

UNEP GLOBAL JUDGES PROGRAMME

**APPLICATION OF ENVIRONMENTAL LAW BY NATIONAL
COURTS AND TRIBUNALS**

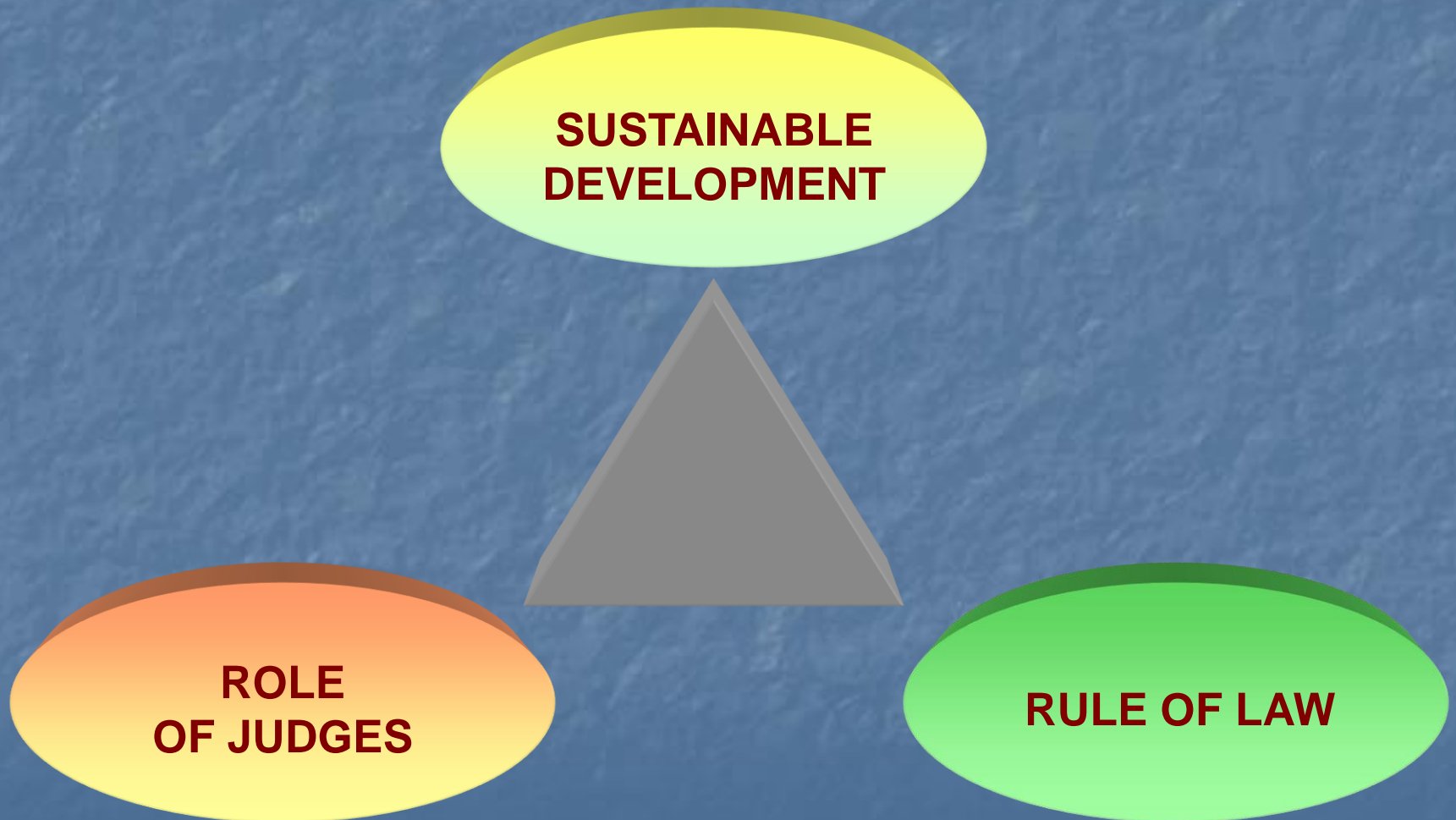
PRESENTATION 3

**ROLE OF THE JUDICIARY IN
PROMOTING THE RULE OF LAW IN
THE AREA OF SUSTAINABLE
DEVELOPMENT**

OUTLINE OF PRESENTATION

- Judging environmental disputes
- Upholding the Rule of Law
- Applying and interpreting laws
- Imposing and supervising remedies
- Conclusion

SUSTAINABLE DEVELOPMENT AND THE RULE OF LAW





ROLE OF THE JUDICIARY IN THE ENVIRONMENTAL ARENA

- Administering environmental litigation
- Promoting compliance by enforcing the law
- Serving as guarantor of public participation rights
- Balancing environment and development considerations
- Influencing societal attitudes towards the environment and the concept of sustainable development
- Through judgments, furthering the development of legal concepts in the area of sustainable development
- Furthering the implementation of regional and global environmental accords where part of the corpus of domestic law
- Serving as a check on executive inaction and overreaching in the environmental arena
- Protecting the rights of the accused

General functions of judges

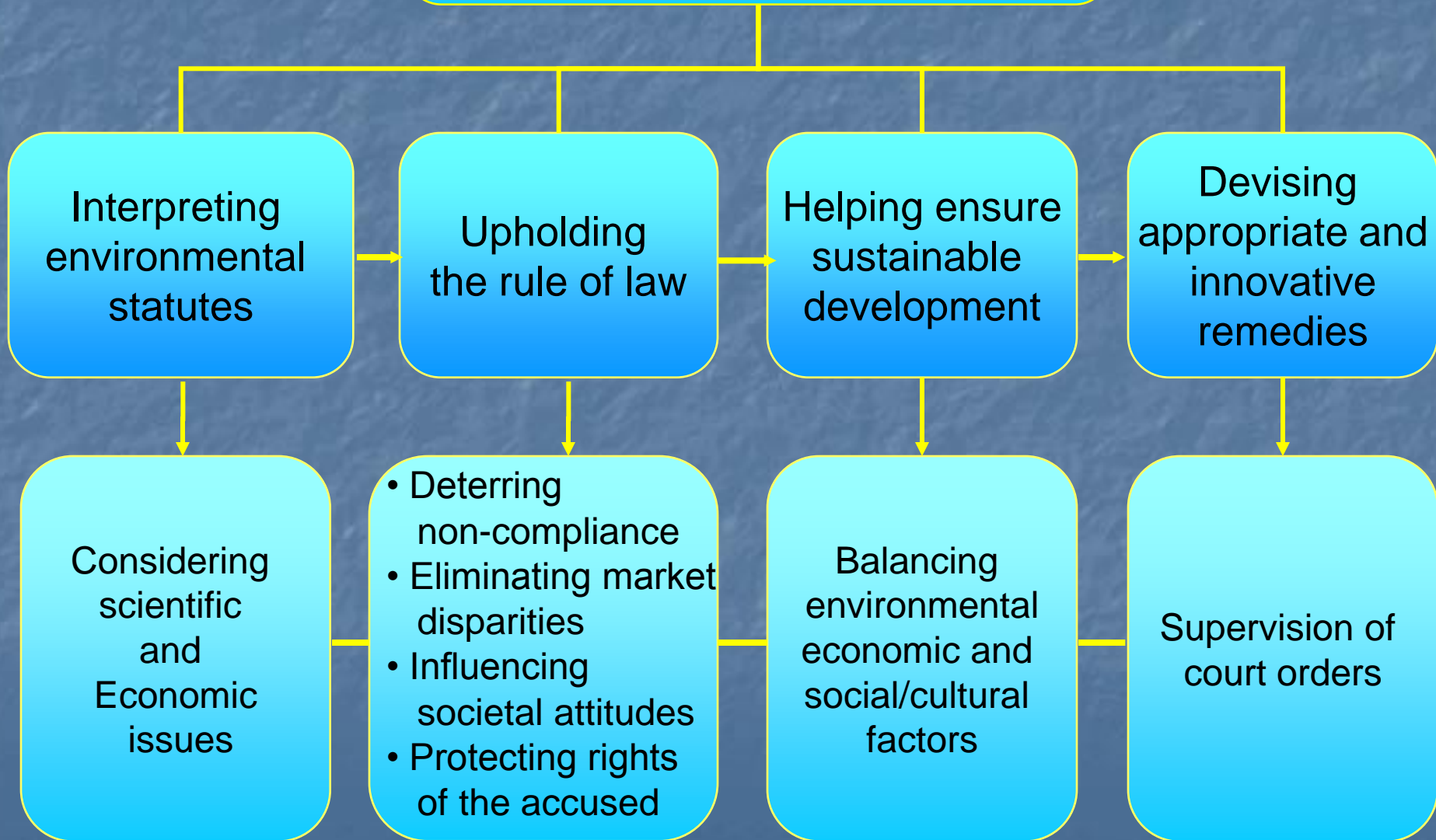
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graph TD; A[General functions of judges] --> B[Peaceful resolution of disputes]; A --> C[Interpreting and applying statutes]; A --> D[Upholding the rule of law]; B <--> C; C <--> D;
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Peaceful resolution of disputes

Interpreting and applying statutes

Upholding the rule of law

Judging Environmental Cases



CHALLENGES IN JUDGING ENVIRONMENTAL DISPUTES

- a) Dealing with scientific issues and evidence
- b) Managing uncertainty and risk
- c) Context of sustainable development
- d) Diversity of issues, parties and settings
- e) Individual v. society
- f) Economic issues
- g) Retroactive effect
- h) Remedies and continuing supervision



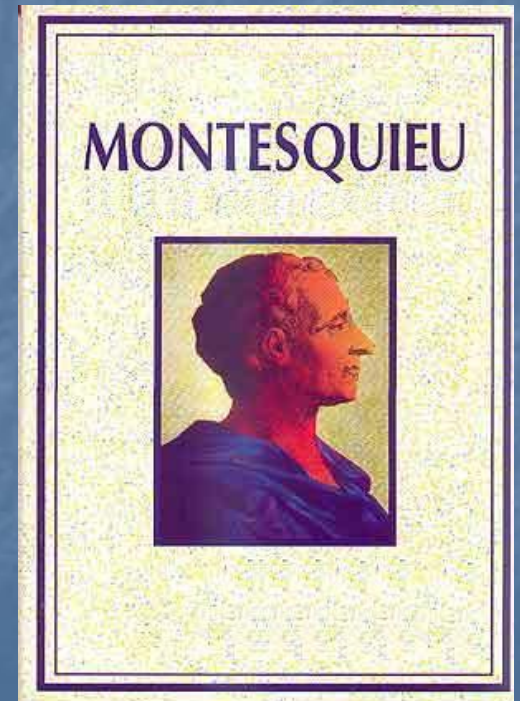
UPHOLDING THE RULE OF LAW

- Ensuring justice, fairness and inclusiveness
- Recognizing constitutional supremacy
- Protecting inalienable individual rights
- Stemming the arbitrary exercise of power by government agencies
- Serving as guarantor of public participation rights
- Holding violators accountable



THE SPIRIT OF LAWS

Charles de Secondat,
Baron de la Brède et de Montesquieu
(1689-1755)

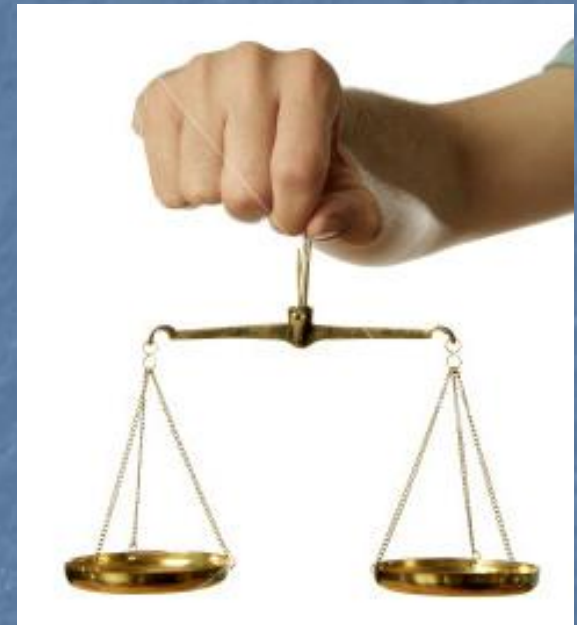


BALANCING ENVIRONMENT AND DEVELOPMENT

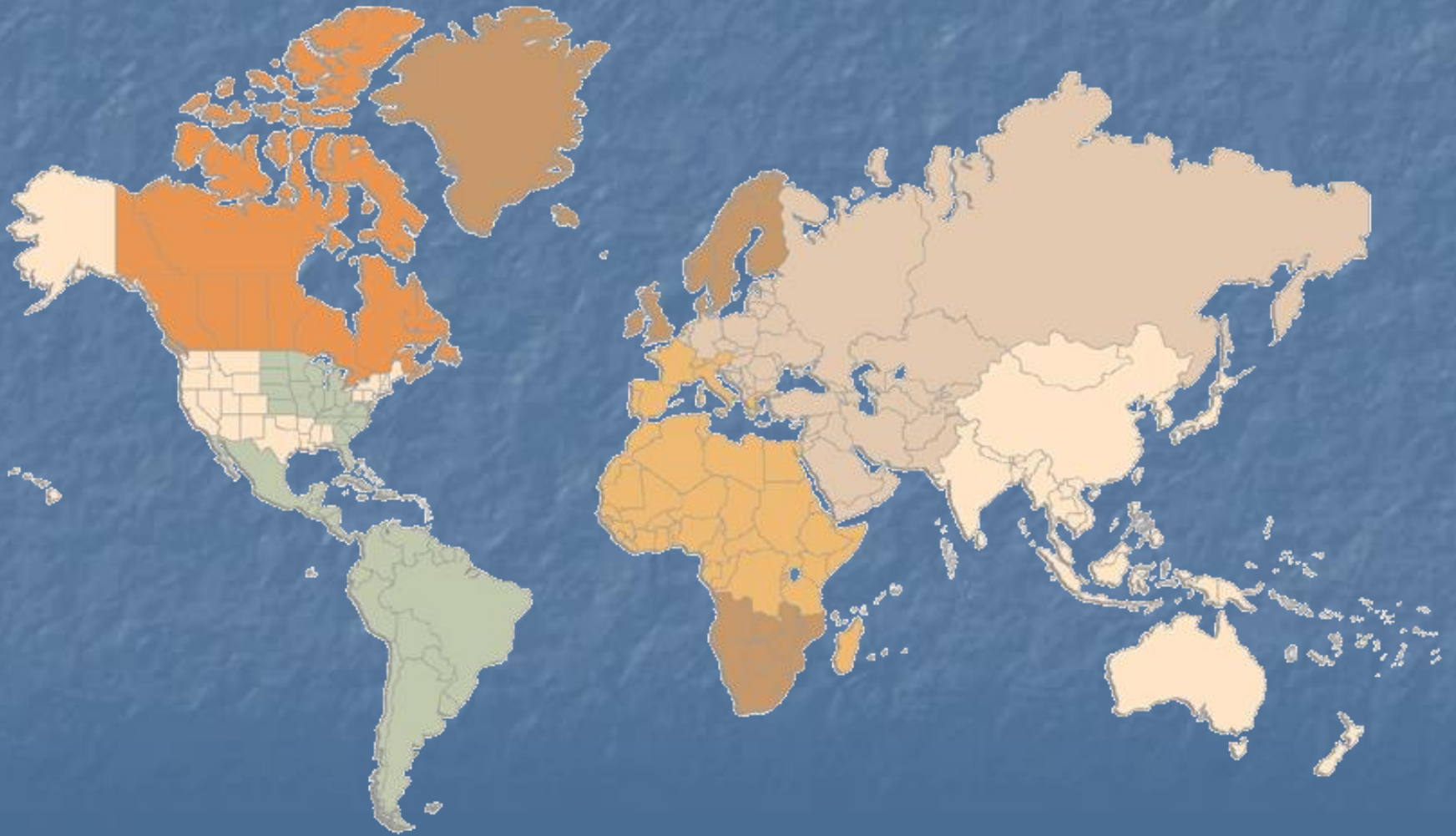


APPLYING AND INTERPRETING THE LAW

- Reasoned judicial decisions
- Context
- Statutory interpretation
- Legislative history
- Precedent
- Reviewing government decisions



Judges and Sustainable Development; A Sampling of Judgments from Around the World



INDIA

Rural Litigation & Entitlement Kendera v Union Of India



- Following a public interest petition:
 - Fresh quarrying in Dhera Dun district stopped
 - closure of several limestone mines
- A Scheme for quarrying - rejected by Committee

Held

- Approved the decision of the Committee
- Brings into focus the conflict b/w development & conservation & emphasises the need for reconciling the two in the larger interests of the country

INDIA

Vellore Citizens Welfare Forum v Union of India

- Pollution caused by discharge of untreated effluent by tanneries and other industries



Held

- The Central Govt. to constitute an authority to
 - implement the precautionary and “polluter pays” approaches
 - identify the families who had suffered
 - assess compensation to be paid by the polluters
- Monitored by a special bench - “Green Bench”

INDIA

Vellore Citizens Welfare Forum v. Union of India

- Tanneries discharging untreated effluent into agricultural fields, waterways & openlands.
- Upheld:
 - Relied on Pollutor Pays and Precautionary Approaches
 - Ordered Control Government to establish authority to identify loss to environment and damage to persons and determine compensation
 - Fine imposed on Tanneries put into Environment Protection Fund.

SRI LANKA

Bulankulama VS. Secretary, Ministry of Industrial Development

- Fundamental rights Case. Exploitation of phosphate deposit inside Sri Lanka's Cultural Triangle. Threat of imminent environmental damage
- Supreme Court of Sri Lanka embraced or applied the following concepts:
 - Sustainable Development
 - Inter-generational equity
 - Protection of the cultural heritage
 - Precautionary Principle
 - Requirement of EIA
 - Polluter Pays Principle
 - The Imperative for Gender-neutral legislation
 - Public Participation
 - Access to environmental information



PAKISTAN

Shehla Zia v WAPDA



- Residents alleged electromagnetic field posed health hazard from construction of a grid station
- “At present, scientific evidence regarding the possibility of adverse biological effects from exposure to power-frequency fields, as well as the possibility of reducing or eliminating such effects, is inconclusive
- The remaining question is how the legal system, including both the judiciary and the various regulatory agencies, might respond to this scientific uncertainty
- In such a situation, the precautionary principle should be applied. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence and precaution.”

PHILIPPINES

Oposa v. Factoran

- 43 Minors represented by their parents brought case against government to cancel timber licenses on ground that destruction of natural resources affected rights of present and future generations.
- Held: rights of future generations recognised as an expression of "inter-generational justice"



MALAYSIA

Kajing Tubik & others v Ekran Biid & others (Bakun Dam case)

- Petitioners deprived of right to obtain copy of EIA to make public representation, as the Minister had issued an Order declaring that EQA would not apply to Sarawak
- Held: Public participation under EQA mandatory and as of Right
- Declared Ministers Order Invalid



UNITED KINGDOM

Empress Cars Ltd v National Rivers Authority

- Spillage from a diesel tank into the river
- The appellant was convicted for causing water pollution and he appealed

Held

- Appeal dismissed
- Sufficient that the company allowed a state of affairs in which polluting matter could escape, whether or not this was the immediate cause of water pollution

UNITED KINGDOM

Environment Agency v Brock

- Allegedly caused tip leachate to enter a ditch
- Contrary to Section 85 (1) and (6) of the Water Resources Act 1991
- The Magistrate acquitted the company - stated the case for opinion of the High Court

Held

- House of Lords in the Empress Car Co. Case – strict liability under Section 85 (1)
- The matter was remitted back to the Magistrates with a direction to convict the company



SOUTH AFRICA

Wildlife Society of Southern Africa & others v Minister of Environmental Affairs & Tourism & others

- Coastal conservation area –
dwellings & roads → environmental degradation
- No preventive measures by Ministers responsible
- Application for Order compelling respondents to
enforce legal provisions

Held

- *locus standi* of applicants conceded by Constitution
- Take steps to enforce provisions of Decree 9
(Environment Conservation) 1992

TANZANIA

Festo Balegele & 749 others v Dar es Salaam City Council

- The applicants sought orders of:
 - *certiorari* - quash decision of dumping waste
 - prohibition - barring future use of site
 - *mandamus* - establish a suitable site
- The respondent –
dumping temporary, sought order to continue
- *locus standi* of applicants upheld & orders granted
- Life deliberately exposed to danger
 - Denial of a basic right



KENYA

Waweru V Republic of Kenya 2006

- Development that threatens life is not sustainable and ought to be halted
- “The council is in a position of public trust to ... ensure that adequate land is available for sewage treatment works”
- Government is under the law under an obligation to approve sustainable development and nothing more, which is development that meets the needs of the present without compromising the ability of future generations to meet their needs”
- At this time and age, no development is valid which cannot answer the requirements of sustainable development”

KENYA

Adnan Karama Petroleum Ltd. Vs. National Environment Management Authority

- Order to close a petrol filling station as it posed a serious threat to the environment and human health.
- Pertinent issues: a chance to be heard; whether petrol station and its operations are in compliance with the law; whether it posed actual and potential threats of damage to human health and the environment; notice to close down *ultra vires* the Respondent's powers; whether prompted by malice and bad faith; who has responsibility to carry out an environmental audit.
- Held: Location of facility inappropriate, and it does not allow for necessary remedial measures to be taken to bring the facility and its operations into compliance with the law. The deficiencies of the facility are not capable of being remedied.
- Reasonable to require the facility to be closed down completely.
- Authority can ask proprietors to conduct environmental audits and ensure compliance.

UNITED STATES

Sierra Club et. al v Coleman and Tiemann

- The construction of the Darien Gap Highway
- Environmental groups sought enjoining orders

Held

- A preliminary injunction granted and later extended
 - inadequate compliance with the provisions of the National Environmental Policy Act (NEPA)
 - Failure to circulate the Final Environmental Impact Assessment report to the Environmental Protection Agency for comments
 - Failure to discuss possible alternatives

CANADA

R. V Bata Industries Limited

- Corporation and directors charged with pollution of ground water and soil, for failing to take all reasonable care to prevent the discharge of pollutants
- Defendants argued that they had exercised “due diligence”
- Court found corporation and its directors liable



ARGENTINA

Asociacion Coordinadora de Usuarios, Consumidores y Contribuyentes v. ENRE-EDESUR

- Effects of electricity grid on residents
- Court explicitly stated that it was applying the precautionary approach embodied in the law and several international environmental instruments

AUSTRALIA

Leach v. National Parks and Wildlife Service



AUSTRALIA

Booth v Bosworth

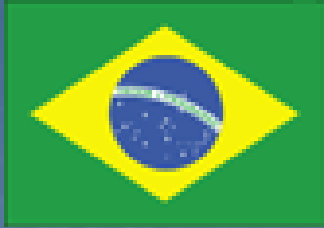
Case concerned killing of spectacled flying foxes to protect lychee orchard situated near a World Heritage area, which was the main habitat of the flying fox

Spectacled Flying Fox
(Fruit bat)



JUDICIAL OBSERVATIONS ABOUT SUSTAINABLE DEVELOPMENT





Brazil

“..., neither the Constitution, nor any other Brazilian law mentions the words “sustainable development”. The judicial decisions do not use this expression either. We have thousands of precedents in Brazil and no one refers to sustainable development. However, in many of them, it is possible to find it used in other words where the economic exploitation is linked to respect towards the environment...”

Hon. Justice Vladimir Passos De Freitas
President, Federal Court, Brazil



Canada

The question of Sustainable Development, as many have already said, is to bring together all debates on Law: International Law, Public Law, International Private Law, Comparative Law and as was said this morning, the Philosophy of Law too, to contribute to the emergence of universal legal values, a sort of common law for sustainable development

Hon. Justice Charles D. Gonthier
Judge
Supreme Court of Canada



India

While dealing with such cases, an important principle which has been applied and followed is that considering the need for economic growth, there has to be sustainable development. It is now recognized that environment and development must co-exist. There cannot be protection of environment at the cost development, or development at the cost of environment. The two must co-exist. A proper balance must be struck.

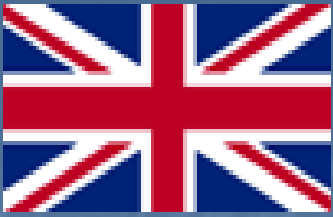
Hon. Mr. Justice B.N. Kirpal
Chief Justice of India



South Africa

Of course, we do not invent the text. We do not invent the principles. We do not invent the norms. They are to be found in international instruments; they are to be found in legislation, in constitutions. So we work from the instruments that are there, if we look hard enough to find them, and we put them together. But we interpret them and use them and implement them in an active kind of way. And that's where the principles that we profess become important. We need to have coherence. We need to have guiding themes to the huge multiplicity of measures that give underlying rationale for what we are doing so that it is organized and fruitful. We also need sustainable forms of remedy. And again this puts pressure on us as judges to be creative. Remedies that themselves are sustainable. It is very easy to fall into the temptation of judicial populism, to become a hero denouncing the polluters, denouncing those destroying the environment. But if we don't come up with a remedy that is effective and is itself a sustainable remedy, then we are simply trivializing the very enterprise that we are seeking to pursue.

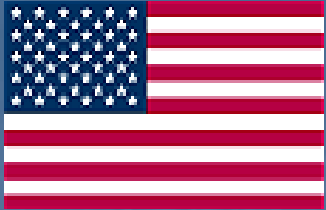
Hon. Justice Albi Sachs - Justice of the Constitutional Court of South Africa



United Kingdom

: “...it is my firm belief that the judiciary of different jurisdictions have an immense amount to learn from each other. Our legal systems may differ. They may fall on one side or the other of the divide between the common law and civil law systems, or they may be a mixture of both systems or even unrelated to either of those systems. Yet, the problems with which they are confronted today are still very similar ...One of the problems, is how to protect the environment, the critically important subject of this conference.”

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



USA

So, my view is that the rule of law is where we should begin and that the rule of law is best observed through sustaining and improving the democratic process. It may take longer than the non-rule of law process, but in the long run society and society's choices will be enhanced. I do not disagree with the importance of environmental law. I do not disagree with the importance of sustainable development. What I do propose is that we do it in a democratic process ensuring and understanding the procedures which make life worth living in countries with liberty and the democratic process.

Hon. Justice J. Clifford Wallace
Chief Judge Emeritus
United States Court of Appeals

CONCLUSIONS

