courts are making progressive and innovative environmental law. Nevertheless, there is still a long way to go before citizens have access to environmental justice and environmental protection is the norm in practice.

Our parallel review of ECs and ETs has also shown some impressive developments in establishing new environmental judicial and quasi-judicial institutions in Asia. However, some of these ECs and ETs seem not to be structured to fully promote environmental protection and citizen access (e.g. India and Bangladesh). For other ECs, courts and donors will need to deploy significant fiscal and technical resources if they are to fulfill their promise (e.g. Philippines).

The idea of an AJNE seeks to harness the collective Asian judicial experience in environmental decision-making — its successes and failures — and to strengthen judicial capacity in this area of the law in the service of improved environmental adjudication at national levels. Yet it assumes more than just shared experience and collective problems. It relies on judges viewing themselves and each other as connected by the shared professional mission of advancing justice that extends beyond their own national jurisdiction.¹²² "It requires that judges see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders."¹²³ Moreover, it adds the additional core value that is "environmental" justice. Through these intangible connections, in conjunction with the more practical ones, an AJNE would be an important way to mobilize interest, support, and energy around strengthening the capacity of judges to decide environmental and natural resource cases in Asia.

122. Slaughter, *supra* note 106, at 1124.

123. *Id.*

EDUCATING JUDGES ABOUT ENVIRONMENTAL LAW

*John Pendergrass**

The Environmental Law Institute (ELI) began its Judicial Education Program in 1990 in response to a challenge to ELI by Chief Judge James L. Oakes, of the United States Court of Appeals for the Second Circuit, to close a gap in judges' knowledge by educating them about environmental law. This challenge was reiterated in August 2002, when Supreme Court judges from more than fifty countries met at the "Global Judges Symposium on Sustainable Development and the Role of Law" in Johannesburg, South Africa. The judges concluded that "the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law."¹ The judges also stated that there was an "urgent need to strengthen the capacity of judges, prosecutors, legislators and all persons who play a critical role at national level in the process of

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1. JOHANNESBURG PRINCIPLES ON THE ROLE OF LAW AND SUSTAINABLE DEVELOPMENT, Global Judges Symposium, Aug. 18-20, 2002, Report, Vol. 1 at 14 (UNEP 2002), available at <http://www.unep.org.dpd/symposium/Principles.html>.

implementation, development and enforcement of environmental law.”²

National Context

In two decades of working with judges and advocates to design programs to inform judges around the world about environmental and natural resource issues, ELI has learned a number of lessons. Foremost among these is that there is no single best method of educating judges, but that it is essential to make the program directly relevant to their duty to decide cases based on the law of their jurisdiction. Judges and judicial institutions in different jurisdictions undoubtedly share certain characteristics, including expertise in the judicial process, but vary substantially in their authority, the law they apply, and their preferred methodology for learning about new areas of the law. Thus, ELI has found that the national context is critical to the success of any educational effort. This includes but is not limited to the type of legal system, judicial system, existing educational programs for the judiciary, ethical norms for judges, accepted educational methods in the country, and the cultural context. Consequently, ELI custom-designs education programs for judges specifically for a particular nation’s judiciary, or in some federal countries, for sub-national jurisdictions. Regional or multi-national educational programs can be valuable where the programs cover subjects about which the judiciaries of those nations have a shared basis of understanding. Within these limits, there are general principles that can be applied to guide development of appropriate judicial education programs in a national context.

Institutionalization of Educational Programs

ELI has also found that judicial education on environmental and natural resources issues is most effective when it is part of a general system of education for judges. Many jurisdictions have established institutions dedicated to educating judges, which typically are the locus of programs to educate judges about environmental and natural resources law. In many countries judges are required to complete a post-law school course of study in order to be eligible to become a judge. Environmental and natural resource law can be added to the

2. *Id.*

curriculum of such a course of study as any other specialized area of the law might be included. Continuing education of existing judges is the most common context in which environmental and natural resource issues are presented to judges. ELI has assisted several jurisdictions with an existing continuing judicial education system to add environmental and natural resources law to the system so that programs on these subjects are offered on a regular basis. This enables all judges in a jurisdiction, including those that join the judiciary in the future, to be educated about these issues. These subjects are complex and cannot be adequately covered in a single short course, so the most effective educational programs will include basic and advanced courses.

Courses are not the only method by which judges can learn about environmental issues, particularly after they have been introduced to the subject and develop an appreciation for the importance of the subject. Motivated judges will conduct further research on their own, but others can be encouraged to further their education by making it easier to obtain additional information. ELI therefore provides judges with written materials, audio-visual materials, and other learning aids that they can refer to on their own. Internet-based materials may be an effective method of providing information to many judges, but are not reliable as the sole method unless all judges have easy internet access and are fully capable of using the internet as a learning tool.

Research for Custom Designing a Course

In ELI's experience it is essential to interview judges and practicing attorneys about the important environmental and natural resource issues in their jurisdictions in order to design a course that provides the judges information that will be most useful to them in deciding cases. In this context, the knowledge of practicing advocates is particularly important because they know which issues are creating disputes and controversies before they reach the courts. Judges may only be aware of the types of cases and issues that have been, or are in the process of being, litigated, but attorneys may be able to predict the issues that will be brought to the courts in the near to medium term. This allows a course agenda to be tailored to cover the topics that will be most important to judges. In addition to substantive topics, such interviews have sometimes revealed the need to focus on procedural

and trial practice issues that are important in environmental cases but that judges may not deal with on a regular basis. Such procedural issues include standing, admission and consideration of technical and scientific evidence, expert opinion evidence, and remedies such as restoration of environmental harm.

Custom-Designed Course

Teaching Methods

Judges are like others in that they learn from a variety of instructional methods and sources of information. One method that is effective in reinforcing learning is to have participants engage in practical exercises that require them to use and analyze information received during a course. ELI has had some positive experience with such practical exercises and other methods that require participants to analyze new concepts and information. ELI therefore investigates the feasibility of including such exercises as part of every course agenda but recognizes that strong local considerations may override the advantages of these methods. For example, some judges consider it unethical to give their opinion on any hypothetical situation. In such situations it may be necessary to discuss legal concepts and laws in an abstract sense without a factual context.

Since judges in different jurisdictions have different expectations of how information should be provided to them and of appropriate methods by which they may be assisted in learning about new topics, ELI has found it to be essential to spend considerable time investigating preferred methodologies in the particular jurisdiction. ELI has found it useful to interview judges, particularly those that head judicial education institutions in the jurisdiction, about what methods are effective in their jurisdiction.

Faculty Selection

Choice of faculty is a key element to success of any educational program. The first qualification for faculty is, of course, that they be expert in the subject matter. Thus the core of the faculty generally has knowledge and experience in the law of the jurisdiction. These may include law professors, prosecutors, attorneys for non-governmental organizations, and attorneys in private practice. Judges typically are very attentive to presentations by judges, particularly those from higher courts, so it is advantageous to find judges who have expertise

in one or more topics of the course.

ELI has found that judges often have specific ideas regarding who would be appropriate to act as faculty in a course for judges. In a number of jurisdictions, judges have indicated that it would be unethical or otherwise undesirable for advocates who might appear before them to act as faculty. In some cases this was interpreted to exclude any practicing attorney, while in others attorneys who did not actively appear before the court were acceptable. A similar division of opinion exists with respect to prosecutors. Particularly in civil law jurisdictions where there is little or no distinction between judges and prosecutors they are preferred faculty, while in other jurisdictions they are disapproved along with other attorneys who appear before the court. These restrictions can make it difficult to use attorneys who are expert in the law of the jurisdiction, which is critical to achieving the goal of providing instruction about the local law. In these situations the judges often consider academics to be the preferred faculty. Academics often are experts in the substantive law of the jurisdiction, but may be less expert in the evidentiary issues. In other instances judges have accepted advocates, and in a few have even preferred them due to their practical experience.

Importance of the Environment

A common concern often shared by government environmental officials, prosecutors, private enterprises, representatives of non-governmental organizations (NGOs), and the public is that judges do not appreciate the importance of environmental and natural resource cases. It may therefore be useful to have a component that describes the environmental and natural resource context of the country or jurisdiction. This may include the particular resources of the country and their current status, such as the quality of air and water, biodiversity, commercially valuable resources, and globally significant natural resources, if any. It may also be useful to include information about the economic value of the environment and natural resources to the country.

Law of the Jurisdiction

The educational program should be designed for the judges of the jurisdiction. Thus, the program should account for the powers that judges in the jurisdiction have and the roles they may have in the legal

system. In some civil law systems, this may include investigative functions that would not be appropriate or available to judges in common law systems. ELI has also discovered that it is often preferable to design courses specifically for judges of a particular level in recognition of the fact that trial judges face a different set of issues than do appellate judges. A course for trial judges might focus more on procedural issues such as standing, admissibility of scientific evidence, handling of expert witnesses, and appropriate remedies, while a course for appellate judges might cover those issues more summarily and focus more on constitutional issues.

In order to be of maximum value to judges who must decide cases, an educational program needs to be grounded in the law of the jurisdiction. Thus the statutes and jurisprudence of the jurisdiction should form the basis of a course, particularly if it is a basic or introductory course. On the other hand, environmental and natural resource law has developed rapidly over a relatively short period since the 1960s and many countries have adopted legal concepts from leading countries, often irrespective of whether they come from similar legal systems. These include the polluter pays principle, precautionary principle, environmental impact assessment, public trust, intergenerational equity, ambient environmental quality standards, and emissions standards. There is, therefore, much that can be learned from the laws of leading countries, and comparative law can be useful in teaching about environmental and natural resources law, but the basis of education on substantive law should remain in the laws in effect in the jurisdiction.

The substantive law education should include any specific constitutional provisions on environment and natural resources, constitutional foundations for environmental and natural resource law, international treaties that the country has ratified, specific environmental and natural resource laws, and jurisprudence in the country regarding all of the above. The substantive subject matter may be quite extensive depending on the jurisdiction, including laws covering such topics as: overall framework for environmental protection; environmental crimes and sanctions; water, air, and land pollution; health protection, including water supply quality standards; surface and groundwater use; mining, fishing, timber, and other natural resource sectors; biodiversity; conservation of natural resources; protected areas; land use planning and control;

environmental impact assessment; and threatened and endangered species.

Procedure

Environmental and natural resource cases can be procedurally complex, so program and course designers should consider including components on the particular procedural aspects of such cases that may be unusual or more complex than other types of cases. For example, plaintiffs in environmental and natural resource cases often seek to represent the public or other diffuse interests, which presents unusual issues of standing or who may have access to courts. Such cases have even resulted in changes to rules of who may be allowed to bring a case. Similarly, such plaintiffs may present unusual issues with respect to case management, including timing, surety or bond requirements, and preliminary relief.

Evidence is a particularly important issue in environmental and natural resource cases as it is typically highly technical and presents issues such as chain of custody and qualification of experts. Components covering such issues should therefore be considered, based on the types of cases that are brought in the jurisdiction. For example, qualification of scientific experts and acceptance of laboratory analyses of samples may be important where pollution cases are common, whereas valuation of timber or other resources may be important where illegal logging or fishing cases are common.

Remedies

Remedies are a critical element of environmental and natural resource cases. Many such cases require judges to consider remedies that are unusual, even if authorized by national law. Judges may need training in appropriate sanctions under penal laws as well as civil remedies. Environmental and natural resource cases often involve conduct that could cause irreversible harm to the environment if allowed to continue while the full process of adjudication is followed, raising the question whether interim remedies that preserve the status quo are available. Environmental and natural resource cases also frequently present questions of whether and how damage to the environment can be repaired, which may require judges to use procedural tools that are unusual. Even more complex issues arise concerning who and how to compensate for past harm to natural

resources or the environment. This is an area where experience from other jurisdictions may be useful, particularly those with similar legal and judicial systems.

Monitoring and Evaluation/ Measures of Success

Educational and capacity-building programs are intended to accomplish certain goals and objectives, even if those are sometimes not clearly articulated. In the case of capacity-building programs for judges these goals may be as prosaic as raising their awareness of the importance of environmental cases or of increasing their knowledge and confidence of environmental law so judges do not ignore or avoid dealing with such cases. More ambitious goals include improving the quality of judicial decisions on environmental issues and even improvement in the environment as a result of such decisions. ELI has found it difficult to demonstrate that it is meeting even the most basic of these goals and has long recognized the need for – and worked to design and implement – methods of monitoring and evaluating the results of its capacity-building programs. This has been particularly challenging with judicial education programs where, as is common, there is no funding for long-term follow-up with judges who have participated in education programs.

One of the methods of evaluating activities such as education is to establish indicators of success and measures of those indicators. Such measures have typically been used for determining if an individual course or other discrete activity has been successfully delivered, but have not often been applied to the more difficult but important issue of whether the activity succeeded in changing behavior or meeting other ultimate goals. Performance measures include those that measure outputs such as the number of educational programs conducted and the number of judges educated. Of more importance to demonstrating the success of a program are outcome measures, which show that the activity leads to results related to the goals and objectives of the program. Outcome measures may relate to ultimate goals or to intermediate steps that demonstrate progress toward the goals. Outcome measures include changes in environmental conditions or in behavior such as compliance with environmental and natural resource rules.

Course providers typically administer a course evaluation at the conclusion of a course. Such evaluations are useful in getting

immediate feedback on the quality of the program and on the performance of individual members of the faculty. One note of caution with respect to such evaluations in judicial courses is that judges often state a preference for other judges as members of the faculty, but may be reluctant to provide constructive criticism of their peers or judges that may out-rank them.

One means for obtaining a more objective measure of the effectiveness of a course is to administer pre- and post-course evaluations that include questions about the participants' level of knowledge and understanding of the topics covered in the course. Comparisons of an individual's two sets of responses can provide the most information about the effectiveness of particular segments, but participants often are reluctant to be identified. Comparison of aggregate changes in knowledge and awareness can still be useful in measuring the effectiveness of specific sessions and the program as a whole. Use of unique identifiers on pairs of evaluation forms allows respondents to maintain their confidentiality while allowing evaluators to match pre- and post-course responses.

In addition to contemporaneous evaluations, ELI has found it important to monitor the effectiveness of training over the medium to long-term. Such monitoring is much more difficult to implement than course evaluations, both in terms of obtaining responses from participants months and years after the course and in obtaining funding to conduct such monitoring.

Indicators of behavior change or change in environmental conditions need to be developed for environmental educational programs in general, and in particular for programs targeted at the judiciary. Care must be taken in developing measures for judicial education to avoid any suggestion that the decisions made by judges should be evaluated for their substantive effect. Thus, the success of educational programs should not be evaluated based on whether judges reach a particular result, which could be seen as seeking to influence the impartiality of judges and be contrary to the fundamental basis of the rule of law. Nevertheless, it may be possible to remain neutral regarding results in case decisions and still measure changes in behavior or performance by judges that indicate whether education was effective. Intermediate outcome measures might include measuring changes in time taken for disposition of cases or number of environmental and natural resource cases handled by the

trial court system as a whole after a majority of trial judges have received basic training. Other outcome measures might include improvements in compliance with environmental law, with a recognition that such an outcome is influenced by many actors and activities and that judges are only one part of the legal and enforcement system that affects this outcome.

Conclusion

As demonstrated by the Johannesburg Principles, judges throughout the world understand that sustainable development is critical to meeting goals of development, environmental protection, and intergenerational equity, among many others. Judges also recognize the need to be better informed about environmental law and the law of sustainable development. Meeting this need requires substantial effort by judges, law schools, judicial education institutes, international organizations, attorneys, and NGOs, all of which have some role in the process. Experience working with these groups for two decades in twenty nations has demonstrated that the most effective educational programs are those designed specifically for the judges based on their jurisdiction, level of court, authority, and customary method of learning. Environmental law nevertheless has significant commonalities, even across dissimilar legal systems, which means that there is also value in cross-jurisdictional learning and comparative law programs. Although many jurisdictions have instituted programs on environmental law for judges, and the United Nations Environment Programme (UNEP) has produced materials for judges,³ relatively few judges have benefited from these programs and materials to date. Significantly greater resources must be committed to educating judges about sustainable development and environmental law in order to assure that the law is implemented.

3. See, e.g., DINAH SHELTON & ALEXANDRE KISS, UNEP, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW (2005); UNEP, JUDICIAL TRAINING MODULES ON ENVIRONMENTAL LAW (2007).

ON THE COMPARISON OF ENVIRONMENTAL LAW

Jan Darpö and Annika Nilsson***

Introduction

Comparative law contributes to the education and knowledge of the lawyer in the same way as legal history and jurisprudence. Furthermore, comparative law most certainly entails a deeper understanding of the legal order as a social phenomenon. It is employed in preparation for legislative reform; in efforts at the harmonization and unification of law; in private international law; in the interpretation of international law; as well as in academic research. The methodological arguments for comparison have varied over the years, but today, an instrumental perspective of law in general, and comparative law specifically, hold strong positions. This is especially true for goal-oriented studies, which are both topical and common in the field of environmental law.

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With most environmental law stemming from European Union (EU) law and international conventions, it is difficult to find any article, report or monograph in this area that does not contain elements of comparison. Lawyers' petitions and investigations, governmental reports, handbooks, court rulings and other legal works frequently carry examples from other countries in support of the argumentation. Within the Nordic countries, this can also be seen in academic works on environmental law.

In light of the constant presence of comparative elements in modern environmental legal thinking and argumentation, one would have expected the debate on *comparative law as a method* to have been vivid over these past years in our particular field of research. Unfortunately, this is not the case. Those who ought to be taking the lead in such a debate — the legal researchers in environmental law — have remained surprisingly quiet on the methodological matters concerning comparative law. In our opinion, this is a general deficit in the legal discourse in our area. Furthermore, such a debate is distinctly necessary in order to make known the common misuse of comparative elements. All too often, such arguments have been shown to be misleading when scrutinized. This can be illustrated by the Swedish governmental report on the “four big predators.”¹ By way of analogy, the commission made reference to the Latvian lynx to show that increased hunting of wolves in Sweden would comply with article 16 of the habitats directive (92/43) provided it would be undertaken in accordance with a “management plan.” What the report omitted, however, was the fact that the Latvian lynx has a “favourable conservation status,” whereas wolves are critically endangered in Sweden.² Moreover, the commission asserted that such decisions could be made on a regional level; as such an order had been accepted by the European Court of Justice (ECJ) in the Finnish “wolf-case.”³ What the commission failed to state was that environmentalists in Finland could appeal regional decisions to the national level, whereas this is not — and was never proposed to be — the position in Sweden.

1. Report SOU 2007:89 from the Governmental Commission on the Management of Big Predators (December 4, 2007).

2. The entire population originates from four (4!) animals. See the reply from Uppsala Universitet 2008-05-27 (UFV 2008/11) to the remit on the commission report.

3. Case C-342/05 *Finnish wolf case*.

Viewed in this light, we believe that a debate on comparative law as a method for environmental legal research has become necessary. This article represents a first effort. Our aim is both to emphasize the research value of the method and to illustrate the challenges therein. This article is divided into three parts. In section 1, we submit general remarks on comparative method in legal research. We then proceed, in section 2, to illustrate certain difficulties that the comparatist might encounter in relation to how different legal systems, culture and perceptions might influence the notion of "law" in particular countries. Finally in section 3, we present our concluding remarks on methodological questions and the ambitions of comparative law.

Comparative Law as a Method for Legal Research

The Aim and Purpose of Comparative Law

There are many aims and uses of comparative studies.⁴ Often they have no aim or use at all, other than to provide ornamental, though often quite interesting, information. This can be attributed to the traditionally exclusive national scope of legal dogmatic study. A traditional task for legal research is the normative problem-solving activity based upon the positive law of one given legal system — a view founded on the traditional legal dogmatic doctrine — especially in its limitation to positive law in a given legal system.⁵

Normative problem-solving based upon internal positive law in a given legal system is admittedly an indispensable part of legal science, but there are other beneficial legal scientific approaches. The primary aim of comparative law research is knowledge; the same universal aim as that of legal research in general and of all science. Researchers do not need any immediate aim or purpose other than furthering knowledge and understanding in their particular areas of study, or for a specific problem or situation in general. Comparative law research increases the lawyer's ability both to understand and indirectly to manage the legal system. This understanding potentially

4. See, e.g., MICHAEL BOGDAN, *Jämförande juridik – vad, varför, hur?*, in MARKKU SUKSI (ED.): *JÄMFÖRANDE JURIDIK – VAD, VARFÖR, HUR?*, 2 (Åbo Akademi, 1996); and ANTERO JYRÄNKI, "Im fremden Spiegel" – *Tankar om jämförande rättsforskning*, in MARKKU SUKSI (ED.): *JÄMFÖRANDE JUR+IDIK – VAD, VARFÖR, HUR?*, 12 (Åbo Akademi, 1996).

5. STIG STRÖMHOLM, *Har den komparativa rätten en metod?*, in SVENSK JURISTTIDNING 456 (1972).

takes on both an internal and an external perspective of the legal system. It does so by looking at law as instrumental and studying functions in the normative context, instead of the regulations themselves of any given legal system. If one accepts that legal science represents not only the techniques of interpreting the texts, principles, rules and standards of a national system, but also the discovery of models for preventing or resolving social or other conflicts, then it becomes clear that comparative law research can provide a much richer range of model solutions than a legal science devoted to a single nation.⁶ The study of several ways of regulating situations in different systems may enable researchers to gain valuable knowledge, and, more importantly, to understand the relevant legal functions.

Functional Methodology

A comparative study entails, first of all, identifying a common character, a *tertium comparationis*, of the objects compared in the different legal systems. This requirement is imperative for all comparisons. A popular example states that one could compare the weight and shape of an apple and a hand grenade, but not really their taste or nutritional value. Such a comparison would not clarify any relevant problems or arrive at any meaningful answers.⁷

The researcher may here be prone to set out to study the black letter law of the chosen legal systems. The relevant legislation is then approached with the legal terms as a starting point, rather than starting with those legal and social problems that first resulted in the regulation and terminology. This can be treacherous. The terminology might not exist in the other system. The problem may be viewed and solved in an entirely different manner and in a different part of the legal system concerned. This is where functional methodology⁸ comes in. The central point of this methodology is to lift the research from a study of rules to a study of functions. Hence, it is the problem that the regulations are directed at that is to be studied. The researcher does not look to common terminology or areas of legislation, but seeks comparative functions in the different systems. The common func-

6. KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 15 (3d ed., trans., Tony Weir, Clarendon Press, 1998).

7. BOGDAN, *supra* note 4, at 6f.

8. Authoritatively described in ZWEIGERT & KÖTZ, *supra* note 6.

tion, is the *tertium comparationis* of comparative jurisprudence.⁹

Functionality is the basic methodological principle that determines the choice of laws to be compared, the scope of the undertaking and the creation of a system of comparative law. This idea rests upon the belief that all legal systems face essentially the same problems and solve them by quite different means, but often with similar results. This belief is in turn founded upon a view of law as being instrumental and not having a self-contained value or purpose. Law is a system of instruments used to implement and enforce legal political goals and wishes and to resolve conflicts and solve problems in society. Different rules and regulations exist in national legal systems and the social contexts often differ, but the situations and the problems that the legal systems are set to solve and regulate are broadly similar. The question to which any comparative study is devoted is thus posed in functional terms in order to avoid one's vision being clouded by concepts inherent in that person's own national system. This perspective can also be seen in modern environmental law methodology. Another advantage of this method is that the research and subsequent discussion elevates the subject, from a study of different regulations, to a more instrumental and principal level and, thereby, to a higher level of abstraction with its analysis of functional counterparts.

Critical Reflection

It is, however, important when applying the functional approach to exercise a degree of humility in relation to the fact that one is comparing different legal systems, and in some sense always comparing apples and oranges (or hand grenades). Accordingly, the researcher had best take on a healthy scepticism throughout the study.¹⁰ A critical reflection of one's methodology is always important. The functional comparative method can be criticized as oversimplifying legal structures and discourses, and it can easily lead to the comparatist presuming too much in terms of similarities in the legal systematic functions.

It is rightly argued that neither lawyers nor the law can rise

9. BOGDAN, *supra* note 4, at 7; and Ole Lando, *Kort inføring i komparative ret, JURIST OG ØKONOMFORUNDETS FORLAG*, 87ff (1986); see also John C. Reitz, *How to Do Comparative Law*, 46 *AMERICAN JOURNAL OF COMPARATIVE LAW* 622 (1998), for comment on this point of departure.

10. Reitz, *supra* note 9, at 622, available at <http://www.heinonline>.

above themselves — by making themselves “transcendent,” for they are inevitably related to their culture.¹¹ They are not only connected, but melded together. Law is an amalgam of a multitude of cultural aspects. Even when legislators on different levels have tried in different ways to harmonize legislation, or to introduce a foreign legal construction, it will inevitably be reformulated within the local legal culture.¹² Thus, an understanding of law can never be extricated from its cultural, historical and political context - and the contextual excursions into non-legal study materials are never sufficient safeguards for this problem.

This criticism is most relevant, and we believe that the comparatist must always bear it in mind. However, we do not assert that this should be taken so seriously as to suggest that comparative law or the functional method cannot be done. As a working method and practical approach the functional approach is most useful. But the comparatist has to think carefully about what he or she can really understand from the studies and how to make use of the results. The comparatist should be aware of the singularity of law and its unbreakable connection to the cultural context, but may embrace this cultural dynamic to refresh the legal discourse nationally and internationally. The pluralistic understanding and meaning of what looks the same in black letter law and may very well have the same origin (often in international conventions and EU law) may be particularly fruitful in giving life to legal theory and practice.

The Comparative Study

Introduction: “How to”

In this section, a comparative study method and disposition will be suggested. The purpose of this presentation is not to provide a manual for all comparative law studies or to define different projects as being comparative or not. Rather, this is an illustration of how one tackles a comparative project. It may, however, be stated very basically that a comparative law study entails the study and comparison

11. See, e.g., Pierre Legrand, *Paradoxically Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631 (2005); Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L L.J. 517 (2006); Pierre Legrand, *How to Compare Now, Legal Studies*, 16 J. SOC’Y LEGAL SCHOLARS 236 (1996); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MODERN L. REV. 12 (1998).

12. Teubner, *supra* note 11, at 11-12.

of more than one legal system. The mere study of foreign legal systems does not a comparative study make.

Starting Out

A comparative study begins with the posing of a problem, a set of questions, or a working hypothesis, and choosing the legal systems to be studied. The study should begin with the identification and study of the functions of the relevant topic area, rather than studying different ways of regulating the same problem. In this phase, shortcomings, problems or even contra-productiveness can be identified or at least suspected.

The choice of legal systems to be studied and compared in a comparative research project must be guided both by the subject and the aims of the project. In environmental law, there is a common goal and interest of mankind to reach and maintain a sustainable development. There are also accepted principles of environmental law and policy, such as the “polluters pay” principle and the precautionary principle. This means that there is common ground. There are, therefore, immense possibilities for the comparison of different regulatory means of meeting the challenges set by these common goals and principles, and how they are implemented and enforced within the context of different legal cultures. Choosing legal systems with similar environmental goals and regulations but different legal cultures, in terms of legal history, tradition and style, can be very beneficial.

The Country Studies

A fundamental prerequisite for a meaningful comparative study involves acquiring correct, relevant and updated materials on the legal regulations and functions to be compared.¹³ The researcher must consider carefully what materials are accessible and give the most relevant and accurate description of the legal system concerned. The terminology must be carefully investigated since one cannot assume that it is identical to that of the researcher’s own country.

Legal research should be based upon primary sources such as legislation and case law. These sources must be thoroughly investigated and understood. But it is not sufficient merely to study the leg-

13. MICHAEL BOGDAN, *KOMPARATIV RÄTTSKUNSKAP*, 39 (2d ed. Nordstedts Juridik AB, 2003).

isolation of a country. In this context one should consider that to gain access to the real meaning and content — the validity — of the law, one must consider the actual functioning of the normative system within the context of a cultural tradition, society's use of the norm.¹⁴ It is, accordingly, difficult to obtain relevant information on the functions of the foreign solution if one focuses only on black letter law in traditional sources of law. Foreign legislation, court decisions, preparatory works, and other sources of law, should be read and employed in the same way as in the country of origin, to provide as truthful and realistic a view as possible of the particular foreign system. To find this view of the law, however, it is also often necessary to make use of descriptions of the system found in documents such as handbooks, information published by the authorities, non-precedential decisions from courts and various authorities. These untraditional sources provide an insight into how the domestic lawyers, researchers and practitioners understand the relevant system, its structure, sources and functions; what the critical voices are arguing and how the debate is proceeding.¹⁵

Also, non-legal norms can be of importance, as the law does not always describe fully the realities of society. People also subject themselves to rules other than legal ones. Attitudes toward the legal order and specific legal rules differ. The legal system is a social phenomenon and it expresses only one aspect of social life. Not until other aspects of society are brought into the study does it become possible to see the role that the legal regulation plays and how it works in practice.¹⁶ This wide scope of gathering data for a research project can be overwhelming and naturally delimitation is crucial. The principle of functionality will have to guide the researcher in the process of evaluating which deeper excursions into the non-legal context are of interest.

Language is an important factor when studying foreign legal materials.¹⁷ It is important when gathering material to realize one's limitations in relation to such difficulties as getting at the real meaning in translating the message contained in a legal text, in describing

14. JAAKKO HUSA, *Vertaileva oikeustiede ja voimassaoleva oikeus – Eräitä juomioita valtiosääntöoikeudellisen oikeusvertailun näkökulmasta*, in MARKKU SUKSI (red), *JÄMFÖRANDE JURIDIK – VAD, VARFÖR, HUR?*, 86ff (Åbo Akademi, 1996).

15. Lando, *supra* note 9, at 90f; and BOGDAN, *supra* note 13, at 41f.

16. BOGDAN, *supra* note 13, at 52.

17. JYRÄNKI, *supra* note 4, 11 and 21f; BOGDAN, *supra* note 13, at 39f.

and analyzing the foreign legal system, and in presenting the results. Translated materials are generally comparable to secondary sources, and the researcher must be constantly aware of the possibility of damage done to the meaning and substance of legal terms and systematic functions by translation. This is also the case when the researcher studies materials in the original language and also when in direct contact with foreign colleagues.¹⁸

Finally, after having grasped all the challenges of understanding the foreign legal system and the functions thereof, the study results may be presented in country reports. Here, the relevant functions of each of the systems studied are presented in the context of their own legal orders.¹⁹

Comparison

After all the hard work of studying the different foreign legal systems, it is sadly necessary to say that this work, however essential for comparative research, is not in itself comparative research, but merely a preliminary step. The essence of comparative law is the comparison, that is, placing comparable legal elements in different legal orders side by side and investigating and describing their similarities and differences.²⁰

Notably, the process of comparison at this stage involves adopting a new point of view with which to consider all the different solutions. The objective country report gives a portrayal of the legal solution of the reported system, but does so with the perspective from within that system. When the comparison begins, each of the solutions should be freed from the context of its own system and, before evaluation can take place, set within the context of all the solutions from the other jurisdictions under investigation. Here, too, the researcher should follow the principle of functionality; the solutions found in the different legal systems must be cut loose from their conceptual context and stripped of their own national doctrinal overtones so that they may be seen only in the light of their function, as an attempt to satisfy a particular legal need.²¹ If this is accomplished differently within different systems, the comparatist may investigate the

18. BOGDAN, *supra* note 13, at 40.

19. ZWEIGERT & KÖTZ, *supra* note 6, at 43f.

20. BOGDAN, *supra* note 13, at 56.

21. ZWEIGERT & KÖTZ, *supra* note 6, at 44.

reasons why. By searching for plausible explanations, those factors that influence the structure, development and content of a particular legal system are illuminated. These are, for example, the economic and political systems, political ideology, history, geography and demographic factors.²² Here, the researcher might venture to build a system based upon the comparison. This involves systemizing the functional parts of the investigated problem and the legal situation, and sorting the results of the comparison and, perhaps, also experiences of, and reasons for, differences and similarities in the way solutions are reached. Interesting scientific results can be presented in a valuable and “scientific” manner by way of such a construction of a system, according to the functional role of the different solutions.²³ The elevation of the study from the regulations of all countries to functional parts of a system will hopefully reveal itself, and this may in turn lead to a wider knowledge and deeper understanding of the area of law and of the specific issues studied.

Normative Analysis

After making a comparison, it is often of interest to ask which of the presented solutions is the most effective or best in some other aspect. This might also enhance the scientific value and interest of the study.²⁴ At this stage of the study, the different solutions identified in the compared legal systems are evaluated in relation to one another. However, the comparative evaluation is not necessary in a comparative study, and the absence thereof does not necessarily mean that the study is purely descriptive or does not include a legal scientific analysis.

A delicate task in this part of the study is to choose appropriate criteria for the critical comparative evaluation. It is futile to try to find an uncontroversial criterion for evaluating legal orders and regulations. However, if the legal political aims are the same for the compared solutions, as they generally are in environmental law, the effectiveness in reaching them can be stated as a general criterion. The problem will involve working out a more detailed and tangible criterion to be used as a measurement in the actual evaluation. Having come this far, one must be aware of the fact that effectiveness is not

22. BOGDAN, *supra* note 13, at 66ff.

23. ZWEIGERT & KÖTZ, *supra* note 6, at 44f.

24. BOGDAN, *supra* note 13, at 73; ZWEIGERT & KÖTZ, *supra* note 6, at 46.

easily defined nor identified and legislative aims are generally part of a larger, immensely more complicated picture. Accordingly, it will be difficult to see and compare the full picture of the legal political aims. In addition, it is quite complicated to measure the degree of effectiveness. Conducting practical studies of the actual results in nature of one or another instrument is not easily achieved by the legal researcher. The focus will have to be on a legal systematic effectiveness, since this is the only area where the researcher can claim to make any scientific progress. The theories and challenges of the concept of effectiveness is then, of course, an intrinsically difficult concept, which should be critically examined, but this is not the place for such a discussion.

And now, finally, the comparative study may proceed to the stage of normative analysis and *de lege ferenda* discussion within its "own" legal system. Here, the comparatist argues, as does any other lawyer, for the best solution to a legal problem, but with additional sources from foreign legal systems, and from the functional understanding gained by the comparison per se. This is where, we argue, the vast potential of comparative analysis lies. It is, however, crucial to remember that the study and comparison of foreign systems contains very weak, if any, normative argument.²⁵ Such normative character can only be gained through the criteria of the evaluation as described above, presented clearly and applied faithfully. Otherwise, there is a risk of stating merely a personal ethical or political view, rather than scientific arguments. Drawing one's normative arguments from the study of foreign legal systems is always an exceedingly complicated and risky undertaking.

Legal Culture

Introduction

As described in section one, it is a complicated undertaking to gain a deep understanding of the legal situation of another country. But it can also be just as difficult to understand the legal situation in one's own country. Beside the provision itself, preparatory works and case law, and other factors, play a role in the formation of a legal situation. "Soft regulation," administrative practice, hidden procedural aspects, the organization of the courts and administration, vol-

25. Reitz, *supra* note 9, at 624.

untary agreements in society — all can be important in its understanding. The fact that so many factors decide the meaning of law does not, however, prevent our trying to get a clear picture of our own legislation.

Let us, therefore, approach comparative studies with the same bold attitude. We must, however, be aware of the fact that often we can only gain a shallow understanding of foreign legal orders. As stated earlier, this is mainly because of factors other than plain differences in black letter law. One of these is the legal culture; the traditional, religious, economic and social contexts that form the basis for the understanding of a rule. In the following sections, we wish to illustrate this by some examples that we have experienced in our comparative efforts.

Different Legal Perceptions

The first example concerns *different perceptions* of an issue, namely the “legal nature” of liability for damages to the environment per se. In Sweden, this type of liability is regulated exclusively by public law remedies.²⁶ The legal basis for the authority’s demand on the polluter is found in specific provisions in administrative law. Also, the question of whether the authority in question may recover costs from the polluter if it undertakes investigations or remedial work is exclusively regulated in such provisions.

However, in other countries there is a private (tort) law perspective on liability issues. The state/authority is regarded as an injured party in a tort law manner in relation to the polluter. The underlying philosophy is that the environmental authorities have a right to be compensated for damage caused by unlawful acts infringing on their interests. This standpoint has not only been taken in relation to state-owned or state-administered property, but extends to other interests that the legislator has commissioned the authority to protect. In several countries, this perspective has been exercised in relation to contaminated land, where the environmental authority’s ability to recover costs is based upon tort law.

Public law and private law perspectives may provide entirely different answers to important questions such as the legal basis for li-

26. However, there is some interesting case law where the state has been awarded damages for endangered species that have been hunted illegally (see the Swedish Supreme Court’s judgement in case NJA 1995 s. 249).

ability and time limits. An important question relates to what happens when public law provisions do not cover a certain situation. In the public law countries, the answer can be that the authority concerned never recovers the money. In contrast, in some of the countries that have private law traditions combined with modern environmental legislation, the authorities have a right to choose between the instruments. In The Netherlands, for example, the choice of which law to employ can be made freely, so long as the use of the private law remedies does not interfere in an unacceptable way with the public law system (“*twee weegenleer*” or “the two-road doctrine”).²⁷

It is hard to find any evident explanations as to why the perspective differs between the legal systems. Sweden/Finland and the United Kingdom are typical public law systems, while the Netherlands and Belgium provide examples of private law thinking.²⁸ An explanation could be that the latter perspective is stronger in those countries where the state owns or controls the groundwater, which is the most common order on the European continent. When the authority remediates groundwater from contamination, it has a civil law claim against the polluter. Another explanation can be that the authorities in countries without a strong tradition of public law in the environmental area have instead become more dependent on private law remedies. There are also examples, such as Denmark, where culpability and time limits pursuant to tort law are complementary conditions for public law liability that have been established by the general courts.²⁹

Be that as it may, some of the effects of the differing perspectives can be studied using rule-oriented methods of comparative law. But as it is a question of legal culture and perspective, some of the consequences are impossible to grasp with such a method. For many controversial issues, no answers are to be found in explicit provisions or comments in preparatory works or handbooks, and they are never

27. G. Betlem, *CIVIL LIABILITY FOR TRANSFRONTIER POLLUTION* 334ff (Graham & Trotman/Martinus Nijhoff, 1993) (Chapter 6:3).

28. When René Seerden and Kurt Deketelare edited the anthology *Legal aspects of soil pollution and decontamination, in THE EU MEMBER STATES AND THE UNITED STATES*, (Intersentia Uitgevers, Antwerpen 2000), the portion addressing cost-recovery had the heading “Civil aspects on soil contamination,” even for the public law countries. The only explanation for this is that the editors were concentrating on their own traditions.

29. For many years, *Ellen Margrethe Basse* has been the fiercest critic of this phenomenon in Danish case law.

clarified by administrative practice or case law.

Traditions

A related problem arises when studying an instrument of environmental law that is heavily influenced by *national traditions*. This dilemma is illustrated by the example of “environmental permits.” Such permits have old traditions for administrative control of hazardous and polluting activities. At the same time, important unification of national environmental legislation is driven by the requirements for permits through EU directives. The modern permit regime can be said to have three main functions. Firstly, the permit is an authorization beforehand to carry out an activity under certain conditions to protect the environment, the natural resources and the surrounding neighborhood. Secondly, the decision-making procedure entails an important democratic aspect. All interests and the public concerned should have their say on the issue of approval. Finally, the permit also provides economic security for the permit holder, meaning that additional conditions cannot be demanded unless under specific circumstances.

When the modern, EU-regulated permit regime encounters national traditions, interesting differences can be noticed among the Member States. These differences obviously have little to do with the black letter law. On the face of it, the permit regimes often look similar. Instead, the differences are due to systematic approaches, such as whether the permit is regarded as imposing a right or a duty on the applicant. Of great importance also is whether the permit procedure is looked upon as an affair exclusively between the applicant and the decision-making authority, or as an integrated procedure between all parties affected by the activity.

In some systems, the applicant cannot use the permit decision so long as it is not finally decided. In those systems, an appeal postpones the permit, unless the permit body specifically decides otherwise. In other systems, the doctrine of “favorable administrative decisions” is prevalent, meaning that the applicant can proceed with the permitted activity despite the fact that the decision is challenged by appeal. In those systems, it is up to the party challenging the permit decision to convince the appeal tribunal or court that the decision should be suspended. Sometimes, the challenger has to post bond to ensure that the operator does not suffer any economic damage from delay if the

decision is upheld. The United Kingdom is an example of such a system. One must not forget that the final result of the famous case of *Lappel Bank* was a pyrrhic victory for the environmentalists. While winning a glorious victory in the ECJ, the parking lot was nevertheless built in the protected area!³⁰

Additionally, the legal effect of the permit differs from one country to another, despite the fact that the national rules all implement the EU directives in the environmental area. For example, when it comes to updating, the possibilities cannot only be judged from the provisions as such, but must also be seen in the light of the national apprehension of the permit. In some systems one cannot diverge too far from the original scope of the permit — or the “Grundslagt” (basis) as the Dutch say — irrespective of the demands of EU law. Evidently, such an aspect is of great importance for what is considered to be the law of those systems.³¹

Furthermore, it is difficult to explain in applying only rule-oriented methods of comparative law, the fact that in some Member States the authorities are quite keen to initiate updating, while in others they are extremely reluctant. The explanation is to be found in organizational, social and economic factors. Tendencies of corporatism are hard to pinpoint, but are obviously of great importance - as are the possibilities of challenging the authority's passivity by legal means.

In summary, while the requirements of black letter law concerning permits can appear to be identical from one country to another, the factual results can differ in many respects. In fact, the national permit regimes of public and environmental law are most interesting for those wishing to study *anything but* black letter law. Swedish traditions on water law and the still living sub-culture of the abolished water courts illustrate this clearly. Here, one can find peculiarities such as “implied conditions,” voluntary permits, cases pending for more than thirty years and other phenomena that are difficult to conceive for anyone coming from a different legal context.

30. Case C-44/95, *Regina v Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds (Lappel Bank)*, 1996 ECR I-03805. The Royal Society for the Protection of Birds refused to pay cross-undertakings in damages in awaiting the preliminary ruling from the ECJ.

31. Teubner, *supra* note 11.

The Public Interest

Another difference among the legal cultures in Europe is the varying viewpoints on who *represents the public interest*. In some countries, the authorities are traditionally the sole defenders of the public interest in relation to a good environment. Consequently, there is little room for environmental, non-governmental organizations (NGOs) in decision-making procedures. This is, for example, the traditional situation in Germany. Here, organizations in most cases cannot take legal action merely in the capacity as owner of property or as the representative for concerned individuals. Traditionally, the situation is similar in Sweden. However, the Swedish system has been expanded with the introduction of the Environmental Code and the implementation of the Aarhus Convention. Today, environmental NGOs can appeal some decisions according to the Code. But this possibility is open only to organizations with 2,000 members or more, which, in effect, excludes all organizations except two or three of nationwide character. Established NGOs in Sweden's neighbouring countries, Denmark and Norway, have more expansive rights, as do most other European countries. Some countries use the technique of listing and registering those NGOs authorized to make environmental challenges. France and Austria are examples of this order, which generally excludes local groups and ad hoc groups from standing. However, as a general rule, the openness of these systems is established not by legislation, but by case law. The United Kingdom and the Netherlands — where access to justice for organizations is particularly wide — are examples of countries, which give standing to both ad hoc groups and very small organizations so long as the group is defending an environmental interest according to its statutes and previous activities.

Hence, it is clear that attitudes in different jurisdictions vary with regard to NGOs in terms of the types of organization allowed to take legal action. Differences also exist as to what kinds of decision can be challenged by them by way of appeal or judicial review. Finally, there are significant differences with regard to whether NGOs have recourse to civil law and criminal law instruments to protect the public interest. This is, of course, problematic from an Aarhus Convention perspective, and also in relation to the effective implementa-

tion of EU law. But this remains a topic to be discussed elsewhere.³² Based upon the subject of this contribution, one must say that there are no specific comparative challenges to describe and discuss the position of environmental NGOs in different countries. The debate is wide open and many reports and articles have been written on the matter.³³ But when it comes to judging the *systematic effects* of these differences, we encounter methodological problems. We might assume that the activities of the operators and authorities are influenced by access to justice for third parties, but we really do not know. We can further assume that the actions of major environmental NGOs such as SNM³⁴ toward the regional environmental authorities of the Netherlands have had a cathartic effect on the willingness to initiate updating of permits for industrial activities, since the passivity of the authorities is challengeable by way of judicial review. Moreover, we can only assume that this is the reason why there is such an appalling difference compared with Sweden where such possibilities do not exist (and updating activities are virtually non-existent). The same goes for controversial issues such as the speed of decision-making procedures ("better regulation") versus the importance of public approval ("environmental justice"). And still, any comparative discussion, for example, on the implementation of international conventions or effectiveness of EU law, is at risk of being meaningless if such factors are not considered.

Enforcement

Enforcement of environmental law is another example of where

32. See, e.g., J. DARPÖ, *Justice through environmental courts?*, in ENVIRONMENTAL LAW AND JUSTICE (Jonas Ebbesson ed. to be published by Cambridge University Press).

33. See, e.g., N. de Sadeleer, G. Roller & M. Dross: ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS AND THE ROLE OF THE NGOS (Europa Law Publishing, Groningen 2005); European Environmental Bureau (EEB), *How far has the EU applied the Aarhus Convention?*, (Oct 2007). The European Commission carried out a study last summer on the implementation of article 9.3 of the Aarhus Convention on access to justice in 25 of the Member States, Summary report on the inventory of the EU Member States' measures on access to justice in environmental matters, Milieu Environmental Law and Policy, Bryssel 2007. The report is published on the website of the Commission, available at http://ec.europa.eu/environment/aarhus/study_access.htm.

34. Stichting Natuur en Milieu, The Netherlands Society for Nature and the Environment. See Natuur & Milieu, <http://www2.natuurenmilieu.nl/home> (last visited Nov. 16, 2010).

systematic differences between European countries cannot easily be studied in their entirety by employing only rule-oriented methods of comparative law. Differences in emphasis exist in relation to administrative, private and criminal enforcement, and this emphasis is principally a national issue. In the Nordic countries, enforcement mainly rests upon administrative law. The environmental authorities have an arsenal of instruments at their disposal, such as orders, undertaking measures on behalf of the addressee, administrative fines (*astreinte*) and semi-criminal instruments such as sanction fees.

In other countries, the environmental authorities work primarily with criminal sanctions. This is, for example, the case in Spain. In the United Kingdom also, the enforcement of environmental law, to a great extent, is focused upon criminal law measures. Requirements for permits are often formulated as exemptions from prohibitions and their application has been subject to a rich and lengthy case law. Furthermore, criminal liability is described as being "strict," although with exemptions.³⁵ It is also a criminal offense to contravene an administrative order. The most "exotic" feature, however, is perhaps the fact that the Attorney General plays an inconspicuous role when it comes to environmental offenses, as both individuals and environmental authorities can prosecute.

Most prosecutions in the United Kingdom are brought by the Environmental Agency through its "prosecution offices," and this activity is considered to be a normal part of its supervisory activities. Private prosecutions are not that common, but they have been known to occur. The individual does not have to show any sufficient interest in the matter, and the possibility of receiving legal aid is quite good. One can therefore suggest that the mere possibility of private actions can put pressure on the authorities to prosecute, especially given that the decision *not to* can be challenged by way of judicial review.

As with access to justice, there have been only a few studies on the systematic differences concerning enforcement of environmental law,³⁶ and even fewer on the effects of the different systems. We do

35. In fact, we would rather describe the criminal liability as "systematic," meaning a duty to maintain the systems for operation and control in such a fashion that even unexpected events can be avoided.

36. However, see CRIMINAL PENALTIES IN EU MEMBER STATES' ENVIRONMENTAL LAW (Faure, M.G. & Heine, G. Metro (eds.) Maastricht European Institute for Transnational Legal Research, 2002), available at http://ec.europa.eu/environment/crime/pdf/criminal_penalties1.pdf.

not know much about the effectiveness of administrative instruments, compared with civil and criminal ones. We can only make assumptions that the sky-high levels of penalties in the United Kingdom have a greater deterrent effect on operators, encouraging them to “keep on the right side of the law,” compared with their competitors in other countries with their far more modest sanctions.³⁷ With rule-oriented methods of comparative law, perhaps we can examine how access to criminal sanctions varies from one position in the Finnish region of Åland, where *only* the environmental authority has the competence to *notify* the police of an environmental offense, to that of the opposite position in Spain, where *all members of the public* can *prosecute*, that is, “*actio popularis*” in criminal matters. However, it is a much more complicated task to study the entirety of the system. Taken together, perhaps the Swedish environmental authorities are just as active and successful, using orders and administrative fines, as their English counterparts are employing criminal enforcement. In such a comparison, the functional method can be useful as a practical approach.

Comparative Law in the Environmental Area

The Need for a Realistic Ambition in Comparative Law

Viewed in light of the “legal culture” described in Parts 1 and 2, one might wonder whether different national systems can be usefully compared in a legal, scientifically relevant manner. It may be doubted whether a foreign researcher could attain the knowledge required for such a study. In any event, such a task would be immensely time-consuming and overwhelming. The researcher is expected to study vast amounts of legal material as well as non-legal contexts, such as political history, in order to understand properly the role of the legal functions to be investigated.³⁸

However, in our view it is a matter of ambition. One must take a realistic perspective on comparative legal research. By this we mean that comparative law *makes it possible to see one's own legal order with*

37. An all-time high sanction in the United Kingdom a couple of years ago was £750,000 *plus* costs for the technical evidence in the Howe case. B. JONES & N. PARPORTH, ENVIRONMENTAL LIABILITIES 253 (Shaw & Sons, 2004). Another famous case is that of Anglian Water, which was brought by a private individual, a Mr. Hart, whose success (£250,000 in fines plus costs) was a great embarrassment for the Environmental Agency (GOVERNMENT SUGGESTS “VOLUNTARY” INITIAL RECYCLING TARGETS FOR ELVS, 54 (ENDS Report 326 March 2002), p. 54), *available at* <http://www.endsreport.com/8559/voluntary-targets-mooted-for-elvs>.

38. JYRÄNKI, *supra* note 4, at 11.

new eyes, from a new perspective and at some distance. In this way, one can gain a better understanding of the function and value of old and well-known legal phenomena within one's legal system. This makes it possible to evaluate this legal order without being bound by certain legal solutions that for other, more nationally limited lawyers, appear self-evident and indispensable, their not having experienced other functional measures to solve similar legal problems. This openness to other solutions is not only especially important in legislative work, but also in other situations where the lawyer works *de lege ferenda* – for example, in research. Rather than guessing and speculating, one can study the vast experience accumulated in other legal orders, using other measures and instruments to meet legal demands and solve legal problems.

The main task for comparative law, as in all research, is to further knowledge in a certain topic and area. The perspective and the material basis that the study of functions in different legal systems provides can be most beneficial to such an endeavour. It presents new perspectives and angles that can remove obstacles in the system. When a legal problem seems to have stagnated in its own system, a glimpse in a foreign mirror can impart a new perspective.

Comparing Environmental Law

There are no principal aims associated with comparative law, in the same way that there are none in science in general, other than the pursuit of knowledge. However, there are specific tasks that comparative law may fulfill in this instrumental view and methodology. This entails a kind of indirect use of foreign sources of law and is especially useful when the black letter law, i.e., the legislation and the rules and norms seem similar on the surface. This is often the case in European environmental law, through the influence of EU law and other international institutions of environmental law and policy. Such an approach can have a freeing effect on the analysis of legal norms, interpretations, theories and practices that seems absolute, given, or trapped in deadlock.

In environmental law, there is a universal goal and a common interest of mankind; sustainable development. We should, however, remind ourselves that as researchers of law we do not compare the environment or environmental goals. Instead, we compare the legal solutions of environmental problems within different legal systems,

and their functionality in reaching environmental objectives. We are, thus, studying legal constructions: the legal instruments, their potential, their difficulties and effectiveness within their functions. It may well be argued here that the instrumental view of law is oversimplified, but it serves as firm ground for comparative and environmental law research. The functional principle is functional, also in an environmental law context.

Advice to the Comparatist: Be Honest and Open-Minded

The legal researcher in environmental law must be honest with his or her ambition. Obviously, there is a substantial difference between a compliance study on the implementation of EU legislation in an area, compared with merely the comparison of a minor issue between two or three countries with related legal systems and legal perspectives. We think it is important that the comparatist, from the very beginning, openly declare the goal of the comparison and remain honest with regard to the risks and pitfalls associated with the method employed in a specific case. Furthermore, the comparatist must not exaggerate the advantages of foreign solutions simply because he or she is thrilled by their novelty. Be skeptical, and expect and confront problems at all times.

Furthermore, set the goals of the study in a perspective such that the work does not rest entirely on the correct interpretation of certain parts of the foreign terminology. Adjust your method to the scope of the study and try to refine the comparison with functional elements. Employing a casuistic method is helpful. There are also other methodological countermeasures that may help in the difficulties of studying foreign legal orders. After an initial period of studying traditional sources of law, it is fruitful to undertake in-depth interviews with lawyers in the particular country to be studied. It is, however, of great importance that such interviews be conducted after the comparatist has already acquired substantial knowledge of the system in question, otherwise it can result in a waste of time. In a way, the ideal is to know the black letter law better than the person to be interviewed. It is also important that interviews be conducted with all manner of subjects — with those from administration and industry, with advocates, representatives of NGOs and, of course, with different legal scientists. Not all interviews will, at first, seem fruitful. But it is from small pieces of information that a body of knowledge is formed. Finally, it

is crucial that the comparatist work with quality assurance. In our opinion, this is best achieved by communicating the written study with the interview subjects and others in a mutual language. In that phase of the study, it might also be helpful to use complementary questionnaires. One must, however, be aware that any such effort is quite time-consuming. Taken together, the introductory period of studying more or less traditional sources of law, the visit to the country in question and the interviews with different participants, and finally, the exchange of ideas over a written document, might well form interesting “food for thought” in the comparison with one’s own legal system.

Concluding Remarks

The challenges are many and varied for the environmental law comparatist, and it might be questioned whether any researcher could meet them all. It is, nonetheless, important to state a methodological ideal. This helps the comparatist take the correct perspective and exercise the care that is the essence of comparative jurisprudence. In the end, the researcher will have to present his or her results in a manner that reflects the ultimate humility of all the risks inherent in this process. Writers have repeatedly stressed the pitfalls and dangers of comparative method. We find that in the end it is neither possible, nor even interesting, to list them all or to avoid them all. One just has to be aware of the risks. One must be alert, and not lack courage, and perhaps remind oneself of that most apt of quotations applicable to Nordic environmental law research: “Damn the torpedoes! Full steam ahead!”³⁹

39. Originally used by Admiral *Farragut* in the battle of New Orleans in 1862.

SUSTAINABILITY AND THE COURTS: A JOURNEY YET TO BEGIN?

*Klaus Bosselmann**

Abstract

The international judiciary system has not yet developed a coherent approach to cases involving sustainability concerns. Furthermore, sustainability has rarely influenced the *ratio decidendi* of decisions. There are institutional and normative reasons for the lack of legal recognition of sustainability. In addressing these deficiencies, the historical and cross-cultural roots together with the fundamentality of sustainability need to be acknowledged to extrapolate its normative quality and rule-generating potential. Essentially, sustainability is a fundamental legal principle akin to justice and equality.

Introduction

In his analysis of international case law, John Gillroy found that sustainability “has emerged as the core concept of the current environmental debate within international law”¹ and that sustain-

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1. John Martin Gillroy, *Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of “Environmental Sustainability” in International Jurisprudence*, 42 STAN. J. INT’L L. 1, 2 (2006).

ability is present in *obiter dicta*, illustrating its moral significance, but not in *rationes decidendi* of the decisions.² In fact, there is a notable gap between general references to sustainability and its actual recognition as a guiding legal principle. This anomaly exists for conceptual, normative and institutional reasons.³

First, conceptually, the use of the term “sustainability” is often confusing. While the word is derived from the Latin *sustinere* (*tenere*, to keep or hold; *sus*, up) and as such akin to the endurance of anything, the historical origins and context makes it clear that sustainability refers to the endurance of the natural resource base or ecological systems that human development is depending on. Historically, the idea of sustainability has its roots in ancient civilizations seeking to live in harmony with nature,⁴ in the European context, for example, as a legal concept of care for the “commons” in England, or “Allmende” in German-speaking countries⁵. The term sustainability emerged in the seventeenth century as a translation from the German *Nachhaltigkeit* where it had been defined as an economic term to describe the endurance of the natural resource base for human enterprise.⁶ In today’s parlance, this means ecological sustainability. The term remains, therefore, as a distinct and defined principle irrespective of its inflationary use in other contexts.

Second, normatively, for a principle to guide international dispute resolution, sustainability must not only be a legal principle, but a rule-generating adjudicatory norm. This has not occurred for sustainability because the “principle” of sustainable development itself is not of a sufficiently definitive rule-creating character; it contains a number of competing and even contradictory sub-principles that dilute its normative power.

On the other hand, sustainability is much older and more fundamental than the late-twentieth century concept of sustainable development. Its normative character can be in little doubt considering that at the core of sustainable development is the moral imperative to pass on an undiminished world to future generations. For many centuries, this imperative has been widely accepted across

2. *Id.* at 5-6.

3. See KLAUS BOSSELMANN, *THE PRINCIPLE OF SUSTAINABILITY* 67 (Ashgate Publishing 2008).

4. *Id.* at 12.

5. *Id.* at 14.

6. *Id.* 16-22; see also *infra* at 343-46.

many cultures. In our age of unprecedented short-sightedness, it would be a bitter irony to not consider the consequences of today for the long-term tomorrow. I will return to the rule-generating potential of sustainability towards the end of this essay.

Third, institutionally, the international judiciary system has been evolving as a set of parallel, closed legal regimes with specific adjudicatory norms. Therefore, a new legal principle, in order to become an adjudicatory norm, may require institutional refinements. Among these refinements are special environmental branches of the court system, including the long-standing proposal for an International Environmental Court.

The Institutional Dimension

Fundamentally, international law is shaped around the core value of state sovereignty. This has not changed over the past sixty years despite new challenges to sovereignty, for example, through the emergence of human rights as universal norms or the emergence of global concerns such as economic liberalization and environmental sustainability. The International Court of Justice (I.C.J.) has not altered its core adjudicatory norm of sovereignty to accommodate sustainable development. Instead of sovereignty, the equivalent adjudicatory norms of other international tribunals are the law of the sea (International Tribunal for the Law of the Sea), free trade (Panel and Appellate Body of the World Trade Organization) and human dignity (United Nations Human Rights Council). This allows for greater flexibility, however, none of these tribunals have referred to sustainable development in any way other than *obiter dicta*.⁷ Overall, the norm-generating quality of sustainable development has not been recognized.

The classic case on sustainable development is the I.C.J.'s Gabčíkovo-Nagymaros case,⁸ which concerned a hydroelectric dam on the Danube River. Project planning began in 1977 after Hungary and (then) Czechoslovakia signed a bilateral treaty. In 1989, Hungary suspended the project and by 1992 it tried to pull out of the project because it would divert 80% of the flow of the Danube away from Hungary.⁹ Hungary cited ecological necessity as its basis for

7. BOSSELMANN, *supra* note 3, at 67-72.

8. Gabčíkovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. 7 (Sept. 25).

9. *Id.*

withdrawing from the treaty and stopping the project. As a result, the Court was faced with the argument of sustainability and environmental damage as well as the usual questions of law of watercourses, state responsibility, and law of treaties.¹⁰ The Court readily acknowledged that the concerns expressed by Hungary for its natural environment in the region affected by the project related to an “essential interest” of that state.¹¹

While the Court held that these arguments were insufficient to terminate the 1977 treaty or pardon Hungary of responsibility for its failure to comply with it, the Court did consider the nexus between environmental protection and economic development relevant to international law. Quoting from its decision in the Advisory Opinion on the Use of Nuclear Weapons, the Court requested that the parties renegotiate the treaty reasoning:

Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — ... new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.¹²

In his Separate Opinion, (then) Vice President Weeramantry stated that the right to development and the right to environmental protection are principles currently forming part of the body of international law and that they need to be reconciled with the principle of sustainable development which is a recognized principle of international law.¹³ He considered it “a general principle of international law recognized by civilized nations” and “an integral part of modern international law,” “by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community.”¹⁴

10. Gillroy, *supra* note 1, at 43.

11. Gabčíkovo-Nagymaros Project, 1997 I.C.J. at 41.

12. *Id.* at 78.

13. *Id.* at 88-89 (separate opinion of Judge Weeramantry).

14. *Id.* at 95.

The Court concluded that the treaty remained in effect, however, and required the parties to negotiate a proper balancing of environmental and developmental needs.¹⁵

It could be argued that the reluctance of the I.C.J. to make sustainable development an overarching concern of international law is due to its jurisdictional constraints. Such constraints might be less of an issue if the long-proposed International Environment Court were established. A specialized court of this nature would most likely increase chances for better enforcement of international environmental law. Yet, the traditional, state-centered approach to institutional reform may be adverse to any calls for institutionalizing new adjudicatory norms.

The experience of New Zealand may be of some relevance here. New Zealand established a nation-wide Environment Court in 1994, becoming the first — and still only — country to do so. The Court was established in conjunction with a major environmental law reform culminating in the Resource Management Act (RMA),¹⁶ a statute with sustainability at its core.¹⁷

Conceptualizing it as “sustainable management,” section 5(2) of the RMA defines the term as follows:

- (2) In this Act, “sustainable management” means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while —
- a. Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonable foreseeable needs of future generations; and
 - b. Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
 - c. Avoiding, remedying, or mitigating any adverse effects on activities on the environment.¹⁸

This definition and its application has been the subject of many debates and decisions in the New Zealand Environment Court.

15. *Id.* at 83 (majority opinion).

16. Resource Management Act, 1991 (N.Z.).

17. See David Grinlinton, *Contemporary Environmental Law in New Zealand*, in 1 ENVIRONMENTAL LAW FOR A SUSTAINABLE SOCIETY 19-46 (Klaus Bosselmann & David Grinlinton eds., New Zealand Centre for Environmental Law 2002).

18. Resource Management Act, 1991, § 5(2) (N.Z.).

Under a straightforward reading of section 5, decision-makers need to secure the outcomes detailed in paragraphs a, b, and c which operate as high-level constraints.¹⁹ However, the meaning of the word “while” has been controversial. Are the various purposes of resource use, mentioned in the first half of section 5(2), conditional to a, b, and c? This is the “environmental bottom line” approach. Or is the word “while” merely requiring one to additionally consider a, b and c? This is the so-called “overall judiciary approach.” A number of Environment Court decisions follow the environmental bottom line approach. This approach would be consistent with the principle of (ecological) sustainability or “strong” sustainability.²⁰ The overall judiciary approach, on the other hand, reflects the more traditional weighing of potentially conflicting objectives and leads to compromises or trade-offs.

The Environment Court and other courts increasingly follow this approach, once the socio-economic consequences of environmental-bottom-line reasoning became more apparent. Essentially, the “weak” sustainability approach, clearly favored by government and the corporate sector, demands no more than considering environmental impacts or “business-as-usual.”

The New Zealand experience suggests that sustainability can, in fact, play an important role in both legislation and court decisions. However, it is also possible to conclude that neither well-written legislation nor the existence of a specialized Environment Court would per se make a difference. Obviously, reasoning around the fundamental importance of sustainability has had some impact on the way judges approach environmental cases. Leading Judge Peter Salmon, for example, has repeatedly stated the fundamental importance of the sustainability principle “as the only meaningful cure to the problems that face the world.”²¹ The Parliamentary Commissioner for the Environment criticized authorities and courts for not sufficiently focusing on the Act’s “core thrust” with its

19. Simon Upton et al., *Section 5 Re-visited; A Critique of Skelton and Memon’s Analysis*, 10 RESOURCE MGMT. J. 10, 13 (2002).

20. See Klaus Bosselmann, *Strong and Weak Sustainable Development: Making the Difference in the Design of Law*, 13 S. AFR. J. ENVTL. L. & POL’Y 14 (2008).

21. Peter Salmon, Paper Presented to the Auckland Branch of the Resource Management Law Association: Sustainable Development in New Zealand 3 (Oct. 30, 2002).

recognition of “intrinsic values” and ecological “bottom lines.”²² The Commissioner has repeatedly reminded the people of New Zealand that sustainability is a foundational principle for society and its economy (“strong sustainability”) requiring a profound shift of values and policies.²³

The Normative Dimension

Generally speaking, the reception of sustainability in the jurisprudence of courts and tribunals has not been particularly significant. The predominant approach internationally²⁴ and in New Zealand²⁵ has been to consider sustainability amongst other – mostly social and economic – concerns without giving it priority.

This “weak” approach is arguably in contrast with the actual importance and wider history of sustainability. Its history did not begin with the 1987 Brundtland Report but in the ancient traditions of most major cultures, including Europe.²⁶

The situation of pre-industrial Europe is worth noting. By the mid 1800’s, most forests were gone. Deforestation had reached a degree that threatened the entire economy of Europe.²⁷ This opened up two possibilities for the future: to look for a new energy source to refuel the economy or to look for an alternative economy. Of course, coal replaced wood and fired up the industrial revolution. But the alternative was available too, i.e., the “discovery of sustainability.”²⁸

Forest management scholars in Germany proclaimed the wisdom of replacing every felled tree with the planting of a new one.

22. See OFFICE OF THE PARLIAMENTARY COMM’R FOR THE ENV’T, TOWARDS SUSTAINABLE DEVELOPMENT, THE ROLE OF THE RESOURCE MANAGEMENT ACT 1991 7 (1998); OFFICE OF THE PARLIAMENTARY COMM’R FOR THE ENV’T, SUSTAINABILITY REVIEW 2007: NEW ZEALAND’S PROGRESS TOWARDS SUSTAINABLE DEVELOPMENT (2007).

23. See OFFICE OF THE PARLIAMENTARY COMM’R FOR THE ENV’T, CREATING OUR FUTURE: SUSTAINABLE DEVELOPMENT FOR NEW ZEALAND 35 (2002).

24. See BOSSELMANN, *supra* note 3, at 67-72.

25. See Klaus Bosselmann, *Judiciary and Environmental Governance in New Zealand*, in THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES 355 (Louis Kotze & Alexander Paterson eds., Kluwer International 2008).

26. BOSSELMANN, *supra* note 3, at 13-22.

27. See JOACHIM RADKAU, NATURE UND MACHT EINE WELTGESCHICHTE DER UMWELT 245 (Beck 2000). This work was recently published in English as JOACHIM RADKAU, NATURE AND POWER: A GLOBAL HISTORY OF THE ENVIRONMENT (Cambridge University Press 2008).

28. See ULRICH GROBER, DIE ENTDECKUNG DER NACHHALTIGKEIT (Kunstmann 2010).

They cited the medieval land use system (“*Allmende*”) as the mother of sustainable economies. The Allmende system recognized public ownership of the land to guide any form of private land use. That way the substance of the land could be protected from overuse, thereby preserving it for future generations. In 1714, this effect was termed “*Nachhaltigkeit*” by German accountant and administrator Hans Carl von Carlowitz.²⁹ The term and concept eventually dominated forest economic theory and were exported, for example, to the French Forest Academy where, in 1837, its director Adolphe Parade translated it to “*soutenir*” (showing its Latin roots: *sustinere* = to keep, preserve, sustain). From there it reached the English translation of “sustainability.” By the mid-1800’s, the notion “living from the yield, not from the substance” was widespread among forest academies and indeed science and economic faculties throughout Europe. It was state-of-the-art knowledge.

The fact that the industrial revolution ignored this knowledge does not render it useless, obviously. It only meant that the idea of sustainability did not fit the all-persuasive idea of progress. Essentially, this has not changed to this day — except for the fact that the case for sustainability has never been stronger.

The modern chapter of the sustainability discourse began with the Report of the United Nations Commission for Environment and Development³⁰ (Brundtland Report) that created the composite term “sustainable development,” but did so — or should have done so — on the basis of a well-established history of the sustainability concept. The famous Brundtland definition³¹ is, of course, incomplete. It leaves open the question of what might be the needs of future generations and consequently what may have to be passed on. It is fair to assume that the Brundtland Commission called for a fundamental duty to keep the basic options open for future generations. The only way to

29. HANS CARL VON CARLOWITZ, *SYLVICULTURA OECONOMICA, ANWEISUNG ZUR WILDEN BAUM ZUCHT [FOREST ECONOMY OR GUIDE TO TREE CULTIVATION CONFORMING WITH NATURE]* (TU Bergakademie Freiburg 2000) (1713). See also Ulrich Grober, *Tiefe Wurzeln: Eine Kleine Begriffsgeschichte von “sustainable development” – Nachhaltigkeit [Deep Roots: A Short History of the Concept of “Sustainable Development” – Sustainability]*, 3 *NATUR UND KULTUR* 116 (2002).

30. WORLD COMM’N ON ENV’T & DEV., *OUR COMMON FUTURE* (Oxford University Press 1987).

31. “Sustainable development is development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.” *Id.* at 8.

keep these options open, however, is to sustain the ecological basis of development. The Commission was quite clear about this. The inaugural meeting of the Commission in October 1984 set out the objective “to build a future which is more prosperous, more just, and more secure because it rests on policies and practices that serve to expand and sustain the ecological basis of development.”³² In many passages, the Report emphasized that we are borrowing the environmental capital from future generations and that economic growth must be constrained to preserve the Earth’s ecological integrity.³³

History, science and ethics all seem to point to the same, rather simple idea: any form of development must respect ecological boundaries to avoid decline or collapse. This characterization has three important implications for the sustainability discourse. The first is that sustainability is separate from sustainable development. Both terms are often used interchangeably, but need to be kept separated from each other. The second implication is that the notion “sustainable development” relates development to sustainability in a sense that the former is grounded in the latter. Like “sustainable management,” “sustainable use” and similar composite terms, “sustainable development” represents an application of the principle of sustainability, nothing more and nothing less. The third implication is that sustainability is the most fundamental of all environmental principles, although this fundamentality has yet to be recognized by the courts.

There are important parallels between the idea of sustainability and the idea of justice.³⁴ The justice discourse has always maintained certain distinctions that are equally relevant to the sustainability discourse. First, justice is different from composite terms such as “just society.” Second, the notion of a “just society” relates society to justice in a sense that the former is grounded on the latter. Third, the term “just society” represents an application of the principle of justice which is fundamental to civilized nations, similar to the principles of

32. *Id.* at 356.

33. For example: “We borrow environmental capital from future generations with no intention or prospect of repaying. They may damn us for our spendthrift ways, but they can never collect on our debt to them. We act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.” *Id.* at 8.

34. See BOSSELMANN, *supra* note 3, at 9.

freedom, equality – and sustainability.

This all amounts to what the New Zealand Ministry for the Environment once aptly pointed out: “Sustainability is a general concept and should be applied in the law in much the same way as other general concepts such as liberty, equality and justice.”³⁵

Conclusion

The characteristic of fundamental principles is that they cannot per se be defined in precise terms, yet they are absolutely indispensable as guiding ideals for the design of public policy and law. Governments may fail to live up to these ideals, but they are constitutionally obliged to pursue them. The same goes for the judiciary.

One premier role of the law is to promote fundamental principles, often expressed in constitutions and human rights catalogues, and ensure that the legal process is reflective of them. If sustainability is perceived as one of such fundamental principles, the legal process will have to be reflective of it. If, by contrast, the principle of sustainability is perceived as just one of an array of environmental principles, it will compete with these and almost certainly vanish in the politics of governments still fixated on economic growth and international competition.

It would be too presumptuous to think that a fundamental concern such as the one just described has guided the creators of the New Zealand *Resource Management Act*, the more ambitious judges of national or international tribunals, the drafters of the *World Charter for Nature* or the creators of the *Earth Charter*. More likely, there was not a coordinated and coherent effort behind these various pursuits.

However, it would be even more presumptuous to assume that the mentioned activities were guided by an attempt to merely “balance” economic, social and environmental concerns. Surely, such a balancing act would not reflect what most feel when we think of climate change, biodiversity loss and water scarcity. The global ecological crisis came about because of a profound imbalance of economic, social and environmental dimensions of human activity and not as a technological glitch. The more appropriate assumption

35. N.Z. Ministry for the Env't, *Resource Management Law Reform: Sustainability, Intrinsic Values and the Needs of Future Generations* 9 (N.Z. Ministry for the Env't, Working Paper No. 24, 1989).

is, therefore, a fairly common acceptance that the ecological basis of human survival is at risk. If, for example, climate change is threatening our life conditions, then any trade-offs and compromises between economic prosperity and ecological sustainability seem almost suicidal. Today's concerns are either those for ecological sustainability or do not exist at all (favoring business-as-usual or overly naïve trade-offs).

The role of courts is to safeguard the fundamental principles and values of society. This normally means watching over the rule of law and constitutionality of governmental actions. Yet, sometimes safeguarding the fundamentals may require more. If courts are faced with governmental failures and breakdowns that threaten long-term sustainability, they surely must be proactive and insist on law's ultimate promise.

INTERVIEW

DR. PARVEZ HASSAN: PAKISTANI ENVIRONMENTAL LAWS

*Dr. Parvez Hassan currently serves as the President of the Pakistan Environmental Law Association. As a pioneer in Pakistan's environmental protection movement and the promotion of an independent judiciary, Dr. Hassan has unique insight into Pakistan's struggle to preserve the rule of law and the environment. After receiving his Master of Laws in 1963 from Yale University, Doctor of Laws in 1969 from Harvard University and practicing with several distinguished law firms, Dr. Hassan returned to Pakistan and is a senior partner at Hassan & Hassan (Advocates). Notably, he argued and won *Shehla Zia v. WAPDA*, the case before the Supreme Court of Pakistan which affirmed that a decent environment is a constitutionally protected right to life and dignity. More recently, Dr. Hassan spoke out against the removal of Chief Justice Chaudry by former president and general, Pervez Musharraf, which resulted in his arrest along with over 500 other lawyers. His leadership and advocacy have helped to evolve the rule of law and protection of the environment in Pakistan and left an indelible mark on Pakistan's sustainable development movement.*

*Interviewed by Hannah Cochrane**

*Hannah Cochrane is a student at Pace University School of Law.

Dr. Hassan, can you please give a brief description of your background in cultivating Pakistan's sustainable development movement?

I was not formally schooled or educated in environmental law. On return to Pakistan in 1969, following post-graduate degrees in law from Yale and Harvard, and associations with three law firms in the United States, I established a corporate law firm in Lahore. My first encounter and romance with environmental protection started with a surprise invitation in 1977 from the United Nations Regional Office, Economic and Social Commission for Asia and the Pacific (ESCAP) to do an overview of Environmental Protection Legislation in the ESCAP Region. This led to more associations with the important work of ESCAP and the United Nations Environment Program (UNEP) in the region. Such work included a mission to Bangladesh and the drafting of its proposed Environmental Protection Ordinance in 1978. A similar effort was made in proposing what became the Pakistan Environmental Protection Ordinance, 1983.

This early opportunity with ESCAP and UNEP led to my becoming a member of the Board of Directors of the Worldwide Fund for Nature Pakistan (WWF Pakistan). Also, I met Wolfgang Burhenne during an ESCAP–UNEP meeting in Bangkok. This introduction resulted in his later offer to me to become the deputy chair of the Commission on Environmental Law (CEL) of the International Union for Conservation of Nature and Natural Resources (IUCN). I was the chair of CEL from 1990 to 1996, guided by Deputy Chair Nick Robinson.

At home, I was active with the IUCN activities in Pakistan and was the founding chair of the Rockefeller Foundation–sponsored LEAD Pakistan as well as on the Board of LEAD International. We later established the Sustainable Development Policy Institute (SDPI) in Islamabad and I was on its Board of Governors and also the chairman.

All of the above gave me the opportunity to develop the origins of the environmental movement in Pakistan. We invoked the public interest jurisdiction of our superior courts to move our mission forward in the case of *Shehla Zia v. WAPDA*.¹ This case, which I

1. *Shehla Zia v. W.A.P.D.A., P.L.D. 1994 SC* (Supreme Court of Pakistan) 693.

argued before the Supreme Court of Pakistan, gave us a head start in the early recognition by the country's highest court that environmental rights were a part of the constitutionally-protected fundamental rights. This work has continued with the Pakistan Environmental Law Association (PELA) founded in 1999, which I presently chair.

In essence, close associations with the leading national and international organizations: ESCAP, UNEP, WWF Pakistan, IUCN, LEAD International, LEAD Pakistan, PELA and SDPI have facilitated my work in the field of environmental protection and sustainable development. I could not have wished for a better background to canvas and advocate environmental priorities in Pakistan.

Can you describe your role with the Environmental Protection Council in protecting the environment and the importance of the Environmental Protection Council in promoting the rule of law and the preservation of the environment?

I was involved in drafting both pieces of legislation in Pakistan pertaining to the environment. First, in the Pakistan Environmental Protection Ordinance, 1983, which was replaced by the Pakistan Environmental Protection Act, 1997 (PEPA), we established the Pakistan Environmental Protection Council as the highest policy making forum in the country. But, the provision that the president or the prime minister of Pakistan shall head the council, intended to strengthen the council's authority, has proven to be a weakness over the years, because the president and the prime minister have not been available for the minimum two statutory meetings a year required under PEPA and the earlier Pakistan Environmental Protection Ordinance, 1983. I have been a member of this council since its inception and, other than the National Environmental Quality Standard which we adopted at our first meeting in 1993, I cannot identify anything else of durable importance that may have been transacted by the council.

I understand that there have been recent changes to Pakistan's Constitution. How were these changes drafted and what impact will it have on the rule of law?

The subject of the environment was included in the Concurrent List of the Constitution of Pakistan 1973 (the Constitution). This meant

that both the federation and the provinces of Pakistan could legislate on subjects included in the Concurrent List. However, following the Eighteenth Amendment passed in 2010, the Concurrent List has been deleted and the result is that the environment is now a provincial subject. This may be a severe setback to the federal–provincial coordination on environmental matters, and the provinces are currently responding to the new situation by working toward specific provincial legislation on environmental protection. The chances are that such provincial legislation will mirror some of the provisions of PEPA.

The constitutional amendment notwithstanding, the thrust of jurisprudential activism by our superior courts led by the *Shehla Zia* case, will continue to anchor citizens' concern about major environmental issues.

You were part of the 500 lawyers who were arrested for protesting the removal of Chief Justice Chaudhry by General Musharraf. This remarkable event made headlines all around the world. Can you explain the momentum behind this unprecedented event, why it was important for you to participate and your views on the government's response?

Pakistan has been unfortunate in the repeated interruptions of democratic rule by *coup d' etats* and takeovers: by Ayub Khan in 1958; Yahya Khan in 1969; Zia-ul-Haq in 1977; and Pervez Musharraf in 1999. Indeed, as much as half of Pakistan's existence as a nation since 1947 has been under military rule. It seems to be a historical legacy in South Asia that movements for independence and human rights were led by lawyers such as Gandhi, Nehru and Jinnah. Lawyers in Pakistan have, resultantly, led movements against military dictators. In some ways, facing police brutality and imprisonment has come to be an occupational hazard for lawyers in Pakistan. I was active in the leadership of the lawyers' movement against General Zia-ul-Haq in the 1980s and was brutalized by the police. I responded with the same conviction in joining the lawyers' movement against Pervez Musharraf in 2007, when, in a defining moment in Pakistan's history, Chief Justice of Pakistan, Mr. Iftikhar Muhammad Chaudhry, refused to resign and showed unique courage in standing up to Pervez Musharraf and his generals. The lawyers' movement is a symbol of the admiration and gratitude that the lawyers, civil society and media

have for the independence of the chief justice, an independence that was not acceptable to Pervez Musharraf. Pervez Musharraf needed “a more reliable judge” considering the important constitutional matters that were likely to come up before the Supreme Court during the election year 2007, including his own eligibility as a presidential candidate and his right to continue holding the dual offices of the army chief and the president of the country. The success of the lawyers’ movement against Pervez Musharraf showed the strength that the lawyers, civil society and media had jointly achieved in forcing change.²

During the February 2008 elections, both the Pakistan’s Peoples Party (PPP) and Pakistan Muslim League (PML-N) parties elevated the issue of the reinstatement of the judges. Were you surprised by this response? Were you surprised by the breakdown of the new coalition government over the mechanism for restoration of the judges?

When the Pakistan People’s Party and Pakistan Muslim League–N joined in the demand for the reinstatement of judges, it was simply in tune with the popular demands expressed so vocally in the nationwide protest movement which was lionized by the media, particularly the electronic media. When, later, the ruling Pakistan People’s Party delayed the reinstatement of the judges, it was clear that this inaction could jeopardize the success of the new government. It finally gave in to the pressures of the movement.

Shortly after the 2007 crisis you remarked, “The rule of law remains elusive in Pakistan and a dream more distant than it appeared in 1947.” Do you still believe this to be true? Is the newly-elected government respecting judicial independence?

When the judges were reinstated in 2009, the rule of law appeared no more elusive in Pakistan and no more a distant dream. We thought we had gotten there. But the ruling government has been obstructive in its implementation of some of the decisions of the Supreme Court of Pakistan which impact, directly or indirectly, on the corruption of the present leadership in the government. The

2. See, generally, Parvez Hassan, *Environmental Protection, Rule of Law and the Judicial Crises in Pakistan*, 10 ASIA-PAC. J. ENVTL. L. 167-181 (2007).

constitutionality of some of the provisions of the Eighteenth Amendment has been challenged before the Supreme Court, particularly the new role of the legislature and executive in the appointment of judges to the superior courts. These provisions are seen as a threat to the independence of the judiciary. From these perspectives, 2010 will be an important year in the determination of the balance required in the separation of powers.

In an article you have mentioned that judicial activism on the part of the chief justice was one of the reasons for the 2007 judicial crisis. Can you explain the connection?

The chief justice had moved against the Musharraf government in the cases of persons who were missing from their homes, many suspected to have been in the custody of intelligence agencies, as well as other human rights violations. He and his court also struck down several important governmental initiatives such as the privatization of the Pakistan Steel Mills. Further, they struck down the development of Murree [one of the largest resort towns in the Galyat area of Pakistan] on grounds of protecting the environment. I believe that this “green” approach annoyed the military dictatorship at that time.

Would you discuss the importance of *Shehla Zia v. WAPDA* for both Pakistan and for the emerging right to a clean and healthy environment in international law?

In 1994, the Supreme Court of Pakistan was presented with a unique petition: some residents of the federal capital, Islamabad, had approached the Court regarding the construction of a high voltage grid station by the Water and Power Development Authority (WAPDA) in a residential area of Islamabad. The residents of this neighborhood, led by Ms. Shehla Zia, asserted that the electromagnetic radiation of the grid station would likely be harmful to the health of the residents. The extraordinary aspect of this petition was that it sought the jurisdiction directly of the Supreme Court of Pakistan under Article 184(3) of the Constitution under which the Supreme Court of Pakistan can enforce the fundamental rights guaranteed to the people of Pakistan by the Constitution if such protection is a matter of “public importance.” Ordinarily, the High Courts in the provinces are mandated to protect the fundamental rights of the citizens of Pakistan and it is only in exceptional

circumstances that Article 184(3) can be invoked. The second unusual feature of this petition was that it did not pertain, strictly speaking, to any of the fundamental rights guaranteed by the Constitution. The claim was for a right to a clean environment and the Constitution did not in any manner provide for such a fundamental right.

The result in *Shehla Zia* exceeded the expectations of the petitioners. In one broad sweep, the Supreme Court laid down law to be followed by all the courts in Pakistan: (1) Environmental rights are covered in the rights to life and dignity guaranteed in the Constitution; (2) Environmental rights are to be interpreted in accordance with developments at the international level; (3) Commissions composed of technical experts may be established by courts in determining complex policy issues;³ and (4) Public disclosure and participation are essential in decision-making by governmental agencies.

The *Shehla Zia* case has attracted a great deal of international attention and comment. It is included in the UNEP/UNDP Compendium of Judicial Decisions on Matters Related to Environment: National Decisions compiled in 1998. It is also included in a recommended syllabus for the law schools of the Asia Pacific region in Asian Development Bank, Capacity Building for Environmental Law in the Asia and Pacific Region: Approaches and Resources (2002).⁴ The case also has been cited with approval in many subsequent cases both in the Supreme Court and in the courts below.⁵

Can you explain the origins of the *suo moto* power and the use of the public interest litigation by the court to protect the people of Pakistan?

The *suo moto* jurisdiction invoked by the superior courts in

3. The use of judicial commissions in environmental cases, post *Shehla Zia*, has been discussed in Parvez Hassan, *Judicial Commissions as a Way Forward for Environmental Protection in Pakistan*, 37/2-3 *Envtl. L. & Pol'y*, 185-193 (2007). See also Parvez Hassan, *The Role of the Judiciary and Judicial Commissions on Sustainable Development Issues in Pakistan*, a paper presented at the Pakistan Development Forum, held in Islamabad on May 10, 2006.

4. Capacity Building for Environmental Law in the Asian and Pacific Region: Approaches and Resources (Donna Craig, Koh Kheng-Lian & Nicholas Robinson eds., 2002).

5. For a further discussion of the *Shehla Zia* case, see Parvez Hassan, *Shehla Zia v. WAPDA: Ten Years Later*, 48 *P.L.J.* 48 (2005); Parvez Hassan, *A Decade of Shehla Zia*, *Int'l Env'tl. L. Comm. Newsletter* (A.B.A., Chicago, Ill.), May 2005, at 13-19.

Pakistan, that is the High Courts and the Supreme Court of Pakistan, is based, generally, on the broad powers granted in the writ jurisdiction to the High Courts under Article 199 of the Constitution for the protection of the fundamental rights enshrined in the Constitution. Also, the enabling provision for the Supreme Court to act *suo moto* is Article 184(3) of the Constitution which gives it over-arching jurisdiction in matters of “public importance” with respect to the “enforcement of fundamental rights.”

The *Shehla Zia* case was the first environmental case before the Supreme Court under Article 184(3). The Supreme Court had already invoked this power in a public interest initiative with respect to a case involving bonded labor.⁶ Thereafter, the Supreme Court invoked *suo moto* jurisdiction to hear cases involving malpractice in the educational system, child abuse, victims of gender exploitation, murder cases, traffic control, and environmental degradation.⁷

Do you see a connection between the growth of environmental protection and the response from the lawyers protesting in 2007? What are the implications for the broader world as well as in the region against extremism?

As a consequence of the escalating degradation of the environmental conditions in Pakistan and the continuing executive and legislative apathy, the judiciary has stepped in to fill a vacuum. The lawyers’ movement for the rule of law and the independence of the judiciary have played a vital role in encouraging and promoting judicial activism in Pakistan.

The use of extremism in the region has been explained in several dimensions. The most important is the deprivation of human liberties and the denial of prompt and effective justice. The new spirit and energy of our superior courts could respond to this need.

Can you briefly describe what you think the Pakistani people expect out of their legal system, and in your opinion are they getting it?

The people of Pakistan, like the people of any other country in

6. Darshan Masih v. State, PLD 1990 SC (Supreme Court of Pakistan) 513.

7. Public interest litigation in Pakistan has been discussed in Parvez Hassan & Azim Azfar, *Securing Environmental Rights through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L.J. 215, 216-36 (2004).

the world, want their legal system to provide free, timely and effective justice which can only be secured by the presence of an independent judiciary in the country. The judiciary in Pakistan had always been the subject of political influence and interference, both by the elected governments and the military dictators. The lawyers' movement has led to an independent judiciary in the country, probably for the first time in the history of Pakistan. It is yet premature to say that the present judiciary in Pakistan has succeeded in providing free, timely and effective justice to the people of Pakistan, but it can be said that the judiciary has started its journey in that direction. The Judicial Policy of Pakistan (2009), announced by the chief justice of Pakistan following a consultative process, is a demonstration of this commitment.

Have there been any notable judicial developments in the area of environment protection?

The Constitution does not prioritize environmental protection even in the formulation of the fundamental rights. The subject of "ecology" was included in the Concurrent List of the Constitution but this list has been deleted by the Eighteenth Amendment to the Constitution (2010). The inclusion of a matter in the Concurrent List enabled both the federal government and the provincial governments to legislate in the matter (with federal primacy in case of a conflict with a provincial law). The federal overarching environmental legislation, PEPA, and the Environmental Tribunals created under it were enabled by the Concurrent List. However, with the deletion of the Concurrent List, all matters covered by such a list would be within the sole and exclusive domain of provincial governments.

With this development, PEPA and the tribunals set up under PEPA, would now need to be established in provincial legislation.

Historically, in Pakistan, there is a wide gap between legislative goals, declared national policies and their implementation. Whether it is constraint of resources, financial or technical, or lack of capacity or lack of will to commit to environmental protection and sustainable development, the harsh reality is that our laws and policies are not effectively enforced. This weakness of the executive in environmental management has been matched with a vigorous intervention by the judiciary in giving primacy to environmental rights.

The Environmental Tribunals, established pursuant to Section 20

of PEPA, played an important role in the protection of the environment.

In addition to the Environmental Tribunals, the superior courts of Pakistan have also played an important role in the protection and conservation of the environment.⁸

What are the functions of Pakistan’s Environmental Tribunals? Are there measures that could enhance their effectiveness?

The Environmental Tribunals established under Section 20 of PEPA have exclusive jurisdiction to:

- (1) try and impose penalty on any person who discharges or emits or allows the discharge or emission of any effluent or waste or air pollutant or noise in an amount, concentration or level which is in excess of the National Environmental Quality Standards (Section 11);
- (2) try and impose penalty on the proponent of any project who commences construction or operation without filing with the Pakistan Environmental Protection Agency an initial environmental examination or, where the project is likely to cause an adverse environmental effect, an environmental impact assessment, and without obtaining from the Pakistan Environmental Protection Agency approval in respect thereof (Section 12);
- (3) try and impose penalty on a person who imports hazardous waste into Pakistan and its territorial waters, exclusive economic zone and historic waters (Section 13);
- (4) entertain an appeal filed by any person aggrieved by any order or direction of the Pakistan Environmental Protection Agency or any Provincial Environment Protection Agency under any provision of PEPA and rules or regulations made thereunder (Section 22); and
- (5) exercise such other powers and perform such other functions as are, or may be, conferred upon or assigned to it by or under PEPA, or the rules and regulations made there under (Section 21).

The Environmental Tribunals do not take cognizance of any offense except on a complaint in writing by:

8. For a discussion of Pakistan’s efforts in sustainable development and the case law of its superior courts and Environmental Tribunals, see Parvez Hassan, *From Rio 1992 to Johannesburg 2002: A Case Study of Implementing Sustainable Development in Pakistan*, 6 SING. J. INT’L & COMP. L. 683 (2002).

- (1) the Pakistan Environmental Protection Agency or any government agency or local council; and
- (2) any aggrieved person, who has given notice of not less than thirty days to the Pakistan Environmental Protection Agency or the Provincial Environmental Protection Agency concerned of the alleged contravention and of his intention to make a complaint to the Environmental Tribunal.

In the exercise of its criminal jurisdiction, the Environmental Tribunals have the same powers as are vested in the Court of Session under the Code of Criminal Procedure, 1898 (Act V of 1898). In the exercise of the appellate jurisdiction under Section 22 of PEPA, the Environmental Tribunals have the same powers and follow the same procedure as an appellate court in the Code of Civil Procedure, 1908 (Act V of 1908).

The effectiveness of the Environmental Tribunals can be enhanced by:

- appointing independent and highly qualified persons as members of the Environmental Tribunals;
- increasing the number of Environmental Tribunals;
- and, creating awareness among the people of Pakistan as to the applicable environment laws.

After the amendment to the Constitution in 2010, Environmental Tribunals would need to be a part of the future provincial legislations.

INTERVIEW

PROFESSOR BHARAT H. DESAI: INDIA'S NATIONAL GREEN TRIBUNAL

Professor Bharat Desai currently serves as Chairman of the Centre for International Legal Studies (CILS) and holds the Jawaharlal Nehru Chair in International Environmental Law, School of International Studies (SIS), at Jawaharlal Nehru University, New Delhi, India. He received both his master's and Ph.D. in international environmental law from Jawaharlal Nehru University, and LL.M. and LL.B degrees in international law from Gujarat University, Ahmedabad. In addition to consulting work performed with the Indian Ministry of Environment & Forests and other government agencies, Dr. Desai has collaborated extensively with groups such as the United Nations Environment Programme, the Asian Development Bank, and the International Union for the Conservation of Nature, and has been appointed to numerous Indian delegations and National Consultative Groups. Dr. Desai has served as visiting professor and fellow at several international academic institutions, and has authored dozens of books, articles, and research papers on various issues of international environmental law, particularly relating to capacity building, multilateral environmental agreements, and the Indian environmental statutory infrastructure.

*Interviewed by Sara Vinson**

*Sara Vinson is a third-year law student at Pace Law School. She was a 2010 Summer Research Scholar for the school's Center for Environmental Legal Studies.

Professor Desai, you currently hold the very prestigious Jawaharlal Nehru Chair in International Environmental Law. Can you please briefly discuss your background in international environmental law, touching on some of the other positions you currently hold, or have held in the past?

This chair has been named after India's first Prime Minister Jawaharlal Nehru. It is the only chair of its kind in this part of the world. I am also Chairman of the Center for International Legal Studies, which is part of the School of International Studies at Jawaharlal Nehru University in New Delhi.¹ The school is more than fifty years old.

What areas of international environmental law does your current research focus on?

During the past twelve years, I have been engaged in larger issues of lawmaking and institution-building processes. This includes issues like strengthening the interconnected web of multilateral environmental agreements (MEAs); treaty-making processes; and the way in which environmental lawmaking takes place in instruments that are characterized by "hard shells," but "soft bellies."² In addition, I have focused on the ways in which some of the treaty-based institutions – such as secretariats and funding mechanisms – come into being. In fact, Cambridge University Press (New York) has published my work in April 2010 on the subject entitled: *Multilateral Environmental Agreements: Legal Status of the Secretariats*.³ It has sought to address cutting-edge issues concerning host institution arrangements and the legal capacity of the convention secretariats to operate both on the international plane as well as within the domestic sphere of the host country. Another facet of my work is on International Environmental Governance (IEG). It comprises the institutional dimension of centralized legalization in international

1. Centre for International Legal Studies, <http://www.jnu.ac.in/Academics/Schools/SchoolOfInternationalStudies/LegalStudiesCentre.htm> (last visited Nov. 15, 2010).

2. See BHARAT H. DESAI, MULTILATERAL ENVIRONMENTAL AGREEMENTS: LEGAL STATUS OF THE SECRETARIATS 70 (2010) (noting that some treaties and framework conventions have hard shells with soft bellies "because of the softness of the language (content) used in the instrument as well as the intention of the state parties that these frameworks do not create conventional hard obligations").

3. See generally *id.*

environmental law, as well as the future of MEAs. Since at least 1997, this subject has been the focus of attention of the U.N. General Assembly and its subsidiary organ, the U.N. Environment Programme (UNEP). It has been subjected to several intergovernmental processes; and yet there is still no definite outcome with respect to various proposals to “strengthen” it (including upgrading the existing United Nations Environment Program (UNEP)), as well as reluctance of the sovereign states to consider any *de novo* environmental organization. In this context, back on January 15, 1999, I made a proposal (in a lecture at the legal department of the World Bank, in Washington D.C.) for the “upgrade” of UNEP into a “specialized agency” that could become the U.N. Environment Protection Organization (UNEPO). It is an important proposal that could become acceptable to the states in the near future. In fact, a “strikingly similar” proposal was presented before the U.N. General Assembly by the European Union a full six years after my 1999 proposal.⁴

Can you briefly describe your involvement in environmental law training and capacity building, specifically the capacity building projects undertaken with the Indian Ministry of Environment and Forests?

This goes back to 1998 and 1999, when I did some concrete work with the assistance of the Ford Foundation on *Regional Capacity Building in Environmental Law in South Asia*. I brought to New Delhi some young lawyers, law teachers and those working with environmental law civil society groups from different South Asian countries. They were exposed to about six months of full courses in environmental law. It was a very interesting experience. Subsequently, I have organized for several years specialized lecture workshops for the Union Ministry of Environment & Forests,⁵ as well as the Indian Council for Forestry Research and Education for senior civil servants and forestry officials on select international law issues,

4. See EU Priorities for the 60th General Assembly, http://www.eu-un.europa.eu/articles/en/article_4599_en.htm (last visited Nov. 16, 2010) (“the EU supports the launching of a process to establish a UN agency for the environment, based on UNEP, with a revised and strengthened mandate, supported by stable, adequate and predictable financial contributions and operating on an equal footing with other UN specialised agencies.”).

5. Ministry of Environment and Forests, Government of India, <http://moef.nic.in/index.php> (last visited Nov. 16, 2010).

multilateral environmental agreements and negotiations.⁶ Apart from these, I have conducted several special lecture series at various universities, judicial academies, foreign service institutes, and others to promote environmental law literacy among the judicial officers, foreign service officers, law teachers, students, and others.

The Supreme Court of India has interpreted the fundamental right to life to include the “right to a wholesome environment.”⁷ Can you elaborate on what, specifically, this right includes?

This is a marketable judicial feat of innovation by the Supreme Court of India in the wake of its quest to institutionalize human rights jurisprudence in India. It was triggered as an offshoot of the apex court’s landmark directions in asserting basic rights of prisoners and those subjected to preventive detention. In this process, the court laid down the basic contours of human rights within the framework of the fundamental right to life and liberty guaranteed under the Constitution of India.⁸ It has been a fine example of procedural *due process*. The court has numerous times examined this crucial right and has construed “life” to necessarily include the “finer graces of civilization,”⁹ as well as the “right to a clean and healthy environment.”¹⁰ The broadening of the ambit of the right to life came about through many twists and turns in several landmark cases, starting with the *Doon Valley* case.¹¹ The court has expounded upon this right in various pollution cases and has continued to broaden its scope.¹² This innovative judicial interpretation virtually amounted to a

6. Indian Council of Forestry Research and Education, <http://www.icfre.org/> (last visited Nov. 16, 2010) (these lecture workshops were especially targeted at those who often form part of the official Indian negotiation teams).

7. *See, e.g.*, Indian Council for Enviro-Legal Action v. Union of India, A.I.R. 1996 S.C. 1446; Law Soc’y of India v. Fertilizers & Chemicals Travancore, A.I.R. 1994 Ker. 308.

8. INDIA CONST. art. 21 (“No person shall be deprived of his life or personal liberty except according to procedure established by law”).

9. P. Nalla Thampi v. Union of India, A.I.R. 1985 S.C. 1133.

10. *See, e.g.*, Virender Gaur v. State of Haryana, 1995 (2) S.C.C. 577. *See also* T. Ramakrishna Rao v. Hyderabad Urban Development, Writ Petitions No. 36929 of 1998 (July 20, 2001), *available at* <http://www.elaw.org/node/1843> (decision by the High Court of Andhra Pradesh).

11. Rural Litig. & Entitlement Kendra v. State of Uttar Pradesh, A.I.R. 1985 sc 652, 656.

12. *See, e.g.*, M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965 (dealing with the *Delhi Oleum Gas Leakage* case); M.C. Mehta v. Union of India, A.I.R. 1988 S.C. 1115 (targeting pollution in the River Ganges); M.C. Mehta v. Union of India, (1988) 4 S.C.C. 463 (Kanpur Tanneries’ Litigation); M.C. Mehta v. Union of India,

Constitutional amendment through the back door. Subsequently, the court has reiterated the right in almost every environment related *public interest* case. The underpinning of this judicial innovation has been facilitated by the court's innovation as regards liberalization of the rule of *locus standi* for any disadvantaged group, as well as for protection of pristine environment or cultural or natural heritage sites and monuments.

Several countries around the world have responded to an increase in environmental litigation by setting up their own environmental courts and tribunals. One of the most recent developments has been in India, with the passage of the National Green Tribunal (NGT) Act. Can you briefly explain what prompted India, in addition to increased litigation, to create this tribunal?

There is a history of quest for environmental courts in India. The Supreme Court first touched upon this question in the *Delhi Oleum Gas Leakage* case (1986).¹³ It was propelled by the difficulty faced by the court to deal with the technical nature of the case, since it entailed examining the harmful effects of oleum gas, the toxicity of a caustic chlorine plant and other matters concerning the industry. In this case, the court had to appoint several expert panels as advisors, so that the court could take a judicial view of the matter to make an appropriate pronouncement and take remedial action. But the court found the *ad hoc* mechanism of convening technical experts and commissioners as well as expert institutions (such as Central Pollution Control Board or National Environmental Engineering Research Institute) for each case inconvenient. In fact, the court mooted the idea of a standing "ecological sciences research group" to advise and assist the court as and when required. As such, the court in its concerted view, also called for the establishment of specialized environment courts. In its celebrated 1986 judgment, the court went to great length to make out a case for setting up such specialized environment courts in India. However, the government did not take it quite seriously, and its resistance to such specialized courts could be attributable to various factors. Therefore, the Supreme Court (as well as several High Courts) resorted to designating a special "green bench" — one that could hear

A.I.R. 1997 S.C. 734, and M.C. Mehta v. Union of India, A.I.R. 2001 S.C. 1948) (air pollution harming the Taj Mahal).

13. M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965.

environmental cases on a fixed day — or to assigning all environmental cases to a special judge or judges. For instance, the apex court heard on every Friday all pending environmental matters (some of the matters included cases like the *Ganges River*, the *Taj Mahal*, and the *Shifting of Hazardous Industries from Residential Areas in Delhi* that had several hundred municipalities and industries as respondents, pitted against the sole petitioner-in-person). In fact, some of these marathon litigations have gone on for many years. Subsequently, there were some half-hearted efforts in this direction such as the 1995 National Environment Tribunal Act (“NET”) and the 1997 National Environment Appellate Tribunal.¹⁴ Thus, twenty-four years after the original Supreme Court suggestion, the 2010 National Green Tribunal (NGT) Act has been enacted by the Parliament.¹⁵ It received the Presidential assent on June 2, 2010, and was duly notified on October 18, 2010.

What is the overall purpose of the National Green Tribunal (NGT)?

The overall purpose of the NGT is to provide for the “effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources, including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property.”¹⁶ The coverage of NGT is quite broad and covers almost the entire range of issues concerning environment protection and conservation of natural resources in India (as regulated by the seven enactments mentioned in Schedule I to the NGT Act).

What is the basic structure of the National Green Tribunal?

The NGT provides for a chairperson as well as a large composition of members comprising judicial and expert members. In both cases they will be expected to be *not less than ten but subject to a maximum of twenty full-time members*. Thus, if the NGT is given its full

14. The National Environment Tribunal Act, No. 27 of 1995; INDIA CODE, available at <http://envfor.nic.in/legis/others/tribunal.html> (last visited Nov. 17, 2010); The National Environment Appellate Authority Act, No. 22 of 1997; INDIA CODE, available at <http://envfor.nic.in/legis/others/envapp97.html>.

15. The National Green Tribunal Act, No. 19 of 2010; INDIA CODE, available at <http://www.elaw.org/system/files/National+Green+Tribunal+Act+2010.pdf> (last visited Nov. 17, 2010).

16. *See id.*

permissible strength, it will comprise forty members and one chairperson, which could be a huge composition.

Can you briefly explain the difference between a tribunal and a court, and why India has decided to create a green tribunal as opposed to a court?

The difference goes far beyond composition of the particular court or tribunal. The composition of a court is usually very small (one to three judges). In contrast, the NGT has the potential for a much larger composition (maximum forty plus a chairperson) as provided for in the statute. Still, while the tribunal does have all the powers of a regular civil court, the NGT is not bogged down by the rules of procedures the way a civil court is. A tribunal can follow summary procedure, if required and is, generally, not bound by normal rules of evidence. It will be guided by the *principles of natural justice*. Essentially, a tribunal may do what a court could do, but without such strict fetters that constrain normal courts. Thus it seems to have a hybrid structure.

What is the “green bench” of the Supreme Court of India? Will this continue with the passage of the NGT Bill?

For many years, the Supreme Court of India, in the absence of a special environment court, managed large numbers of environmental litigations through a special “green bench.” When the court saw that the executive did not take its suggestion for setting up an environment court, it created an *ad hoc* panel within its existing structure, where a designated bench of two or three judges heard environmental cases on a fixed day of the week (often every Friday). Such a bench was advantageously comprised of judges who were well-versed in the many technical aspects of environmental matters, and was relatively unaffected by the normal “roster” for the allocation of pending matters. As a result, the same judges could deal with some marathon cases for months and years that brought about expeditious treatment and result-oriented approaches. The green bench became quite well known. In fact, to some extent its existence alone acted as a deterrent, since the court, in most situations, took cases to their logical and just conclusions. This was especially profound in the court’s frequent dealings with the right to a clean and healthy environment as a fundamental right under Article 21 of the constitution. The green

bench was facilitated by its original jurisdiction, inherent powers and authority, and the finality attached to any order or judgment handed down from the apex court. The court could exercise not only preventive jurisdiction, but could also provide remedial justice where environmental harms had already taken place – like invoking the *public trust doctrine* for restoration of *status quo ante* in a case concerning the diversion of the course of the Beas River to protect the private property of M/s Span Motels Pvt. Ltd., owned by the then Union Environment Minister Kamal Nath.¹⁷ It led to the famous reprimand from the apex court that: why has the protector become a predator, causing such harm to the natural resources of India?

What, if any, other environmental adjudicatory mechanisms were in place prior to the enactment of the NGT Act? Were these mechanisms ever successful?

The previous mechanisms in place – The National Environment Appellate Authority and the National Environment Tribunal – were half-hearted mechanisms, since the executive was not serious about the whole issue. It seems the executive took the suggestion of the Supreme Court – for setting up special environmental courts, proposed in the *Delhi Oleum Gas Leakage* case¹⁸ – as mere *obiter dictum* and did not duly follow up. But it somehow grudgingly enacted the 1995 National Environment Tribunal Act, as well as the 1997 National Environment Appellate Authority. The first was never notified and brought into being. The latter came into being but had hardly any work in hand. Both of these had highly-limited jurisdiction.¹⁹ As such, these earlier efforts did not come anywhere near the original suggestion of the Supreme Court for establishment of a specialized set of environmental courts.

It is against this backdrop that we could view the creation of the NGT as a significant, positive development, in spite of its drawbacks.

Do you think that the need for the NGT Act would have arisen if efforts had been made to ensure the functionality of the existing

17. M.C. Mehta v. Kamal Nath and Ors., A.I.R. 2002 S.C. 1515.

18. See M.C. Mehta v. Union of India, A.I.R. 1987 S.C. 965.

19. In many cases, these authorities had the ability to hear only cases involving accidents arising from the handling of any hazardous substance, or an appeal against decisions concerning environmental clearance.

authority (the National Environment Appellate Authority and the National Environment Tribunal)?

As mentioned earlier, both the earlier efforts were half-hearted. Even if the 1995 Environment Tribunal had been established, it was a very limited and casual response to the pressing need for special environment courts as repeatedly called for by the Supreme Court in several of its judgments. Similarly, the NEAA lacked credibility, did not evoke adequate responses, and thus failed. Since they did not cover the broader range of environmental issues, the need for a National Green Tribunal would still have been felt. The need was for a comprehensive environment court or tribunal to deal with all of the many environmental issues. So again, in spite of its existing deficiencies, the NGT is a welcome initiative.

What are the main differences between the National Environment Tribunal (established by the National Environment Tribunal Act) and the new National Green Tribunal?

The mandate was highly limited for the NET. The tribunal could only hear questions of relief and compensation for damages arising from any accident occurring while handling any hazardous substances.²⁰ The NGT is much broader and ambitious in scope, powers, and procedure. In terms of composition, there are some similarities between the NET and NGT. Unlike the NET that sought to provide for relief and compensation for damages relating to the handling of hazardous substances, the NGT seeks to provide for much broader “relief and compensation for damages to persons and property.”²¹ Moreover, unlike the NET, the NGT has sought to derive its mandate from, and takes due cognizance of, the “judicial pronouncement in India” with regard to the fundamental “right to healthy environment” as construed “as a part of the right to life under article 21 of the Constitution.”²² The NET did not prescribe any set number of vice-chairpersons or members. It was left to the discretion of the Central Government (i.e. the Union of India). The NGT, however, shall consist of not less than ten and maximum of twenty judicial as well as expert members. The NGT Act provides for making

20. The National Environment Tribunal Act, *supra* note 14.

21. The National Green Tribunal Act, *supra* note 15.

22. *Id.*

rules generally regulating the practices and procedure of the Tribunal.²³

One of the criticisms of the NGT has been its inclusion of a five-year complaint period. Many argue that due to the fact that many environmental impacts take years to manifest, the short complaint period defeats the purpose of the NGT. Do you agree? If so, what should the time frame be?

There is a genuine concern about this period of limitation, as there are several types of environmental harms that take many years to manifest their adverse health and environmental effects. For instance, any exposure to radiation or chemical leakage (such as that seen in the Bhopal case) could only be seen after many years (not necessarily just within five years as prescribed).²⁴ Even after twenty-five years, the victims of the Bhopal disaster still suffer from a variety of ailments.²⁵ Thus, the period of limitation laid down in the NGT Act must be raised to accommodate any environmental harm that could manifest in the future.

There has even been criticism over calling the judicial body the “National Green Tribunal,” as opposed to the “National Environment Tribunal.” What do you think the correct choice would be and why? Do you think using the term “green” instead of “environment” will have an impact on the effectiveness of the system?

This is just a style preference. Perhaps they just did not want to repeat the same word that was used in the 1995 NET that never saw the light of the day. Possibly, they wanted to try something new and wanted to make it more in tune with the times, in terms of the ‘green justice’ that has become the buzz word around the world.

What do you think of the NGT Act’s wording with respect to the Tribunal having jurisdiction over “substantial questions relating to the environment” (e.g. damage to public health is “broadly

23. *Id.*

24. *See* Union Carbide Corp. v. Union of India, A.I.R. 1992 S.C. 248.

25. *See* Suketu Mehta, *A Cloud Still Hangs Over Bhopal*, N.Y. TIMES, Dec. 2, 2009, at A43.

measurable” or “gravity of damage” to the environment is “substantial”)? Do you think it is proper to ask a judge to make this subjective assessment?

It seems the Green Tribunal’s jurisdiction will extend to any “substantial questions relating to the environment (including enforcement of any legal right relating to environment).”²⁶ However, any such judicial determination could only be with respect to a question that “arises out of the implementation of the [seven] enactments specified in the Schedule I” of the NGT Act.²⁷ Thus, such “substantial questions” will only need to be seen in the context of those seven specified legislations. The court will not be able to go beyond these.

As of June 2010, it has been stated that the tribunal will be established by year’s end; however, the act itself does not set forth a specified date for the law to come into effect. Do you think, without a fixed time frame, that it is possible that this act will be like the National Environment Tribunal Act, which was passed by Parliament in 1995, but never officially established?

The NGT Act came to receive the assent of the President of India on June 2, 2010, and has been duly notified on October 18, 2010, with the appointment of Justice Lokeshwar Singh Panta, a former Supreme Court judge, as the chairperson.

Why is Bhopal set to be the location of the first new court? Do you agree with this decision?

As per the notification issued by the government of India dated October 18, 2010, the NGT will be located in New Delhi, not in Bhopal, but it shall have ‘circuit benches’ across India.

Do you think it is best to set up the new courts in a staggered manner as suggested by the act, or all at once? Why?

As mentioned earlier, it seems the NGT will function as a composite court. It shall have “circuit benches” in different parts of India. Since the chairperson has just been appointed, its actual working will become clear in the coming months once the full

26. The National Green Tribunal Act, *supra* note 15, ch. III.

27. *Id.*

composition is also determined and duly notified. It will be a matter of practice and procedure to be spelled out in the rules of the Tribunal, to see what final shape the NGT takes.

Some have argued that the NGT Act was created in a non-transparent, hurried manner, with inadequate public consultation. Do you agree, and if so, do you think the NGT Act is substantially flawed as a result?

There were indeed concerns in terms of the way in which the Act was drafted, without much wider public debate or consultations with relevant stakeholders including the academia. The executive may not have followed the non-transparent path for obvious reasons. Such drafting processes and legislative consultations are not generally institutionalized. As such, it is the exclusive preserve of the nodal ministry (Environment & Forests), along with the legal draft that is prepared by the law ministry. In the absence of such transparent and participative processes, the concerned legislation may not reflect the long term interest of the public at large. It could become a victim of institutional inertia, and may safeguard the interests only of the industry and not the citizens. Except in cases where there are widespread public outrage or health and safety considerations (for instance, Bt. Brinjal matter),²⁸ such public consultations are very rare.

The larger concern, which is often attached to these special tribunals, relates to the age at which the chairperson and most members are generally appointed – that is, often post-retirement from normal service. Thus, in most cases, the retirement age at which a chairperson or a member joins a Tribunal could be sixty-five or sixty-two (judicial members) or sixty (civil servants). There are genuine concerns that at that age and with such a service background, it may be difficult to expect much in the way of innovation or the active interest necessary to translate the spirit of the Green Tribunal into action. So the question that arises is: Does it serve any public interest to induct such persons who lack enthusiasm or the spirit to give it a push? In this light, the argument of ‘experience’ may not hold much water if the Tribunal simply becomes a dumping ground for retired bureaucrats and judges (in most cases without distinct background or

28. See, e.g., *Bt brinjal controversy unravelled*, PIONEER, Nov. 18, 2010, available at <http://www.dailypioneer.com/231271/Bt-brinjal-controversy-unravelled.html>.

record). As regards the expert members, prospects for appointment of an expert with a legal background (law professor) or socio-economic expertise still remain remote. There appears to be institutionalized discrimination concerning the maximum age up to which a judicial member could work (up to sixty-seven years), as compared to the expert members (who could work up to sixty-five years). In fact, the NGT Act could have provided for a uniform criterion of a maximum term of five years, or an age of seventy years – whichever is earlier. Moreover, instead of a mandatory requirement of a serving or retired judge to be the chairperson, the act could also have provided for the appointment of any eminent social activist, lawyer, or legal professor as chairperson of the tribunal. Since the act has been notified, it seems these flaws could now be addressed by the Parliament once the tribunal sets its work in motion and gradually after the “status quo” mindset gives way to a more progressive approach.

Overall, do you think that the new National Green Tribunal will be effective in addressing the increase in environmental litigation? What, if any, changes do you think must be made prior to the establishment of the new tribunal in order to increase its effectiveness?

The mere fact that a new dispute settlement forum is brought into being, by itself, is not going to take care of the increase in environmental litigation. Several things will need to go into the working of the NGT to address the effectiveness and efficacy of the NGT. The existing composition of the tribunal and the manner in which judges and expert members are selected does not inspire much confidence for imparting “green justice.” As indicated earlier, if the NGT comprises those people whose age, expertise and background does not augur well, the tribunal may not be able to measure up to the expectations of the public. For this, a transparent and institutionalized process needs to be put into place. Moreover, the rules for the practice and procedure of the NGT will need to be forward-looking to ensure it could stand up to huge developmental pressures, bureaucratic inertia, and corporate clout. For this, the NGT will need to hold on to some of the most sacrosanct environmental law principles, such as polluter pays, natural justice, equity, precaution, strict and absolute liability, and public trust doctrine, as well as “entities of incomparable

value.”²⁹ NGT’s success could depend upon its judicious composition and the fair and transparent process for the purpose. Overall, the success of the tribunal will depend on whether and to what extent the executive takes the NGT seriously.

India has a Judicial Institute. Can you tell us about its responsibilities and something about its programs? Will it be involved in the establishment, or in providing services to the new Environmental Tribunal?

There is a National Judicial Academy (NJA) in Bhopal.³⁰ It serves under the direct supervision of the chief justice of India. It is engaged in training and capacity building programs for the judicial officers. It conducts thematic programs throughout the year for different batches of judicial officers who are sent by their respective State Judicial Academies and, in some cases, even the High Courts. It is possible that for the selection of “right” judicial members, the NJA could provide some help. It will depend upon the process and working of the NGT as to how much interface it is allowed to have with the NJA. If so, it will set a very healthy precedent.

29. MINISTRY OF ENV'T & FORESTS, GOV'T OF INDIA, NATIONAL ENVIRONMENTAL POLICY 12 (2006), available at <http://moef.nic.in/downloads/about-the-ministry/introduction-nep2006e.pdf>.

30. National Judicial Academy, India, <http://www.nja.nic.in/> (last visited Nov. 17, 2010).

INTERVIEW

LALANATH DE SILVA: SRI LANKA ENVIRONMENTAL LAWS

Lalanath de Silva currently serves as the director of the World Resources Institute's Access Initiative. He offers a unique perspective into environmental law in Sri Lanka. A graduate of the Sri Lanka Law College, de Silva obtained a Master of Laws degree from Washington University School of Law in 1991. While practicing law in Sri Lanka, de Silva represented politically unpopular clients who were subjected to intimidation and violence. From 1994 to 1996, he served as Legal Consultant to Sri Lanka's Ministry of Environment and Forests, during which time he was involved in the creation of the majority of Sri Lanka's environmental regulations. From 1996 to 2002, he practiced law within the private sector, and was Chairman of the Public Interest Law Foundation and Executive Director of the Environmental Foundation. As a Legal Officer in the Environmental Claims Unit of the United Nations Compensation Commission (UNCC) from 2002 to 2005, he aided in the processing of environmental damage war reparation claims resulting from the 1991 Gulf War. As director of the Access Initiative, de Silva works to promote access to justice in environmental decision-making in countries across the globe.

*Interviewed by Sara Vinson**

*Sara Vinson is a third-year law student at Pace Law School. She was a 2010 Summer Research Scholar for the school's Center for Environmental Legal Studies.

Can you provide some background information on the Access Initiative and how you came to be involved with the program?

The Access Initiative is ten years old now and is operating in fifty countries. It is basically a civil society initiative where coalitions in different countries try to assess their governments under Principle 10 of the Rio Declaration, which has three pillars: access to information concerning the environment; opportunity to participate in decision-making processes about the environment; and access to judicial and administrative proceedings including redress and remedy. We have developed a web-based diagnostic tool kit, with some 148 indicators that are applied to a minimum of eighteen case studies. The tool kit helps identify gaps in laws and practices pertaining to access. We use the evidence developed with the tool kit as a basis for making recommendations and engaging the governments in a dialogue concerning improving access to information and participation, and reforming institutions, laws and practices in order to do so. This has been the strategy and the objective of the Access Initiative. There have been several outcomes that show that this strategy actually does work.

I have been working with NGOs for most of my life except for two brief stints when I worked with the UNCC for three years and the government of Sri Lanka for two years. And so I've always had an abiding interest in access issues. When my work with the UNCC was finished in 2005, I applied for the position of director of the Access Initiative. As director, I have changed the Initiative's course from centering on assessment to centering on outcomes, and changing laws, practices, and institutions.

From 2002 to 2005, you served as a Legal Officer in the Environmental Claims Unit of the UNCC. Can you please briefly describe your work in this position, including your help in processing the largest war reparations claims dealing with environmental damage ever handled by the UNCC?

For me, the time I spent at the UNCC was both educational and exciting. It was very new work for me because until then I had worked at the local or regional level. The UNCC work allowed me to get into an international institution, look at things from an international perspective, and work closely with national governments. I worked particularly closely with the governments of

Saudi Arabia and Iran because I was handling their claims for environmental damage resulting from the 1991 Gulf War. I also worked with the government of Iraq, of course.

The UNCC's establishment of the Environmental Claims Unit to consider war related reparations was the first international mechanism established for war reparations. Historically, the winning side set up tribunals. Even the Nuremburg Trials were basically set up by the Allied Forces, which won the war in Germany. This was the first time that the U.N., as an international body, set up an institution to assess war reparations, which for the first time, again, included environmental restoration and damages. The whole process was novel.

The processing of claims involved natural resource damage assessments, which was very new at the time. From about 2002 to 2005, we worked extensively with scientists and economists trying to put valuation methodologies in place. We had immense challenges because there was hardly any data on the areas that had been damaged in the Middle Eastern desert in 1991. We used satellite photographs trying to figure out what had happened on the ground. There were enormous challenges in terms of evidence of causation and assessing damages.

Roughly \$80 billion worth of environmental claims had to be processed. The main sources of damage were, of course, the oil well fires. Iraqi troops set fire to oil wells as they retreated. Saddam Hussein also dumped 200 million barrels of oil into the Gulf because he wanted to set it alight in the hopes of stopping the forces from coming ashore. There was also the military damage itself. The desert has a very thin layer, about half an inch to one inch, of fertile soil. So, when it rains, you have grass and vegetation, which is why you have shepherds. When that topsoil is removed, that's the end of the vegetation cover. It's dead. The use of large military vehicles and the building of camps and all kinds of military fortifications devastated the desert. Refugees were another source of damage. All of this had to be assessed.

Now let's go back to your time working for the Sri Lanka government as the Legal Consultant to the Ministry of Environment and Forests. Can you tell us about your work at the Ministry?

I was at the Ministry of Environment and Forests from 1994 to 1996. This time was also quite exciting. I basically wrote about 80% of Sri Lanka's environmental regulations. We also drafted a national environmental protection act, which included an environmental tribunal—a law that never saw the light of day. It was killed both by some territorial government agencies, as well as outside companies. There are bits and pieces of it floating around. While I was there, we put together a number of regulations, ranging from noise regulations to chlorofluorocarbons (CFCs), as well as appellate procedures and hazardous waste.

What were your biggest accomplishments as Legal Consultant to the Ministry of Environment and Forests?

The biggest accomplishment during this time was just getting all those regulations on the books and mastering the administrative system. Learning how these regulations are drafted, processed, and adopted and working the system to make that happen was a challenge. I am also proud of another achievement. The U.S. Energy Information Administration regulations had been adopted before I joined the Ministry. I was involved in drafting those regulations as an NGO representative. After I joined the Ministry, I was actively involved in implementing and enforcing those regulations.

What is the most memorable case you worked on as an environmental lawyer in Sri Lanka?

My most memorable case was one that I brought in my own name against the Minister of Environment. It is widely cited and studied in law schools. I brought the suit to force the Minister of the Environment to pass regulations to control vehicle emissions. I was asking for three types of regulations: (1) vehicle emission standards, (2) oil standards for petroleum and diesel, and (3) imported second-hand vehicle standards. We had many second-hand vehicles coming into the country, particularly from Japan. I wanted pollution control standards for those.

The argument was that my right to life had been violated. Unfortunately, the Sri Lanka Constitution does not include an express right to life. The biggest hurdle, therefore, was to convince the court that the right to life was implied by virtue of the existence of other

human rights in the Bill of Rights. The Chief Justice referred this to a constitutional bench of five judges. It was quite an experience to argue before five judges rather than three. I was on my feet for one and a half days. I was not getting through to them on the right to life. At the end of the first day, the presiding judge asked me whether it was the only argument I had. He asked whether I also had an argument on the basis of equality before the law. I did have that argument, but I was not pressing it then. He asked me to think about that argument.

I consulted senior colleagues at the bar and they asked whether I wanted a precedent or whether I wanted clean air. The next day, I presented the argument based on equality — when you have an ambient air quality standard, you also need emission standards — without emissions standards, one cannot maintain an ambient standard. Failure to enact emission standards would lead to violations of the ambient standard in some places — like large cities where vehicular pollution was rampant. In turn, this would result in unequal application of the law in those areas and consequently a heavier pollution impact on human beings living in those areas. I argued that this was unequal treatment of those individuals by deliberate omission on the part of the Minister of Environment. The argument went extremely well. After about an hour, the court stopped me and turned to the additional solicitor general. Within half an hour, the state had agreed to enact all the standards I was asking for within six months. We got a consent decree saying they would be enacted within six months.

What are some of the most important environmental issues that Sri Lanka currently faces? Would you say that the Ministry of Environment and Forests' efforts and regulations have been effective thus far in combating these issues?

Sri Lanka faces a number of issues. Three or four are particularly important. As an island country, the coastline is very important for commercial reasons, including the hotel industry and fishing. There is a lot of competition for space on the coastline. However, with global warming, the coastline is threatened, due to sea level rise, as well as coral die back. Sand mining also upsets the sand movement along the coast. So, coastal zone issues and coastal erosion are very big, visible issues.

Deforestation is also a big issue. There is very little tropical forest left. About 10% to 12% of our land area is in national parks and there is a lot of pressure to reduce those park areas. Twelve percent of a small island is a large amount of land. It is also a very crowded island. Although, when you fly over the country, you would never guess that because it is very green. So there is always pressure to reduce these forest areas.

Another issue we have is elephant-human conflict. In addition, in cities you have the “brown” issues, like water and air pollution.

The Ministry of Environment and Forests’ regulations have been effective to some extent, but in my view, not effective enough. In Sri Lanka, we have an environmental protection licensing scheme for polluting industries. Out of some 40,000 to 50,000 industries that have been surveyed as requiring a license, only 17,000 have obtained one. That’s less than one-third. Two-thirds of these industries are operating without a license, illegally, with no controls. So, there’s still a big problem, and I would say it’s only been about 30% to 50% effective.

There are also capacity constraints on the Ministry of Environment and the Central Environmental Authority — the leading environmental agency in the country. They need more resources and more personnel to enforce these rules and regulations. Also, because of the long civil war in Sri Lanka, there has never been enough money for these issues. Hopefully now with the end of the war, that situation will change. But one danger is the growing push by the government to attract investors at all costs — including waiving environmental safeguards. That would be a big mistake indeed. While Sri Lanka needs new investors to boost its lagging economy, these must be filtered through environmental safeguards.

Have there been any initiatives in Sri Lanka for the development of an environmental court or tribunal? Do you think one is needed?

When I was in the Ministry from 1994 to 1996, I made an effort to create a state of the art tribunal. However, the entire bill was killed. Since then, there has not really been an effort to set up an environmental tribunal, although the judiciary has become very green. There are many green judges, all the way from the Supreme Court down to the local courts. Also, when I was at the Ministry,

there was an extensive program to educate the judges. Every three months or so, we would have trainings. That really did help.

A specialized environmental tribunal is needed. These are specialized issues and it would be better to have a specialized institution. However, perhaps, there are other ways to meet these adjudicatory functions. Perhaps it would be through a tribunal, or an ombudsman, or some other kind of decision-making entity.

The 1978 Constitution lists eight fundamental rights, including: free speech, association and conscience; freedom from torture and illegal detention; and equality. Some have claimed that the 1978 Constitution has taken a “minimalist” approach to human rights, in that it does not account for broader civil and political rights, including economic, social, cultural, and environmental rights. Do you agree with this critique?

Yes and no. Our first Republican constitution was in 1972. The previous constitution did not have a bill of rights. In 1972, we got a bill of rights — a chapter described as “fundamental rights.” It had many of the currently enumerated fundamental rights and was lifted off the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).¹ There was, however, no enforcement mechanism other than ordinary suits for declarations and damages.

In 1978, those rights were to some extent expanded. The limitations were reduced and an enforcement mechanism, via access to the Supreme Court, was introduced. These were pretty innovative and creative changes. From that point of view, the 1978 Constitution broadened and improved upon the 1972 Constitution. However, if you judge it based on international standards, Sri Lanka’s constitution falls far short. Sri Lanka is a party to the UDHR and ICCPR, and so has an obligation to update its laws and ensure they conform to the international obligations articulated in those international human rights instruments.

1. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), U.N. Doc. A/6316 (1966).

The Constitution grants the executive the power of judiciary appointments. What overall effect has this had on the judicial system?

The executive refers to the president who may make high appointments. Appointments to the lower judiciary are made by the Judicial Service Commission, which is composed of Supreme Court judges. Appointments to the upper judiciary — the Court of Appeal and Supreme Court — are made by the president.

Previously, the president did not have executive power. Under the 1972 Constitution, the president was a nominal head of state. Appointments were made by the president on the advice of the prime minister. Over the years there have only been a handful of controversial appointments — perhaps three or four. Most appointments have been either automatic elevations from the lower judiciary or senior counsel from the Attorney General's Department have been appointed.

Unfortunately, there had not been an appointment from the bar since the '70s. Recently, the current president appointed Justice Sureshchandra from the private bar. He is known to me and a good choice. The bar brings a wealth of experience. It is a great pity that more members of the bar have not been appointed to the bench. We have lost out on experience and innovation, and a great source of appointees. I don't think this has been by design. I don't think any president has decided not to appoint members of the private bar. It's just that there has been pressure to push people up from the lower judiciary or attorney general's department. Also, there has not been a great deal of interest from the private bar due to potential loss in income if appointed.

The handful of controversial appointments involved clearly political appointees. Though previous presidents clearly made political appointments, the current president has not done this. At the same time when you look carefully at some of these political appointments, some of them turned out to be great judges. For example, the first woman appointment was very controversial. She was a professor of law and pretty junior to be appointed to the Supreme Court. Over the years though, she has turned out to be a very respected and intelligent judge who writes very good judgments.

All in all, when you talk about appointments, it is difficult to say that the executive has been responsible for politicizing the

judiciary through appointments. Rather, the judiciary has become politicized through external benefits received by judges. For example, once they leave the bench, some have been appointed as ambassadors. There are many “plums” that come with a judicial appointment, like housing. Those kinds of things have influenced judges’ behavior more than actual political appointments. I think this is where the problem lies. There is a need to insulate the judiciary from those kinds of benefits which sometimes amount to misaligned incentives.

There has also been some harassment of judges. Neville Samarakoon CJ, for instance, was charged with contempt of Parliament and there was a motion to dismiss him as chief justice. He had fought for better salaries for judges and fallen out with the president of that time. Other judges who have issued decisions against the government have received threatening calls, government-organized protests outside their homes, and withdrawal of police guards. Bribery has begun to creep into the judiciary, particularly in the lower judiciary. This is pretty painful because Sri Lanka had a very clean and independent judiciary, even under the 1972 Constitution.

The Seventeenth Amendment of the 1978 Constitution establishes a Constitutional Council. Can you briefly describe the responsibilities of this council?

From 2002 to 2005, the Constitutional Council oversaw appointments to the upper judiciary, the Elections Commission, the Police Commission, the Bribery Commission, and a number of other important public offices. While the president continues to make those appointments, they must be approved by the Constitutional Council, which is made up of the president, the prime minister, the leader of the opposition and a number of other people of various political colors. After 2005, a constitutional crisis arose because vacancies on the council were not being filled, but the president was continuing to make appointments by-passing the council.

The council was created to try to rectify what were thought to be political appointments to the judiciary and other key public offices. In my view, the problem and the remedy were ill-matched. What was really needed was a set of rules or constitutional institutions to guard the judiciary from other influences. There is a rule that says salaries cannot be reduced, but there are no rules about receiving benefits,

such as low-cost government land, tax-free cars or post-retirement appointments to commissions and ambassadorial positions. Those issues should have been addressed.

The constitution does not allow for actions to be brought against the executive for non-performance of mandatory legal duties?

The president is immune from suit during the time he or she holds office. That is not unique to Sri Lanka. It is in many countries' constitutions. However, in Sri Lanka you can sue any member of the executive who performs public duties. The writ of mandamus (an order from a superior court to a public officer to perform a mandatory statutory public duty) is provided for in the constitution and is used against officials in the executive branch of government and is granted regularly.

My personal belief with respect to the executive is that no one should be above the law, not even the head of state. You may need special mechanisms to ensure that the head of state is not slapped with thousands of suits from across the country. But in principle, everyone should be subject to the rule of law. It is the constitution that is supreme — not any institution or individual however high an office they might hold. Providing for accountability mechanisms that are effective is the key to a good constitution.

Do you think it necessary that mechanisms, such as a writ of mandamus, be put into place to ensure the protection of fundamental rights?

Under the current constitution, it is possible to raise fundamental rights violations either directly in the Supreme Court or vicariously in writ applications before other competent courts. Should such issues arise, those courts are obligated to refer the issue for decision by the Supreme Court.

What has been the effect of Sri Lanka's two sets of emergency regulations issued under the Public Security Ordinance and the 1979 Prevention of Terrorism Act on the protection of fundamental rights?

I think that the emergency regulations had a devastating effect on fundamental rights. We must balance this against the need to deal with terrorism, which was a real problem in Sri Lanka. I have

experienced terrorism, particularly as a lawyer dealing with controversial environmental issues. I have been harassed and scared.

Sri Lanka has been a working democracy. The government has struggled to maintain the democracy through terrorist threats. In that situation, you need to bring in laws and regulations, such as these emergency regulations, to deal with the problem. Some of the provisions could have been milder, but I can't honestly step back and say they were totally unnecessary. They certainly could have been crafted in ways that tried to minimize interference with rights and maximize remedies. For example, under these regulations a person could be arrested and detained for weeks without access to a court. But this is never an easy balancing act in the face of terrorism which has no rules and respects nobody.

So, while I think these regulations have hurt fundamental rights, the government had to take some action to deal with the realities of the threat of terrorism. For example, militant groups often exploded bombs in the city of Colombo in crowded places using suicide bombers. Many innocent civilians including children died in these bombings. They disrupted road traffic and railways by damaging infrastructure. They killed dozens of innocent unarmed villagers in their sleep. I'm not agreeing with all the government's actions to deal with these threats, but it is important to balance rights against the maintenance of wider public order and the need to fight terrorism and protect democracy.

Now that the war is over, there really is no need for the regulations. There is evidence that the regulations are being scaled back. The Minister for External Affairs, Professor G.L. Peiris, has said that the regulations will be further reduced over the next year or two. We should return to normal democratic civil government. The sooner we can do that, the better. I think the right steps are being taken, and I would urge the government to keep that momentum and accelerate the pace.

Can you describe some of the issues that lawyers are currently facing in Sri Lanka? Are lawyers severely constrained by the threat of contempt of court?

Due to the war situation, there were a lot of weapons in the market and a lot of ex-soldiers available for hit jobs for very cheap. A culture of violence has grown up side by side with the culture of

civilization. Therefore, lawyers have been intimidated and received violence from all sides — sometimes from opponents, political figures, etc. This is obviously not good and must be condemned

I don't think the threat of contempt of court is what constrains lawyers — rather these kinds of harassments are a bigger problem. Contempt of court has been occasionally used, but has not been that widespread.

Now that Sarath Silva has retired and Chief Justice Asoka de Silva has been appointed, do you see any changes occurring within the judiciary?

I know Asoka de Silva, the new chief justice quite well. He is a very erudite man and very respectable gentleman. He has a lot of experience. He served on the U.N. Criminal Court for Rwanda. He has a lot of legal and judicial experience. I have a lot of respect for him. Unfortunately, he is due to retire soon. He has already made some changes to put the judiciary back on track. He is trying to regain judicial respect and minimize corruption. Within his two years, there may not be a lot he can do, but hopefully the next appointee will carry on his good work. The next appointee could make or break the judiciary.

Do you think the judiciary will gain more freedom in its ability to protect fundamental rights?

I hope the judiciary will gain more freedom. I believe it should do that by sticking to doing what it does best and what the constitution mandates, which is to judge. It should not have these forays into political areas. Parliamentarians should fight the political battles. The judiciary needs to remain independent and engage in its constitutional duty of interpreting the laws and adjudicating disputes impartially.

What recommendations would you make for the Supreme Court as it moves forward? Would you propose any amendments to the constitution to allow for better protection of fundamental rights?

I believe that the human rights chapter in the constitution needs to be broadened. More rights should be included, including the right to a healthful environment and the right to life. There should also be a right to education. Sri Lankans have enjoyed the right to free

education for a while, so why can't it be a right in the constitution? We have nothing to lose. There are a lot of rights like that, that should be written in, including the right to participate in government decision-making and the right to information.

I hope if a new chapter is written, limits will be much smaller and that the courts will be allowed to broaden human rights and interpret them widely. There would also need to be checks and balances. As far as the Supreme Court goes, broadly speaking, the current constitution gives the court broad powers. One recommendation I have though is to empower the Supreme Court with the power of judicial review of legislation. It does have a pre-legislative judicial review. The judiciary may declare a bill unconstitutional, but an independent judiciary needs to have the power of judicial review of legislation — the right to strike down laws that are unconstitutional. That is the only way to ensure the constitution is upheld. I also think there should be additional provisions written in to ensure the Supreme Court is insulated and independent.

BOOK REVIEW

ENVIRONMENTAL GOVERNANCE IN KENYA: IMPLEMENTING THE FRAMEWORK LAW

*Charles O. Okidi, Patricia Kameri-Mbote and
Migai Akech, Eds.*

*East African Educational Publisher, Ltd. 2008
554 pages*

*Reviewed by Hannah Cochrane**

With the realization of the Environmental Management and Co-ordination Act, 1999 (the EMCA), Kenya joined the forty-two countries that have implemented national environmental governance structures. *Environmental Governance in Kenya: Implementing the Framework Law*, edited by Charles Okidi, Patricia Kameri-Mbote and Migai Akech, is the authoritative text on the EMCA. It brings together in a seamless collaboration, thirteen distinguished scholars, advocates and practitioners to discuss Kenya's efforts to harmonize its current environmental conservation and management regime with the EMCA.¹ Prior to 1999, Kenya did not have a cohesive environmental law system, but instead a piecemeal coordination of policies and laws remnant of its colonial past. The EMCA sought to remedy this by "provid[ing] for the establishment of an appropriate legal and institutional framework for the management of the environment in Kenya," while recognizing that the coordination of the current

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1. ENVIRONMENTAL GOVERNANCE IN KENYA: IMPLEMENTING THE FRAMEWORK LAW (Charles Okidi, Patricia Kameri-Mbote & Migai Akech eds., 2008).

sectoral and functional laws already on the books would lead to better environmental management.²

The book is divided into three parts and to a certain extent each builds upon the previous. Part I lays a foundation for the reader with four introductory chapters on environmental law and management, the origin of environmental common law and the intersection of criminal and environmental law. The introduction makes the primer easily understandable for readers without an extensive legal or environmental background. Providing a full overview of the various influences on the development of environmental law, the book draws on English and American common law including classic cases like *Rylands v. Fletcher*,³ as well as traces the roots of international environmental law. It also offers examples from around the world of the emerging right to a healthy environment, which the EMCA incorporates into Kenyan law in section 3 which provides that “every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment.”⁴

Part II offers an excellent overview of the current laws in the agrarian, forestry, land use and land tenure, wildlife, water and sanitation systems, mineral resources, energy, genetic resources and coastal management sectors, and surveys the extent to which these laws are congruent with the framework law.⁵ Under section 148 of EMCA:

[A]ny written law, in force immediately before the coming into force of this Act, relating to the management of the environment shall have effect subject to modification as may be necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of the Act, the provisions of the Act shall prevail.⁶

Therefore, all municipal environmental laws need to be reviewed for compatibility and harmonized with the EMCA. For

2. The Environmental Management and Co-ordination Act (EMCA), No. 8 (1999), KENYA GAZETTE SUPPLEMENT No. 3 Pmbl.

3. [1868] 3 L .R.E. & I. App. 330 (H.L.) The famous House of Lords case where the common law doctrine of strict liability was developed.

4. EMCA § 3.

5. Part II, ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1.

6. EMCA § 148.

example, all land tenure laws on the books must be revised to promote sustainable environmental management as required by the EMCA. This requires not just repealing inconsistent laws, but also creating a comprehensive land use and zoning program to streamline the remaining laws. Each chapter discusses the extent to which harmonization has occurred. Finally, Part III focuses on the larger environment around Kenya with an inquiry into environmental laws across the region and as they apply to the East African Community.

While the book is thorough in breadth, several substantive issues that are briefly mentioned could have been examined more deeply. For example, *locus standi*, the right to bring an action or to be heard by a given forum, is mentioned throughout various discussions.⁷ Prior to the implementation of the EMCA, *locus standi* was a major barrier to environmental justice for the Kenyan public.⁸ In order to be heard, there had to be a showing that the person had a direct personal interest in the matter, usually established by demonstrating harm or damage to property.⁹ This often precluded public interest litigation from being successful.¹⁰ A key accomplishment of the framework law was the lessening of the burdensome standard of proving *locus standi*.¹¹ Section 3(3) of the Act provides that “any person who alleges that his or her entitlement to a clean and healthy environment is being or is likely to be contravened may apply to the High Court for redress.”¹² This creates an express right to standing without having to show a right or interest directly violated beyond a threat to a clean and healthy environment. Creating this right to standing should provide the public with better access to redress and slowly build

7. BLACK'S LAW DICTIONARY 960 (8th ed. 2004); ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1, at 160 *passim*.

8. The well-known case of *Wangari Maathai v. Kenya Times Media Trust Ltd.*, (Civil Case No. 5403 [High Court of Kenya at Nairobi, Dec. 11, 1989]) exemplifies the barriers to redress by a judiciary when it narrowly applies standing rules in the case of public interest litigation.

9. ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1, at 161.

10. See *Wangari Maathai v. Kenya Times Media Trust Ltd.*, *supra* note 8, (denying standing to private citizen to suit for violations to the environment where the general public is affected); *Wangari Maathai v. City Council of Nairobi*, (Civil Case No. 72 [High Court of Kenya at Nairobi, Mar. 17, 1994]) (denying standing to public interest plaintiffs challenging the transfer of development of municipal land).

11. S. Amos Wako, *Foreword* to ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1, at iii.

12. EMCA § 3(3).

accountability and responsibility for the environment. However, there is no discussion about whether the liberalized *locus standi* has created more public participation since the implementation of the EMCA a decade ago. Likewise, although the author mentions the importance of public participation and its absence historically, there is no discussion about how to increase it in Kenya. Public participation is crucial to the success of the framework law and discussion of the progress being made in local communities would have been helpful in terms of “best practices” for other practitioners reading the book.¹³

The chapter on wildlife management delves into colonialism, a major historical influence on Kenya’s law. A review of Kenya’s long history of game management explores how colonialism created some of the deficiencies among Kenya’s sectoral laws. The author shows how the paternalistic game management policies instituted during the colonial period hindered the initial advances made in conservation.¹⁴ While early restrictions on game management tightly controlled hunting, allowances were made for settlers to kill animals destroying crops. However these allowances were not extended to natives. Instead, native Kenyans were forced to rely on game wardens to protect their crops. Today, attempts to take into account communities’ needs while still promoting sustainable management of wildlife resources have not yet struck a feasible balance. The author suggests this may be the result of the state’s failure to institute innovative policies such as enlisting community involvement through equitable sharing of benefits, strengthening the sanctions for poaching or creating a compensation fund for destruction to farm lands by wild game.¹⁵ Due to the complexity of the colonial experience, a more complete exploration of its historical influence on Kenya’s law may have also been instructive since the impact is still felt in the wildlife, land use

13. For a long time, pollution was seen as a by-product of industry and thus foreign investment. The assumption was that environmental degradation was only of concern in the big cities where industry was located. This assumption, and a lack of knowledge on the part of the community damaged by the pollution, contributed to environmental pollution without recourse for many years. See Evanson Chenge Kamau, *Environmental Law and Self-Management by Industries in Kenya*, 17 J. ENVTL. L. 229, 238-39 (2005).

14. The first conservation efforts resulted in the 1900 Convention which called for the reduction of hunting and establishment of national parks and reserves for the protection of wildlife. Wildlife hunting has been banned in Kenya since 1977. However after the 1977 ban, the Kenya Wildlife Service reported as much of 90% of its black rhino population has been depleted due to poaching.

15. ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1, at 304.

and other sectors of law. However, with the book already containing over 500 pages, not everything could be included without making it unwieldy in both weight and content.

Most chapters in the book explore the designated topics in impartial tones, discussing the current state of affairs, harmonization efforts and possible recommendations. The chapter on water and sanitation, however, stands apart for its fairly critical tone. By highlighting serious deficiencies in the current state of the law with respect to water and sanitation, this chapter underscores the urgency of the matter.¹⁶ The Water Act of 2002, enacted only several years after the EMCA, was supposed to harmonize Kenya's water management with the EMCA. However, it carries the same deficiencies as the previous regime, including the lack of clear responsibility among the various agencies and the continued concentration of power within executive authorities. These are the very shortcomings the EMCA sought to remedy. The author states in no uncertain terms, "the policy objective of integrated management of water resources is unlikely to be realized given the many deficiencies of the new Water Act."¹⁷ The chapter on water and sanitation illustrates the monumental task Kenya faces in harmonization of all areas of environmental law, not just the sector explored in this chapter.

This book, a definitive survey of the current landscape of Kenya's environmental law, is an excellent starting point for legislators and policymakers who are responsible for harmonizing the law. With the collective knowledge and experience of thirteen authors, *Environmental Governance in Kenya: Implementing the Framework Law*, is sure to propel Kenya's law forward. The book's stated objectives as set forth in the introduction are to present the current status of Kenya's environmental law; provide Kenyan lawmakers with reasoned recommendations for harmonization; facilitate speedy revision of the current status; create an environmental text for teaching and research at all levels and show the relation between Kenya's framework law and environmental laws of East Africa.¹⁸ Certainly, these objectives have been met.

16. Chapter Thirteen is written by Migai Akech, also an editor of the book.

17. ENVIRONMENTAL GOVERNANCE IN KENYA, *supra* note 1, at 323.

18. *Introduction* to ENVIRONMENTAL GOVERNANCE IN KENYA: IMPLEMENTING THE FRAMEWORK LAW, *supra* note 1, at xx.