



# **GLOBAL JUDGES SYMPOSIUM ON SUSTAINABLE DEVELOPMENT AND THE ROLE OF LAW**

Johannesburg, South Africa  
18–20 August 2002

**REPORT  
(Country Papers)**

**VOLUME II**



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**Global Judges Symposium on  
Sustainable Development and the Role of Law**

**REPORT**

**VOLUME II**

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## MESSAGE FROM THE EXECUTIVE DIRECTOR OF UNEP

I am very pleased to send this Message to the *Report of the Global Judges Symposium on Sustainable Development and the Role of Law*, which represents the verbatim report of the Symposium. The Symposium was held in Johannesburg, South Africa, from 18 to 20 August, 2002, as a parallel event to the World Summit on Sustainable Development (WSSD). The Symposium brought together over 120 Senior Judges, including 32 Chief Justices from around the world representative of the different geographical regions of the World and of diverse legal systems.



The Global Judges Symposium was convened with a view to fostering a better informed and more active judiciary, advancing the rule of law in the area of sustainable development. This requires information sharing and the promotion of enriched awareness of the issues relating to sustainable development, especially among judges from different regions of the world. An important outcome of the Symposium was the adoption of the *Johannesburg Principles on the Role of Law and Sustainable Development*, which were submitted to the WSSD.

The Judiciary is a crucial partner in bringing about a judicious balance between environmental, social and developmental considerations and thereby promoting sustainable development. Courts of Law of many countries have demonstrated sensitivity to promoting the rule of law in the field of sustainable development through their judgments and pronouncements which, typically, have to balance between the imperatives of environmental management and of economic development.

Recognising this fact, the Governing Council of UNEP in its decision 21/23 on the Programme for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty-First Century (Montevideo Programme III), called on UNEP to continue to give priority to securing active judicial involvement in promoting the rule of law in the area of environmental law and sustainable development.

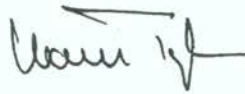
In fulfilment of this mandate UNEP, in collaboration with other partners, has organised regional symposia for judges in several geographical regions of the World including in Africa, (1995), South Asia (1997), South East Asia (1999), Latin America (2000), Caribbean (2001) and the Pacific (2002). Chief Justices and senior Judges from some fifty countries have participated in these Regional Symposia.

The Global Symposium, whose proceedings are published in this Volume, sought to build upon the Regional Judges Symposia. It marks a new phase in UNEP's effort to promote the further development and effective implementation and enforcement of environmental law through the active support of the judiciary, functioning within its constitutionally mandated role in regard to the interpretation, enforcement and enhancement of law.

This verbatim Report of the Symposium captures the richness of the discussions at the Symposium and the diversity and complexity of issues arising from judicial efforts to enforce the requirements of the various multilateral treaties in the field of sustainable development within their national jurisdictions. The Report is an important addition to the literature dealing with the promotion

and further development of sustainable development. Its publication is a tribute to the Chief Justices and other senior judges and the resource persons who participated in the Symposium as well as partner organisations who collaborated with UNEP in organising and funding the Symposium.

I take this opportunity to thank everyone who contributed to the success of the Symposium and assure UNEP's resolve to take action to implement the recommendations arising from the Symposium.

A handwritten signature in black ink, appearing to read 'Klaus Toepfer', with a horizontal line extending to the right.

Klaus Toepfer  
Executive Director

## I. INTRODUCTION

The Global Judges Symposium on Sustainable Development and the Role of Law was organized by UNEP, the South African Government and other partners. It was held at the Kopanong Hotel, Johannesburg, South Africa from 18 to 20 August, 2002, as a event parallel to the World Summit on Sustainable Development (WSSD). This Symposium was attended by over 120 Senior Judges, including 32 Chief Justices from around the world, representative of different not only geographical regions of the United Nations, but also its diverse legal systems.

The overall objective of the Global Symposium was to foster a more active and better informed Judiciary, that advances the rule of law in the area of Sustainable Development. It was envisaged that this would be achieved in two ways: through information sharing and awareness enrichment at the Symposium especially among judges from different regions of the world and also through the triggering of follow up activities under a plan of action flowing from the Symposium.

The Judiciary is a crucial partner in bringing about a judicious balance regarding environmental, social and developmental considerations and thereby in promoting Sustainable Development. In the field of Sustainable Development, Courts of law of many countries have demonstrated sensitivity to promoting the rule of law through their judgments and pronouncements. Recognising this fact, *Decision 21/23 on the Programme for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty First Century; the Montevideo Programme III*, promulgated by UNEP's Governing council, called on UNEP to continue giving priority to securing active judicial involvement and to promoting the rule of law in the area of environmental law and sustainable development.

Getting the Judiciary behind international and national efforts to promote the goals of sustainable development has many advantages, which are self-evident and include:

- Promoting compliance and enforcement of environmental regulations;
- Balancing environmental, social and developmental considerations in judicial decision making;
- Networking among judiciaries regarding exchanging judgements, getting information on environmental law and policy, and becoming aware of international developments in the field;
- Promoting the development of regional environmental accords and implementation of global and regional environmental conventions through judicial pronouncements;
- Promoting national policies and strategies for environmental management in the context of the respective socio-economic and cultural realities through judicial pronouncements and
- Strengthening the hand of the Executive in fearlessly enforcing environmental regulations, against improper influences which stifle Executive action.

The Global Symposium sought to build upon six Regional Judges Symposia that UNEP, in collaboration with several partner agencies convened in: Africa, (1995), South Asia (1997), South East Asia (1999), Latin America (2000), Caribbean (2001) and the Pacific (2002). Chief Justices and Senior Judges from some fifty countries participated in these Regional Symposia. In convening these Regional Symposia, the organisations that collaborated with UNEP included UNDP, UNU, the Commonwealth Secretariat, the Hanns Seidel Foundation, the Government of the Netherlands, SPREP, the World Bank Institute, US-EPA, SACEP, NORAD, the Chief Justice's Chambers in Philippines and the Premier's Department in Queensland, Australia.

The Global Judges Symposium, as have the Regional Symposia, sought to achieve a number of specific objectives:

- To provide a global perspective to the importance of the national role that the Judiciary plays in promoting sustainable development through the Rule of Law;
- To enhance the profile and the level of understanding of the different approaches that are taken by the Judiciary at national level in implementing the *Rio Declaration's* 10<sup>th</sup> Principle, regarding the vital elements of Governance; This is in regard to public participation and access to both information and justice;
- To lay a foundation for a well-structured co-ordinated and sustained programme of support, regarding capacity strengthening of national judiciaries around the world. This focuses in the areas of improving governance and the Rule of Law and implementing National Environmental Law, especially in both developing countries and countries in transition.
- To present the recommendations of the Global Judges Symposium on the strengthening of the National Judiciary capacity for promoting the Rule of Law in the area of sustainable development to the United Nations World Summit on Sustainable Development.

The following themes were expounded upon in the Symposium:

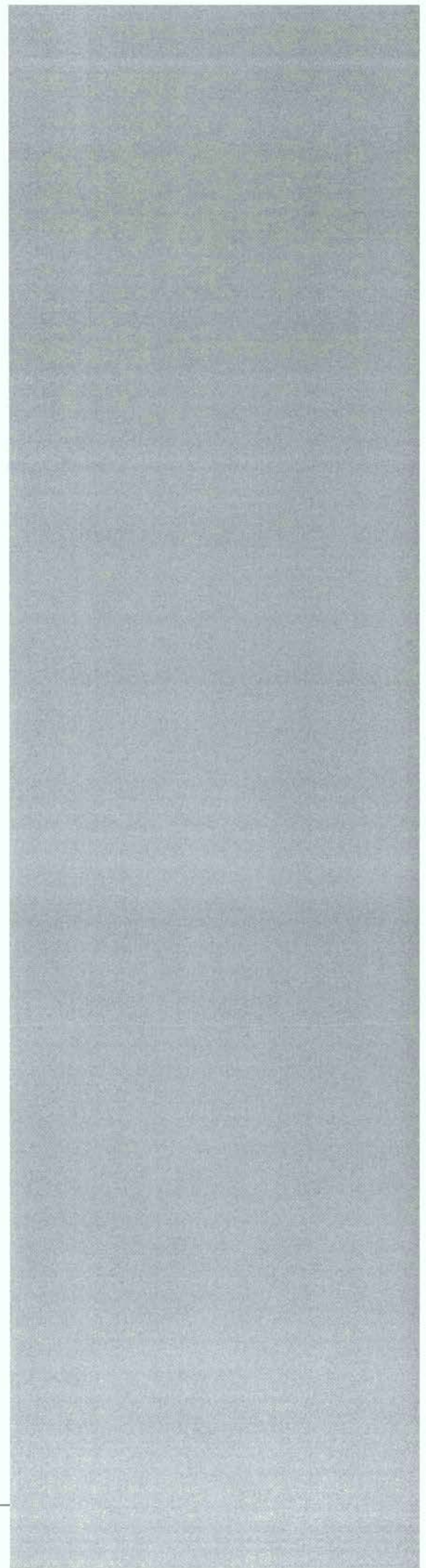
- i) Sustainable Development and the Role of Law;
- ii) National Environmental Governance and the Role of Law;
- iii) Environmental Justice, Human Rights and the Rule of Law;
- iv) The Role of the United Nations and Others in Promoting the Progressive Development of Environmental Law in the context of Sustainable Development; and
- v) Strengthening the Global Judiciary to meet the challenges of the 21<sup>st</sup> Century in the area of Environmental Law in the context of Sustainable Development.

There was a short presentation by Special Guest Speakers, followed by brief interventions by the panel comprising 4-5 participants. Then a round-table dialogue structured along the lines of an Issues Paper prepared in advance was found to be the most appropriate, considering the participation level. Resource persons had prepared the papers presented at the Symposium. The participants prepared Country Papers, which were also presented. A principal outcome of the Symposium was the *Johannesburg Principles*. These were made available to the WSSD.

The proceedings of the Symposium have been published by UNEP in two Volumes. Volume I is the Verbatim Report of the proceedings, while Volume II is a publication of the papers that were either presented at the Symposium, or were otherwise made available to the participants, even if they were not formally presented.



**II. SPEECHES AT THE  
COMMENCEMENT OF THE  
SYMPOSIUM**



## 1. SPEECH DELIVERED AT THE INAUGURATION OF THE GLOBAL JUDGES SYMPOSIUM

*Dr. Klaus Toepfer, Executive Director of UNEP*

Your Excellency Mr. Jacob Zuma, Deputy President of the Republic of South Africa, Hon. Justice Arthur Chaskalson, Chief Justice of South Africa and the host of this Symposium, Hon. Minister P.M. Maduna, Minister of Justice and Constitutional Development, Hon. Mohamed Valli Moosa, Minister of Environmental Affairs and Tourism, Hon. Ministers, Hon. Chief Justices and Judges, Distinguished Participants and Guests, Ladies and Gentlemen.

It gives me great pleasure, on behalf of the United Nations Environment Programme to welcome the distinguished Chief Justices, Senior Judges and other participants from around the world to the UNEP Global Symposium on Sustainable Development and the Role of Law. At the very outset, let me thank the Hon. Chief Justice of South Africa, Justice A. Chaskalson for so graciously agreeing to host this important event. My gratitude also extends to the Government of South Africa for every support and assistance given in organizing this Symposium.

Celebrating a passage of thirty years, this year, since its journey from Stockholm, UNEP has led in the progressive development of international environmental law. It has accomplished this through its sponsorship and support for the negotiation of international legal instruments that have far-reaching global and regional significance, and its active support of developing countries and newly independent states in formulating and implementing environmental law regimes.

Not only has the International Community widely appreciated UNEP's contribution, but Mr. Kofi Annan, United Nation's Secretary General applauded it in the 1998 UN Reform Proposals placed before the United Nations General Assembly in 1998. Then, he expressly recognised UNEP's "contribution to the initiation, negotiation and support of some of the most important treaties that have been agreed in the international field," as one of it's *most notable achievements*.

We meet in Johannesburg, on the eve of the World Summit on Sustainable Development, to open a new frontier of action that has the potential to contribute in a tangible, measurable and effective way, to the realization of the goals of the *United Nations Millennium Declaration*. These were adopted at Fifty-fifth Session of the UN General Assembly, and the future implementation of the outcome of the World Summit of Sustainable Development, which will convene in Johannesburg next week. These are to mobilise the full potential of the judiciaries in all countries around the world in vindicating our civilization's shared interest in a healthy and secure environment, via the interpretation, enhancement and enforcement of environmental law. This includes the universal application of the *Guidelines on Environmental Compliance and Enforcement* adopted at the Seventh Special Session of the UNEP Governing Council held in Cartagena, earlier this year. The foundation of realizing global environmental justice rests upon the three pillars of sustainable development, namely environmental, economic and social development. UNEP remains firmly committed to assisting the Judiciary in realising the goal of Global Environmental Justice, since it is the special responsibility of the global Judiciary.

Never before have so many distinguished Chief Justices and other Senior Judges from national and international courts and tribunals, of both developing and developed countries around the world, ever met to discuss any branch of law. This unique gathering is itself therefore, a glowing testimony to their conviction that the Judiciary, well informed of the rapidly expanding boundaries of environmental law and sensitive to their role and responsibilities in promoting the rule of law in regard to environmentally friendly development, is essential for the realisation of sustainable

development. It should therefore be systematically highlighted and fostered. It is indeed an auspicious lead-up to the World Summit on Sustainable Development, which will commence not far from here, in a week's time.

Since *Stockholm*, the thirty years have heralded the creation of an intertwined framework of global, regional and national environmental law. This, as the *Malmö Ministerial Declaration* adopted at the First Global Ministerial Environmental Forum states, "provide[s] a sound basis for addressing the major environmental threats of the day."

The imperative of the next decade is to underpin these gains with a more coherent, coordinated and determined approach towards their implementation and further strengthening the enforcement and liability regimes. The Judiciary's inherent authority, as well as the indispensable and pivotal role that it plays in this regard, are widely acknowledged and recognised.

Teetering at the edge of sustainability, the fragile state of the global environment has been likened to whichever point of a spider's web is touched: since doing so, causes the ripple that it creates to impact upon every point of that web. Thus, for example, global warming impacts on desertification, land degradation, loss of biodiversity, change in weather patterns, which in turn gives rise to floods, famines and droughts, which have devastating consequences for all forms of life on earth.

Tragically, it is the poorest segments of the population that suffer most from these adverse consequences, losing not only their livelihood, but also life itself. Borne out of their own judicial experience, this point has not gone unnoticed by the Judges who participated in UNEP's six Regional Judges Symposia, who have highlighted this fact.

The linkages between environmental degradation, poverty, denial of human rights and justice, are all too well documented in the judicial literature for me dwell at length on it before an audience holding the biggest ever gathering of Chief Justices and Senior Supreme Court Judges from around the world. In this age of globalisation, it is evident that the well being of the poor is inextricably intertwined with not only the well being of the rich, but also the well being of the earth. Intergenerational Equity is not a pious sentiment, but a clarion call to determined and urgent action. Through three volumes of *Summaries of Judgements in Environment-related cases* from around the world, the environmental case law presented to you, is replete with judicial pronouncements. These uphold the three pillars of Environmental Justice - Public Participation, Access to Information and Justice, and other principles of environmental law reflected in the *Stockholm* and *Rio Declarations*. UNEP remains deeply committed to giving every encouragement and support to their efforts.

The global impact of environmental harm brings home the truth that we are all in this together! Each of our actions, each of our decisions, has a direct link to whether the world as we know it today will survive, or succumb during the lifetime of our children. Success in combating environmental degradation is dependent on the full participation of all actors in society. It is therefore essential to forge a Global Partnership, to build an enduring civilization on Earth that rests on the reaffirmation of Human Values set out in the *United Nations Millennium Declaration*: Freedom, Equality, Solidarity, Tolerance, Respect for nature and Shared Responsibility. It is the Judiciary that has a key role to play, in weaving these values into the fabric of contemporary global civilization. One of the key ways of translating these shared values into actions is by strengthening respect for the rule of law in international as in national affairs. Obviously, the Judiciary has a pivotal role to play in this respect.

Having this Symposium during the week before the World Summit on Sustainable Development provides a unique opportunity to convey a strong message from you. It is the practical, useful perspective of the independent body in governance charged with interpreting and enforcing the

law, which will inform and guide the work of the World Summit. I note with much satisfaction, that the discussions at the Symposium will focus on a wide range of subjects relating to the global Judiciary's commitment to contribute towards the realization of the goals of sustainable development, through their constitutionally-mandated role as guardians in the enhancement, interpretation and enforcement of law. I feel certain that this Symposium will in taking full advantage of the Judiciary's unique reservoir of expertise and experience in this field, examine ways and means of fostering a Judiciary well informed for advancing compliance, enforcement and enhancement of national and international environmental law. To us the Global Judges Symposium is of special character and significance. I hope that this Symposium will lay a strong foundation for a strategic partnership with you and the judicial system that you represent worldwide, for the pursuit of the principles and goals of sustainable development within the context of global environmental governance.

I wish this Symposium every success!

## 2. KEYNOTE ADDRESS AT THE OPENING SESSION

### *Dr. Penuell Maduna, Minister for Justice and Constitutional Development, Republic of South Africa*

Chair of the Symposium, Hon. Chief Justice Arthur Chaskalson, Your Excellencies, Distinguished Delegates, Ladies and Gentlemen. A very good morning, to you! I trust that all of us had a good rest last night and are ready and raring to get on with the Symposium's tasks.

Last night, when expressing our gratitude to the many persons who have sponsored our Symposium, I forgot to inform you that the beautiful briefcases that some of us received on our arrival at the venue, were made specifically for this Symposium by prisoners at a corrections facility in Witbank. On behalf of all of us gathered here, I wish to thank the prisoners for this noble gesture. I also wish them all to quickly get out of the prison and return to their communities where they hopefully, will apply the skills that have been imparted to them, as part of their rehabilitation.

It is indeed a great honour and privilege for me to have the pleasure of addressing you today, at this significant event. Who would have thought 10 years ago that Sustainable Development would have become such an important issue, that more than 126 Judges would decide to take some time from their ever hectic schedules, travel long distances to come together here and discuss the critical role of law in Sustainable Development? Indeed, who would have thought that eight years after the end of apartheid, you would have transformed this, our beautiful city of gold, your temporary homes, into a global city of hope?

I look forward to my own, your Excellencies' and honoured delegates' active participation in the dialogue, information exchange and outcome which will provide an affirmative platform of consensus for the World Summit on Sustainable Development, that is now only a week away. As we all know, the theme of WSSD is "People, Planet, Prosperity" - proof, if any is required, that the world is committed to doing all it can to progressively achieve sustained improvement of the lives of all human beings, everywhere. As we observed last night, all of us gathered here as well as those who will descend upon Johannesburg a week from now, carry and represent the aspirations, hopes and wishes of the peoples of the world, rich and poor alike. Most of us represent the bulk of the world's 6 billion poor, vulnerable and marginalised populations.

Some of us are participating in all these global activities, on the basis that there is general consensus that the resources of the world such as capital, technology and know-how - all of which are not in short supply - can, and will be mobilised to guarantee to all a better life and shared prosperity. We are in other words making a statement that we are prepared to right that which is wrong about the global and domestic distribution of resources, opportunities, income and wealth. This conclusion we glean from the many global meetings and summits that have been held over the past decade. These have covered issues such as gender, social development, population development, racism, food, children, habitat, HIV AIDS and other infectious diseases, trade, financing for development and environment. At the turn of this century, the world met in New York at the UN Millennium Summit. Subsequently, it met at Doha and Monterey, as part of its efforts at putting together the global agenda for development. Apart from anything else, all these activities, meetings and summits have given hope that the global leadership and leaders in many other spheres of human endeavour have finally accepted their collective responsibility! That is to ensure that every element of human species, no matter where it is located on our globe, will in the fullness of time enjoy the human right to development.

Honourable delegates, today we are here to undertake jointly a very important task. We are here to review the role of law in Sustainable Development. It is here where we have the opportunity to make affirmation of the spirit of Sustainable Development. As President Mbeki points out, all of us as part of the WSSD processes have to reflect on the impact of human activity, including the pursuit of a shared prosperity the global environment. The world has recognised this for a long time already that various patterns of production and consumption have a negative impact on the environment. This environment is the very first condition for human existence itself. It is natural gift we have a duty to protect now and for all time, in the interest of all human beings. As these human beings, we have an obligation to interact with our planet in a manner that preserves the planet. The WSSD must confirm our collective commitment to this goal. It has become a necessity to recognize the integral relationship between environmental degradation and economic and social stresses, and to respond with effective strategies, policies and actions.

The role of law in Sustainable Development has in this context, become an essential stem that brings together the visions, mandates, skills and resources of local, national, regional and international stakeholders into a collaborative new approach to environmental and sustainable law and governance. Needless to say, environmental programmes put the Judiciary at the centre of our activities in this regard. When all else fails, victims of policies, laws and acts, even in this relatively new area of law, turn to the Judiciary for redress. The Judiciary, with its huge reservoir of legal principles and expertise; its fundamental understanding of and sensitivity to the cultures, mores, traditions and social environment in which it operates, is the best suited machinery to grapple with the many and variegated problems encountered in this area.

Recently, environmental issues have become a global concern. An increasing number of environmental problems, previously within the domain of individual nations, now demand international solutions. Serious international environmental disputes have already arisen and others are likely to occur in the future. Among those which have occurred are: the 1984 Bhopal chemical plant accident in India, the 1989 Chernobyl nuclear plant accident in Russia, the 1989 Exxon Valdez oil spill off Alaska and the 1990 burning oil wells in the Gulf. These disasters still continue to have a global impact and have played a part in accelerating the development of international environmental law.

Examples of environmental issues and disputes that have transcended political boundaries include the:- depletion of the ozone layer and climate change, trans-boundary air pollution, waste pollution on land and at sea, transport of hazardous waste, bio-piracy and depletion of biodiversity (such as in the rain forests of the Amazon, Africa and Asia), desertification, deforestation and drought, as well as social issues such as the growing size and number of mega-cities, the increasing role of civil society in drafting and influencing public policies and the transition towards a knowledge-based information society. The ramifications of these are felt globally!

Environmental issues will become more and more pronounced as political boundaries and sovereignty become less significant in this area of globalisation. Arguably, issues around the environment may be the most significant issues that humanity will face in the next century. The global challenge will be not only be to mitigate the environmental and social damage of the last thousand years, but also to preserve what remains of our natural lifeline, so that future generations will be able to survive. The environmental uncertainties facing humankind are a challenge to the legal system, as environmental degradation is often irreversible. There is undoubtedly a global need to sufficiently protect the environment, wisely and forcefully.

My own beautiful country is an excellent reason for me to be involved in today's discussions on why we should find more effective legislative frameworks to protect our living planet. It is said that South Africa is the third most biodiverse country in the world, after Indonesia and Brazil. It

is remarkable to note that a country that occupies only 2% of the global land area contains almost 10% of the planet's plants and 7% of the birds, reptiles and mammals.

Our President, Mr. Thabo Mbeki alluded to the "abundance of the natural resources of this land" and "the ingenuity and enterprise of its people," which form the basic components of production that can be turned into tradable goods, or hold a dream of a better future for all.

Our President in his briefing on the Africa Recovery Plan to the World Economic Forum was clear on the important role that Africa can play in our efforts to save our planet, when he stated that:

...Africa has an important role to play, with regard to the critical issue of the protection of the global environment. The African development strategy should indicate:

How these environmental assets can be turned into tradable goods;  
What investments should be made to ensure that these environmental resources are not destroyed?...

The irony of it all is that we all know that we need to do something, just as we knew ten years ago after *Rio*. We are still losing ground in addressing the two fundamental challenges facing humanity: reversing environmental degradation and reducing poverty on an alarming portion of humanity. Despite the multitude of proclamations and best intentions, the current approach to development is not reversing these trends.

Sustainable Development is a complex and relative concept. It involves potentially conflicting interests: economic progress on the one hand, and intangible human-centred values such as equity, and quality of life on the other; exploitation as opposed to preservation and regeneration of natural resources, short-term versus long-term benefits and the northern hemisphere's interests versus the interests of their southern hemisphere neighbours.

Law, in general, is perceived to be the basis of social justice and political rights. From this perspective, environmental law appears to have a dual function. It has the function of constraining the excesses of the economic market, and protecting the rights of those who are marginalized by it, especially those in developing countries.

From the point of view of sustainability, law and good governance are expected to provide all the answers. The relevant bodies must establish the processes and institutions by which conflicting and intersecting economic, social, political and environmental values and interests can be mediated, balanced or reconciled.

The 1992 *Rio Declaration* affirmed the importance of law, which reflects and shapes a society's norms, as a critical tool for Sustainable Development. It recognizes that in its simplest terms, Sustainable Development is a matter of social justice - giving what is due to each and every member of society now and in the future.

This has been stated to be the principle of intra- and inter-generational equity. In this context, we can consider a rights-based approach to environmental issues: people have a right to a healthy environment and governments have a duty to ensure that the environment is not violated.

This inevitably shifts the role of law to the pivotal position as a tool of Sustainable Development. Unfortunately, examples like the cases of the environmental disasters previously mentioned, have proven that the application of existing international law to the environment and Sustainable Development is currently largely inadequate.

Globally, governments are increasingly expressing concern that the current international environmental governance structure does not distinguish between the needs of developed and developing countries. Developing countries are concerned that the current models of reform wherein the central importance of environmental compliance; enforcement and liability, and observance of the *Rio Principles* are stressed, are not adequately taken into account. Developing countries also feel that with declining terms of trade, tariff and non-tariff barriers to trade, debt, population growth and economic instability, they need more support to meet their environmental obligations.

Thus, there is a distinct need for the development of a new model of international environmental governance that predicts the need for sustainable development that meets social, economic and environmental requirements. The environmental problems of today can no longer be dealt with in isolation.

Any approach to strengthening and streamlining international environmental governance will require reformed institutional structures to command the universal commitment of all countries, based on transparency, fairness and confidence, in such independent structures and the substantive capacity to advise and adjudicate on environmental issues. It is therefore, also imperative that regions and countries introduce effective national and regional governance structures.

Environmental law reform should address the development of an institutional mandate that is not challenged. Currently, a number of countries do not recognise any environmental authority as high as their own, yet they are not ideally positioned to guarantee a balanced legal management of their own environmental problems.

This attitude challenges the ability of the international legal system to cope with uncertainty (including operating with a long-term perspective,) to effectively prevent man-made environmental harm (as opposed to simply attempting to repair it) and to take account of transboundary causes and implications of environmental degradation, which are often global.

The ideal model of a global institutional mandate would be to provide a basis for more effective coordination, between the authority of governments and the environmental activities of international governance structures such as the United Nations Environment Programme. In this way, countries can mutually establish the terms of common responsibility and how they will implement common *protocols* in their national legislation.

Ladies and Gentlemen, the management and control of environmentally Sustainable Development transcends the scope of domestic legal systems and calls for complementary, or at least, harmonized action at the supranational level, whether bilateral, multilateral regional or global.

In recent years, the world has seen the adoption of various international environmental related instruments. *Declarations, recommendations, resolutions* and policy statements are constantly added to the over 170 *environmental treaties* currently in existence. While most of these instruments represent *soft law*, these compacts play a vital role not only in global governance, but also in the development of national environmental governance policy and law. In some instances *soft law* has hardened into binding multilateral commitments or *protocols*.

Unfortunately, the picture is daunting if one considers implementation, enforcement and compliance of this international environmental law regime. This is perhaps the most important problem area, which in the lead up to the World Summit on Sustainable Development, 2002, preoccupies both the legal fraternity and government policy makers. A clear understanding of the issues and principles of sustainable development is an essential starting point in meeting this challenge.



The common foundation for Sustainable Development in all its aspects, is an ordered and just society. Effective legislation is essential to this purpose. The harmonisation between Sustainable Development and International Sustainable Development Law is an enormous task that demands a global, national and regional approach especially, as regards the current disparity between *International Conventions* and the national regulations in many countries.

It is inevitable that international sustainable law will be of limited use, unless it is implemented at regional and national levels. There are various ways of sharing experience and disseminating good practices between countries. International conferences and symposiums such as this one, are among the most effective. The most formal way, however, of getting the message across is to use international legal instruments. Further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns, needs to be promoted.

More and more countries are looking to *environmental conventions* and *agreements* to guide their own policies and law reform processes. There is a definite need to clarify and strengthen the relationship between existing international instruments, in the field of Environment and those that are relevant to social and economic development. Courts hearing environmental legal actions should draw on the jurisprudence of other countries around the world to assist them in handing down fair and informed judgements.

At the global level, it is essential that in the field of International Law on Sustainable Development, all countries contribute to international treaty development. Many of the existing international legal instruments and agreements regarding the environment, have been developed without adequate participation and contribution of developing countries and thus may require review, in order to reflect the concerns and interests of developing countries and to ensure a balance governance of such instruments and agreements.

The parties to international agreements should consider the development of international procedures and mechanisms, to promote and review their effective, full and prompt implementation. For instance, each country could establish efficient and practical reporting systems on the effective, full and prompt implementation of international legal instruments. Consideration of ways in which relevant international bodies, such as UNEP, might contribute towards the further development of such mechanisms, should also be a regional and national priority.

It is heartening to note that governments around the world are now, more than ever, demonstrating a growing commitment to development of specific legislative and institutional regimes. These are intended to protect the global environment and natural resources, beginning with the formulation of appropriate environmental policies, incorporation of environmental principles into national constitutions and the integration of environmental planning into the overall national socio-economic planning models, through to the strengthening of legal and institutional frameworks. Strengthening the capacity of countries, especially developing countries, through the sharing of the best international practice will contribute to the vision of protecting our common environment. Arguably, this can be achieved solely through the development and adoption of a globally accepted environmental and sustainable development legislation regime.

In its endeavours to strengthen Africa's role in the global arena, I am also excited about the effect that the outcome of this Symposium and also EnviroLaw 2002 (that will be held in Durban, later this week,) will have for our own country and regions. I certainly hope that the newly formed African Union, will take notice of the deliverables of these meetings, to guide them in the formation of effective law and governance structures for African countries.

I have no doubt in my mind that if incorporated into the NEPAD initiative and taken to the implementation level, the deliverables of this conference will assist in the practical establishment of the principles of responsibility and ownership, with emphasis on democracy, transparency, good governance, rule of law and human rights, as fundamental factors of development. This in turn could lead to the strengthening of partnerships between South Africa and its African partners, G-8 Countries, United Nations, World Bank and the International Monetary Fund.

Ladies and Gentlemen, it is my submission that this Conference's main objective of strengthening sustainable environmental, social and economic law and governance frameworks on national and regional levels dovetails UNEP's mission of supporting sustainable development. Like UNEP, I also believe that the development of effective domestic governance structures will ensure that our aim of achieving a fair and equitable system of economic well being, social development and environmental sustainability, in each and every developing country, will be a step closer to become reality.

Once again I would like to express my gratitude to the Conference Secretariat for inviting me to this important event and to the valued contribution this conference will make to the success of the upcoming World Summit on Sustainable Development as well as the EnviroLaw 2002 Conference in Durban.

Thank you for your attention.

### 3. REMARKS MADE AT THE OPENING SESSION

#### *Dr. Hans Correll, Legal Counsel of the United Nations*

Honourable Minister Maduna, Honourable Chief Justice Chaskalson, Honourable Justices and Judges, Dr. Toepfer, my esteemed colleagues from the United Nations and Distinguished Participants. The theme of this Symposium is "Global Judges Symposium on Sustainable Development and the Role of Law." The participants are Chief Justices and other senior judges from more than 60 countries around the world. Together, we make well over 100 participants. You come from developing countries and developed countries, including the G-8 countries. You represent different geographical regions and different legal systems. It is an impressive gathering of judges that has come together here, in Johannesburg. In a United Nations context, it is probably unprecedented!

I very much appreciated receiving the invitation to participate in this Symposium, both as a guest speaker during this opening session and as Chairman of one of the sessions, tomorrow. Today, I would like to focus on your work in a broad perspective, national as well as international.

The title of this Symposium mentions the role of law, specifically, as distinct from the rule of law.

The Role of Law. Our first concept is of course a general one, which points to the contribution that law can make to the effort to achieve Sustainable Development, in a world whose resources are more and more heavily exploited. Many speakers will address these aspects under the themes in the coming several sessions:- Sustainable Development and the Role of Law; National Environmental Governance and the Role of Law; Environmental Justice, Human Rights and the Rule of Law; The Role of the United Nations and Others in Promoting the Progressive Development and National Implementation of Environmental Law in the Context of Sustainable Development and Strengthening National Judiciaries to Meet the Challenge of the Twenty-First Century in the Area of Environmental Law in the context of Sustainable Development. I will not pre-empt these discussions, but look forward to participating in them.

One of the purposes of this Global Judges Symposium is to provide a global perspective to the importance of the role that the Judiciary plays in promoting sustainable development through the rule of law at the national level. Therefore, I decided to first focus on that aspect, which is particularly close to my heart.<sup>1</sup> More importantly, the Secretary-General often refers to it, although mainly in the context of the rule of law in international relations. Resounding support for the rule of law can also be found in the *Millennium Declaration*.<sup>2</sup> After this, I will touch upon some matters with which I am involved, in the United Nations.

The Rule of Law: Our point of departure must be that both at the national and the international level, there must be established clear rules by legitimate legislators, and that these rules must be applied objectively and impartially by those who are to implement them. I note in this context that the organizers of the Symposium had the kindness of distributing a keynote address that I gave on 10<sup>th</sup> June, 2002, entitled "*Ethical Dimensions of International Jurisprudence and Adjudication*." Let me also refer to the very interesting paper by Judge Weeramantry that has been circulated in advance of the Symposium. It is entitled "*Sustainable Development: An Ancient Concept Recently Revived*," and provides an excellent introduction to our discussions.

<sup>1</sup> See *inter alia* <http://www.un.org/law/counsel/info.htm>

<sup>2</sup> GA/RES/55/2, in particular paragraphs 9, 24 and 25.

The requirement of the rule of law presents itself in any sector of society where legislation is applied – not only in the field of environmental law. In a nutshell, what we are striving for is the adoption and the application of rules that are seen as appropriate in the society where they are applied; where the legislator is perceived as legitimate and those who apply the laws are seen as independent and impartial.

In any State, Legislation is a sovereign act. Traditionally, laws were enacted in a relatively narrow national perspective. However, this has changed and today much of the legislation adopted at the national level is governed by norms laid down in *international conventions* negotiated under the auspices of the United Nations, or other intergovernmental organizations.

Two areas subject to such international cooperation will be at the forefront during our Symposium: environmental law and human rights.

Likewise, traditionally, the role of the judge has been viewed in a very national perspective. Conditions and in particular, sources of law in States are different. Therefore, there has been a tendency in the past to view the legislation and adjudication in foreign States, even with some suspicion. Consequently, judges traditionally focused almost entirely on national legislation and the case law of their own country.

Admittedly, those who belong to the Common Law system, have probably had a more open attitude, showing greater receptiveness to the influence from other countries within this system. This may be due to the way in which this law is developed and applied, and perhaps also because of the common denominator of the English language. I have certainly noticed a preparedness and an openness on the part of judges from those countries to seek guidance in sources of law from other countries – a habit which I was not familiar with in my own Civil Law system. However, I believe that this situation is now rapidly changing.

One of the main reasons for this is the increasing extent to which national laws based on international instruments negotiated by Governments, are eventually translated by national parliaments into national law. The driving force, I would suggest, is necessity. There are so many phenomena in the world today that transcend borders, which makes it imperative that States join hands across these borders, in order to assist one another in dealing with the various aspects of contemporary life.

Obviously, one of the most prominent examples of this is the environment. Nature does not recognize borders drawn by human beings, and the global effects of our activities do not stop at national borders. Gradually, we have come to realize that activities somewhere on the globe can have repercussions at distances far from those activities. As Head of the Office of Legal Affairs of the United Nations Secretariat, one particular area of concern that comes under my responsibility, is the Law of the Sea. I will revert to this later.

Gradually, and following the *1972 Stockholm Declaration on the Human Environment*, Member States of the United Nations have negotiated agreements that address environmental concerns. These *Conventions* have also resulted in major legislative activities at the national level within Member States. Many branches of the Executive apply laws, but ultimately, it may be for the Courts to decide on how this legislation should be applied in a particular case. That may arise in a situation where an assessment has to be made; may be in regard to whether a particular enterprise should be permitted, or in situation where the consequences of the violation of existing rules has to be adjudicated.

It is in these instances that judges will be called upon to exercise jurisdiction. In order to do this, they need to be familiar with this particular field of law at the junction between development,

necessary for the well being of the people, and the need to protect the environment, in the interest of present and future generations.

It is comforting to note that you do not come to this seminar unprepared. Through five regional symposia sponsored by UNEP, you have been able to review the aspects of the judicial work in the field of environment and also to identify aspects that you will continue to discuss here.

There are several aspects, some of which have been highlighted in the material disseminated before the Symposium. This material was based mainly on the information-sharing during the previous discussions and the conclusions drawn from the information. Allow me therefore, to contribute some personal reflections to this exercise, based on my own experiences, although they are somewhat aged, by now.

In the 1960s and 1970s, I had the privilege of serving in the Judiciary of my own country, Sweden. One of the lasting impressions from that period was the seriousness with which my senior colleagues approached their work. Many times was I deeply impressed by their wisdom and experience. Looking now at our gathering here, in Johannesburg, I can only translate my prior experience in the following way: You all represent the highest instances of your countries. Your experience must be vast, and your knowledge and insight in the judicial work of your respective countries, is at the very highest level. If you add to this the fact that you represent so many countries, so many regions and so many different systems, the gathering that has come together here in Johannesburg is truly unique!

This is an opportunity for all of us, who are together here to deepen our knowledge and to make further contacts. But it is also a responsibility. Of great importance is the knowledge and the experience that you have acquired and will acquire, be transferred within your own national systems - down the line, as it were. As we all know, the main part of the work in any judicial system is done in the first instance. It is inconceivable that every case should rise to the level of the Supreme Court.

Incidentally, in a Circuit Court wherein I served, a Senior Judge, the Hon. Judge Gerhard Möller, once jokingly suggested to me, "It is important to deliver a correct judgement in the first instance, because the Courts of Appeal are weak instances and the Supreme Court could make a mistake!"

The challenge before us is therefore, formidable! At the same time, we all know that legal systems develop gradually, through the efforts of many. The work undertaken both at the international and national level, since 1972, is a testimony to this fact. But hopefully, with every new generation the level of entry is at a higher level and no doubt, - with efforts like the present - we will see a positive trend in the future.

Another experience that I would like to share with you, is one that occurred in 1973. Then, I served in a Court of Appeal, which dealt exclusively with matters relating to water and construction in water, such as damming of water, in particular for hydroelectric schemes, irrigation, building of harbours, etc. The composition of this Court was different from other courts, in the sense that not only lawyers sat on the bench, but technical experts, too! The main task of this court was actually to strike a balance between the interests of development and environment. In many instances, the judges had to assess whether the advantages of a particular enterprise would outweigh the damages that were almost inevitable in any interference with nature. There were several elements in this kind of adjudication that I saw as new and different from what I had been experiencing in other courts of law. Of course, this is 30 years ago, and much has happened since then. But I have no doubt that the task of adjudicating cases where you have to weigh these different interests against each other is a tremendous challenge in any court of law, in any country.

A particular feature here is that it may not be possible for the court to dispense immediately with the case. In many instances, it was not possible for our Court to make a final ruling on the issue of damages, until after a very long period of monitoring the effects of the activities on the environment.

Another interesting factor was that a complete copy of the Court's file was entrusted to an agency, or even a person in the region from wherein the case emanated. This was done in order to allow interested parties, including the general public, to have access to the material in the case that obviously affected them all. As pointed out in the material disseminated before the Symposium, these cases are really not only *inter partes*.

Ladies and Gentlemen, one of the conclusions drawn in the regional symposia sponsored by UNEP is that the Judiciary is a crucial partner in bringing about a judicious balance between environmental and developmental considerations. Another conclusion is the important role of the Judiciary in promoting compliance and enforcement of environmental legislation. Allow me two brief comments on those two aspects.

It goes without saying that one of the features of the role of a judge is that he or she has to be familiar, or prepared to familiarize himself or herself, with any matter of substance that comes before the Court. Certainly, parties will bring this substance before the Court. But I would suggest that in particular, in the field of environmental law, it is crucial that the judges have a general understanding of the whole area within which the issue before the Court is identified.

When it comes to penal aspects of environmental law, this is certainly of importance. However, I suggest that the application of standards set and the question whether these standards have been violated to the extent that criminal responsibility is engaged, is a matter that may not always be of such a complex nature. To the contrary, the balancing of environmental and developmental considerations present far more delicate issues. In adopting legislation in this field it goes without saying that policy considerations, based on norms set at the international level, come to the forefront. However, it is difficult to elaborate on legislation in this field, since it is so precise that one can rule without the judicial instances developing methods that would later form a practice that these instances would apply, as a matter of principle. It will be interesting to see whether within this very complex area, we will see the development of standards or formulae that could be applied by courts, regardless of where they are situated.

Ladies and Gentlemen let me now focus on some aspects of environmental law, in which my own Office in the United Nations Secretariat is involved. As I mentioned a while ago, one of the responsibilities of the United Nations Office of Legal Affairs is the Law of the Sea.

In this respect, we provide to States and intergovernmental organizations, a range of legal and technical services such as: information, advice, assistance, as well as conducting research and preparing studies related to the *United Nations Convention on the Law of the Sea*,<sup>3</sup> adopted in 1982. All this is done with a view to promoting a better understanding of the *Convention*, its wider acceptance, uniform and consistent application and effective implementation. The Office also provides substantive servicing to the General Assembly on the Law of the Sea and Ocean affairs. Every year, in this latter respect, it is the responsibility of my Office to compile through the Division of Ocean Affairs and the Law of the Sea, a report to the General Assembly. This report addresses various aspects of the marine environment, *inter alia*. It is interesting to review this yearly report – but it is also frightening when marine degradation is reported.

<sup>3</sup> United Nations, *Treaty Series*, vol.1833, p. 3.

The *Convention on the Law of the Sea* contains an extremely important set of provisions related to the marine environment. These provisions should be seen against the backdrop of the 1972 *Stockholm Declaration on the Human Environment*.

Of the *Stockholm Declaration's* twenty-six principles, three are of particular relevance to the marine environment. These principles refer inter alia to the duty of States to prevent marine pollution, and their responsibility to ensure that their activities do not cause transboundary environmental damage.

These principles had an immediate and direct impact on the work of the Seabed Committee, the predecessor of the Third United Nations Conference on the Law of the Sea, and on the Conference itself. The process culminated in the formulation of a comprehensive international regime for the protection and preservation of the marine environment in the *Convention*, which is often referred to as the *Constitution of the Oceans*. Nearly 140 States and one organization have ratified the *Convention*. The regime put in place an overarching framework for further development to be carried out by competent international organizations, in dealing with specific aspects of the degradation of the marine environment.

The 1982 *Convention* represents a concrete application of the integrated approach to the human environment that permeated the *Stockholm Declaration*. Marine environmental law cannot be developed and implemented in isolation from the political, economic, social, scientific and technological aspects of marine affairs. Environmental law in one marine sector cannot be developed and implemented in isolation from that in other marine sectors. Furthermore, marine environmental law cannot be developed and implemented in isolation from terrestrial and atmospheric environmental law.

Through the use of oceans and their resources, the *Convention* strikes a basic balance between both the protection and preservation of the marine environment, and the well being of nations. One important component of the balance achieved in the *Convention* is to provide for the rational exploitation, on one hand, and sound conservation of especially living, oceanic resources, on the other hand. The *Convention* thus foreshadows the concept of sustainable development, as was later developed in the *Rio Declaration*, in 1992.

Ladies and Gentlemen, on a number of occasions, the International Law Commission (ILC), which is serviced by the Office of Legal Affairs, has worked on topics relating to the codification and progressive development of international law, in the field of the Environment and Sustainable Development. Most recently, in 1997 the General Assembly adopted the *Convention on the Law of Non-Navigational Uses of International Watercourses*, it was based on Draft articles prepared by the Commission.<sup>4</sup>

The *Watercourses Convention* is essentially a framework *treaty*. It is aimed at encouraging States' Parties to enter into agreements on shared watercourses, and in doing so to apply and adjust the provisions of the *Convention* to the characteristics and uses of those watercourses, as required. The *Convention* espouses a number of important principles to guide States. In particular, the principle of equitable utilization of the watercourses and the obligation not to cause significant harm, form the core of the *Convention*. The *Convention* also establishes a consultative procedure for planned new activities that may have a significant adverse effect on the other States sharing the same watercourse, and includes provisions specifically addressing the preservation and protection of watercourses from pollution. Presently, there are 16 signatories and 12 Parties.

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<sup>4</sup> GA/Res/51/229 of 21 May 1997.

However, already now the text of the *Convention* should be of guidance to States and to those who apply environmental laws at the national level.

The International Law Commission is also presently considering a topic entitled *International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law*, and has so far completed the first part of the study. This part focuses on the prevention of transboundary damage from hazardous activities. At its session last year, the Commission adopted a set of 19 *Draft articles* and commentaries to them, on the issue of prevention of transboundary harm.<sup>5</sup> The focus of the *Draft articles* is on cooperation amongst neighbouring States to work towards preventing transboundary harm that may result from engaging in risky activities. The *Draft articles* envisage a system of prior authorization, assessment of risk, notification, information sharing and consultation on preventive measures.

The *Draft articles* as adopted so far do not deal with the issue of liability and compensation for the resulting damage to the environment. However, this year the Commission has begun its consideration of this complex and contentious issue of international liability for transboundary damage arising from hazardous activities.

Yesterday, the Honourable Vice-President of South Africa referred to the entry into force of the *Rome Statute of the International Criminal Court* on 1 July, this year. He then went on to suggest that, perhaps the time had come for the creation of an international environmental court. Since I have been deeply involved in the question of international courts for some years, let me strike a note of caution here. There is already concern that there is a proliferation of international courts, the International Criminal Court is a different matter. That Court represents a link that was missing in the international legal system. However, when we come to environmental matters, we have the International Court of Justice, the principal judicial organ of the United Nations. This Court can deal with environmental matters and has in the past demonstrated that it is competent to do this. With respect to marine matters, we also have the International Tribunal for the Law of the Sea, in Hamburg. It was established in 1996. I feel confident that presently, these two institutions will be able to assist States, as and when the need arises in the field of environmental law.

Let me finally mention the Secretary-General's initiative that has attracted considerable attention since the Millennium Assembly in 2000. In that year the Organization initiated a programme to encourage wider participation in the treaty framework. The Secretary-General of the United Nations is the depositary of over 500 *multilateral treaties*, focusing on a variety of topics that have been regulated through international conventions and agreements. In this context, *treaty* events were organized both in 2000 and 2001, in order to encourage a wider participation in these *multilateral treaties*.

Also this year, there is a treaty event connected to the forthcoming World Summit on Sustainable Development to be held in Johannesburg, from 26<sup>th</sup> August to 4<sup>th</sup> September. At this Summit the international community will take stock of the progress made in the 10 years, since the Earth Summit in Rio de Janeiro, and seek to reach agreement on further concrete steps to implement sustainable development. The Secretary-General considered that the Summit will also provide a unique opportunity for States to reaffirm their commitment to the principles of sustainable development reflected in *Agenda 21* and a range of carefully negotiated multilateral treaties.

Therefore, the Secretary-General has invited all Member States to participate during the Summit in a treaty event called "*Focus 2002: Sustainable Development*" by signing, ratifying or acceding to

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<sup>5</sup> General Assembly Official Records, Fifty-Sixth session, Supplement No. 10 (A/56/10) pp. 366 - 436.



those treaties pertaining to sustainable development, to which Member States are not yet signatory or party. The treaty event will be held in two locations: Signatures and the deposit of instruments will be undertaken in New York, at the United Nations Headquarters. After these actions have been formally undertaken in New York, they will be ceremonially announced in Johannesburg.

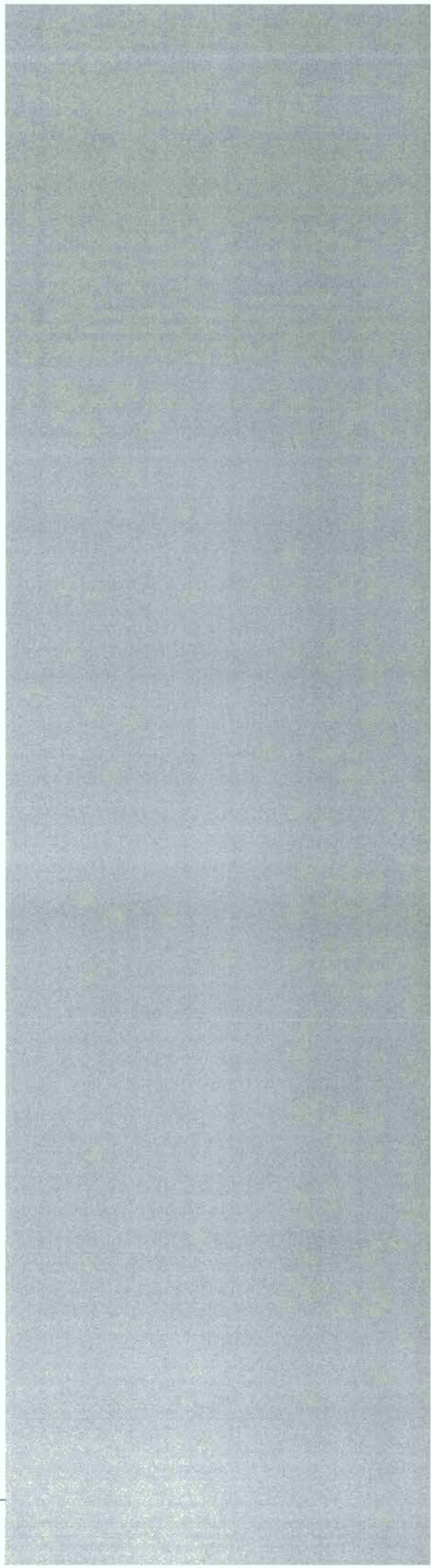
A list of 25 *core treaties* that represent the major principles of sustainable development, and information indicating their present status, has been circulated. It is the Secretary-General's hope that the opportunity presented by the World Summit on Sustainable Development will inspire a renewed enthusiasm for participation in these *treaties* by more States and thereby advance the reach of the framework of treaties on sustainable development.

Ladies and Gentlemen, these were some general reflections that I wanted to share with you before we embark upon our work. Clearly, the interrelationship between the requirements for the protection of the environment and the need for sustainable development is multifaceted and requires continuous policy adjustments, taking into account technological developments and the competition to use the same environment for different purposes. In addition, the absence of case law as well as clearly defined legislation at the international level in this field makes that task of judges more difficult and at the same time more important. That is precisely why gatherings of the kind that we are having now are so important in informing and sensitizing the judges to the issues that are involved and providing them with an opportunity to evaluate the options and their possible consequences with their colleagues.

I look forward to the coming sessions with great interest and expectations and wish you a successful Symposium!

Thank you for your attention!

### **III. PAPERS BY RESOURCE PERSONS**



## 1. THE COMESA COURT OF JUSTICE AND THE SUSTAINABLE DEVELOPMENT OF ITS MEMBER STATES

*The Rt. Hon. Lord Justice A.M. Akiwumi, President, COMESA Court of Justice*

In my experience, it is not often that the judicial expertise of persons holding high judicial office has been sought by international organisations on matters of economic and social importance. The emphasis has usually been placed rather more on legal experts. However, it is clear from the Information Note on this Global Judges Symposium that Judges have an important role to play in economic and social issues such as the advancement of the rule of law in Sustainable Development.

The Common Market for Eastern and Southern Africa, or COMESA, as it is popularly referred to, consists of the following twenty Member States:- Angola, Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

At the national level of the Member States of COMESA, judicial interaction in environmental causes has been in existence for a long time. Among these are the cases that arise out of claims in tort, particularly in the Member States such as Kenya, Malawi, Swaziland, Uganda, Zambia and Zimbabwe, where the common law principles apply. Much milk has been spilt in attempts to define a tort. Pollock said, "There is rather too much talk about definitions. A definition, strictly speaking, is nothing but an abbreviation in which the user of the term defined may please himself." But when one looks at the function and purpose of the law of torts, these are matters that can be simply explained as follows:

...The law of Torts is concerned with those situations where the conduct of one party causes or threatens harm to the interests of other parties. One may define 'interest' in the context as a claim or want or desire of a human being or group of human beings which the human being or group of human beings seek[s] to satisfy, and of which, therefore, the ordering of human relations in civilized society must take account. It is accordingly the aim of the law of Torts to define the obligations imposed on one member of society to his or her fellows, and to adjust, once it is decided that some adjustment is to be made, those losses which must inevitably result from the ever-increasing activities of those who live in a common society. This adjustment is made by providing compensation for the harm suffered by those whose interests have been invaded owing to the conduct of others... 1

When this explanation is considered carefully, it would appear that the celebrated authorities on the torts of Strict Liability and Nuisance (the escape of tangible things likely to cause mischief to another's land; intentional acts such as discharging effluent into a river that destroys fish therein or deliberately and maliciously making noise for the purpose of annoying a neighbour etc.) namely, *Rylands v Fletcher* (1868) LR 3 HL 330, *Read v J Lyons & Co. Ltd* (1947) AC 156, (1946) 2 All ER 471, HL, *Crum v Lambert* (1867) LR 3 Eq 409, *Christie v Daver* (1893) 1 Ch 316, *Pride of Derby and Derbyshire Angling: Association Ltd v British Celanese Ltd* (1953) Ch 149, (1953) 1 All ER 179, CA, to mention a few, were primarily in respect of actions brought for injury done to the property of, or the enjoyment of it, by Plaintiffs therein and for redress by way of injunction or damages, as opposed to the general concept of the degradation of the environment *per se*. It is not easy to say that these authorities which have been routinely applied in our courts in Kenya and in the courts of other countries represented at this Global Judges Symposium, are the origins of judicial intervention in environmental causes. It is a more acceptable theory that these common law decisions though not originally conceived as such, now fit in cosily with the modern principles of the protection of the environment. As recently as 29th August, 1996, the High Court of Kenya in the case of *Abdikadir*

*Sheikh Hassan & 4 Others v. Kenya Wildlife Service*, HCCC No. 2059 of 1996 (Unreported), which is a suit brought in Kenya for the alleged breach of environmental rights granted the Plaintiffs, in a matter that smacks more of the protection of the environment than of pure tort, and adopting a new liberal approach to the principle of *locus standi*, a temporary injunction restraining the Defendant from translocating a rare and endangered species of wildlife, the “Hirola,” from their original habitat to another and which would deprive the local community of their natural heritage namely, the fruits of the earth on which the wildlife live. Again, in the case of *Paul Nderitu Nduneu and 2 Others v. Pashito Holdings Limited and 2 Others*, HCCC No. 3063 of 1996 (Unreported), the High Court held in a preliminary hearing, that the applicants who sought to restrain the Defendants from developing an area of land previously reserved for a police post and water reservoir had *locus standi*, even though the matter involved public land. The institution of these suits illustrates the increasing awareness of the ordinary person in Kenya of his environmental heritage.

With the recognised need to protect fauna and flora and the increasing pressure of technology and the demands of large populations, *Constitutions* and specific framework legislation have been enacted in some Member States of COMESA to deal with sustainable development and the protection of the environment. The *Constitutions* of Uganda and Malawi contain provisions emphasizing the importance of environmental protection. The Uganda *Constitution* guarantees to everybody a right to a clean and healthy environment. It provides in *Article XXVII* that:

...The State shall promote sustainable development and public awareness of the need to manage land, air, and water resources in a balanced and sustainable manner for the present and future generations.

- (i) The utilization of the natural resources of Uganda shall be managed in such a way as to meet the development and environmental needs of present and future generations of Ugandans, and in particular, the State shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources resulting from pollution or other causes.
- (ii) The State shall promote and implement energy policies that will ensure that people’s basic needs and those of environmental preservation are met.
- (iii) The State, including local governments, shall-
  - a. create and develop parks, reserves and recreation areas and ensure the conservation of natural resources;
  - b. promote the rational use of natural resources so as to safeguard and protect the biodiversity of Uganda....

The Uganda *Constitution* in its Article 39 then provides that “Every Ugandan has a right to a clean and healthy environment,” and in its enabling Article 245 that:

...Parliament shall, by law provide for measures intended-

- (a) to protect and preserve the environment from abuse, pollution and degradation,
- (b) to manage the environment for sustainable development and
- (c) to promote environmental awareness through environmental education...

The *Constitution* of Malawi first contains, in its Section 11, the following significant provisions relating to the role of the national court in respect of environmental issues:

...(1) Appropriate principles of interpretation of this *Constitution* shall be developed and employed by the courts to reflect the unique character and supreme status of this *Constitution*.

(2) In interpreting the provisions of this *Constitution* a court of law shall-

- (a) promote the values which underlie an open and democratic society,
- (b) take full account of the provisions of Chapter III and Chapter IV and
- (c) where applicable, have regard to current norms of public international law and comparable foreign case law.

(3) Where a court of law declares an act of executive or a law to be invalid, that court may apply such interpretation of that act or law as is consistent with this *Constitution*.

(4) Any law that ousts or purports to oust the jurisdiction of the courts to entertain matters pertaining to this *Constitution* shall be invalid...

Then Section 13 which forms part of Chapter III, highlights the environmental protection as follows:

...The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals-

- (d) The Environment

To manage the environment responsibly in order to-

- (i) prevent the degradation of the environment;
- (ii) provide a healthy living and working environment for the people of Malawi;
- (iii) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and
- (iv) conserve and enhance the biological diversity of Malawi...

But the Uganda and Malawi *Constitutions* in language, may seem less idealistic than the provisions of the *Constitution* of the Philippines. In the Philippines 1993 case of *Juan Antonio. Anna Roserio and Jose Alfonso and Others v. The Hon. Fulgencio S. Factoran. Jr and Another*, the Petitioners who were minors, claimed to be acting not only on their own behalf, but in terms of their intergenerational responsibility, on behalf of future generations. The Supreme Court of the Philippines in reinstating the Petitioners' suit which had been struck out, relied on the following specific constitutional fundamental legal right provisions of the 1987 *Constitution* namely 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 and the State shall protect and promote the right to health of the people and instill health consciousness among them...

The Supreme Court also went on to express itself, in an idealistic dictum that the right, which the Petitioners had, was not even one that should really have been enshrined in the *Constitution* for: "they are assumed to exist from the inception of time."

In the Pakistani case *Shehla Zia and Others v. Wapda*, the Supreme Court held that the constitutional provision that no person shall be deprived of life save in accordance with law, covered "all facets of human existence."

Considering the prevailing living conditions in developing countries, such constitutional provisions seem well placed. And it should not come as a surprise if some day, a petition to enforce the implementation of such provisions by way of a national health scheme is brought. Whether this can be affordable or not, is an issue which one might say, merits prior consideration. One of the central features of modern environment legislation proper is the emphasis on public

participation, a concept which as shown, for instance in the national legislation of Kenya, Uganda and Malawi, is getting increasingly extended to the doctrine of *locus standi*. The underlying principle is that the task of protecting the environment belongs to individuals and the collective society *pari passu*. It is born of the philosophical position that the environment is a seamless web; protect it as a whole or there will be no life on earth, or the universe for that matter. The protection must also take into account the present as well as the future generations.

Section 72 (1) of the *Ugandan National Environment Statute of 1995* contains the following provisions on *locus standi*:

...For the avoidance of doubt, it shall not be necessary for a Plaintiff under this section to show that he has a right or interest in the property, environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land...

The following wide and emphatic provisions of Section 5 of the *Malawi Environment Management Act 1996* which do not only extend the doctrine of *locus standi*, but also declare unlawful any written law which is inconsistent with the *Act*, are worth being reproduced in full:

...Right to a decent environment

- (1) Every person shall have a right to clean and healthy environment.
- (2) For Purposes of enforcing the right referred to in sub-section (1), any person may bring an action in the High Court -
  - (a) to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment or likely to accelerate unsustainable depletion of natural resources.
  - (b) to procure any public officer to take measures to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment for which the public officer is responsible under any written law;
  - (c) to require that any on going project or other activity be subjected to an environmental audit in accordance with this Act.
- (3) Any person who has reason to believe that his or her right to a clean or healthy environment has been violated by any person may, instead of proceeding under subsection (2), file a written complaint to the Minister outlining the nature of his or her complaint and particulars, and the Minister shall, within thirty days from the date of the complaint, institute an investigation into the activity or matter complained about and shall give a written response to the complainant stating what action the Minister has taken or shall take to restore the claimant's right to a clean and healthy environment, including instructing the Attorney General to take such legal action on behalf of the Government as the Attorney General may deem appropriate.
- (4) Subsection (3) shall not be construed as limiting the right to the complainant to commence an action under subsection (2);

Provided that an action shall not be commenced before the Minister has responded in writing to the complainant or where the Attorney General has commenced an action in court against any person on the basis of a complaint made to the Minister.

Inconsistent provisions in other written laws

- (6) Where a written law on the protection and management of the environment or the conservation and sustainable utilization of natural resources is inconsistent with any provision of this Act, that written law shall be invalid to the extent of the inconsistency...

Enabling constitutional provisions are not necessarily required in order to authorize the enactment of environment management legislation. Although the *Constitutions* of Kenya and Zambia do not contain direct environmental protection provisions, it has been argued in the case of the Kenya *Constitution*, that its Section 71 which deals with the right to life, implies the right, as held in the Pakistan case of *Shehla Zia and Others v. Wavada* already referred to, to a clean and healthy environment. The *Constitution* of Zambia, which also contains in its Article 12 (1) a mere right to life, was no hindrance to the enactment of the *Zambia Environment Protection and Pollution Control Act of 1990*. Similarly, the *Constitution* of Kenya did not constitute a hindrance to the enactment in Kenya, the home of UNEP, of the *Kenya Environmental Management and Co-ordination Act, 1999* which is similar to the *Zambia Act* except that the *Zambia Act*, does not as the *Malawi Environment Management* and the *Kenya Environmental Management and Co-ordination Acts* do, confer wide *locus standi* on individuals, with regard to the enforcement of the *Zambia Act* through court proceedings. It would be convenient to now set out a summary of the *Kenya Act* and the role of the national courts in environmental management.

The *Kenya Act* establishes an appropriate legal and institutional framework for the management of the environment in Kenya. These relate, inter alia, to the establishment of an Environmental Tribunal and proceedings before it; the creation of environmental offences, the establishment of ministerial and administrative authorities and environmental impact assessment which, can be found in all national environment framework legislation. The *Kenya Act* further aims to improve the legal and administrative co-ordination of the diverse sectoral initiatives in the field of environment so as to enhance the national capacity for its effective management. The Government of Kenya has been involved in negotiations for, and is a signatory to, the major *international conventions, treaties, and protocols* relating to the environment and aiming at the achievement of sustainable development. Kenya has signed and ratified the *Convention on Biological Diversity, the United Nations Framework Convention on Climate Change, the Vienna Convention for the protection of the Ozone Layer* and the *United Nations Convention to Combat Desertification* in those countries experiencing serious drought and/or desertification, particularly in Africa, among others.

In Kenya, despite the fact that environmental issues such as soil erosion, deforestation, desertification, loss of biological diversity, pollution and waste management have caused major concern and prompted various initiatives such as the formulation of policy papers to address these concerns, legislation had remained largely sector-specific, with more than seventy statutes which deal with one or other aspects of the environment. These include: *the Water Act, the Forests Act, the Plant Varieties Act, the Penal Code, the Fisheries Act, the Factories Act, the Radiation Protection Act* and the *Standards Act* to mention only a few, with the result that the multifarious environmental management activities being undertaken by the various legal agencies were neither harmonized nor co-ordinated. The *Kenya Environmental Management and Co-ordination Act* will rectify this.

As regards the role of the national courts, I can do no better than to reproduce hereunder, the summarized version of the relevant part of the *Act* as contained in the "*Environmental Management in Kenya, A Guide to the Environmental Management and Co-ordination Act, 1999,*" prepared and edited by G. M. Wamukoya and F. D. P. Situma:

#### ...Introduction

Part 2 sets the Government's fundamental principles with respect to environmental management and conservation. This part of the Act confers *locus standi* to individuals with regard to the enforcement of the Act through court proceedings. *Locus standi* refers to the ability to bring an action in Court without having to show that your right or interest has been or is likely to be violated. This part also outlines the principles of sustainable development, which will guide the court in determining the dispute.

## Responsibility Over the Environment

### What right does the Act confer in respect to the environment?

Every person has a right to a clean and healthy environment.

### Whose duty is it?

Every person has the responsibility to protect and manage the environment.

### What does the right to a clean and healthy environment entail?

The right to a clean and healthy environment includes access by every person in Kenya to various parts of the environment for recreational, educational, health, spiritual and cultural purposes.

### How shall the right to a clean and healthy environment be enforced?

Any person may bring an action in the High Court if:  
the right to a clean and healthy environment has been violated.  
the right to a clean and healthy environment is being violated.  
the right to a clean and healthy environment is likely to be violated.

### What orders can the High Court give on such application?

The High Court, in exercising its inherent powers, may make such orders, issue such writs or give such directions to do the following:

- prevent, stop or discontinue any act or omission which is damaging to the environment;
- direct a public officer to take measures to prevent or stop the act or omission which is damaging the part of the environment for which the officer (e.g. forest officer, etc) is responsible.
- demand that any on-going project or other activity (e.g. road construction, irrigation scheme) be subjected to an environmental audit;
- compel the persons responsible for the environmental damage to restore the degraded environment as far as practicable to its immediate condition prior to the damage; and
- provide compensation for any victim of pollution; and for the cost of beneficial uses lost, and other losses, as a result of an act of pollution.

### Are there any requirements before a person may bring an action in the High Court?

Under the Act, a person does not need to prove that the environmental damage has caused (or is likely to cause) him/her personal loss or injury. However, the complaint should be real and not a waste of the court's time.

### How will the High Court proceed in determining the dispute?

The High Court will be guided by the principles of sustainable development.

These are: -

- the principle of public participation in the development of policies, plans and processes for the management of the environment.
- the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources as long as the practices are reasonable and not in conflict with any written law;
- the principle of international cooperation in the management of environmental resources shared by two or more states;
- the principles of inter generational and intragenerational equity;
- the polluter-pays principle, and the precautionary principle...

Since the enactment of the *Kenya Environmental Management and Co-ordination Act, No. 8 of 1999*, a suit *Rogers Muema Nzioka and 2 Others v. Tiomin Kenya Limited*, HCCC No. 97 of 2001, was filed on 27th February, 2001. In this case, the Plaintiffs, residents in Kwale District, inter alia sought an injunction to restrain the Defendant, a mining company from undertaking any titanium mining in Kwale District as this would "trigger multifarious environmental and health problems." In considering this application, which had been brought by the Plaintiffs under the *locus standi* granted to them by sub-sections (3) and (4) of Section 3 of the *Kenya Environmental Management and Co-ordination Act*, the learned Judge, the Hon. Mr. Justice Andrew Hayanga, whilst holding that the Plaintiffs were entitled under the *Act* to bring the action, went on to grant the injunction



sought as follows:

...As for balance of convenience, it is admitted that the environmental degradation is not necessarily individual concern or loss but public loss so in a matter of this kind the convenience not only of the parties to the suit, but also of the public at large is to be considered so that if the injunction is issued it means that any form of feared degradation, danger to health and pollution will be caused to the detriment of the population, whereas if I REFUSE injunction only the investor will be kept at bay but life will continue for the population safely without risk. It is better to choose the latter than the former...

I will now refer briefly to the framework environment management national legislation of other COMESA Member States, which are to be found in *the Compendium of Environmental Laws of African Countries* published by UNEP and UNDP. These national environment management legislations are similar to the *Malawi Environment Management* and *the Kenya Environment Management and Co-ordination Acts*, except that they do not confer *locus standi* as the Malawi and Kenya Acts do. Their other interesting features relating to the role of the national Judiciary and enforcement will be highlighted.

According to Article 11 of the *Angola Lei De Bases Do Ambiente, 1998*, which is as follows:

...1. Cabe ao Governo fazer publicar os () regulamentos necessaryes para a execucao do Programa Nacional de Gestao Ambiental, responsabilizando os diversos orgaos nele-integrados pelo cumprimento do estabelecido.  
2. As orgaos judiciais devem acompanhar e dar parecer sobre as propstas de regulamento resultants da presente Lei de Bases do Ambiente, devendo intoduzir no sistema de principios judiciais, os conceitos de Ambiente e Desenvolvimento Sustentavel necessaryes a sua actividade...

The Judiciary should support and implement the environmental law, introduce and apply a system of judicial principles and concepts for environmental protection and sustainable development and play an active role in sustainable development.

*The Comoros Loi-cadre No. 94-018, du 22 juin, 1994, relative á l'Environnement*, provides in Article 89, which is not unlike Section 5(6) of the *Malawi Environment Management Act* which stipulates that any written law that is inconsistent to the provisions of the Act shall be invalid, that *Les dispositions anterieures contraires a la presenteloi sont abrogées*.

Similarly the supremacy of the *Swaziland Environment Authority Act, 1992*, is contained in Section 13 which states that:

"Where there is any inconsistency with any other law which affects the environment, this Act shall prevail."

The Seychelles version which is contained in section 34 of the *Environment Protection Act, 1994*, is as follows:

...(1) The provisions of this Act shall be in addition to and not in derogation of the provisions 01 the Public Health Act.  
(2) Subject to subsection (1), in case of inconsistency between any of the provisions under this Act or the Regulations made thereunder and any other law for the time being in force, the provisions of this Act shall apply...

Article 82 of the *Eritrea Environment Proclamation 1996* provides limited *locus standi* as follows:

...a) Natural and legal persons, or communities, or groups with a common interest affected by a violation may require enforcement authorities to impose necessary compliance measure on a violator.

b) Where the enforcement authorities fail within a reasonable time to impose compliance measures on a violator, the affected persons or communities or groups may bring a legal action in the High Court against the enforcement authorities. "

The *Egypt Law No 4 of 1944* promulgating a law concerning the Environment, provides in its Article 103 that:

"Every citizen or society concerned with environmental protection shall have the right to report about any violation of the provisions of this Law,"

and then the *Executive Regulations of the Law for the Environment* made under *Law No.4 of 1994*, goes on to stipulate in Article 65 that:

...Every citizen or association concerned with environmental protection may resort to the administrative or Judiciary agencies for the purpose of applying the provisions of the Law for the Environment and of these Executive Regulations. The Ministry of the Interior, in coordination with the EEAA, shall form a police force specialized in environmental protection within the Ministry and Security Departments in the government, which shall be competent for the enforcement of the provisions of laws and decrees connected with environmental protection, and shall receive complaints and notifications submitted in this respect, and shall also be entrusted to take legal procedures in respect thereof...

As a matter of interest, the *Trinidad and Tobago Environment Management Act* contains in its Section 69 provisions that allow individuals or groups to bring actions for alleged environmental violations. Section 71, also makes decision makers both in the private and public sectors, personally liable for a breach of an environment requirement.

The importance of the sustainability of the environment has in the recent past, been demonstrated by the accession of many countries including Kenya, to various International Environmental Legal Instruments which have been aptly described in the Aide Memoire on Judicial Intervention on Environmental Causes as:

...those essential tools that provide norms, rules, procedures and guidelines in the management of environmental matters. Without doubt these instruments and their negotiating processes have contributed greatly in raising global awareness of governments, states, and individuals to the environmental problems and the related issue of poverty, population control and development...

I would now deal with the relevant parts of the *Treaty* establishing COMESA. The following Chapter Sixteen of the *Treaty* which deals with "*Co-operation in the Development of Natural Resources, Environment and Wildlife*," contains the following comprehensive and wide ranging principles with no time-frame given, to be undertaken and implemented by the Member States:

#### ...Article 122

##### **Scope and Principles of Co-operation**

1. The Member States agree to take for their mutual benefit, concerted measures to foster co-operation in the joint and efficient management and sustainable utilisation of natural resources within the Common Market.
2. The Member States recognise that economic activity is often accompanied by environmental degradation, excessive depletion of resources and serious damage to natural heritage and that a clean as well as an attractive environment is a prerequisite for long-term economic growth.
3. The Member States undertake, through a regional conservation strategy, to co-operate and coordinate strategies for the protection and preservation of the environment against all forms of pollution including atmospheric and industrial pollution, pollution of the water resources, and pollution from urban development.

4. The Member States undertake to co-operate and adopt common policies for the control of hazardous waste, nuclear materials, radioactive materials and any other materials used in the development or exploitation of nuclear energy.
5. Action by the Common Market relating to the environment shall have the following objectives:
  - (a) to preserve, protect and improve the quality of the environment;
  - (b) to contribute towards protecting human health, and
  - (c) to ensure the prudent and rational utilisation of natural resources.
6. Action by the Common Market relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements shall be a component of the Common Market's policy in all the fields of Common Market activity.

### **ARTICLE 123**

#### **Co-operation in Management of Natural Resources**

1. The Member States agree to take concerted measures to foster co-operation in the joint efficient management and sustainable utilisation of natural resources within the Common Market for the mutual benefit of the Member States. In particular, the Member States shall;
  - a) take necessary measures to conserve their natural resources,
  - b) co-operate in the management of their natural resources for the preservation of the eco-systems and arrest environmental degradation, and
  - c) adopt common regulations for the preservation of shared land, marine and forestry resources.
2. The Member States agree to take necessary measures to conserve and manage forests through the:
  - a) adoption of common policies for the conservation and management of natural forests industrial plantations and nature reserves;
  - b) exchange of information on natural forests and industrial plantations development and management;
  - c) joint promotion of a common forestry practice within the Common Market; and
  - d) joint utilisation of forestry training and research facilities
  - e) adoption of common regulations for the preservation and management of all catchment forests within the Common Market and
  - f) the establishment of uniform regulations for the utilisation of forestry resources in order to reduce the depletion of the natural forests and avoid desertification within the Common Market.
3. The Member States shall take measures to engage in Agro- Forestry Systems.
4. The Member States agree to co-operate in the management of their fresh water and marine resources, through the:
  - a) establishment and adoption of common regulations for the better management and development of marine parks reserves and controlled areas;
  - b) adoption of common policies for the conservation, management and development of fisheries resources; and

- c) establishment of uniform fisheries investment guidelines for inland and marine waters.
5. The Member States undertake to accede to international conventions or agreements that are designed to improve the polices of development, management and protection of their natural resources.

#### **ARTICLE 124**

##### **Co-operation in the Management of the Environment**

1. The Member States undertake to co- operate in the management of the environment and agree to:
  - a) develop a common environmental management policy that would preserve the eco-systems of the "Member States, prevent, arrest and reverse the effects of environmental and industrial pollution, declining bio-diversity, loss of genetic diversity and land degradation;
  - b) develop special environmental management strategies to manage forests, terrestrial and marine resources, water resources, atmospheric emissions, water and hazardous toxic substances;
  - c) accede to the UNCED Agreements relating to the Conventions on climatic change and biodiversity;
  - d) accede to the UNEP Convention for Eastern and Southern Africa on water and marine resources, and
  - e) take measures to control trans-boundary, air and water pollution arising form mining, fishing and agricultural activities.
  
2. For the purposes of paragraph 1 of this Article, the Member States undertake to:
  - a) adopt common environmental control regulations, incentives and standards;
  - b) develop capabilities for the assessment of all forms of environmental degradation and pollution and the formulation of regional solutions;
  - c) encourage the manufacture and use of biodegradable pesticides, herbicides and packaging materials;
  - d) discourage the excessive use of agricultural chemicals and fertilizer;
  - e) adopt sound land management techniques for the control of soil erosion, desertification and bush encroachment;
  - f) promote the use of ozone and environmental friendly chemicals,
  - g) promote the utilisation and strengthen the facilities of training and research institutions within the Common Market;
  - h) adopt common standards for the control of atmospheric industrial and water pollution arising from urban and industrial development activities;
  - i) exchange information on atmospheric, industrial and other forms of pollution and conservation technology,.
  - j) adopt common regulations for the management of shared natural resources,.
  - k) adopt measures and policies to address the existing unsatisfactory demographic profiles such as high growth rates and fertility rates, high dependency ratio and poor social conditions in order to mitigate their adverse impact on environment and development; and
  - l) adopt community environmental management criteria.

## ARTICLE 125

### Prevention of Illegal International Trade in Toxic and Hazardous Wastes

1. The Member States undertake to co-operate and adopt common positions against illegal dumping of toxic and undesirable wastes within the Common Market from either a Member State or third country.
2. The Member States undertake to co-operate in sharing technological know-how on clean technologies and low-waste production systems for the energy and productive sectors.
3. The Member States undertake to accede to international environmental Conventions that are designed to improve the environmental policies and management. To this end, the Member States agree to accede to the Montreal Protocol on the Environment.
4. The Member States agree to include environmental management and conservation measures in trade, transport, agricultural, industrial, mining and tourism activities in the Common Market.

## ARTICLE 126

### Wildlife Development and Management

1. The Member States undertake to develop a collective and coordinated approach to sustainable development and management, rational exploitation and utilisation and the protection of wildlife in the Common Market. In particular, the Member States shall:
  - a) adopt common policies for the conservation of wildlife, natural reserves, national parks and marine parks;
  - b) exchange information on wildlife development and management;
  - c) exchange information on anti-poaching activities and suspected poachers and where feasible, carry out joint anti-poaching programmes;
  - d) establish wildlife ranches in arid and semi-arid regions of the Common Market as a compliment to agricultural and livestock production;
  - e) develop common anti-poaching regulations and ensure the effective supervision of the implementation of such regulations;
  - f) carry out joint-breeding programmes of selected wildlife species and domesticated animals so as to infuse disease resistance and hardness qualities in the domesticated animals;
  - g) encourage joint utilisation of training and research facilities;
  - h) utilise proceeds from wildlife for the development and conservation of national parks and the development of adjacent areas; and
  - i) establish uniform trophy hunting prices so as to reduce depletion of wildlife stocks in the Member States.
2. The Member States undertake to accede to international conventions or agreements that are designed to improve their policies for development, management and protection of wildlife and national parks...

And so apart from other international environment instruments to which the Member States have acceded, the *Treaty* also makes provisions for co-operation in the field of environment nearer at home which also recognizes that the issue of the environment transcends national boundaries.

The *COMESA Treaty* also provides for the establishment of a Court of Justice, which shall ensure the interpretation, and application of the Treaty. The relevant provisions are the following:

## ARTICLE 19

### Establishment of the Court

The Court of Justice established under Article 7 of this Treaty shall ensure the adherence to law in the interpretation and application of this Treaty.

## **ARTICLE 23**

### **General Jurisdiction of the Court**

The Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this Treaty.

## **ARTICLE 24**

### **Reference by Member States**

1. A Member State which considers that another Member State or the Council has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court.
2. A Member State may refer for determination by the Court, the legality of any act, regulation, directive or decision of the Council on the grounds that such act, regulation, directive or decision is ultra vires or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power.

## **ARTICLE 25**

### **Reference by the Secretary-General**

Where the Secretary-General considers that a Member State has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, he shall submit his findings to the Member State concerned to enable that Member State to submit its observations on the findings.

1. If the Member State concerned does not submit its observations to the Secretary-General within two months, or if the observations submitted are unsatisfactory, the Secretary-General shall refer the matter to the Bureau of the Council which shall decide whether the matter shall be referred by the Secretary-General to the Court immediately or be referred to the Council.
2. Where a matter has been referred to the Council under the provisions of paragraph 2 of this Article and the Council fails to resolve the matter, the Council shall direct the Secretary-General to refer the matter to the Court.

## **ARTICLE 26**

### **Reference by Legal and Natural Persons**

...Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty:

Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State...

## **ARTICLE 29**

### **Jurisdiction of National Courts**

1. Except where the jurisdiction is conferred on the Court by or under this Treaty, disputes to which the Common Market is a party shall not on that ground alone, be excluded from the jurisdiction of national courts.
2. Decisions of the Court on the interpretation of the provisions of this Treaty shall have precedence over decisions of national courts.

## ARTICLE 32

### Advisory Opinions of the Court

1. The Authority, the Council or a Member State may request the Court to give an advisory opinion regarding questions of law arising from the provisions of this Treaty affecting the Common Market, and the Member States shall in the case of every such request have the right to be represented and take part in the proceedings.
2. A request for an advisory opinion under paragraph 1 of this Article shall be made in writing and shall contain an exact statement of the question upon which an opinion is required and shall be accompanied by all relevant documents likely to be of assistance to the Court.
3. Upon the receipt of the request under paragraph 1 of this Article, the Registrar shall forthwith give notice thereof, to all Member States, and shall notify them that the Court shall be prepared to accept, within a time fixed by the President, written submissions, or to hear oral submissions relating to the question.
4. In the exercise of its advisory function, the Court shall be governed by the provisions of this Treaty and the Rules of Court relating to references of disputes to the extent that the Court considers appropriate.

## ARTICLE 34

### Acceptance of Court Judgments

1. Any dispute concerning the interpretation or application of this Treaty or any of the matters referred to the Court pursuant to this Chapter shall not be subjected to any method of settlement other than those provided for in this Treaty.
2. Where a dispute had been referred to the Council or the Court, the Member States shall refrain from any action which might be detrimental to the resolution of the dispute or might aggravate the dispute.
3. A Member State or the Council shall take, without delay, the measures required to implement a judgment of the Court.
4. The Court may prescribe such sanctions as it shall consider necessary to be imposed against a party who defaults in implementing the decisions of the Court.

The functions of the Court of Justice can be summarised thus.

#### *General Jurisdiction*

The Court's primary function is to uphold the Rule of Law in the operation of the *Treaty* establishing COMESA. It has to ensure the adherence to law in the interpretation and application of the *Treaty*. Its general jurisdiction is to adjudicate as well as to give advisory opinions upon all matters, which may be referred to it under the *Treaty*. Such matters include those itemized and elaborated upon below.

#### *Reference by Member States*

The Court has power to hear a matter brought by Member States against one another or against the Council, in the event of failure by a Member State or the Council to fulfill an obligation under the *Treaty* or in the event of an infringement by a Member State or the Council of a provision of the *Treaty*.

A Member State can also refer for the Court's determination, the legality of any *act, regulation, directive or decision of the COMESA Council* on the grounds that such *act, regulation, directive or decision* is beyond its powers or unlawful or constitutes an infringement of the provisions, of the *Treaty* or any rule of law relating to its application or is tantamount to a misuse or abuse of power.

### *References by the Secretary General*

The Court also has power to hear a matter brought by the Secretary General against a Member State or Member States which have failed to fulfill an obligation or obligations under the *Treaty* or have infringed a provision of the *Treaty*.

### *References by Legal and Natural Persons*

The Court can further hear a matter brought by a person who is a resident in a Member State concerning the legality of any *act, regulation, directive or decision* of the Council of a Member State on the grounds that such *act, regulation, directive or decision* is unlawful or constitutes an infringement of the provisions of the *Treaty* so long as that person has first exhausted local remedies in the national courts or tribunals of the Member State concerned. The Court of Justice reiterated the prior exhaustion of local remedies in local courts or tribunals in its recent judgment in the application: *Republic of Kenya and the Commissioner of Lands v. Coastal Agriculture Limited*, Reference No. 3/2001 (unreported), where it was stated that:

...the Respondent being a legal person resident in a Member State may have the requisite locus standi to refer proceedings to this Court for determination only if it has exhausted all local remedies in the national courts or tribunals of Kenya...

### *Advantage of the Court*

The Court will ensure the maintenance of the Rule of Law within the Common Market through the just resolution of disputes and thereby facilitate and strengthen economic integration that would augur well for the enhancement of trade efficiency, cost effectiveness and resultant general socio-economic well being in the region.

The COMESA Court of Justice, like the national courts of the Member States, is established under the *Treaty* as an independent organ in the exercise of the judicial functions conferred on it under the *Treaty*, which is "to ensure the adherence to law in the interpretation and application of this *Treaty*" and "to adjudicate upon all matters which may be referred to it pursuant to this *Treaty*". The independence of the Court of Justice is reflected in its hierarchical standing as shown in Article 7 of the *Treaty*. Its independence is further fortified by Article 9. 2. (c) of the *Treaty* where it is provided that:-

"It shall be the responsibility of the Council to:

- (c) give directions to all other subordinate organs of the Common Market other than the Court in the exercise of its jurisdiction."

Under Article 31.1. of the *Treaty*, the Court of Justice shall determine every *Reference* made to it under the *Treaty* and shall deliver its judgment, which subject to review by the Court of Justice, shall be final. In this regard, the Court of Justice has made Rules for the Review of its Judgments by a dissatisfied party. Also to emphasize the independence of the Court of Justice in the exercise of its jurisdiction, Article 34 of the *Treaty* as shown, provides for the acceptance of the judgments of the Court of Justice.

The Member States of COMESA have not yet taken action to implement their undertakings under the *Treaty* on environmental issues. But there is no doubt from the national framework environment legislation of the Member States of COMESA that have already been referred to, that a favourable ambience already exists for the implementation of the provisions of Articles 122-126 of the *COMESA Treaty*. When this happens, the role of the Court of Justice, which was established less than five years ago, will be greatly enhanced.

It is now clear that more and more people and countries too, are becoming aware of the scope and possible creativity of environmental legislation, *conventions* and *norms* even where specific



environmental management legislation and *conventions* are not involved. When environmental management legislation and *conventions* are in place, giving greater legal support to the principles enunciated in the *COMESA Treaty*, then the doors will be thrown wide open for an upsurge in litigation that was not previously conceivable. The Court of Justice in interpreting such legislation and *conventions* will be inundated as never before with scientific evidence on novel issues such as environmental impact-assessment and new legal concepts such as intergenerational justice, intergenerational equity and intergenerational rights. But these daunting challenges will be met and indeed, as judges have always done from time immemorial, they will dispose of them as they have always done in interpreting legislation and *conventions* whether they be old or new, to the best of their ability. To put it shortly, nothing is ever too technical for a judge to adjudicate upon.

The existence of COMESA also widens the dimension of the role of the Court of Justice with respect to trans-national environmental issues.

Africa has agreed on the need to accelerate integration and co-operation through the establishment of the African Union. There is acceptance among African governments that the future of the African Union rests with the strengthening of existing regional economic communities. COMESA is at the forefront of African integration.

In his opening statement at the Sixth Meeting of the --COMESA Ministers of Justice and Attorneys-General held on 12th April, 2002, His Excellency, the Rt. Hon. Prime Minister of Swaziland, Dr. B. S. S. Dlamini, made the following remark about the role of the Court of Justice:

...We are all aware that the growth of the European Community was largely facilitated by the existence of a Court of Justice that had been established in 1952, providing a forum for the uniform interpretation of (what are now) EU rules and regulations, particularly with regard to issues affecting competition. It is, therefore, important that, as Ministers of Justice and Attorneys-General, you will continue to strengthen the COMESA Court to ensure that the integration process of COMESA is rule-based...

In his Message in the *Asian-African Handbook on Environmental Law*, published by Asian-African Legal Consultative Committee and United Nations Environment Programme, Dr. Klaus Toepfer, Under Secretary General and Executive Director of UNEP, made the following significant remark, "*International legal instruments are the principal means by which the Community of nations express consensus on measures to protect the environment in the context of sustainable development.*"

It is hoped that the Member States of COMESA would soon implement their undertakings under the *COMESA Treaty* to co-operate in the development of natural resources, environment and wildlife.

## 2. SUSTAINABLE DEVELOPMENT BEYOND RIO + 10

### *The Hon. Hilario G. Davide Jr., Chief Justice of the Supreme Court of the Republic of the Phillipines*

First of all, I wish to thank Chief Justice Arthur Chaskalson for the gracious hospitality he and his countrymen have extended to all of us, and Executive Director Klaus Toepfer and our friends at the United Nations Environment Programme (UNEP) for ensuring that this very significant symposium would be successful. In a very special way, I also thank them for giving me the privilege to Chair Session 6 of the Symposium.

As we move closer to *Rio + 10 [plus ten]*, it is important for all components of society to harmonize their efforts towards the fulfillment of all our countries' mutual commitments under *Agenda 21*. Judiciaries are among those components.

*Agenda 21* sets very ambitious objectives. It invites nations and regions to come together to address the global impact of environmental degradation, and it *encourages all stakeholders to commit to concrete action without delegating responsibility to politicians or governments*. Who among the citizens of the world does not have a stake in the welfare of the environment? Clearly, *Agenda 21* demands action from all citizens and all nations.

We are looking for what is known in United Nations legalese as "Type 2" results. These demands come at a time when the social and ecological impacts of globalization, the effects of technological advances, and the consequences of unsustainable means of production and consumption can no longer be disregarded.

All over the world biodiversity is diminishing, forests are dwindling, water and energy resources are increasingly becoming inaccessible especially to the poor, carbon dioxide emissions are increasing, and global climates are consistently becoming unpredictable. These are but a few of the environmental woes our planet is going through. At first glance, it seems that judicial bodies find no place in this scheme of issues. But we must realize that the overriding goal of *Agenda 21* is simply the assurance of economic development, without sacrificing the environment. We must realize that economic progress has been often pursued at the cost of human rights, and it is often the poor who suffer most. When we shift our perspective to the global arena, we find the situation repeating itself. The poorer countries bear the greater burden of globalization, and in those countries, it is once more the poorer sectors of society who suffer the most as they find fewer markets for their products, less opportunities for economic improvement, and so on and so forth.

Thus, the concerns of *Agenda 21* fall squarely within the jurisdiction of Courts. Economic development must be pursued within a system of predictability, where fairness and transparency prevail, and laws that are made known to all participants, dictate actions. This is, in short, business in accordance with the rule of law; a matter which is definitely a concern of Courts. While development is earnestly pursued, however, we must take care that individual rights are not trampled upon. The concept of sustainable human development espoused by the United Nations encourages economic progress, while realizing the individual's full potential. Individual liberties must therefore, not be neglected. Again, this is a matter, which concerns all Courts. Prosperity and liberty, two elements that we must deem to be written into *Agenda 21*, are both safeguarded by the Courts. Hence, all Judiciaries are stakeholders in the sustainable development that we long for.

It is, I submit, within this context that we must look to strengthening our Judiciaries in the area of environmental law. In this regard, I believe that we must exert efforts to enhance our Judiciaries' independence and to improve our technical expertise.

Independence is a crucial attribute of any Judiciary. This single characteristic ensures that the applicable law rather than the whims of men dictate decisions reached by courts. Any Judiciary must assert its independence and resist the influence exerted by the other branches of government. Many of the resources required by a Judiciary for it to run efficiently are not within its control, hence the assertion of independence is a true challenge. The key to winning independence lies with the magistrates themselves. Their skills and expertise in deciding conflicting claims command respect from the other branches of government and confidence from the people. Respect and confidence are enough reasons for judiciaries to win, assert and demand independence. To gain such esteem however, judiciaries must prove that they are capable of justly deciding conflicting claims.

In the area of environmental law, extraordinary expertise is required of all Judges. This field will challenge Judges to decide cases on genetics, clean air standards, pollution and its environmental effects across international borders, among many other concerns. Needless to state, magistrates of national judiciaries must have full grasp of their State's environmental laws. Parenthetically, in this regard, the Supreme Court of the Philippines will soon print and give all magistrates copies of the latest book on environmental laws in the Philippines entitled "*A Legal Arsenal for the Philippine Environment*" written by Attorney Antonio Oposa, Jr., a friend of UNEP, who is now with me in this Symposium. He kindly authorized our Supreme Court to reproduce copies of the book. We may be forced to discuss issues of food security, resource-based conflicts, and even international trade. We will be required to gain mastery in *treaties* and other *international agreements*. More often than not we will be confronted with novel issues that will necessitate an imaginative or resourceful response that nevertheless complies with the local legal framework.

In the Philippines for instance, the Supreme Court established the doctrine of inter-generational responsibility in the case or *Oposa Factoran* (G.R. No. 101083, 224 SCRA 792), promulgated on 30 July 1993, as it faced the issue of standing of a group of children who questioned the logging rights of a lumber company. In that case we pronounced that the right to a balanced and healthful ecology *concerns nothing less than self-preservation and self-perpetuation* --the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the *Constitution* for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental *Charter*, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the *Constitution* itself--the day would not be too far when all else would be lost not only for the present generation, but also for those to come -- generations which stand to inherit nothing but parched earth incapable of sustaining life.

We may even train our thoughts beyond the Judiciary and explore the possibility of Environmental Education in law schools. In the Philippines, the Supreme Court is given a hand in the formulation of curricula for law schools; your respective jurisdictions may allow similar opportunities. It would serve our judiciaries well if we formed environmental law advocates at this very early stage.

There are common approaches to the enhancement of independence and expertise. One of them is the conduct of symposia such as this one, where judges from different jurisdictions can share their unique experiences in the field of environmental law. These experiences will help each of us evolve common responses to common predicaments, taking into consideration the peculiarities of our respective cultures and government systems. At the very least, with such efforts, we would succeed in creating understanding among our nations at least in the judicial field.

In March of 1999 in Manila, Philippines, the UNEP, UNDP, Hann Seidel Foundation and the Supreme Court of the Philippines sponsored the Southeast Asian Justices Symposium on the Law on Sustainable Development. That Symposium allowed Southeast Asian judiciaries to share the challenges they encountered in advancing the rule of law in the area of environmental justice. The exchange of information certainly benefited all the participants. One of the outputs there was the *Manila Declaration* regarding measures for the continuing cooperation on environmental law in Southeast Asia. I closed that symposium with these words:

*... regardless of nationality, creed, color, sex, age, usages, customs and traditions, all peoples in this planet have only one mother -Mother Earth. She is a unique mother who provides everything for humanity's survival since the time of creation even when her children abuse her love and forget her in times of plenty...*

Since that Manila Symposium, I have been witness and participant to several dialogues among Judges from different countries on judicial approaches to environmental law problems. Environmental cases are usually novel and unique, with no precedent that we can rely on for guidance. We should therefore, welcome every opportunity where we can discuss with our peers the innovations on environmental law implemented by other nations. In the course of these dialogues, we may consider compiling a survey of the judicial approaches to international environmental dispute resolution. The United Nations Environment Programme had already published such a compilation of environmental laws and decisions by Supreme Courts of various nations. This is a worthy endeavor that can surely benefit all judiciaries in tackling environmental disputes.

Another approach to the enhancement of independence and expertise is the establishment of partnerships. The World Jurist Association of the World Peace through Law and the Center for Democracy in Washington D.C., USA are two organizations that provide such partnerships among judiciaries. They offer venues for the exchange of information on how to deal with evolving legal issues. Yet we must not limit our partnership with our fellow judiciaries. The United Nations is one of the crucial actors in development that all courts must partner with. We must give it our unqualified support.

In the Philippines, various UN agencies are deeply involved in efforts of the Philippine Supreme Court to reform the entire Judiciary. These agencies have provided training for our judges and allowed experts on various fields of law to share their thoughts with policymakers in the Judiciary. We must also consider partnership with the scientific community so that we may take advantage of technological advances in addressing environmental concerns. Many issues in environmental cases will inevitably require the intervention of scientific experts. I can imagine, for instance, the issue of whether a certain company has violated clean air regulations of a particular country. Identifying and measuring pollutant particles will call for the use of sensitive equipment that must be expertly handled if their findings are to be trustworthy.

Without a doubt, the issues and approaches I have mentioned are not exhaustive. In sum, we are all required to think outside of the box, so to speak, and yet to decide in accordance with law. This is a challenge that I look forward to addressing, especially since I am assured that all of us here will be united in taking on the same.

Furthermore, while we are only a few weeks away from the World Summit on Sustainable Development, ten years after the Rio Summit, we must now begin to look beyond *Rio*, and beyond *Rio+10*. We must initiate efforts now in our own judiciaries to prepare our courts to respond to environmental matters, with a view to attaining sustainable justice, justice that will endure across generations.

We must also realize that while we act within our own jurisdictional limits, the impact of our actions will be felt across the world as bases for other decisions or even cause for the evolution of international customary law. "Think globally, act locally," has long been the slogan of environmental groups. When we therefore, apply sustainable justice in our own countries, we in fact contribute to global justice. This is a grand ideal, and it is fortunate that all of us have this opportunity to fulfill such a lofty objective.

We all long for a better world; let that world begin with us, here, today.

Thank you for your time and your active participation.

### 3. STRENGTHENING THE JUDICIARY FOR SUSTAINABLE DEVELOPMENT

*Michael Decleris, Hon. Vice President of the Hellenic Council of State*

#### Executive Summary

1. I feel privileged to address a distinguished audience of brothers in the great family of the Global Judiciary. This is a historical meeting indeed!
2. I do not intend to read my paper. Instead, I will focus on the main ideas stated therein and I shall make them explicit.
  - A. Sustainability (or Sustainable Development) is not just another word for Environmental Protection. It does not mean deep ecology either. It is a far greater moral idea, meaning that life and justice are the perennial values and the objective measure of the state of things on earth. In this sense, the philosophy of sustainability marks the end of ethical skepticism and relativism. One cannot approach sustainability problems in such a perspective anymore.
  - B. Sustainability is the wisdom of our cultural heritage, revisited now by western civilization learning from its grave mistakes that have brought us here.
3. Concerning its authority, sustainability is not merely a philosophy, ideology or a scientific theory one can adopt or reject at will. Since *Rio*, it is the *Fundamental Global Law*, our '*Grundnorm*' which is both authoritative and enforceable. Legal argumentation to this effect may vary depending on the particular legal culture, but the obligation of the Courts to impose the fundamental rule of sustainability is the same worldwide.
4. The application of the fundamental law of sustainability by the Global Judiciary is a matter of elaboration: It is jurisprudence, the ever-living source of law, which will render it operative in everyday life. The best way is by general principles. We do not need to wait for *statutes* and *regulations*. They are welcome of course, but they themselves will be judged on the basis of the jurisprudential principles. Sustainability is a long-term policy. Legislative measures reflect middle or short-term policies.
5. In order to perform the above duty the Global Judiciary must be strengthened. These are hard times for the Judiciary. The State is weakening under the pressure of globalizing markets and strong interests are vested in the status quo. The political system is often their ally. Nevertheless, the weakening state needs a strong Judiciary. The alternative is strong and uncontrollable private power.
6. In order to be empowered, the Judiciary does not need the permission of the political system. The strengthening process depends entirely on our own will and dedication to carry out our mission. Once judges become conscious that sustainability is a part of the Rule of Law, as they did with Human Rights in the past, they will find the proper ways to shape the desirable state of things. Undoubtedly, this process will be easier and faster if supported by the political system. Nonetheless, it will equally succeed without such support or even against the open or concealed resistance by the political system. For it will have popular support. Now that it is clear to everybody that the political system has failed to materialize the vision of *Rio*, the wide public everywhere has turned to the Judiciary as the last resort. In fact, the empowerment of the Judiciary on sustainability matters will relieve the political system of significant political cost.

7. The strengthening process of the Judiciary does not need money. True, it will be easier if facilitated by money, but its driving force is higher than that, for it is moral. Effective strengthening measures depend mainly on our own will to improve judicial decision-making, which is a matter of implementation, communication and networking among Judges of the world. Besides, we can count on the valuable administrative support of the UNEP. The present Global Symposium, like the preceding Regional ones, is the best proof of this.
8. Now I would like to draw your attention to some of the factors affecting our problem (Diagram 2). You can see the failures of the Legislative and Administration. They are part of the problem but not an excuse for our own mistakes and omissions. Because our mistakes take place at a higher hierarchical level of the Law System (culture). By acting there we can correct Legislative and Administrative failures (Diagram 3 and Story Memos.) Of course, action at the level of the European Union (*Directives*) can eliminate the problem in European countries. Concerning the mission of the Judiciary, the Action System of Diagram 3 is seen from the Judiciary viewpoint: there are things the Judiciary can and must do by itself.

The Action system Plan (4) 18 is comprehensive and requires cooperation among all state agencies involved.

### Abstract

*Ten years after Rio the implementation of the Stockholm, Rio and Agenda 21 provisions seems to be the dominant problem. Therefore there is an imperative need for strengthening the Judiciary as the main enforcement agent. This strengthening process should start from the judges themselves who have the task and responsibility for consolidating the legal culture of sustainability by their decisions. Several institutional and procedural changes for increasing the capacity of courts are discussed in this paper.*

### A. Preface

1. The purpose of this Report is to study systematically the role that the Judiciary could and should have in Sustainable Development. This role was basically indicated for by the *Agenda 21* in par. 8.18 "*Governments and legislators, with the support, where appropriate, of competent international organizations, should establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and should provide access to individuals, groups and organizations with a recognized legal interest.*"
2. Today, ten years after *Rio*, the above provision seems too simple to address the issues which arose in the meantime from the process of Sustainable Development. The common evaluation is that, while little has to be added to the brilliant action plan of the *Agenda 21*, many things have to be done for its implementation. Beyond any doubt, there is an implementation gap suggested by almost all-environmental indicators.
3. Failures in the implementation of public environmental policies point inevitably to the performance of the Judiciary, since the implementation gap is an enforcement gap too. A systematic evaluation of the performance of Global Judiciary in Sustainable Development so far, is still missing. All we have now is fragmentary information. Still, the general feeling is that more must be expected from the Judiciary in Sustainable Development. But in order to fulfil its mission, the Judiciary must be empowered.
4. Any evaluation of the Judiciary in this respect is necessarily accompanied by problems, which cannot be underestimated. The same holds true for reform proposals. The Judiciary is the most ancient and respectable of all state institutions. Its present structures and functions

have had a remarkable stability over time. They are the outcome of a long and smooth evolution, which has successfully combined institutional order with personal independence of judges. Owing to such independence, any reform proposal should either come from the judges themselves or be approved by them. Moreover, any change should be proposed only if it is absolutely necessary and must be limited to the purpose. However, this is the case today. I believe it is the duty of judges now to re-examine critically the mission of the Judiciary in the 21st century of Global Change.

5. I shall be more specific: It is true that an essential part a Judge's independence is his philosophy of Justice and his sense of mission. Nevertheless, in periods of cultural change the generation of new ideas has an impact upon the Judge's attitudes too. In the past, judges who served as "lions under the throne became the protectors of individual rights freedoms and equality. In due time, the idea of social justice found its place in judicial decision too." Today, we are going through a similar period of cultural change: the moral idea of sustainability is a turning-point in our civilization. In fact, it is the modern version of justice having as a new dimension our moral duty to future generations and reaffirming our respect to Nature.
6. This great idea of sustainability is now forcing us to re-examine critically, a number of interrelated basic issues, such as the meaning of progress growth and development. The limits of human action the rights of nature the rights of coming generations the limitation of technological systems the balance of spiritual and material values the concept of quality in human life etc. It is in this context that our mission should be revisited.
7. The author of this Report has served the Judiciary of his country for quite a long time. He dedicated the last decade of his career working effectively for strengthening the role of the Judiciary in Sustainable Development. He feels privileged that in the present Judge's Symposium he has the opportunity to share his experience and thoughts with you, brothers in the great family of Global Judiciary. We in Greece, feel that the idea of sustainability is up to a certain extent the restoration of classical Greek values of Order, Nature, Justice, Measure and Frugality. I am sure that judges from other ancient cultures will recognise in sustainability important elements of their cultures too. Perhaps sustainability will eventually become a unifying factor in cultural diversity. In this spirit we have conducted a successful experiment in response to the challenge of the idea of sustainability. In the year preceding the Rio Conference (1991), we established a special Chamber for Environment and Sustainability within the Council of State, the Supreme Administrative Court. At that time Greece, a new member in the European Union, was gasping to reach the level of its partners. As a result of this unrelenting developmental effort, the exquisite Greek environment suffered a rapid deterioration. The new Court reacted in a decisive way. Ten years after the new Chamber had started its action, important changes had happened:
  - A complete system of sustainability principles was developed by the Court, in order to be incorporated into the relevant public policies.
  - Either through the preliminary control of the regulatory decrees, or through its decisions and suspension orders, the Court made clear that only sustainable policies would be permissible.
  - Public opinion duly informed by the Mass Media gave full support to the work of the Court.In the light of this experience I shall discuss what can be applicable outside the national borders.
8. The structure of the present Report has the following systemic order:
  - In the First Part, the structure of the problem that concerns the desirable role of the



Judiciary in Sustainable Development is stated.

- In the Second Part, the mission of the Judiciary in Sustainable Development is delineated.
- In the Third part, a system of measures strengthening judicial capacity is proposed, and
- The Report is completed with the study of measures supporting the role of the Judiciary.

Owing to the complexity of the problem the methodology of Large Scale Systems (LSS) is used for its study throughout this Report.

### B. Why the Judges now: the problem situation

In the systemic perspective the Judiciary should be studied in the context of a larger Law System Model which is composed of several components (Diagram 1). For the purposes of the present

## The Role of the Judiciary in Sustainable Development:

### The Systems Context

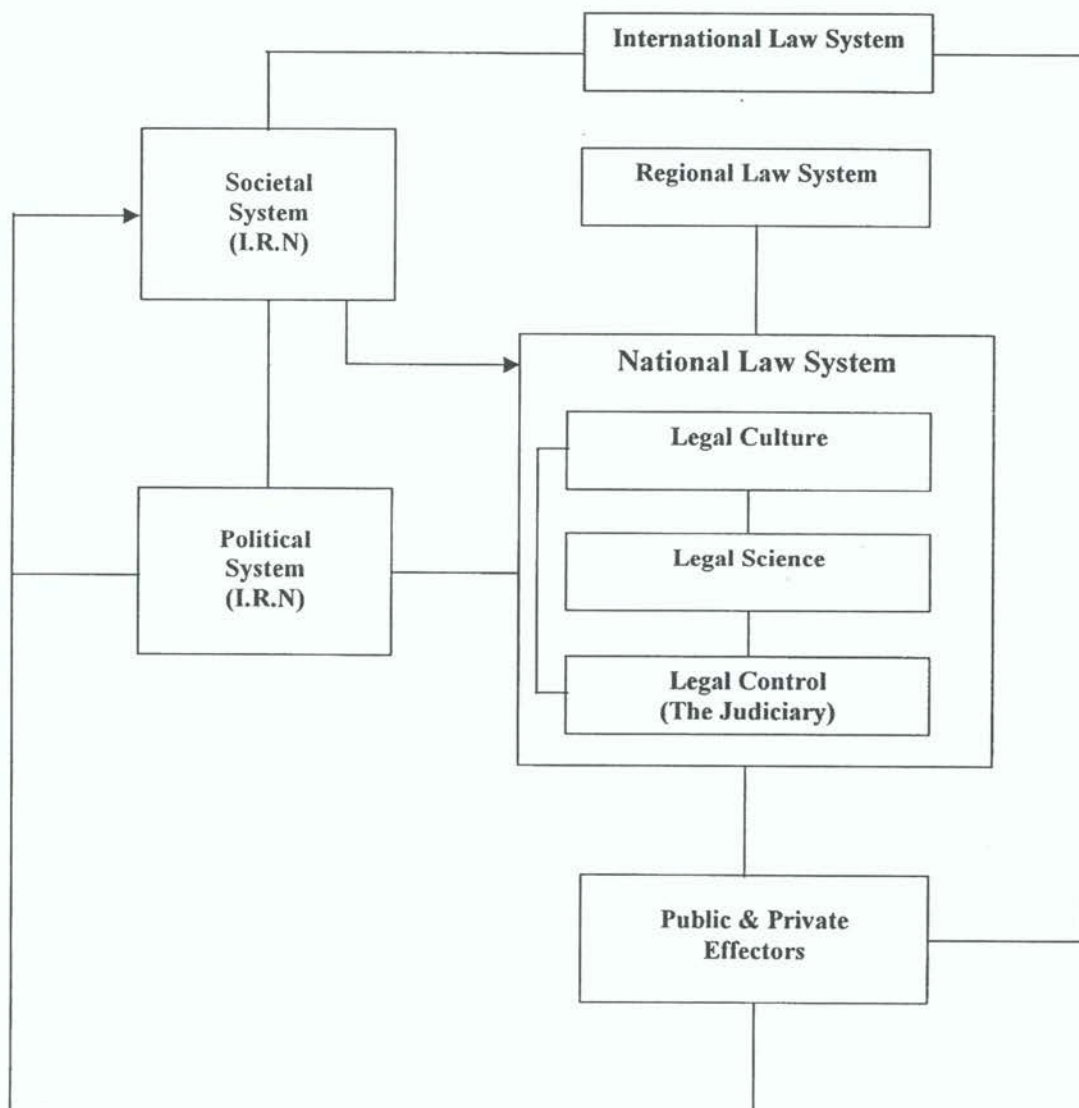


Diagram (1)

analysis, the emphasis is placed on three components of this larger system, which are Legal Culture, Legal Science and Legal Control System. A number of interrelated factors interacting within these components generate the following problem situation (Diagram 2):

### Factors Affecting the Mission of Judiciary in Sustainable Development

#### Problems Structuring

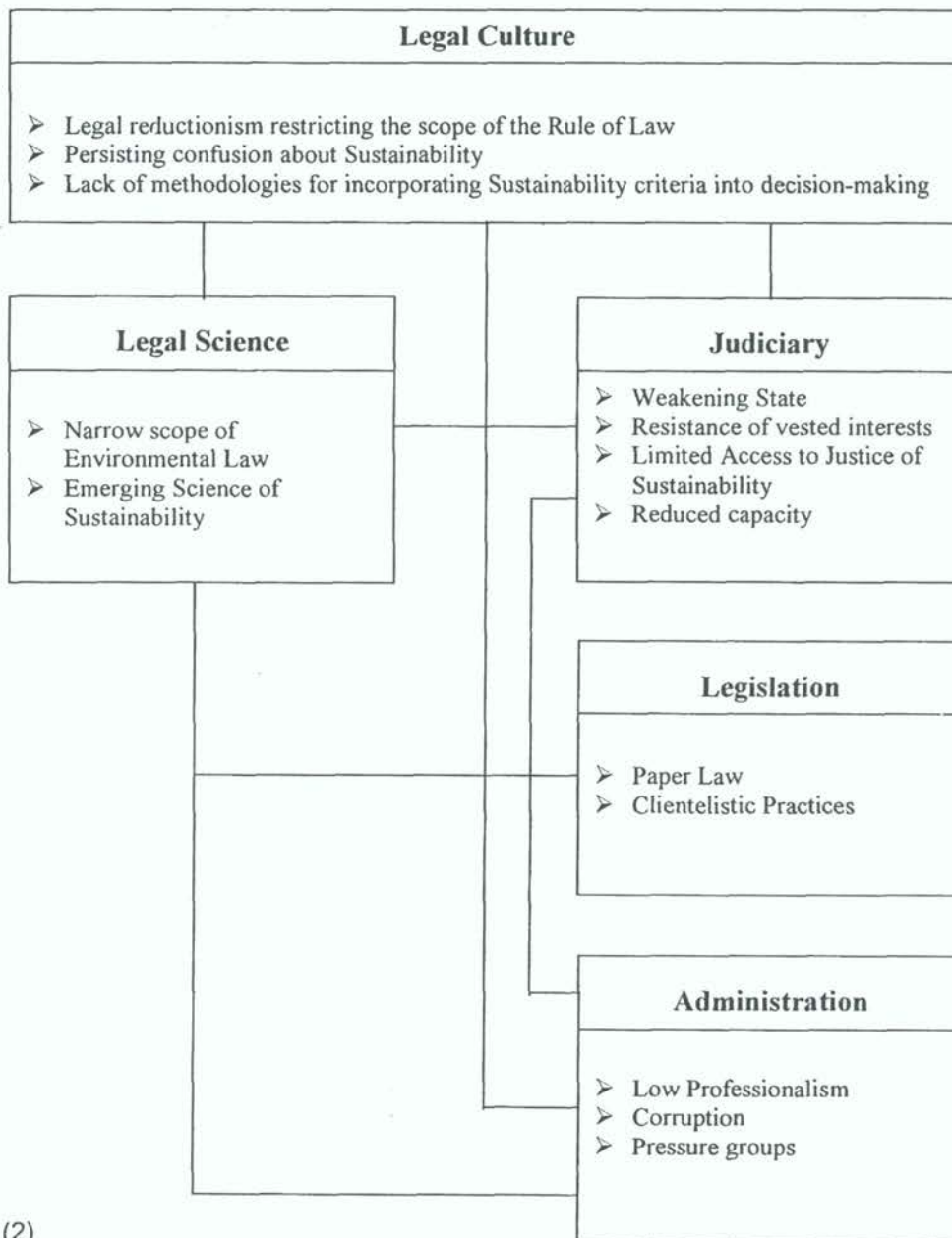


Diagram (2)

## 1. Legal Culture

- 1.1. By this term we refer to the system of basic legal values, fundamental principles and assumptions guiding legal thinking in the jurisprudence of the Courts and in Legal Science. Contemporary legal culture is dominated by the idea of the Rule of Law (or the *Rechtsstaat* in continental terminology). This is the outcome of a long cultural evolution, which started with the concept of *Politeia* in Ancient Greece, was revived in the Anglo-Saxon idea of Constitutionalism (Limited government) and was expanded with the inclusion of the Doctrine of Human Rights developed in the United States and in Europe. Our position is that after the *Stockholm* and *Rio Declarations*, the concept of the Rule of Law has been expanded so as to accommodate environment and sustainability, both crucial aspects of Public Order today. In terms of rights, both should be conceptualized as extensions (off-springs) of the fundamental right to life and health.
- 1.2. Despite the clear letter and spirit of the *Rio Declaration* and *Agenda 21*, some degree of uncertainty and even confusion still persists about the legal definition of sustainability. The main reason is that, after the inclusion of Human Rights in the concept of the Rule of Law, the latter has taken in the minds of certain jurists an atomocentric bias. Nevertheless, the values of environment and sustainability, though proclaimed as new values, are in fact revived collective (common) values of all traditional cultures, which had been forgotten in the process of modernity and economic growth. The co-existence of such pre-modern and modern elements within the broader concept of the Rule of Law makes some jurists hesitant to give the precise legal definition of the concept of Sustainable Development. While in the minds of many judges the problem is solved in favor of the environment and sustainability, we are still experimenting with tentative legal methodologies for doing it and this adds another element of uncertainty in the whole problem. The lack of a precise legal definition of sustainability is a serious gap in our legal culture affecting both Legislation and Justice-We have bad law and conflicting judicial decisions.
- 1.3. On the other hand, the above confusion is aggravated because scientists unfamiliar with the subtleties of legal reasoning propose multiple systems of sustainability indicators. Thus, instead of the required mutual support of legal science and sustainability science, we have conflict.

## 2. Legal Science

- 2.1. After *Stockholm*, another branch of legal science has been created: the Law of Environment has been flourishing ever since. Yet this has also become a source of confusion. The scope of this branch of law is usually narrowly conceived as referring to a self-contained subject matter. Judges have already realized that two distinct generations of legal problems are usually taken to the Courts, the *Stockholm* generation, concerning relatively simple environmental problems such as pollution, waste etc, and the *Rio* generation of more complex legal problems concerning the incorporation of Sustainability criteria into public decisions and in the exercise of private rights. So far there is little theory on the Law of Sustainable Development, properly speaking.

## 3. The Science of Sustainability

- 3.1. For the solution of complex sustainability problems, judges do not simply need a fully fledged law of Sustainable Development, they must become familiar with the now emerging Science of Sustainability, which has a systemic interdisciplinary character. However, while this science is not yet fully developed, conventional economics has so far been unable to assimilate the environmental dimension. This is another source of confusion in our legal culture.

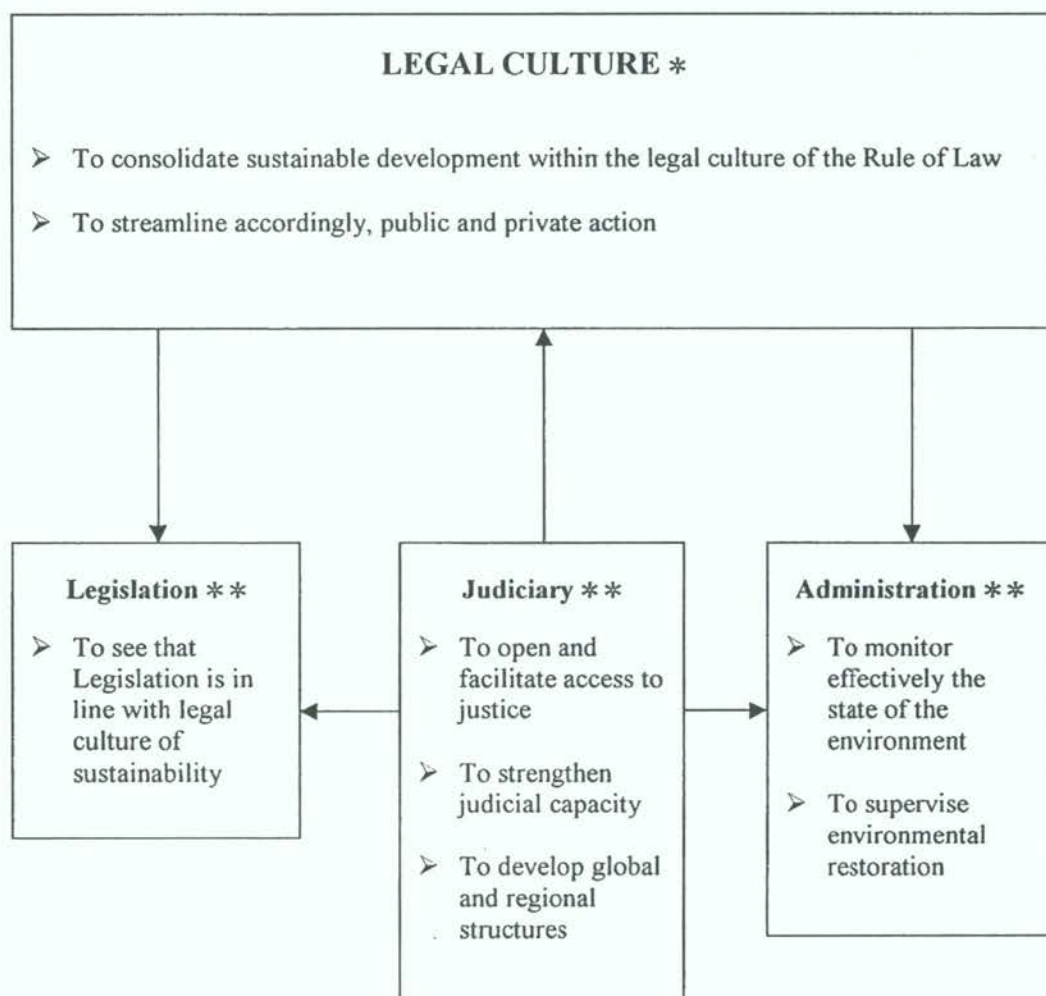
#### 4. The System of Legal Control

- 4.1. This system is composed of the state structures and functions entrusted with the enactment, interpretation and implementation of legal rules. Within this system, legislation as the formal source of legal rules has attracted the attention of the *Agenda 21*, which prescribes that legislation must become effective. This however, is a rather vague advice, which says little about the minimum of environmental subject matters, that legislation must deal with, in order to effectively address the problem of environmental protection. Judges can and must fill this vacuum legis by creative jurisprudence as they have often done in the past. Whether they will succeed or not, depends on the legal tradition of each country -as well as the particular issues brought before the courts a problem, which is associated with the major issue of the access to Justice. In reality, legislation on sustainability problems is still missing. Public policies are still designed and prescribed by the old criteria of unrestricted growth while environmental constrains are fragmentary and random. Such deficient legislation inevitably ends by becoming paper law.
- 4.2. Finally, we come to the Judiciary as the most important element of the legal control system. Despite the courage, tenacity and devotion of Judges, the Judiciary has been undergoing a rather difficult period since *Rio*. Many Judges have responded to the *Stockholm* and the *Rio* messages and the legal values of environment and sustainability declared worldwide. But they are doomed to act, within a state constantly weakening under the pressure of globalization. They are exposed to the strong resistance of interests vested in the status quo and to the resentment and clientelistic practices of their political allies. Paper law and paper decisions are the plague of this period, often discrediting legislation and justice. Beyond any doubt, the Judiciary needs empowerment and through its strengthening, the state may recover its lost authority.
- 4.3. An empowered Judiciary can be useful only if access to justice is opened too. Present day situation is unsatisfactory in this respect. Some courts are self-immobilized by holding the narrow view that access to justice on matters of environment and sustainability should be reserved only to the possessors of private rights. This attitude reduces the role of the Judiciary on these matters.
- 4.4. The strengthening of the National Judiciary is needed in two aspects:
- a. We need the strengthening of the structural and functional capacity of the Courts. In some parts of the world, the Judiciary has remained the weak and slow moving arbiter of private rights disputes. It does not have the extensive powers to deal effectively with the hard environmental and sustainability problems, in which issues of public order and public interest prevail. Action *suo moto (ex officio)*, inquisitorial system, absolute liability, monitoring system, enforcement system and system of sanctions are some of ilie powers still missing from the armor of many courts.
  - b. All courts will benefit from the strengthening of the professional capacity of the judges in environmental and sustainability matters. They need it in order to be able to develop the creative jurisprudence required in the complex problems of sustainability. We already mentioned that Sustainable Development is not a simple matter of law implementation. On the contrary, it is a dynamic regime, which will be shaped by the creativity and ingenuity of judges formulating the relevant general principles guiding public and private decisions.

## C The Mission of the Judiciary: What the Judges should do for Sustainable Development

1.1. The preceding analysis has shown that the Judiciary has its own domain of responsibility in Sustainable Development. It is a complex task requiring a systemic response, if we aim at a significant progress. We have to act simultaneously in several fields. In the relevant diagrams, this mission is described in two levels, corresponding to:

### Mission of the Judiciary for Sustainable Development in the 21<sup>st</sup> century



\* Long Range Strategic Goals

\*\* Constant Goals

Diagram (3)

**Systems Action Plan for Improving the Role of the Judiciary  
in Sustainable Development**

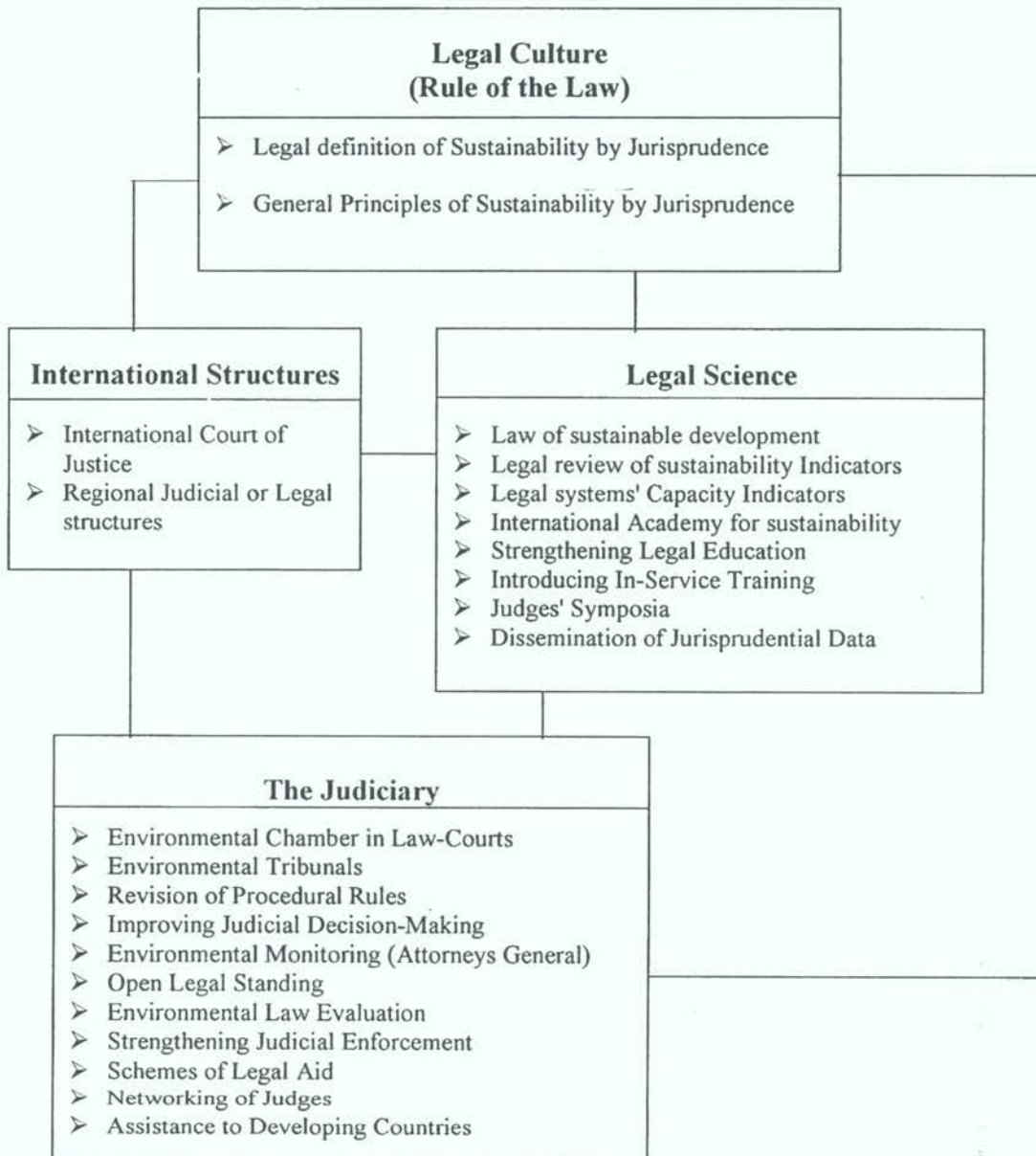


Diagram (4)

- a. the function required (Diagram 3)
- b. the specific measures to be taken (Diagram 4)

- 1.2. The first task of the Courts is to provide the precise legal definition of sustainability. This is the only effective way to consolidate the legal culture of sustainable development. The definition must come from the judges themselves and not from the legislators, because it is a matter of constitutional order, beyond the powers of Legislature. The *statutes* themselves, *regulations* and any *Administrative Act* dealing with sustainability issues will be judged by reference to the legal definition provided by Jurisprudence. Sustainability, as the driving force of our civilization in the 21st century, will of course inspire and permeate all social and political institutions. But institutions, though conceived by philosophers or politicians and realized by social action, take their definite form by the precise legal definitions of the courts. And this is exactly what judges must do today. By doing it, the Judiciary confirms its leading role in the consolidation of the legal culture of sustainable development.

There are several methods for this purpose. Judges, who have a predilection for legal positivism usually refer to Sustainability as a **generally accepted principle of International Environmental Law**, which is equally valid in domestic law. This task will be easier whatever a constitutional clause protecting the environment can be interpreted in the light of *Rio* principles and *Agenda 21* provisions.

However, it is only the **historical and theoretical foundation**, which gives sustainability the right place within the broader concept of the rule of law. This idea was born in Ancient Greece as the "Politeia" not founded on power but designed by wise legislators (Aesyttnites). The two pillars of Politeia were Nomos and Justice. The purpose of Politeia was the respect of human life and dignity, virtue and happiness. On the other hand, **order, nature, measure and frugality** were the predominant social values.

The idea of Politeia was revived in modern times under the name of **Constitutionalism**, an Anglo-Saxon modality of limited government. Constitutionalism was in time enriched with the idea of **equality** and **human rights** eventually declared on a global scale by the well-known *Declaration of the United Nations* (1948).

However, inherent in Constitutionalism are the concepts of **Public Order** and **Public Interest**, which both set the limits to individual rights. That is why after *Stockholm* and *Rio*, sustainability expressing the idea of public ecological order, took automatically its place within the concept of the rule of law. Therefore, for the protection of environmental order, we don't even need a special Constitutional clause.

Nevertheless, judges who feel the need to rely upon a specific provision of the *Constitution*, usually refer to the right of life, by the valid argument that human life is protected not only against violent destruction or arbitrary deprivations, but also against the degradation of environment threatening life and health.

- 1.3. Having given the legal definition of Sustainability, the judges will proceed to make it operational in the decision-making process. The appropriate method for doing this would be the formulation by the jurisprudence of the **General Principles of Sustainability**. This is how the creative talent of the judges will shape the dynamic regime of Sustainable Development. Jurisprudential general principles have always been the living source of Law. Civil Law has been developed by the decisions of Roman Praetors or Common Law Judges, Administrative Law by the decisions of French Council of State, etc.

Judges determined to create the general principles of sustainability won't have difficulties in specifying them. There is abundant relevant material in International Environmental Law, both hard and soft. The *Stockholm* and *Rio Declarations*, the *Agenda 21* and the numerous *international treaties* on specific environmental matters, will be of valuable help. We only

need to note that such principles should not be **procedural** only, but **substantive** as well, referring to the basic relationship of human systems with ecosystems, which is the central problem of Sustainability. Thus, in the Vth Chamber of Hellenic Council of State we made frequent use of the general principles of carrying capacity, mandatory restoration of damaged environment, biodiversity, common natural heritage, mild management of fragile ecosystems, mandatory spatial planning, sustainable urban environment, aesthetic value of nature, and others. It should be remembered that the legal operation of general principles of Jurisprudence is to streamline public and private action towards sustainable development. Without the guidance of the jurisprudential principles, the legislator, under the pressure of affected interests, may not only deviate from the right direction, but even be tempted to neutralize unwanted judicial decisions a favored policy in some countries including Greece.

- 1.4. While the legal culture on sustainability will be shaped by Jurisprudence, the relationship of the Judiciary with Legislation will be on critical importance. In view of the fact that environmental damages are often irreversible, the courts should follow closely the process of legislation and the impact of *statutes* on environment and sustainability. Judges should indicate improvements of such *statutes* suggested by their experience in the control of implementation. For the same purpose, they may participate in committees improving *statutes* on the above matters. *Bills* of Parliament affecting such matters should be discussed in the Plenaries of the Courts acting in an advisory capacity. On the other hand, the Courts should respond immediately to *statutes* affecting their powers or reversing their decisions. This kind of interaction can protect the independence of the Judiciary far better than delayed reaction following accomplished facts.
- 1.5. With respect to the Administration which is also an important element of the Legal Control System, there already exist several modalities of Judicial Review of administrative action. The most effective way is the continuous judicial control of public policy-making by the Administrative Courts and particularly by the Council of State. Wherever such a system exists, the preliminary control of *statutes* and regulatory *decrees* by the Council is the fast way to create and consolidate a fully-fledged system of General Principles of Sustainability.

In the legal cultures where a unified Judiciary exists, the guiding role for the same purpose should naturally be undertaken by the Supreme Court. However, this important task of the Supreme Court will be greatly facilitated if a special Chamber is set up within the Court, with exclusive jurisdiction on matters of Sustainable Development and Sustainability. It is the complexity of the relevant problems which requires a deeper knowledge of the environmental science by the judges, which cannot be acquired otherwise than by specialization.

- 1.6. Another modality for the same purpose would be the creation of special environmental tribunals, i.e., tribunals with exclusive jurisdiction on all matters of environment and sustainability. It is a good solution for the problem of the judicial expertise in environmental matters but it is inferior to the idea of the special Chamber within the Supreme Court. The special environmental tribunals may eventually lead to the marginalization of environmental law, while the idea of sustainability needs the authority of the Supreme Court, in order to permeate all legal relationships.
- 1.7. The empowerment of the Judiciary is not simply a structural problem, but a procedural one as well. It is true that the procedural rules followed by the Courts change as slowly as their structure. Today however, the adaptation of the procedural rules to the requirements of environmental problems, particularly in matters of evidence, is an imperative necessity.



- 1.8. There is a deeper problem concerning the method and structure of the judicial decision-making. In view of the advances made in the cognitive science and in the science of human decision-making, judges should reexamine their methods so as to allow cross-fertilization with the emerging science of sustainability. Administrative courts in particular, should take into account that public policy-making is usually supported by the use of scientific methods including Decision Support Systems and Policy Evaluation. It is an axiom of cybernetics that any control system should at least have the complexity of the controlled system. In that sense judicial control of Administration should be served by the same methods too.
- 1.9. Evaluated by the strict criteria of Control Science, the Judiciary has a serious problem with its sensors, which are the persons enticed to take environmental disputes to the Courts. The broader the circle of these persons the higher is the sensitivity of the Courts. There is a generally recognized problem of access to the Judiciary, particularly in the countries with a formal legal culture where this access is only reserved to the possessors of rights. Taking into account that sustainability problems eventually affect the common good of environment, access to justice must be dissociated from rights and granted to all adversely affected by environmental damages. The present day situation is often tantamount to avoidance of Justice.
- 1.10. The judicial decision-making must also be strengthened in the areas of monitoring and enforcement. It is another axiom of the science of decision-making that implementation of decisions is a problem of the decision-maker himself and not of the implementation agents only. In other words, the Courts should monitor implementation of judicial decisions.

In our legal culture the institution of judicial monitoring already exists with regard to the problems of public order only. Environmental order is a crucial sector of public order closely connected with life and public health. Therefore, it is only reasonable that monitoring of public environmental order should be considered a special duty of Attorney-Generals or a task for a special environmental Attorney-General, instituted for that purpose. This Attorney-General shall have a double task: environmental scanning for the detection of relevant violations and ensuring the implementation of judicial decisions

- 1.11. Finally, the enforcement of judicial decisions is of course a matter of utmost importance. The *Agenda 21* has already provided in this respect that all countries should develop integrated strategies to maximize compliance with environmental laws. Such strategies should include institutions of collecting compliance data, regularly reviewing compliance, detecting violations, establishing enforcement priorities, undertaking effective enforcement, and conducting periodic evaluations of the effectiveness of compliance and enforcement programs.

In the context of such programs, the power of judges to give detailed instructions for the implementation of their decisions, in view of the complexity of the sustainability problems must be recognized. For the rest, we believe that the Anglo-Saxon institution of the "**Contempt of the Court**," gives the judge the capacity to control insubordination provided that no public decision-maker is exempted from the scope of judicial decision.

#### **D. Supporting the Judiciary: Strengthening the professional capacity of judges**

1. Strengthening the institutional capacity of the courts should be parallel to strengthening the professional capacity of Judges, in dealing with environmental problems. In order to assume the above described mission, Judges should be helped to assimilate all relevant information and improve their training.

Two research projects should be given priority by the UNEP:

- a. A systematic comparative evaluation of judicial performance in environmental protection will allow us to proceed to the precise needs assessment, which is still missing. Through the successful regional Judicial Symposia, the UNEP has collected valuable information in this respect. But we need an evaluation based upon a rigorous systems methodology. This research should be coupled by another research project developing systems indicators for measuring judicial capacity. Both projects should be undertaken by the UNEP with the help of knowledgeable Judges.
  - b. While the Judges will be engaged in elaborating the legal definition of Sustainability, a research program linking judicial work with the proposed multiple systems of sustainability indicators will dissolve existing confusion in the concept of Sustainability and will also provide a solid scientific base to the legal definition of sustainability .
2. Judicial decision-making needs continuous scientific support, too. Since the emerging science of Sustainability is in a constant and rapid evolution, the training of Judges engaged in environmental protection should be adapted to the requirements of such continuous change.

The Judiciary needs its own institutions for legal education and in-service training. We need an International Academy, which will be both the authoritative Research Center and the Training Institution for judges engaged in environmental protection and sustainability problems.

While this Academy will co-ordinate the scientific support to the Judiciary on a global scale, other regionally based structures may do the same work on a regional scale. Within the Academy and the regional structures, Judges in charge of scientific and training projects will co-operate with competent scientists in all fields of the science of environment and sustainability.

Until the Academy and the regional structures start their functions, pilot projects regarding the in-service training of judges in Environmental and Sustainable sciences, preferably those coming from developing countries, are an absolute priority.

3. The success of the regional Symposia conducted by the UNEP point to the need of institutionalizing this kind of communication among judges. These Symposia may be assigned with the Academy and the regional structures in the future.
4. Parallel to this, the UNEP may ensure the constant distribution among judges of Jurisprudence on environment and sustainability either through printing or through electronic mail.
5. In view of the successful performance of the various networks that bring together scientists and professionals in the field of environment and sustainability (INECE, IMPEL etc); the setting-up of a special network bringing together the judges acting in the field of environmental protection and sustainability, will greatly help an on-going mutual information process and enhance moral support among judges. This network can be given birth in the present Symposium.
6. Particular mention should be made about the needs of the Judiciary in the developing countries: We appreciate the help given by UNEP to such countries, but we think that more generous support is needed. Our brothers in these countries need manifold help: legal, scientific and technical. They must have this help as a matter of first priority. Enabling the

judges to protect the environment of their countries is the most effective way to protect global environment. For it is there that global environment is vulnerable today.

### **Epilogue**

Soberly evaluated today, the state of environment and Sustainable Development may not be thought satisfactory. A lot of things remain to be done. Still, we should not underestimate the distance we have covered since *Stockholm*. It is significant in this common effort, the peoples of Earth and their leaders have played their part: they gave us the vision of Sustainability. Scientists too gave us knowledge to protect environment and pursue Sustainable Development; now, is the hour of Judges, their mission is to consolidate Environmental Order and Sustainability as the particular dimensions of the rule of law in our times. They must do it and they will, for this is the expectation of the world community today!

## 4. NATIONAL ENVIRONMENTAL GOVERNANCE AND THE ROLE OF LAW

*The Hon. Mr. Justice Charles Gonthier*

### I. OPENING

This gathering is extremely important and timely, in the context of the upcoming World Summit for Sustainable Development. It is an honour to be part of the process.

I have been invited to speak on 'National Environmental Governance and the Role of Law.' This suggests consideration of the existing state of affairs, both the trends, the challenges and also some thoughts toward future scenarios.

I will undertake to do this in the context of the upcoming World Summit in Johannesburg, inspired by the discussions at a recent conference on International Sustainable Development Law in Montreal, Canada, at which I had the pleasure of giving a Closing Keynote Speech.

I should note that of course, in this brief presentation it is not my place to provide a survey of all systems of national environmental governance. The countries of the earth are as diverse as the different species in an ecosystem. Each legal system is a characteristic of the broader society in which it is embedded, with unique challenges and unique moments of beauty, truth and justice. With this in mind, and with great interest in the world's different legal traditions, I very much look forward to the comments of my colleagues on the panel.

Having been a member of the Supreme Court of Canada for some years, my presentation will rely mainly on the experiences of my Court and my country, experiences which spring both the common and civil law traditions. I hope not only to identify some general themes within my discussion, but also to be provocative enough to inspire comparative comments and debate.

### II. INTRODUCTION

#### 1. Environmental governance and the role of law - the challenges

Environmental Governance, as a starting point, raises several questions. Governance of what, by whom and for whom?

##### *1.1. What is Environmental Governance?*

National Environmental Governance can be described as the regimes including principles, institutions and participatory mechanisms, which ensure compliance with national environmental laws and standards. Seen broadly, it is also about the setting of national goals, the rules that achieve these goals, and the people who make it work. Good governance is not simply about respect for the black letter of the law, but also about faith in the rule of law itself. Fundamentally, governance is about people. It is underpinned and bolstered by broader social recognition of the importance of environmental values, and a spirit of solidarity, or as I put forward in Montreal, "fraternité," being reminded of Art. 1 of the *Universal Declaration of Human Rights*. "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of *brotherhood*."

A commitment to one's fellow citizens, to the needs of future generation and to the very stability of one's society over the longer term, is reinforced by faith in the rule of law. This is because law provides the framework for national environmental governance. It is the socially negotiated set of rules upon which the rest of the environmental governance system, including those crucial relationships is built.

According to the World Resources Institute, environmental governance, including compliance and enforcement can be weak, due to ineffective and inefficient institutions, unrealistic environmental standards (regulatory and management frameworks), weak judicial systems, limited participation of local communities and the public, and lack of technical capacity. These problems are exacerbated by poverty, and as such may be particularly relevant for developing countries. While the law is only part of a broader environmental governance system, particularly on the national level, it has a role to play in addressing all of these challenges.

## 1.2 Governance of What?

This is not a simple question. Governance of the environment itself is, of course, almost impossible. Even if we had full scientific certainty regarding the nature and extent of most environmental problems, nature is extremely complex and powerful. Scientists would be the first to testify to this, as would persons who have experienced recent natural disasters, or tried to restore an extinct species. The environment itself is actually the sum of many natural and human-made characteristics, from rivers or mountains, to problems such as pollution, desertification or deforestation. Each problem requires its own set of solutions, complete with rules, which must be followed. So surely when we speak of environmental governance, we really mean the governance of human affairs as they affect the environment. This governance is a daunting challenge, but the role of law is clearly quite significant within it. Put simply, the law can provide principles and instruments to ensure that humanity moves forward in a way that are respectful of the environment, a way that may be sustained over time. National environmental laws can contribute to the goal of environmental protection and further, in conjunction with social and economic laws, can ensure a commitment to sustainable development. This happens through incentives, inducements or by recourse to authority.

But at the heart of environmental governance lies several paradoxes thrown into sharp relief, when we consider the role of law more deeply. First, environmental challenges and opportunities come from many different aspects of human society. They cut across many economic and social sectors - health, agriculture, energy and natural resources, to name but a few. Such a complex set of issues requires not one, but essentially many, problem-based solutions. Most environmental laws and jurisprudence are as such, all over the map. They address clusters of issues as distinct as climate change and emissions controls on the one hand, to biodiversity and ecosystem restoration on the other. The solutions are usually tailored to the problems at hand, leading to a complex, multi-sectoral web of laws, regulations and guidelines all related to the environment. Second, the environment itself knows no borders. The environment is global, in terms of the planet Earth, but also fundamentally local - each small creek-bed operates as a microcosm. Therefore, ecosystem boundaries rarely map to political jurisdictions. However, most current environmental laws are national. In a federal system such as Canada's, they are even sub-national. National environmental governance is part of international environmental governance, and it encompasses local environmental governance. Much more needs to be done to strengthen the effectiveness of all these levels. As recently observed by the World Bank over the last decade, the pace of economic globalization has outstripped the development of political institutions necessary to manage its environmental impacts at local and global levels.<sup>6</sup> While it is necessary to govern the environment at the national level, it must be done in a manner that reflects the shared

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6 [www.worldbank.org](http://www.worldbank.org)

responsibility, one which others depend upon as much as does the country or community 'doing the governing.'

When we consider national environmental governance, we must take into account these challenges, both of overlapping institutional mandates, and overlapping scales. These paradoxes come from the differences between the environment itself and the way human societies govern their activities, which impact on the environment. This brings us to the next question.

### 1.3 Who carries out Environmental Governance?

As we will discuss here, this question is also challenging. In most countries, as suggested by the topic of this session, it is the national government that is the main actor. In countries such as Canada, this responsibility is shared with provincial or sub-national units, down to the municipal level.

But governance is also much broader than simply different levels of government. Increasingly, environmental governance is done by industry in the new ways that they conduct their affairs, by civil society organizations in the protests they make and the projects they do, and by each and every individual. The law plays a special role in this changing state of affairs, and the law can also facilitate access by all individuals and interested sectors of society ('major groups', in the language of *Agenda 21*). This raises the final general question.

### 1.4 For Whom is Environmental Governance Done?

Many actors, particularly the 'major groups', are relevant and interested parties in determining how humanity will impact upon our resources and the ecological communities of which we are members. In short, environmental governance is everyone's business. It depends on access to information and legal redress, for those members of the public who are willing to participate in its functions. I will refer to this later. Now, I simply observe that the law can provide the backbone for a democratic, transparent and accessible system of environmental governance, and that increasingly, legal rights, including legal standing, are being granted to citizens whose environmental concerns require them to seek information, or access to environmental justice.

But a further moral obligation also exists, that of the need to protect and stand in solidarity with the interests of those yet unborn. Sustainable development is concerned not just with the present, but with the future, and seeks the achievement of a healthy environment and society that will continue to maintain and renew itself. Fundamentally, human activities with regard to the environment must be governed for these future generations, not only of humans, but also for the broader living communities of which human beings form a part.

The role of the law in this undertaking is not just important: it is crucial. Just as law can protect the interests of un-named heirs, or minority shareholders, so can the law protect the interests of future generations. But it must be based on serious, efficient systems of environmental governance, with the participation of all interested parties, and it must serve to protect the interests of the future without compromising the needs of today.

## III. OBSERVATIONS

### 1. National environment governance and the role of law: the trends

National environmental governance systems can address these considerable challenges. Certain trends which have become subject of much debate in the World Summit for Sustainable

Development, and in which the law plays a key role can be observed. In particular, I would like to address three.

First, **increasing participation and accountability for environmental performance** - finding ways to involve all actors, including governments, industry and individuals, and hold them accountable for their environmental performance;

Second, **ensuring that authority is placed at the right level** - locating authority and capacity for environmental governance at level closest to those affected, where possible; and

Third, **developing innovative relationships and institutions for environmental governance** - shaping more effective, dynamic principles and institutions to address the environmental challenges of a globalizing world, and promote sustainable development more broadly.

At the centre of these trends toward improvement are our courts and our judiciaries. I will address each of these thoughts in turn, drawing upon examples mainly from the Canadian experience.

### 1.1 Participation: The protection of the environment as everyone's business

The environment concerns individuals and their lifestyle choices, companies and their ways of doing business, and civil society organizations, as well as governments and the Judiciary. Governance however, is not just about institutions, it is about people who commit themselves, people who dare to become involved in issues beyond their own needs.

Thus, national environmental governance has an essentially procedural component. If it is open, transparent and participatory, based on the full access to information and justice which underpins effective public participation, it has more chance for success. In Canada, the *Access to Information Act*, provides a right of "access to information in records under the control of a government institution," including information pertaining to environmental matters.

In the *Friends of the Old Man River Society case*, a civil society organization initiated a private prosecution invoking federal guidelines to stop a large dam from being built. In general terms, the guidelines required of all federal departments and agencies with decision-making authority that any proposal potentially having an environmental effect on an area of federal responsibility, be initially screened to determine whether it may give rise to adverse environmental effects. If this was found to be the case, a public review by an independent environmental assessment panel was to be requested. Our Court held that the Guidelines Order was valid and imposed compliance on the federal government.

As regards access to justice, in addition to traditional recourses by way of criminal and civil proceedings, the *Canadian Environmental Protection Act*<sup>7</sup> allows individuals to have public investigations initiated whenever an offence has been committed under the *Act*. Also, under the *North American Agreement on Environmental Cooperation*<sup>8</sup> individuals and non-governmental organizations may make submissions to the secretariat of the Commission for Environmental Co-operation where a party to the agreement fails to effectively enforce its environmental laws. Class actions also may offer an important avenue to bring before the courts claims based on the environmental protection regime. This was acknowledged by our Court in the decision of *Hollick v. Toronto (City)*<sup>9</sup> dealing with a class action application on behalf of some 30,000 persons who might have been affected by noxious fumes from a landfill.

7 S.C. 1999, c. 33.

8 12 and 14 Sept, 1993, 32 I.L.M. 1480.

9 [2001] S.J.C. No 67.

## 1.2 Subsidiarity: Environmental governance in and between many jurisdictions

The environment is a shared responsibility. It may be global, but much of national environmental jurisdiction is actually shared between national and sub-national levels of government. This requires clarity between the different levels of authority, in terms of jurisdiction. It also requires cooperation between the different sub-national levels, when environmental issues under their jurisdiction transcend boundaries.

In international debate, this notion is often referred to as 'subsidiarity': decision-making ought to be kept at the closest level possible to those affected as is consistent with effectiveness. This concept has recently gained considerable recognition in the European Community. A related concept, that of building good relationships between the different sub-national jurisdictions, has also become very important in the Canadian federal structure. Indeed, it is a principle of our constitutional law that 'full faith and credit' be granted between different institutions and jurisdictions in a federal governance structure.

In Canada, the environment is a diffuse subject that cuts across many different areas of constitutional responsibility.<sup>10</sup> The environment falls under the jurisdiction of both the provincial and territorial governments. Each of these has an environmental authority of some kind, and the federal government as well, mainly through our Ministry of the Environment, which was created soon after the first United Nations Conference on the Human Environment, in 1972. Perhaps my colleagues on the panel have similar architectures for environmental governance in their countries. In Canada, this shared jurisdiction has generated controversy on occasion, and our court has been called upon to offer clarification.

In the *Crown Zellerbach case*,<sup>11</sup> it was held that certain environmental matters, such as dumping of substances into inland bodies of water, were "*matters of national concern*" and as such, could fall within the jurisdiction of federal authorities. It was held that "*marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole.*"

Even more recently, in the *Spraytech v. Hudson case*,<sup>12</sup> a municipal *bylaw* limiting the use of pesticides was upheld by our Court, recognizing the matter as one of shared jurisdiction with federal and provincial authorities. It was found that the *bylaw* in its preventive purpose embodied international law's "precautionary principle."

Thus national environmental governance is actually about finding the appropriate levels of jurisdiction over the environment, and it is also about cooperation between those different jurisdictions, especially in cases of overlap.

## 1.3 Problem-based Environmental Governance

In addition, as I have already mentioned, environmental governance involves many different problems and laws that have been specifically designed to address those problems, while these may actually connect to further issues.

This requires environmental governance, and courts, which can help to clearly define the environmental issues in question and help to sort out which sectors and problems are involved, as well as how they relate to each other.

<sup>10</sup> R. v. Hydro-Quebec, [1997] 3 S.C.R. 213, par.112.

<sup>11</sup> [1988] 1 S.C.R. 401.

<sup>12</sup> [2001] 2 S.C.R. 241.



The *Canadian Pacific case*<sup>13</sup> addressed the need for a level of specificity in legislation, but also the generality that is required in defining the object of an environmental law. The law must show flexibility in these matters. The *Canadian Pacific* railway company was charged under Ontario's *Environmental Protection Act* (EPA), which contained a broad and general prohibition of pollution "of the natural environment for any use that can be made of it." The main issue was to determine if that section was unconstitutionally vague and therefore in violation of s.6 of the *Canadian Charter of Rights and Freedoms*. We concluded "environmental protection is a legitimate concern of government and a very broad subject matter which does not lend itself to precise codification."<sup>14</sup> A Legislature, when pursuing the objective of environmental protection, may be justified in choosing equally broad legislative language.

Courts play an important role in reconciling economic development with environmental protection providing guidance in this respect and enlightened enforcement of laws and regulations. They are the forums which victims may address for the protection of their rights and repair of the damages they suffer.

#### 1.4 Partnerships: The need for a carrot, not just a stick approach

Much of environmental protection was originally founded upon public outcry, leading to new laws, and occasionally, the intervention of the Judiciary to help to interpret and develop these laws. This trend is even more clearly observed in the jurisprudence of the United States.<sup>15</sup>

But litigation is only one answer and leaves much to be desired. Particularly, for the more complex questions of today, partnerships are needed between all actors. This concept of 'partnership' will be an essential aspect of the World Summit for Sustainable Development discussions next week, and indeed, I have been informed that many civil society, private sector and government led initiatives will be launched in the days to come.

These voluntary initiatives are founded upon mutual commitment to common goals, and usually have monitoring and dispute settlement procedures built into them, or recourses to authority. Canada's national Office of Pollution and Prevention has recently developed an *Environmental Performance Agreement* with companies and other departments of the federal government and provincial agencies to harness the forces of competition, innovation and entrepreneurship to make the environment cleaner and safer. This policy framework is a "new architecture" of environmental management that is based on partnerships, knowledge and incentives. Due to their flexible nature, Environmental Performance Agreements can address a wide variety of environmental issues such as:

- Reducing the use and emission of selected pollutants, including substances deemed toxic under the *Canadian Environmental Protection Act*;
- Advancing product stewardship;
- Conserving sensitive habitats; and
- Providing for remedial action where project monitoring indicates a need (e.g., after an environmental assessment) or where environmental effects monitoring associated with an ongoing operation shows a similar need.

My advisors tell me that in Norway, they have gone a step further and innovative civil society and business partnerships can even be 'codified' by the Legislature. Similarly, German wind

13 [1995] 2 S.C.R. 1031.

14 *Ontario v. Canadian Pacific Ltd.*, par. 84.

15 B. Karkkainen, "Environmental lawyering in the age of collaboration", *Wisconsin Law review*, volume 2002, p.555.

power producers' efforts to generate renewable energy, I am informed, are reinforced by laws guaranteeing market share. Perhaps our colleagues from Europe who are here with us can expand upon these examples, or others. I stress however, that these innovative relationships cannot exist in thin air. Just as companies need a secure, reliable, stable corporate legal framework to do business, so do environmental partnerships need a good system of national environmental governance, supported and enforced by the law.

But beyond enforcing the agreed conditions for such joint ventures, and ensuring a level playing field, the law can play a further role. The law can support and encourage responsibility from different levels of government as well as from the private sector and individual citizens. For example, each government department at the federal level in Canada is now responsible for preparing a 'Sustainability Strategy'. Section 54 of *the Auditor General Act*<sup>16</sup> requires the Federal Minister of the Environment to issue objectives, guidelines, and codes of practice addressing sustainable development among other factors. The Auditor General oversees this strategy and is helped by a commissioner to perform his duties, which include:

- Monitoring Departmental Sustainable Development Strategies;
- Assisting in Audits and Special Studies of Government Activities;
- Responding to Public Petitions; and
- Undertaking Studies of special interest to Parliament.

#### IV. CLOSING:

##### 1. Environmental governance and 'fraternite.'

I would like to close my remarks by referring back to the importance of fraternity, as expressed in the *Universal Declaration of Human Rights*, and our responsibility toward future generations. Fraternity is the heart of Sustainable Development. It calls for not imposing solutions determined by one's own agenda rather than regard for the needs as experienced and perceived by the recipients. Where there is no fraternal impulse in the development endeavour, there is no true understanding and commitment to the problems of those in need.

A longer-term view must be based on solidarity, founded upon respect for the interests of future generations. A moral approach might even suggest that what we do is always under a fiduciary duty of some kind, to manage the planet for the needs of future generations.

We as Judges, especially in the common law tradition of legal precedence, are faced with the needs of those who are affected by the environment. We are well accustomed to consider the long-term consequences of our decisions through carefully weighing the implications of our reasoning, for both the case at hand, and for the future development of the law. As such, we are well placed to support and encourage stronger and more effective national environmental governance, in keeping with the principles and laws of our countries.

The international aspects of this agenda will be discussed on subsequent panels, so I have mainly confined my remarks to a consideration of challenges and trends for the role of law in strengthening national environmental governance. Each country, and hence each system of environmental governance, has a responsibility to change course toward more sustainable development, in developed and developing countries.

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<sup>16</sup> R.S.C. c. A-17, s.21.1.

Several developed countries and also many developing countries, have seriously taken up these challenges, and are developing innovative approaches. Their judiciaries have played a key role in many respects, providing an impartial balancing of priorities, and also a realistic long-term perspective.

For many countries however, there is still far to go in this respect, and we face many further challenges. However, with compassion and cooperation, in adherence to the spirit as well as the letter of the law, we owe it to our children to try.

## 5. SUSTAINABLE DEVELOPMENT AND THE EUROPEAN UNION - ENVIRONMENTAL LAW BEFORE THE EUROPEAN COURT OF JUSTICE

*The Hon. Gil Carlos Rodriguez Iglesias, President of the European Court of Justice, and Hon. Kurt Riechberg, President's Chambers, Chef de Cabinet*

### I. TREATY FRAMEWORK AND POLICY STATEMENTS

According to Article 2 of the *EC Treaty*, the Community shall have as its task, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

The initial *European Community Treaties* from 1952 and 1957 did not contain any provisions on environmental policies, because that concern was not present in the first phase of the process of European integration. It was through the *Single European Act* that environmental protection became part of the *EC Treaty* in 1987. Since then a considerable amount of legislation in this field has been enacted. The overall policy frameworks for this legislative activity were the different EC environmental action programmes.

Article 174 of the *EC Treaty* provides that the Community policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources; and
- promoting measures at international level to deal with regional or worldwide environmental problems.

Article 174 further stipulates that the Community policy on the environment, shall aim at a high level of protection, taking into account the diversity of situations in the various regions of the Community. This policy is to be based upon the precautionary principle and on the principles that the preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

Article 174 also allows for cooperation between the Community and the Member States with third countries and with the competent international organisations.

The first major international instrument to be implemented within the Community was the *Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)* which was opened for signature in 1973. The purpose of that *convention* is to protect endangered species of wild flora and fauna by regulating international trade in them. To achieve its objectives, the *convention* imposes a number of restrictions and controls. *Council Regulation No 3626/82* on the implementation of the convention in the Community seeks to ensure that the commercial policy instruments to be employed under *CITES* are uniformly applied within the Community.

At present one of the priorities for the European institutions with regard to the Sixth Environmental Action Programme are contributions to the United Nations Conference in 2002.

Sustainable Development is a global objective. The European Union wishes to play a key role in bringing about sustainable development within Europe and also at the global stage, where international action is required. To meet this responsibility, the Union as well as other signatories of the 1992 United Nations *Rio Declaration* have committed themselves to draw up strategies for sustainable development in time for the 2002 World Summit on Sustainable Development.

Within the European Union the strategy for sustainable development has identified the following major challenges :

- Climate change and clean energy;
- Public health;
- Management of natural resources;
- Poverty and social exclusion;
- Ageing;
- Mobility, land use and territorial development.

## II. ENVIRONMENTAL LEGISLATION

From a legislative point of view, the policy areas governed by Community law includes important fields of environmental protection, encompassing measures not directly linked to intra-Community trade and not necessarily involving trans-border contamination. Air and water pollution as well as waste management have received considerable legislative attention, but the Community has also legislated in the area of chemicals, hazardous substances, nuclear safety, wildlife and noise.

Environmental protection has become one of the most dynamic areas of legislative activity at the Community level. The European environmental policy area is characterized by complex interactions between the Community and its Member States. Although some Member States may have a stronger standard of environmental protection than the Community's standard in areas not linked to the internal market, the overall dynamic has been one of significantly upgrading most of the Member States' protection of the environment.

European legislation may take the form of a *Regulation* or a *Directive*. Article 249 of the *EC Treaty* provides that a *Regulation* shall have general application and that it shall be binding in its entirety and directly applicable in all Member States. A *Directive* shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

The large majority of European legislation in the field of environmental protection is composed of *Directives*, which have to be incorporated into the legal orders of the Member States. One of the few examples for the use of the other instrument is *Council Regulation No 259/93* on the supervision and control of shipments of waste within, into and out of the European Community.

Direct action of Community institutions in the area of environmental protection is exceptional. By virtue of the decentralized structure of the Community, protective measures are for the most part implemented and applied by Member States authorities, even if the legal basis for these actions is to be found in Community law.

Environmental legislation comprises a wide range of legislative and administrative obligations. These obligations include the obligations: to formulate plans, to identify areas that are under threat, to grant permissions, to provide information, to carry out of assessments and evaluations, to enact prohibitions relating to the handling of hazardous substances and general supervisory obligations.

Finally, it should be mentioned that the *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* had entered into force on 30 October, 2001. The European Community is a signatory to the *Convention*, although it has yet to ratify it. Upon signature, the Community declared that *the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention*. Thus, the EC will have to align to the obligations of the *Convention*, not only by means of legislation directed to the Member States, but also for its own institutions.

There have already been steps in the first pillar of the *Convention*:

- *Regulation* No 1049/2001 regarding public access to European Parliament, Council and Commission documents (Official Journal L145 of 31.5.200) became applicable from 3 December, 2001.
- proposal for a *Directive on public access to environmental information* (OJ C 337 of 28.11.2000, p.156).

The Commission has made proposals in the context of the second pillar :

- proposal for a *Directive* providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (OJ C 154 of 29.05.2001, p.123).

And concerning the third pillar (access to justice), there is an ongoing consultation process, the last document being a working paper of the Commission's services of 22 July, 2002. This will also probably result in the adoption of legislation.

### III. FUNCTIONS OF THE COURT OF JUSTICE

Environmental litigation in the Court of Justice is a relatively recent phenomenon as compared to national courts or other types of litigation. Environmental cases brought before the Court can be broadly divided into two categories, i.e. litigation between the European Commission and Member States or between European institutions and references for preliminary rulings regarding the interpretation and the validity of Community law.

When Community law is incompletely or incorrectly implemented, or has been badly enforced by the national authorities, the European Commission may initiate proceedings under Article 226 of the *EC Treaty* and refer the matter to the Court which is empowered to establish an infringement of Community law. The Commission may also start "urgency procedures" and request interim measures against a Member State.

If the Commission considers that the Member State concerned has not taken the measures to comply with a Court ruling it may bring the case again before the Court and specify the amount of a lump sum or penalty payment to be paid by the Defendant State. If the Court finds that the Member State concerned has not complied with its judgment it may impose such a lump sum or penalty payment. In recent years, several actions have been brought by the Commission on the basis of Article 228 of the *EC Treaty*, most of them relating to non-compliance with Court judgments in the field of environmental protection. In most of these cases the action was withdrawn in the course of the Court proceedings, because the Defendant Member State had in the meantime abided by the requirements of Community law.

The Judgment of 4 July, 2000 (*Commission v. Greece*) was the first application of Article 228 by the Court. It is highly significant that compliance with European environmental requirements was

the object of this action. In 1992, the Court had held that Greece had failed to fulfil certain obligations under two Community *Directives* relating to waste and to toxic and dangerous waste respectively. In new proceedings brought by the Commission, the Court found that Greece had not implemented all the necessary measures to comply with the previous judgment. As to the amount of the penalty payment, the Court found that in the absence of provisions in the *Treaty*, the Commission might adopt certain guidelines for determining those payments, subject to judicial review by the Court.

In this case, since the infringements were particularly serious and of considerable duration, the Court ordered Greece to pay a penalty payment of EUR 20 000 for each day of delay in implementing the measures necessary to comply with Community law.

The other type of procedure is the *Preliminary Reference Procedure*. This has played a fundamental role in the evolution of Community law. Indeed, *Referrals* from national courts have led to the most important judgments of the Court dealing with the direct applicability and the primacy of the Community legal order over conflicting national law as well as the application of certain generally accepted fundamental legal principles.

Within the framework of the preliminary reference procedure, it is solely for the national court, before which the dispute has been brought and which must assume the responsibility for the subsequent judicial decision, to determine both the need for a preliminary ruling. This enables it to deliver judgment and the relevance of the question, which it submits, to the Court. While the Court cannot rule directly on the interpretation or the validity of national law, it may provide the national court with an interpretation of Community law, which the latter needs in order to assess, its effects upon national law.

In the following section, several important Court judgments in the environmental field are described.

#### IV. FREE MOVEMENT OF GOODS AND NATIONAL MEASURES OF ENVIRONMENTAL PROTECTION

Articles 28 and 30 of the *EC Treaty* prohibit quantitative restrictions and measures having equivalent effect on imports and exports between Member States.

Quantitative restrictions have been defined by the Court of Justice as *measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit*. The concept of measures having equivalent effect is even broader being defined by the Court as all trading rules enacted by a Member State which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade .

Article 29 of the *EC Treaty* permits prohibitions or restrictions on imports, exports or goods in transit justified on various grounds which are public morality, public policy or public security, the protection of life and health of humans, animals or plants; the protection of national treasures possessing artistic, historic or architectural value; or the protection of industrial or commercial property. The second sentence of Article 29 stipulates that such prohibitions or restrictions must not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

In interpreting Article 29 the Court has stressed that exceptions from the fundamental principle of free movement and their scope must be strictly construed. Restrictive measures must not simply be necessary to protect the interests with which Article 29 is concerned, but they must also be necessary in the sense that such interest could not be as effectively safeguarded by measures less

restrictive of free movement. The burden of proof is on the Member State seeking to rely on Article 29.

The Court has also recognized the acceptability of trade-restricting measures applicable to imports and domestic products, which are necessary to satisfy certain mandatory requirements. Such trade-restricting measures may be permissible, provided that they are necessary in the sense that no measures less restrictive of trade would achieve the same ends and do not unjustifiably discriminate in their application or their effect.

The first ruling of the Court in which environmental concerns were recognized as such mandatory requirements was handed down in 1988.

Consumer waste was at the centre of an infringement action by the European Commission for a *Declaration* that by introducing a compulsory system under which all containers for beer and soft drinks had to be returnable, Denmark had violated Article 28 of the *EC Treaty*. The main feature of this national law was that manufacturers had to market beer and soft drinks only in re-usable containers. The containers were to have been approved by the domestic administration that may refuse approval of new kinds of container, especially if it considers that a container is not technically suitable for the deposit and return system. It was undisputed that the Danish law had been enacted to reduce the quantity of household waste.

In its judgment the Court emphasized that the protection of the environment is one of the Community's essential objectives which may justify certain limitations on the free movement of goods and concluded that environmental concerns can be considered as a "mandatory requirement," i.e. as a justification for trade-restricting measures.

With regard to the Commission's argument that the Danish rules were contrary to the principle of proportionality, in so far as the aim of environmental protection may be achieved by means less restrictive of intra-Community trade; the Court pointed out that those measures must not go beyond the inevitable restrictions, which are justified by the pursuit of the objective of environmental protection. In other words, it had to be ascertained whether the restrictions, which the contested rules imposed on the free movement of goods, were necessary to achieve this goal. As regards the obligation to establish a deposit-and-return system for empty containers, the Court observed that this requirement was an indispensable element of a system intended to ensure the re-use of containers and therefore was necessary to achieve the aims pursued by the contested rules.

Another important judgment of the Court in the problem area of free trade and national measures of environmental protection relates to waste management.

In 1990, an infringement action was brought by the European Commission against Belgium regarding the total prohibition by the Walloon authorities to deposit waste from other countries as well as from Flanders and Brussels in that part of Belgium. The Commission argued that the Walloon legislation infringed Article 28 of the *EC Treaty*. In its judgment the Court of Justice held that waste is a commodity falling under the protection of free trade, no matter whether waste is recyclable or recoverable or has or might have economic value. Although the prohibition was clearly discriminatory with regard to waste imported from another Member State, the Court emphasized the necessity to take account of the particular nature of waste in order to determine whether the contested legislation was in violation of the free trade, principle. The Court held that in effect, the principle that environmental damage should as a priority be rectified at the source; a principle established for action of the Community in the area of the environment in Article 174 of the *EC Treaty*, implies that it is up to each region, municipality or other local entity to take the appropriate measures to ensure the receipt, treatment and elimination of its own wastes. These



must indeed be eliminated as close as possible to the place of their production, with a view of limiting their transportation as much as possible.

The Court therefore concluded that the Walloon import ban was justified on environmental grounds. It also referred specifically to the *Basel Convention on the Control of Transboundary Movements of Hazardous Waste* which stipulates that transboundary movement of hazardous wastes is permitted only between parties and is subject to numerous conditions confirming thereby the principle of self sufficiency in the area of waste management.

A recent judgment of the Court has clarified the scope of Member State action with regard to the promotion of renewable energy sources (*Preussenelektra*, 2001 ECR I, 2099).

In this case the Court of Justice had been asked by a German Court, whether an obligation placed on traders in a Member State to obtain a certain percentage of their supplies of electricity from a national supplier can constitute an obstacle to free trade within the Common Market? German law on electricity supply produced from renewable energy sources imposes the purchase obligation at a statutory minimum price.

The Court found that the German legislation constituted at least potentially, an obstacle to intra-Community trade. However, it then stated that, '*in order to determine whether such a purchase obligation is nevertheless compatible with Article 28, account must be taken, first, of the aim to the provision in question, and, second, of the particular features of the electricity market*'.

The Court then stated that the use of renewable energy sources for producing electricity is intended to promote the protection of the environment in so far as it contributes to the reduction in emissions of greenhouse gases, which are amongst the main causes of climate change. It recalled the European Union and its Member States have committed themselves to such reductions in order to comply with the obligations, which they contracted by virtue of the *United Nations Framework Convention on Climate Change*.

The Court also stressed that Community legislation allows Member States to give priority to the production of electricity from renewable sources so that the German law was not in violation of the principle of free movement of goods.

## V. SPECIAL PROTECTION AREAS

One of the earliest legislative instruments adopted by the Community in the environmental field was *Directive 79/409* on the conservation of wild birds. The aim of this *Directive*, as stated in Article 1 (1) thereof, is the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States. To that end, it introduces rules for the protection, management and control of those species. It also lays down rules for their exploitation. Under Article 5, the birds *Directive* generally prohibits the killing, capture or keeping of protected species. The *Directive* is designed to address the decline in the populations of a large number of species of wild birds naturally occurring in the European territory to which the *Treaty* applies. Effective bird protection is seen as typically a trans-frontier environment problem entailing common responsibilities, particularly as regards migratory species which constitute a common heritage of all Member States (*Preamble*, second and third recitals).

*Directive 79/409* has given rise to an abundance of case law starting in 1987. Initially, these cases mainly concerned the extent to which Member States could derogate from the prohibition on capturing and killing wild birds, but more recent case law has focused on the more complicated and politically sensitive issue of the designation and conservation of special protection areas as required by Article 4 of the *Directive*. As far as the latter are concerned, the *Leybucht Dykes* (Case

C-57/89 [1991] ECR I-883) and *Marismas de Santoña* (Case C-355/90 [1993] ECR I-4221) judgments are of paramount significance.

The procedure for the classification of special protection areas, under the *Wild Birds Directive*, has to be conducted by the Member States that must 'classify in particular the most suitable territories, in number and size' for the conservation of those species of birds listed in Annex I to the *Directive*. Member States shall also take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection. Particular attention is to be paid to the protection of wetlands and especially to wetlands of international importance.

Among the substantive obligations imposed upon Member States pertaining to the management of special protection areas are the duties outlined in Article 4(4): Member States "*shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article.*"

European Commission brought the first case on Article 4 of the *Directive* against the construction of a dyke in Northern Germany. The Court held that Member State authorities might not reduce the surface of special protection areas, except for exceptional reasons of public interest. However, the Court held that the danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify dyke works and the strengthening of coastal structures; so long as those measures were confined to a strict minimum and involved only the smallest possible reduction of the special protection area. Thus, only the concern for human life was recognized by the Court as a motive to derogate from the regime of protection established by Article 4(4) of the *Directive*.

In 1993 the Court had to deal with another action brought by the European Commission, in which several local infrastructure measures in Spain were alleged to be in violation of Article 4 of the *Directive*. In its judgment, the Court held that "although Member States do have a certain margin of discretion, with regard to the choice of special protection areas, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the Directive, such as the presence of birds listed in annex I, on the one hand, and the classification of a habitat as a wetland area, on the other."

As regards the obligation to protect the Santoña marshes, pursuant to Article 4(4) of the *Directive*, the Commission's action had identified a series of local measures endangering birdlife in this area, such as the construction of a road through a part of the marshes, the establishment of industrial estates, the granting of an administrative authorization to a fisherman's association to farm clams in the middle of the marshes and the discharge of untreated waste water. All those actions were held by the Court to be incompatible with the requirements of protection laid down in Article 4(4) of the *Directive*.

This line of jurisprudence was confirmed by the Court, in a judgment based upon a reference for a preliminary ruling from the British House of Lords. In 1993, the British authorities had decided to designate the Medway Estuary and Marshes as a special protection area for birds. At the same time, an area of about 22 hectares, known as Lappel Bank, had been excluded from this area. Lappel Bank is an area of inter-tidal mudflat immediately adjoining the Port of Sheerness and falling geographically within the bounds of the Medway Estuary and Marshes. It shares several of the important ornithological qualities of the area as a whole and it is an important component of the overall estuarine ecosystem. The designated Medway Estuary is a wetland of international importance also listed under the *Ramsar Convention* for a range of wildfowl and wader species which use it as a wintering area, and as a staging post during spring and autumn migration.

The Royal Society for the Protection of Birds brought an action against that decision arguing that it was illegal by virtue of the *Wild Birds Directive*, to have regard to economic considerations when classifying a special protection area.

The Court noted, first, that Article 4 of the *Birds Directive* lays down a protection requirement which is specifically targeted at and reinforced both for the species listed in Annex I and migratory species.

Consequently, the protective requirements do not have to be balanced against other interests in particular those of an economic nature. Article 4(1) or (2) of the *Birds Directive*, therefore was interpreted as meaning that a Member State is not authorised to take account of economic interests when designating a special protection area and defining its boundaries.

Secondly, the House of Lords had asked the Court of Justice whether the *Wild Birds Directive* allows a Member State, when designating a special protection area and defining its boundaries, to take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that *Directive*. The Court replied that, having regard in particular to its 1993 judgment in the *Santona Marshes* case, economic requirements could not on any view correspond to a general interest superior to that represented by the ecological objective of the *Directive*.

Another judgment of considerable general importance was handed down in 1998, when the Court held the Netherlands to be in violation of *Directive 79/409*, because it had not designated a sufficient number of special protection areas. This was the first time that a Member State has been condemned for its wild birds conservation policy as a whole.

The Court emphasized that "*while the Member States have a certain margin of discretion in the choice of those areas, their classification is nevertheless subject to certain ornithological criteria determined by the Directive.*" Member States are required to designate special protection areas, an obligation, which it is not possible to avoid by adopting other special conservation methods. The Court was of the opinion that the designation by the Netherlands of only 23 areas of a total surface area of 327,602 hectares was largely insufficient in comparison with figures published in an international inventory of important bird areas in the European Community. According to this scientific report, there are 70 Dutch sites covering 797,920 hectares, which should be designated as special protection areas. The Court stated that this ornithological study is the "only document containing scientific evidence making it possible to assess whether the defendant State has fulfilled its obligation to classify as special protection areas the most suitable territories."

In recent years, the Court has confirmed the most important elements of the relevant case-law, in particular as regards the obligations of the Member States to identify special protection areas and to provide a legal status for their protection which is binding upon all national authorities. (*Judgments in Case C-166/97, Commission v. France* [1999] ECR I-1719, and in *Case C-96/98, Commission v. France*). The Court emphasized in each case the very high ornithological value of the disputed sites for numerous species, including species in danger of extinction or vulnerable to changes in their habitat. In each case, the Court also found that the legal status conferred on those areas for their protection was insufficient having regard to the requirements laid down by the *Directive*.

## VI. NATURAL HABITATS OF WILD FAUNA AND FLORA

Natural resources underpin Sustainable Development. They provide essential life support functions such as foods and habitats, carbon storage and water catchment, and provide essential raw materials. Although small changes in most stocks of natural resources pose little immediate

threat, a persistent decline is of great concern for resources that are difficult or impossible to replace, such as biodiversity.

There are several general problems that undermine the efficient and sustainable use of natural resources. Different forms of industrial and agricultural activity affect many natural resources. Recent decades have seen very significant losses in virtually all types of eco-systems in Europe. Many nature conservation sites can be considered at risk from infrastructure developments.

In order to respond to these concerns, a comprehensive new instrument was adopted in 1992. In accordance with Article 3(1) of *Directive 92/43* on the conservation of natural habitats of wild fauna and flora, Member States are to set up a coherent European ecological network of special areas of conservation, known as *Natura 2000* to enable the natural habitat types and the species concerned to be maintained or where appropriate, restored to a favourable conservation status. The term special area of conservation is defined in Article 1(1) as a site of Community importance designated by the Member States through a statutory administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated.

According to Article 6(2) of the *Directive* Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this *Directive*.

In a Judgment following a *Reference* for a preliminary ruling from a British court, the Court of Justice held (Case C-371-98, *First Corporate Shipping*, Judgment of 7 November, 2000) that a Member State may not take account of economic, social and cultural requirements, or regional and local characteristics, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance for the purposes of that directive.

According to the Court, in order to produce a draft list of sites of Community importance capable of leading to the creation of coherent European ecological network of special areas of conservation, the Commission must have available an exhaustive list of the sites. The sites must at national level, have an ecological interest which is relevant from the point of view of directive's objective of conservation of natural habitats and wild fauna and flora. Only in that way is it possible to realise the objective referred to in the *Directive*, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range. That range may lie across one or more frontiers inside the Community and a Member State is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States. That State therefore cannot, whether on the basis of economic, social or cultural considerations or because of regional or local characteristics, delete sites, which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of the objective at Community level.

In 2002 (Case C-103/00, *Commission v. Greece*) the Court for the first time defined the scope of the requisite measures to establish and implement an effective system of strict protection for a particular species of animal so as to avoid disturbance of this species during its breeding period. These obligations are laid down in Article 12 of *Directive 92/43*.

## VII. ENVIRONMENTAL IMPACT ASSESSMENT

The concept of environmental impact assessment was first developed in the United States, where it was included in the *National Environmental Policy Act of 1968*. The concept was later incorporated into *European Community law* through *Directive 85/337* on the assessment of the effects of certain public and private projects on the environment.

The purpose of the concept is to implement environmental considerations at the earliest stage in the decision-making process as possible and hereby to take into account environmental impact and consequences - if not in the same way, then in the same manner as economic consequences are considered.

*Directive 85/337* does not contain any material standards for protection but is designed to promote the involvement of the public in decision-making processes in all planning procedures where an environmental impact assessment is required.

Environmental assessment thus sets procedural requirements for decision making rather than containing specific standards. Environmental assessment rules relate to the style and structure of decision making. The objective underlying the directive is to ensure that those national authorities with responsibility for planning will take decisions on the basis of full knowledge of the environmental impact of the proposed project. The directive therefore reflects the concept of preventive action, which is enshrined in the *Treaty*.

Article 2(1) of the *Directive* provides that "*Member States shall adopt all measure necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location, are made subject to an assessment with regard to their effects.*"

In 1995, the Court of Justice clarified the scope of obligations of administrative authorities in the implementation of *Directive 85/337*. In an infringement action against Germany under the Article 226 of the *EC Treaty* the European Commission argued that a regional authority had infringed various provisions of *Directive 85/337* by not carrying out environmental impact assessment proceedings before the approval for the construction of a power station.

The German government challenged the admissibility of the action arguing that only legislative non-implementation but not non-compliance in individual situations, may be referred to the Court under the infringement procedure of Article 226. The Court rejected this challenge holding that a Member State may not plead the fact that it has not taken the necessary measures to implement a *directive* in order to prevent the Court from dealing with an application for a declaration that it has failed to fulfil a specific obligation flowing from that *directive*. The German government also submitted that provisions of a directive only, may have direct effect when they create rights for individuals and that the provisions of *Directive 85/337* did not confer such rights.

The Court held that the existence of administrative obligations to comply with precise stipulations of a *Directive* is "*quite separate from the question whether individuals may rely as against the State on provisions of an unimplemented directive which are unconditional and sufficiently clear and precise, a right which has been recognized by the Court of Justice.*" Accordingly, there is no link between the obligations imposed upon Member States by virtue of *Community Directives* and the rights of individuals, which may be derived from those instruments.

The Court held that various articles of the *Directive* did "*unequivocally impose on the national authorities responsible for granting consent an obligation to carry out an environmental impact assessment.*" The Court did not address the question whether those provisions conferred rights on individuals.

One year later, the Court again addressed the question of the impact of *Directive* 85/337 on local planning procedures. The *Kraaijeveld* case concerned a Dutch zoning plan in connection with dyke reinforcement measures. In its judgment, the Court noted first that a Member State may not establish criteria or thresholds for environmental impact assessment proceedings at such a level. That, in practice, all projects relating to dykes would be exempted in advance from the requirements of the *Directive*, such a policy would exceed the limits of its discretion granted to the Member States under Articles 2(1) and 4(2) of the *Directive*.

The Court also considered the question as to whether a national judge dealing with an action for the annulment of a decision approving a zoning plan, is required to raise of its own motion the problem that domestic law might be in violation of Community law. It recalled that the obligation of Member States to take all the measures necessary to achieve the result prescribed by a *directive* is a binding obligation imposed by Article 249 of the *EC Treaty* and by the *Directive* itself. The Court stressed that when a *Directive* establishes the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts. According to the Court, such effect would also be weakened if the national judge were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature has kept within the limits of its discretion set out in the directive. The Court added that the fact that Member States have discretion under Article 2(1) and 4(2) of the *Directive* does not preclude judicial review of the question whether the national authorities exceeded their discretion.

The national judge is therefore under a duty to review whether the competent Member State authorities have exceeded their discretion in establishing frameworks for environmental impact assessment proceedings which differ from those established by Community law. If so, these domestic provisions must be set aside. This clearly elevates the role of national courts and guarantees the proper enforcement of Community law obligations.

## VIII. FINAL CONSIDERATIONS

In environmental matters as in any other area, the strength and effectiveness of a policy depends on its translation into legal terms. Protection of the environment must be put to the test of the rule of law.

In the European Union, the law is a key element for the protection of the environment, and this is becoming increasingly so. This has much to do with the role played by the judicial branch in the EC legal system.

On the one hand, there is provision in Article 226 EC, for infringement proceedings against Member States when they violate EC environmental law. Such cases are brought by the Commission, and may result in a judgment by the Court of justice declaring that there is a violation. The impact of such proceedings is considerable. First, because the Court of Justice of the European Communities has a unique institutional position when compared to other international or transnational courts: its jurisdiction is compulsory for the Member States, and it does not require their agreement to submit the case to the Court. Second, because there are clear *financial* consequences of an infringement ruling: if the violation persists after a first judgment, the Commission may bring a second case before the Court of Justice. Then they may request a (usually quite heavy) financial penalty to be imposed on the Member State; also, under the *Francovich* case law, individuals may bring an action for damages before a national court.

On the other hand, judicial enforcement of *EC Environmental Law* is not only in the hands of the Court of Justice. All *national* judges -tens of thousands of them- are competent to apply *EC Law* on an everyday basis. They apply it directly; they interpret their national laws in conformity with it,

if at all possible; if not, they must leave aside national laws that are contrary to *EC Law*, because it is the duty of national judges to guarantee the rights provided for in the treaty and in *EC Legislation*. In other words, individuals may rely upon provisions of Community law before national courts without any implementing element of domestic law, the only requirement being that the provisions relied upon should be sufficiently clear and unconditional to create such rights.

The cooperation between the Court of Justice and the national courts through the *Preliminary Reference* procedure has been decisive to ensure the proper application of Community law and the protection of individual rights created by the Community legal order. The Court's jurisprudence in the area of environmental protection shows particularly well the important role that national judges play in the implementation and enforcement of obligations created by Community *Directives*.

## 6. THE UNITED NATIONS UNIVERSITY, SUSTAINABLE DEVELOPMENT AND THE ROLE OF LAW - A GLOBAL PERSPECTIVE

*Professor Walter J. Kamba, United Nations University*

Your Excellencies, Distinguished Guests, Ladies and Gentlemen.

I am pleased and greatly honoured to represent the United Nations University and participate in this historic Global Judges Symposium on the Role of Law in promoting Sustainable Development.

The global environment presents many complex, inter-linked concerns – growing population, shrinking natural resources and a changing climate.

We confront rising challenges at a time of falling resources. For example, how can we cut poverty, achieve food security and preserve biodiversity – ensure water supplies that are safe to drink and adequate for farming – all of this, and at the same time meet rising energy needs and control climate change?

Global problems are linked! It would seem to follow that our responses must be inter-linked.

In order for us to link our responses, we need to consider three critical aspects derived from the UNU's Inter-linkages Initiative, namely :- Reality, Complexity and Subsidiarity.

### I. WHY REALITY?

There are distortions associated with what we see: What we see is our interpretation of how we want to see and understand issues. The difficult task is to see reality in a multi-dimensional perspective, which is particularly important for global processes.

For example, the reality is that the road to Johannesburg (the World Summit on Sustainable Development) is marred by failures and political clashes at meetings such as those by the WTO, the Durban World Conference on Racism, those by World Bank and IMF, and the G-8 Summits. The international community is swept by the backlash of globalization, meeting and aid fatigue, terrorism, and difficult regional conflicts, such as the one in the Middle East.

Another reality, is that we are faced with multi-tiered and inter-linked problems. Global sources of pollution could have regional effects and at the same time need national actions to solve them. The tier also spans time, as we deal and consider gains of short-term actions versus long-term effects of global problems.

### II WHY COMPLEXITY?

There are no simple solutions to complex issues. The inter-linkages between our problems permeate every aspect of each issue that we deal with. For example, globalization, poverty, development, and the environment are all inter-linked and action in one will cause ripples in the others. This holds true even for issues within each of these regimes – like the problems within the environment such as climate change, biodiversity conservation, desertification, chemical pollution, etc. It is the synergy and consistency between these on which there is lack of consensus.

The whole process has also been characterized by fragmentation. On the environment regime alone, since the 1972 World Environment Conference, over two hundred multilateral agreements



and a plethora of international organizations have been created to respond to challenges ranging from climate change to persistent organic pollutants. The process has been largely ad hoc and fragmented, mirroring the scientific and political muddle of the real world.

### III WHY SUBSIDIARITY ?

This refers to the excessive belief on what can be achieved at the WSSD. There is a need to clearly identify what needs to be done at the global level and what lies in national/local domains. Over the last decade, the need to bring greater coherence to the scene, particularly to the link between environment and development, has been widely felt. Since the 1992 "Earth Summit" on Environment and Development adopted *Agenda 21*, efforts at "Sustainable Development" have engaged the attention of a widening pool of national and international actors.

However, here we are, a week before the World Summit for Sustainable Development (WSSD) – the ten-year review of the Rio Summit – and most experts still agree that progress towards the goals set in *Agenda 21* has been unsatisfactory. Although we have understood well enough our problems and have come up with solutions for them, we still have failed to understand the limitations of and prepare the socio-economic systems that would have to implement these solutions.

For example, next week's Summit will look at environmental governance reform from a global perspective, but without the necessary and probably more important aspect of national and local repercussions (or lack thereof) of these global reforms. We may, for example, look again at different structural aspects of the UN and try to reform these, but what we are missing is the fact that at the national level, it is not structure, but function-centric approaches that will lead to better implementation of solutions. Instead of focusing on institutions, maybe we should focus instead on capacity development, assessment, education, information management, etc. Not only will these approaches be easily do-able, but they are also less politicized, demand driven and value added.

To facilitate this, it will be critical to ensure that governance structures that will come out of Johannesburg will be flexible enough to take into account the realities of decision making in distinct global and local levels of society.

This brings me to the important role that the Judiciary plays in the implementation of *Agenda 21*. We all know that compliance with and enforcement of international and national environmental law is one of the principal challenges facing nations in the pursuit of sustainable development. Rules and policies are only as effective as their implementation and compliance. The Judiciary is a crucial partner for promoting compliance with and enforcement of international and national environmental law.

It is interesting to note that in most governments, it is only the Executive which plays the role of moulding international environmental governance. Although their roles in national implementation is undoubtedly critical, neither the Judiciary nor parliamentarians are major groups by the UN definition, and as such are not accorded the formal opportunities to participate fully in international law making. This now links back to the principle of Subsidiarity, and in the case of parliamentarians, probably even issues related to legitimacy. If we are therefore, to ensure both the ratification and the compliance to international accords, then it is only logical to ensure that these two groups are not only well informed, but if possible, also part of the molding process right from the very beginning.

For the Judiciary, probably the burden of implementation is greater, as they not only must interpret laws that incorporate the *Rio principle* of Sustainable Development including the "polluter pays"

principle, the “precautionary” principle, and the principle of “continuous mandamus” in the corpus of international and national law; “inter-generational” and “intra-generational equity;” importance of traditional values and ideas; interpretation of constitutional rights including right to life and right to a healthy environment; etc., but also weigh them against economic and political principles.

If we are to promote the further implementation of *Agenda 21*, we need to understand the realities that we face, the complexities of the problems and the solutions that we propose and determine where best these solutions could be implemented. We believe that this can be achieved if we looked pragmatically at the inter-linkages that exist between our problems and try to ensure that our solutions take advantage of these linkages.

## 7. UNEP'S CONTRIBUTION TO THE DEVELOPMENT & IMPLEMENTATION OF ENVIRONMENTAL LAW IN THE CONTEXT OF SUSTAINABLE DEVELOPMENT

*Mr. Bakary Kante, Director, Division of Policy Development & Law,  
UNEP*

Mr. Chairman, Distinguished Chief Justices and other Senior Judges of national and international courts and tribunals, Distinguished Guests, Ladies and Gentlemen.

### I. BACKGROUND ON THE MISSION OF UNEP IN ENVIRONMENTAL LAW

- It is indeed a great pleasure for me to address this gathering on the contribution that UNEP has made to the development and implementation of environmental law at international and national levels over the past thirty years.
- As many of you know, UNEP is a normative body within the UN system and serves to catalyse international and national action for the protection of the environment, in the context of Sustainable Development.
- UNEP's mission is "[t]o provide leadership and encourage partnership in caring for the environment by inspiring, informing and enabling nations and peoples to improve their quality of life without compromising that of the future generations."
- In carrying out this mandate in the field of Environmental Law, UNEP has served as the principal body within the United Nations system that has promoted the development and implementation of *environmental conventions* and other *legal instruments*.
- UNEP has carried out a wide range of capacity building activities in environmental law. These activities include: (1) Strengthening of environmental legislation, (2) Legal training and (3) Information dissemination.

### II. MONTEVIDEO PROGRAMME AND MALMO DECLARATION

- From 1972 to 1982, UNEP's activities in the area of environmental law were addressed in an ad-hoc manner. Since 1982, our work has been carried out on the basis of a ten-year strategic programme of work, which was adopted by the Governing Council. Today this is known as *the Montevideo Programme*.
- We are now in the third Montevideo Programme. This was developed with full governmental participation and wide consultation with legal experts throughout the world.
- The aim of the third Montevideo Programme is to address the concerns of the first decade of the current Millennium.
- The Montevideo Programme III is comprised of twenty components. These components are organized under three major themes, namely: (1) Effectiveness of Environmental Law; (2) Conservation and Management; and (3) the Relationship between Environmental Law and other fields of Law and Policy. All three major themes are of equal importance to UNEP in its efforts to promote environmental law worldwide.

- The *Malmö Declaration* was adopted at the first Global Ministerial Environment Forum held in 2000. Principle 3 of that *Declaration* is to strengthen UNEP's mandate in the field of environmental law.
- In short, the Principle states: (1) the importance of international environmental law and the need for the development of national environmental legislation; (2) the necessity for a more coherent and co-ordinated approach among international environmental instruments; (3) the importance of environmental compliance, enforcement and liability; (4) the necessity to promote the observation of the precautionary approach as contained in the *Rio principle* and other policy tools; and (5) the importance of capacity-building.

### III. UNEP'S PARTNERS IN PROMOTING ENVIRONMENTAL LAW

- Our principal partners in giving direction and content to our work in environmental law are Governments.
- Within the United Nations' system, we work closely with Specialised Agencies and bodies such as FAO, WHO, UN University, Office of the UN Human Rights Commissioner, UN-Habitat.
- Partnerships with inter-governmental and non-governmental organizations are cornerstones in our work in environmental law among which many of you are here for the Symposium.
- More recently, close relationships have been forged with a number of regional organisations such as the AU (African Union), ASEAN (Association of South East Asian Nations), SADC (South African Development Community), and SPREP (South Pacific Regional Environment Programme).
- With the six Regional Judges Symposia and this major landmark event, UNEP has opened a new frontier of cooperation with the Global Judiciary. This is a unique opportunity to benefit from the vast and unique reservoir of wisdom, knowledge, expertise, and experience, in promoting compliance, enforcement and implementation of environmental law. We will also benefit from their guidance on the progressive development of environmental law at the international and national levels.

### IV. HIGHLIGHTS OF UNEP'S KEY AREAS OF WORK IN ENVIRONMENTAL LAW

- Let me now briefly turn to UNEP's key areas of work in environmental law.
  - (i) We initiate, nurture the negotiating process, and support the development, adoption and implementation of binding global and regional legal instruments and soft law principles and guidelines;
  - (ii) We promote the compliance with and enforcement of environmental law including Multilateral Environmental Agreements, hereinafter, MEAs; and finally
  - (iii) We provide capacity building to developing countries and countries with economies in transition.

## V. UNEP'S MAJOR ACCOMPLISHMENTS IN ENVIRONMENTAL LAW SINCE 1972 - FROM STOCKHOLM TO JOHANNESBURG

### 1. Development of environmental legal instruments

- *At the global level*, UNEP is among the leaders in developing environmental conventions. We also act as the secretariat for major global and regional conventions.
- Examples of global Multilateral Environmental Agreements (MEAs) developed under the auspices of UNEP include:
  - (i) The *Vienna Convention for the Protection of the Ozone Layer* (1985) and the *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987);
  - (ii) The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (1989) and *Protocol on Liability and Compensation* (1999);
  - (iii) The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (1998) and the *Stockholm Convention on Persistent Organic Pollutants (POPs)* (2001) (under the auspices of UNEP and FAO);
  - (iv) *Convention on Biological Diversity* (1992) and *Cartagena Protocol on Biosafety* (2000).
- Examples of Global Multilateral Environmental Agreements (MEAs) developed with the technical assistance of UNEP include:
  - (i) *United Nations Framework Convention on Climate Change* (UNFCCC - 1992);
  - (ii) *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (UNCCD - 1994).
- *At the regional level*, UNEP provides legal support to countries and inter-governmental meetings for the development of regional legal instruments.
- UNEP has concentrated its efforts in: 1) Regional Seas, 2) Shared Water Resources, 3) Atmosphere, 4) Biodiversity, and 5) Hazardous Wastes.
- In the area of protection and management of the marine and coastal areas, the activities of UNEP have been mainly carried out within the context of the Regional Seas Programme.
- Under this Programme several *conventions, protocols* and action plans have been adopted for the benefit of about fifteen regional marine and coastal areas in different regions of the world.
- Just to mention another success story - UNEP promoted the development of the 1994 *Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora*.
- *Concerning non-legally binding instruments*, UNEP promotes the development of principles, guidelines and codes of conduct in several areas. The aim of these instruments is to encourage governments and other actors to take actions for the protection of the environment on a voluntary basis.
- At the non-binding level, UNEP has also developed several Programmes of Action of which the most important is the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (GPA). This Programme of Action complements the *UN International Convention on the Law of the Sea*.

- As you know, several of these soft-law instruments have been used as the basis for the negotiation of legally binding instruments.

## 2. Compliance With and Enforcement of Environmental Law

- As I already mentioned, UNEP has among its priorities the promotion of compliance and enforcement of environmental law.
- In this regard, UNEP has developed *the Guidelines on Compliance with and Enforcement of MEAs*. These Guidelines are the outcome of a consultative process, consisting of several geo-politically balanced expert meetings, which started back in 1999. The exercise culminated in a meeting of legal experts from over 70 nations, in October last year. During this meeting the Guidelines were finalized taking into consideration the comments received from Governments.
- In brief, the Guidelines serve as a “toolbox” to governments and others. The scope of the Guidelines covers all the MEAs and focus on legal measures for the implementation of MEAs and for international cooperation.
- Notably, the Guidelines place particular emphasis on capacity strengthening and technology transfer as essential elements for the improvement of the implementation of international environmental law.
- I will now focus on *liability and compensation* for environmental damage as another crucial component of our activities in then area of compliance and enforcement.
- There are numerous global and regional agreements addressing various concepts of liability and compensation, in relation to environmental damage. However, it is important to have in mind that most of these instruments have been developed on an ad-hoc basis under the auspices of various international organizations. Therefore, they tend to be limited to specific areas and issues.
- UNEP has conducted a thorough review of several MEAs, regional and national environmental instruments and cases concerning liability and compensation from countries world-wide.
- Interestingly enough, only a few of the instruments reviewed address key issues in this area. These relate among others to the definition of environmental damage, identification of liable party (or parties), and the nature and quantification of the compensation.
- In order to address this problematic legal issue, UNEP is currently organizing a series of experts meetings on the subject of Environmental Liability and Compensation. The last meeting was held in May this year in Geneva. A background document on this issue is available.

## 3. Capacity Building to Developing Countries and Countries with Economies in Transition

- An important component of UNEP’s activities in the field of environmental law is capacity building. The objective is to strengthen the regulatory and institutional capacity of developing countries, in particular the least developed and small island developing States, and countries with economies in transition.

- The capacity building provided consists of the following main activities: (1) Legal technical assistance; (2) Training and promotion of education in environmental law matters; and (3) Environmental law information.
- Capacity building being provided on the basis of an assessment of needs and requests by Governments.
- In the area of *Legal Technical Assistance*, UNEP has been mandated to provide legal advisory services to developing countries and countries with economies in transition. The technical assistance centres around; (1) the development and strengthening of national environmental legislation and institutions; (2) the implementation of MEAs; (3) the harmonization of existing environmental laws; (4) the negotiation of regional legal instruments; and (5) the implementation of existing multilateral environmental agreements.
- UNEP's approach to technical assistance is based on national ownership and commitment, where national legal experts and consultants play the major role in developing and strengthening of their own legal and institutional regimes.
- During the past 30 years, UNEP has provided legal technical assistance to more than 100 developing countries and countries with economies in transition.
- As one example, let me mention the very successful joint UNEP/UNDP project on Environmental Law and Institutions in Africa. This is a pilot project, which so far has been implemented in seven countries. It aims to provide legal and institutional frameworks suitable for the management of the environment and natural resources for sustainable development.
- Technical assistance has also been provided in the area of harmonization of environmental legislation. Countries, which have benefited from this assistance are those of the NIS in Eastern Europe and African countries, (falling under the third area).
- The third area in which technical assistance has been provided relates to the development and implementation of global and regional MEAs.
- Given the increase in the number of legally binding instruments in the field of Sustainable Development, their implementation through domestic legislation has now become a top priority in the environmental agenda. In this context, it is worth noticing that the UN Secretary-General has established an Inter-Departmental Group. The Group is chaired by the Under-Secretary General for Legal Affairs, the Legal Counsel of the UN, Dr. Hans Corell. UN Agencies including UNEP are represented in the Group. This initiative will assist developing countries in ratifying and implementing international environmental conventions.
- The second part of UNEP's capacity building activities relates, as already mentioned, to *training and promotion of education in environmental law matters*.
- UNEP organizes training programmes, workshops, conferences, seminars and symposia at the international, regional and national levels.
- One of the most important training initiatives is the Global Training Programme (GTP) in Environmental Law and Policy. The Training Programme is conducted every two years and is directed at government officials working in the field of environmental management and legislation. In the five editions held so far, more than 180 government officials, from 120

countries, mainly developing countries and countries with economies in transition, have been trained.

- The other very important UNEP initiative is the Judges Symposia on Environmental Law. Since 1996, UNEP has organized six regional Symposia on the Role of the Judiciary, in Promoting the Rule of Law in the Area of Sustainable Development. The aim of these Symposia is to promote Judiciary networking, sharing of legal information and harmonisation of the implementation of global and regional instruments. The six Symposia brought together Chief Justices, Senior Judges and Prosecutors from countries in Africa, Asia and the Pacific as well as Latin America and the Caribbean.
- This Symposium builds on the experience and success of the regional Symposia.
- The third component of our capacity building activities relates to *Environmental Law Information*.
- With the aim of enhancing the knowledge of Environmental Law issues, UNEP is systematically producing and disseminating information material on Environmental Law through publications and electronic media.
- Over the years, UNEP has produced several publications on Environmental Law, including the *Register of International Treaties and Compendia of Environmental Laws and Judicial Decisions*.
- Recognizing that the electronic media is increasingly becoming an important tool in information sharing, UNEP, IUCN and FAO have jointly developed an electronic database on environmental law information project - the well know ECOLEX database.
- UNEP has also contributed substantially to the development of regional environmental law databases and information networks.

Mr. Chairman, Distinguished Chief Justices and other Senior Judges, Distinguished Guests, Ladies and Gentlemen.

On behalf of the Executive Director, I would like to thank you for your support and active participation in this important gathering. The Executive Director would like to express his wish for continued fruitful deliberations during this last day of the Symposium. He asked me to reiterate that this Symposium is only the beginning of a process which has as its next step the presentation of its recommendations to the World Summit on Sustainable Development.

UNEP counts on your support in ensuring that the conclusions reached and decisions made will manifest themselves, through your personal commitment and dedication, at the global, regional and national level.



## 8. ENVIRONMENTAL LAW: THE BEDROCK FOR SUSTAINABILITY

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### 1. INTRODUCTION

Since the United Nations' 1972 *Stockholm Conference on the Human Environment*, Environmental Law has emerged as a distinct field of law in its own right. By the time of the 1992 UN Conference on Environment and Development in Rio de Janeiro, every nation had enacted a prodigious body of *environmental statutes*, and over 75 States had amended their *constitutions* to confirm their citizens' right to a sound environment. Today, in 2002, Environmental Law is at once the most extensive and most rapidly developing field of law among all fields of law. It has emerged as the foundation, or bedrock for sustainability. Without a robust system of environmental law, States cannot attain Sustainable Development.

It is no wonder then, that as the field of environmental law matures, it becomes the province of the Judiciary around the world. Judges are shaping environmental law no less so than parliamentarians in legislation and diplomats in *treaties*. Indeed, the Courts may have perhaps the most profound influence on attaining sustainable development of all branches of government, since judicial decisions today ultimately shape how future generations regard whether our generation effectively observes environmental law as a guarantor of sustainable development, or fails to do so. In their rulings, Courts can and must envision the long-term implications of their immediate decisions. Judges seek to apply basic principles, in order to decide disputes that recur over the years, with consistency, to achieve fairness and justice. In the context of environmental law, the courts are applying a jurisprudence that emerged to guide human relations with nature itself.

This paper explores the judicial dimension of environmental decision-making. Three aspects are examined in turn. First, it outlines the distinctive characteristics that distinguish environmental law from other fields of law, making its observance of more fundamental importance than is the case with many other fields of law. Second, it reviews the leading basic principles of justice that courts are called upon to apply. Third, in light of these aspects, it outlines how international organizations may be of assistance to the courts as they discharge their important responsibilities with respect to environmental law.

### II. CHARACTERISTICS THAT MAKE ENVIRONMENTAL LAW UNIQUE AMONG LEGAL FIELDS

While Environmental Law shares many of the same features as all other field of law, it has unique characteristics. First, it evolved in tandem with the maturing of the scientific discipline of ecology, and other environmental sciences. Second, in the space of less than four decades, human society has identified in environmental law a basic set of principles and values that are different from other value system. Third, environmental law has become universal; every society in every nation has found in its traditions the roots of environmental law, and the field has become an important discipline in every land. The rapid elaboration of this field poses some tough challenges, since education and training systems have yet to provide full support for judges and other professionals. An important reason why environmental law has become so widely accepted is that its link to the environmental sciences can be objectively verified. Further, it is not based on an ideological

or poorly perceived basis; another reason is that environmental law provides the legal framework for “sustainability” portion of the goal of Sustainable Development.

Environmental law operates on a continuum, from the roles of the local authority with its management of local wastes, farmland, forests and fields, through to the regional or national authority with its broader controls over shared river basins and sea coasts, to the biosphere of Earth itself wherein States and intergovernmental organizations endeavor to secure the protection of the stratospheric ozone layer to maintain migrations of species across continents and oceans, and to abate transnational problems such as the acid rain and persistent organic polluting chemicals from one place to another. Environmental Law would establish a pattern of stewardship for all human activity, so that the integrity and benefits of natural systems can be sustained from one generation of humans to the next. Environmental law is rooted empirically in what society learns from ecology and other environmental sciences. Environmental laws derive their normative rules from the knowledge derived from ecology and other environmental sciences. In short, environmental law seeks to conform the laws of human society, to the laws of nature.

The urgent need for refining and observing environmental rules becomes increasingly evident as the trends in environmental degradation deteriorate worldwide. When human society ignores the laws of nature, it suffers predictable consequences. For instance, in 1998, *Hurricane Mitch* caused devastation in Central America. This caused death and destruction produced in the wake of its winds and rain was multiplied by the facts that forest cover in the river basins had been excessively cut and catchment basins to store rainwater had not been installed. Building on steep and eroded slopes resulted in mud-slides. The intensity of the storm itself may have been exacerbated by the effects of climate changes in the growing differential of air temperature *vis à vis* the sea temperature, yielding a more virulent storm. Or consider the collapse of marine fish stocks in the wake of over-fishing, with the resultant loss of jobs and food in several regions. Or consider how excessive use of chemicals in the lower latitude results in chemical residues finding their way into the Mothers’ milk of the Inuit in the Arctic. Similarly, it is troubling that atmospheric emissions from the burning of fossil fuels in northern Asia cause harm from acid rain in South Asia. Europeans still produce acid rain to fall in Scandinavia and several states in the center of the U.S.A. still pollute Canada and the states in the northeast U.S.A., with incremental accumulation of harm to both the natural and the built environment. These recitations of deteriorating environmental trends can be elaborated at length. It is the role of environmental law to reverse such unsustainable and counter-productive conduct.

The link between sustaining nature and the social goal of sustainable development is evident in each of these examples. Unfortunately, political leaders often sacrifice the productivity of natural systems for the short-term financial gains that excessive exploitation can produce. This is why environmental laws are needed, to guide such political or economic decision-making, and constrain its anti-social excesses. The fact that unsustainable practices still are embedded in economic systems worldwide makes important for courts to understand and apply environmental law. For instance, the failures to observe laws on sustainable ocean fishing have led all nations to the point of crisis. As Sir Crispin Tickell cautioned in the first report of the United Kingdom’s advisory group on Sustainable Development, some seven years ago, the impending collapse of the world’s fishing stocks looms as perhaps Earth’s most immediate ecological disaster. A part of this is due to over-fishing, and a part is due to human disruption of the phytoplankton on which the food chain for marine fish depends. As recently as 9 August, 2002, the National Oceanic and Atmospheric Administration in the U.S.A. reported an evaluation of satellite studies of ocean phytoplankton. It showed a decline of 30% in the North Pacific, 14% in the North Atlantic, and a global decline of 8% since the 1980s, when comparable satellite data was available. Not only is phytoplankton important for sustaining yields of fish, but since they account for half of the photosynthesis on the planet, their loss would remove significant amounts of carbon dioxide from the atmosphere, exacerbating global warming.

Enforcement of an environmental law for what may seem to be a small infraction of rule can be part of a pattern of greater harm. If the environmental sciences teach anything, they instruct us that all natural systems on Earth are inter-related. The cumulative effects of even small emissions from industry and other human endeavors can have severe effects in distant places. Environmental law protects not just the local environmental, but must protect the entire natural fabric of life from harmful human activity. It is for these reason that the International Union for the Conservation of Nature and Natural Resources developed in 1973 the *Convention on the International Trades in Endangered Species* (CITES), or the United Nations established Part XII of the *UN Convention on the Law of the Sea* as an environmental Constitution for Earth's oceans, or the UN Environment Programme (UNEP) developed the *Barcelona Regions Seas Agreement for the Protection of the Mediterranean Sea* and a dozen other regional seas treaties. The "Rio" Treaties of 1992 – the *Convention on Biological Diversity* and the *UN Framework Convention on Climate Change* – instruct us that no one nation can defend its natural well-being without there being a comparable defense provided by other nations. In *Agenda 21*, adopted at the 1972 UN Earth Summit in Rio de Janeiro as the longest "soft law" legal instrument ever negotiated, all nations acknowledge their duties to protect natural systems. Chapter 8 of *Agenda 21* encourages all States to further develop of environmental law as a priority.

Each nation has common but differentiated responsibilities for the common natural systems upon which all nations depend. As such, each State's national laws are part of an international matrix of mutually interdependent undertakings. Thus, when a court interprets its nation's national laws, it must necessarily take into account this broader context. As a distinct field of law that provides the underpinnings for Sustainable Development, environmental law is not like the more instrumental fields of law. Its status or role is more akin to that ascribed to fundamental human rights. There can be no derogation from fundamental environmental norms. Environmental norms are not just a set of rules that can be changed from time to time, as is often the case, for instance, with commercial laws. Environmental law is grounded on what scientists have discovered about what must be done to maintain Earth's natural systems, on which human society depends. Although a human legislator cannot repeal the "laws of nature," those, whose hubris is such that they ignore the environmental sciences when they enact laws that perpetuate unsustainable practices, betray their own ecological illiteracy.

The diplomats who negotiated *Agenda 21* recognized the importance of the environmental sciences in defining the physical characteristics of sustainability in nature. In Paragraph 31.7-8, *Agenda 21* observed that:

...Scientists and technologists have a special set of responsibilities which belong to them as inheritors of a tradition and as professionals and members of disciplines devoted to the search for knowledge and to the need to protect the biosphere in the context of sustainable development. Increased ethical awareness in environmental and development decision-making should help to place appropriate priorities for the maintenance and enhancement of life-support systems for their own stake, and in so doing ensure that the functioning of viable natural processes is properly valued by present and future generations...

Environmental legislation and *treaties* are embedded in the teachings of scientists. In turn, the basic principles of environmental law have been formulated in light of what ecology has explained about how nature sustains life on Earth. *The World Charter for Nature*, adopted by the UN General Assembly (UNGA Res. 37/7, 1982), reflects many of the norms derived from an understanding of environmental scientific knowledge. The 1992 *Declaration of Rio de Janeiro on Environment and Development* (UN Doc. A/Conf.151/26), also endorsed by the UN General Assembly, contains many of these norms as well. When the courts find they must interpret environmental law, they need to resort to these underlying scientific and jurisprudential foundations to find guidance for their legal opinions.

Environmental Law has become a field of law studied by law students in all nations. Regional approaches to environmental law do exist, of course; all law has evolved with distinct cultural differences. For instance, the Asian Development Bank, in cooperation with IUCN and UNEP, this year published a two-volume compendium entitled "*Capacity Building for Environmental Law in the Asian and Pacific Region: Approaches and Resources*," with an extensive chapter devoted to the decision of courts in Asia about environmental law. IUCN, UNEP and the Faculty of Law of the University of Kuwait have launched the Arab Regional Centre for Environmental Law (ARCEL) and next October will convene the first meeting of judges from the Arab region on environmental law. IUCN has published a study entitled "*Environmental Protection in Islam*" (1994) and ARCEL is examining how to enhance the rule of environmental law in Islamic States. In China, Wuhan University has hosted a national Environmental Law Institute for over two decades, and many more recent environmental law centers now exist in the Pacific region, Africa, North and South America, and East and West Europe. What is remarkable about these many regional efforts at environmental law education is not their distinctive regional characteristics, but rather that together they all share a common set of values about the law and nature.

### III. FUNDAMENTAL PRINCIPLES OF LAW WITHIN ENVIRONMENTAL LAW

The common but differentiated responsibilities of States for sustaining the environment are made clear through the basic principles, the framework legislation, and the normative prescriptions of environmental statutes. All States share a common set of environmental values. The different geographic locations, developmental conditions, or environmental contexts give rise to differences in how the responsibilities are made specific. Environmental law reflects the shared or common responsibilities, just as it prescribes the different responsibilities that each State has for implementing those shared duties.

Courts in every nation can and should recognize and observe this body of common environmental law principles. Many courts, for instance the Supreme Courts of States such as India (e.g. *M.C. Mehta v. Kamal Nath and Others*, 1977, SCC 388), or the Philippines (e.g. *Oposa v. Factoran*, GR No. 101083, 1993) have already given effect to these principles and elaborated upon their meaning.

While a full dissertation on these principles is beyond the scope of this paper, it is necessary to briefly note some of the leading jurisprudential norms of environmental law as follows:

There is a fundamental right in each human and in other living beings, to live in the conditions that sustain their biological and social well being, variously described as *the right to life*. This means that potable water, breathable air, and the enjoyment of natural beauty are birthrights of individuals. Where ambient environmental conditions deny individuals these rights, it is the role of environmental law to restore such conditions. This right to a healthful or sound or sustaining environment is now accorded in the *constitutions* of over eighty nations, as well as being recognized internationally in *the World Charter for Nature* or the *Rio Declaration on Environment and Development*. Further proposals for restating these norms, such as the "*Earth Charter*" under study by the IUCN, acknowledge this right even more explicitly. When called upon to address this issue, the highest calling of courts is to acknowledge and elaborate upon the application of this basic right.

From this fundamental right other principles are derived. One aspect of such norms concerns *environmental ethics* toward nature itself; human society exists within nature. Another aspect addresses the duties of *environmental equity* within human society; human society has a duty to treat every individual person's environmental needs equitably. Each of these two aspects calls upon judges to envision the wider application of the specific dispute before them. Each aspect may be described as follows:

- (a) Environmental ethics: One ecologist's seminal philosophical statement of the former is Dr. Aldo Leopold's "land ethic" (*A Sand County Almanac*, Oxford University Press, 1948):

...An ethic, ecologically, is a limitation of action in the struggle for existence. All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts. The land ethic simply enlarges the boundaries of the community to include soils, water, plants, and animals, or collectively: the land...

A number of courts have acknowledged the "land ethic" and made it a rule of decision. Judicial decisions need to be conscious of their role in advancing environmentally ethical conduct.

- (b) Environmental equity: If all life deserves respect, then so to do all humans. Unfortunately, the distribution of environmental well being, like the distribution of other forms of wealth and material resources within human society, is uneven, within States and among the developed and developing regions of States. These issues are addressed by norms of distributive justice. Environmental equity seeks to ensure that differences benefit the least well off; it is not fair to locate a hazardous waste processing facility only where poor people live; nor is it fair to let sea levels rise with global warming so that small island states, and low lying coastal areas are inundated, while emissions from fossil fuels on higher lands continue unabated. Since exposure to risks or access to benefits cannot be distributed equally across all nations or around the world, distributive justice would ask how should they be shared. Environmental equity also encompasses inter-generational equity; the current generation should not consume or harm nature on which future generation depend. While courts are called upon to make decisions in the context of concrete disputes, each court needs to understand that its decision is contributing to a broader understanding of how distributive justice is to be defined for achieving environmental equity.

Beyond these fundamental aspects of justice, a further set of more specific environmental principles exists that courts are called upon to refine and apply. For instance, the Precautionary Principle calls upon decision-makers to take precautionary measures to protect nature or human environmental health even before the full threat of the potential harm is known; ignorance of the scope of possible harm can never be a reason to delay taking protective measures. The most pervasive legal means for giving effect to the Precautionary Principle is the duty to undertake Environmental Impact Assessment (EIA). At the 1992 UN Conference on Environment & Development, in Principle 17 of the *Rio Declaration*, all States were enjoined to use EIA in their national decision-making. Ever since EIA was first enacted in 1969 in the *National Environmental Policy Act* in the U.S.A., it has become a standard tool for nations in all regions. The European Union has required it by *Directive* since 1985, and it is now a part of international treaties (e.g. Article 206 of the *UN Convention on the Law of the Sea*, and in the 1998 *Åarhus Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters*). EIA works effectively *only* when the courts require strict and full observance of its requirements. Judicial decisions in many States have enforced EIA laws, e.g. *Shehla Zia and Others v. WAPDA*, Pakistan L. D. 1994, SC 693; *Calvert Cliffs' Coordinating Committee v. US Atomic Energy Commission*, 449 F. 2d 1109 (DC Cir., 1971).

Another well recognized norm is the "*Polluter Pays Principle*." The person or enterprise or national emitting the pollution has the duty to either prevent it, or pay the costs associated with ameliorating its negative consequences. At the national level, most environmental laws require those who produce wastes to minimize or eliminate their wastes. The *Polluter Pays Principle* reflects a well-grounded sense of fairness about who bears the burdens and benefits of potential pollution. When a polluter dumps unwanted and harmful wastes on others, not only is recipient of the waste injured, but the producers of the pollution (or purchasers of products made with pollution) are saved the costs of abating or averting the production of the waste in the first place. When courts enforce pollution laws, they give effect to the *Polluter Pays Principle*, and cause producers

of waste to internalize the costs of coping with the wastes. This judicial enforcement, in turn, induces such polluters to avoid creating the wastes in the first place, and produced a sustainable economy.

At the level of international public law, these principles are embodied in the *Principle of Good Neighborly Relations*. For instance, in *Principle 21 of the Stockholm Declaration on the Human Environment*, it was acknowledged that while States have the sovereign right to develop their resources, no State may do so in such a way as to harm the environment of another State. National courts enforce this norm when they enforce rules that would prevent pollution that harms other states, as in transboundary water pollution. It will be applied in due course to the precursor emissions causing acid rain or climate modification just as it does to the emissions within a State of Chlorofluorocarbons (CFCs) that harm the Earth's stratospheric ozone layer.

Finally, courts are the guarantors of the *Principle of Public Participation* in governmental decisions that affect the environment. *Principle 10 of the Rio Declaration on Environment and Development* underscored the right of those whose environmental well being is affected to be involved in decision-making. Courts can ensure that all stakeholders are heard, and hold administrator responsible for consulting all interests concerned. This begins at the local level, and courts need to enforce the rules for devolved collaboration in environmental decision-making. EIA is one example of such a procedure. In Brazil, the Ministerio Publico is charged with appealing to courts on behalf of the public interest. In Common Law jurisdictions, the role of courts in response to citizen suits and public interest litigation is critical to ensuring this right. Special constitutional rules, as in the citizen's right to request and be given environmental information under the *Constitution* of the Russian Federation, also reflect this basic right.

Naturally, there will always be some tensions and difficulties in courts giving effect fully to these principles. Of course, where public or governmental support for the courts is weak, the enforcement of environmental law in turn will be weak. The legal community concerned with environmental law needs to be equally concerned with the health and integrity of the Judiciary in each State. Without an independent and strong court system, the rule of law falters and sustainable development is unattainable. As Dr. Parvez Hassan, former chair of the IUCN Commission on Environmental Law, has written: "Good governance is important to any effort toward sustainable development. There is a need to facilitate the devolution of power and empowerment of stakeholders, particularly women." ("Road to Johannesburg," DAWN, 15 June 2002). Moreover, when courts recognize and adhere to fundamental principles, they derive greater strength from the integrity of their positions. Through observing environmental principles, courts themselves build up their own strength and further sustainable development.

The scope of each Court's power is limited to a finite geographic region, and is often subjected to appeals to higher courts. Court decisions may be nullified in some instances by parliamentary or executive authority. Nonetheless, since the natural environment extends across borders and beyond all nations, it is incumbent on courts to recognize that each must act to protect the environment, as it actually exists in Earth's biosphere. It is sophistry for a court to pretend that pollution stops at the border of its jurisdiction. Many national courts have, for instance, required that EIA in one State study the adverse environmental impacts in another State and examine ways to avoid producing such impacts.

Environmental disputes are often charged with controversy. The intensity of the argument cannot be allowed to cloud or obscure the application of the basic environmental principles involved. Judges need to take the broad view, and look to norms of environmental justice in making their decisions. The longer, biological, sustainable view will be remembered by present and future generations, not the short-term, immediate allocation of each party's interests in an unsustainable natural resource use. This wider public environmental interest should provide the foundation

for the judge's decisions. The highest role of the Courts is to integrate these broad considerations of environmental justice into the more parochial and narrow controversies that come before them. Courts cannot do so when they countenance loop holes that cause pollution to continue, or allow past pollution to persist unabated. Politicians may well behave with such expediency, but this is not the traditional role for the Judiciary.

#### IV. FACILITATING JUDICIAL LEADERSHIP IN APPLYING ENVIRONMENTAL LAW FOR SUSTAINABLE DEVELOPMENT

Since the basic principles of environmental law can be identified within legal systems all around the Earth, the decisions by courts in each region are naturally of considerable interest and potential use to judges and legal scholars and lawyers in other regions. Comparative law techniques are of particular use in environmental law for three basic reasons. First, the natural and physical sciences do not vary from nation to nation; the scientific "laws" of ground water hydrology or the effects of chemicals or ecological systems are constant around the world. Second, human conduct and impacts of technologies tend to be the same from land to land; it is human nature for people to make the same sort mistakes in each country. For example, examples of urban concentrations of the exhausts from the internal combustion engine, "smog," or burning of plastics, or unplanned urban sprawl, are found in practically all nations. Third, over 300 environmental treaties now link the frameworks of national environmental laws worldwide; environmental laws tend to be similar in each nation. Environmental law has the same general framework in every country.

Whenever a judge in one region has occasion to apply and refine the principles of justice, and in particular the environmental principles, that reasoning of court's decision will have bearing on how to resolve similar problems arising elsewhere. In order to facilitate the sharing of judicial decisions on environmental matters, the International Union for the Conservation of Nature and Natural Resources (IUCN), through its Environmental Law Programme, has prepared a portal on the Internet. Justice Paul Stein, of New South Wales, Australia, a member of the Commission on Environmental Law of IUCN, has agreed to assist in developing the international forum of judges that can oversee this judicial service. The UN Environment Programme (UNEP) and IUCN will cosponsor this new Internet portal and web site, which is being unveiled on August 19<sup>th</sup> at this Global Judges' Symposium on Sustainable Development and the Role of Law. IUCN's Environmental Law Centre, headed by John Scanlon, in Bonn, Germany, has undertaken to develop and maintain this new Internet portal and website. It is available to judges directly, anywhere in the world.

IUCN, founded in 1948, established its Environmental Law Programme in 1965. Its Commission on Environmental Law operates in most nations of the world. Over the past several years, IUCN has been co-operating with the UNEP in the development of environmental resources for use by the Judiciary, and in October 2003, IUCN and UNEP will cosponsor meetings with judges in the Arab world in Kuwait and in West Europe in London. Further regional meetings are planned. Beyond the establishment of the Judicial Internet Portal, a range of scholarly legal publications and seminars are being planned. Topics included are for instance: the judicial techniques appropriate to enable courts to establish or find facts about environmental conditions, using expert evidence and scientific expertise; the mandates and competence of special tribunals for environmental law enforcement or dispute resolution; procedural issues concerning appeals from specialized environmental courts to appellate courts of general jurisdiction; when and how courts can design and oversee remedies to restore damaged ecological systems; patterns or guidelines appropriate to consider for the imposition of financial penalties, and length of incarceration, when sentencing individuals and companies convicted of criminal violations of environmental laws; which international environmental laws have direct application within a State, and are appropriate for direct application by national courts as legal norms *ergo omnes*, or otherwise.

IUCN and UNEP will be consulting widely with judges around the world to refine these proposals and develop legal references and seminars for judges as the courts may request them.

Inevitably, the ends of justice are best served and the rule of law most effectively affirmed, when the rulings of courts guide and educate society toward respecting the fundamental elements of justice. This is no less true for environmental law than in the case of fairly applying family law, ensuring the safeguards of criminal procedure, respecting human rights law, or securing honest commercial transactions. Since the 1972 UN Conference on the Human Environment, and certainly since the 1992 "Earth Summit" in Rio de Janeiro, the international community has come to recognize that environmental norms are basic to life on Earth for all. Without the informed decisions about these norms by judges worldwide, environmental justice will be denied.

It is evident today that nations cannot attain sustainable development, unless the courts in all regions come to apply consistently the fundamental environmental principles of law and to enforce the common but differentiated responsibilities that each State has embraced for the stewardship of Earth. As a global environmental jurisprudence becomes better reflected in the practice of courts everywhere, justice will be served, and all people will be immeasurably closer to attaining the goals of sustainable development.



## 9. ENFORCING SOCIO-ECONOMIC RIGHTS: THE EXPERIENCE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT

### *The Honourable Justice Albie Sachs, Judge Constitutional Court of South Africa*

#### **Editorial Note:**

This paper contains the following: a paper by Justice Albie Sachs entitled "Social and Economic Rights: Can they be Made Justiciable?" and excerpts of the following cases: *The Certification case*; *The Soobramoney case*; *The Grootboom case* and *The Treatment Action Campaign case*.

#### **1. INTRODUCTION**

One of the most notable features of the *South African Bill of Rights* is the inclusion of socio-economic rights. These include:

##### *Section 25 -Property*

- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions, which enable citizens to gain access to land on an equitable basis.

##### *Section 26-Housing*

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

##### *Section 27 -Healthcare, food, water and social security*

- (1) Everyone has the right to have access to:-
- (a) healthcare services, including reproductive healthcare;
  - (b) sufficient food and water and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

##### *Section 28 -Children*

- (1) Every child has the right
- a. to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - b. to basic nutrition, shelter, basic healthcare services and social services.

### Section 29 -Education

- (1) Everyone has the right
  - (a) to a basic education, including adult basic education and
  - (b) to further education, which the state through reasonable measures, must make progressively available and accessible.
  
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-
  - (a) equity;
  - (b) practicability; and
  - (c) the need to redress the results of past racially discriminatory laws and practices.

The inclusion of these socio-economic rights in the South African *Constitution* was unsurprising. As the Constitutional Court stressed in its judgment in the *Soobramoney* case discussed later:

We live in a society in which there are great disparities of wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the *Constitution* was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

Thus the inclusion of socio-economic rights thus sought to contribute to addressing one of the greatest challenges facing South Africa, its people and its government the massive legacy of, poverty and inequality.

However, the judicial enforcement of socio-economic rights is often said to raise a number of difficult and complex issues. These include:

- the separation of powers;
- the legitimacy of unelected courts determining policy and expenditure;
- the problems of institutional capacity, process and evidence;
- and a reconceptualisation required about the nature of rights that expand over time and are expressly made dependent on resources.

The Constitutional Court has dealt with these issues in four different judgments:

- The first involved objections taken by some parties to the inclusion of socio economic rights in *the Constitution*.
- The second relates to a case brought by Mr Soobramoney, a man suffering from renal failure who sought access to dialysis on the grounds of his right to health.
- The third was brought by Ms Grootboom and the people of her community and concerned shack-dwellers living in appalling conditions and their right to housing.
- The final case concerned the government's policy for reducing the risk of mother-to-child transmission of HIV, in particular restrictions placed on the use of an anti-retroviral drug called Nevirapine, and was brought by the Treatment Action Campaign -a civil society organisation.

What follows is an article by Justice Albie Sachs on the justiciability of socio-economic rights given before the last two decisions mentioned.

This is in turn followed by extracts from the four judgments mentioned above which indicate how the Constitutional Court has dealt with the judicial enforcement of socio-economic rights and the complexities that this brings. The facts and decision of the case are summarised prior to each set of extracts.

**II. SOCIAL AND ECONOMIC RIGHTS: CAN THEY BE MADE JUSTICIABLE? A PUBLICATION OF SOUTHERN METHODIST UNIVERSITY SCHOOL OF LAW,  
[www.smu.edu/-smulra](http://www.smu.edu/-smulra) The Hon. Justice Albie Sachs**

Note: This talk was given prior to the hearing in the Grootboom case.

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AN: Announcer

AS: Justice Albie Sachs

AN: Good Afternoon. We are honored to have with us for the second time in a year Justice Albie Sachs of the Constitutional Court of South Africa. Last year, Justice Sachs spoke about the Truth and Reconciliation Commission, an event in which he was very personally involved. In giving what I thought was one of the most poignant talks that I have heard, he focused on the story of Henry, a stranger who visited his chambers. This man turned out to be a very important person in Justice Sachs' life because he was involved in doing the reconnaissance for the bomb that almost killed Justice Sachs and which deprived him of one of his limbs.

Justice Sachs' car was bombed on April 7th, 1988 in Moputu, Mozambique, where as an exiled freedom fighter, he was working on what was to become the New South African *Constitution*. The anniversary of the bombing was this past Friday. He chronicles his experiences and his recovery in his book, *The Soft Vengeance of a Freedom Fighter*. A recent new edition of his book has just been released which includes a foreword by Archbishop Desmond Tutu and a new epilogue by Justice Sachs.

The title of his talk today is, "Social and Economic Rights: Can They be Made Justiciable?" It is my honor and privilege to welcome my friend back to the law school, the Hon. Justice Albie Sachs.

As: Our chickens are coming home to roost. My generation of lawyers in South Africa fought long and hard for social and economic rights to have the status of enforceable constitutional rights. Now, as a member of the Constitutional Court, I am soon to hear a case known by the title of the main Plaintiff, Mrs. Grootboom, which literally means 'Big Tree.' In this, we have to determine exactly how, if at all, we can actually enforce social and economic rights.

I think that just about everyone agrees that shelter, education, nutrition, clean water, and basic health services should be universally available. That is not controversial. One of the responsibilities of government, whatever its nature and whatever the society, is to ensure at least the minimum decencies of life for all its citizens. What is controversial, is whether claims to such decencies should be regarded as enforceable fundamental rights in the constitutional order, in a way similar to the classic freedom or liberty rights and the great civil rights of the citizen: to vote; to speak freely; to be elected; to participate in government; to enjoy a measure of privacy from state

intrusion; to have certain rights in relation to property; and generally to be a free person in a free society. The issue has provoked profound debate in my country.

In the middle 1980s—which to many of you may seem like long, long ago, and to me is yesterday—a group of black students at the Law Faculty at the University of Natal, in Durban set up a body called the Anti-*Bill of Rights* Committee. I think it was the only committee in the world created with that title. There are many oppressors who deny fundamental rights, but why should black students who belong to an oppressed community anticipating a new constitutional order associated with liberation, set up an Anti-Bill of Rights Committee? I was in exile at the time. I was shocked when I heard of their initiative, but I understood their motivation.

These students saw a *Bill of Rights* as a document established in advance by a privileged white minority to ensure that when eventually one-person, one-vote majority rule came to South Africa, and everyone was at last able to enjoy the ordinary rights of citizenship, a *Bill of Rights* would be in place to block any moves toward major transformation. In effect, it would defend the status quo, guarantee property rights, and impose extreme limits on the capacity of the democratic state to take decisive action to achieve meaningful redistribution of wealth. Remember the situation at that time in the country: 87 percent of the surface area of South Africa was reserved by law for whites only, including all the central business districts and all the beautiful tree-lined suburbs. We were not dealing simply with the kind of inequalities between rich and poor that you could find in most if not all, societies. We were confronted with state-enforced separation which played allowed for the extensive accumulation of resources and power by a racially defined minority. And there was corresponding state-enforced dispossession of the majority, which led to the marginalization of their languages, the loss of their land, and a global reduction of their dignity and status. In that context, a *Bill of Rights* was seen as a “*Bill for Whites*” not to defend the fundamental rights and freedoms of everybody, but an instrument enacted in advance to ensure that those who had would continue to have forever, and those who had not would remain without forever.

I immediately wrote an article espousing the need for an “Anti-Anti-Bill of Rights Committee.” I did this partly for diplomatic reasons—what kind of freedom struggle takes up an anti-bill of rights position? A *Bill of Rights* would be our answer to apartheid. Apartheid said that black and white could not live together as equals in one country, that they had to have separate institutions, separate rights, and live in separate areas. Our reply was that minorities and majorities could live together as equals provided everyone was constitutionally protected against abuse, irrespective of their language, color, religion, origin, background, or ethnicity. A *Bill of Rights* would thus play an important political role in South Africa, countering any new project to refine and modernize apartheid. It was also needed because many liberation movements in different parts of the world had acceded to power and then gone on to abuse the rights of the very people on whose behalf they had fought.

But there was another reason as well: we needed a clear constitutional framework within which transformation could take place. We had to be deep change in South Africa we could not just carry on with a small minority enjoying all the good things of life while the overwhelming majority continued to suffer deprivation, malnutrition and indignity. Such a country would not last; a house so divided against itself just could not stand.

The difficulty was to ensure that the process of, change itself was fairly conducted according to agreed principles and not according to the whim of whoever happened to be in power at any particular time. One important way of achieving this was to locate transformation in a rights framework. I advanced the vision of social and economic rights as integral elements of a future *Bill of Rights*. In this way, the least amongst us, who happened to be the majority amongst whom

we were, would be regarded as important, as people and citizens worthy of being respected and capable of enjoying dignity in the land of their birth.

It was in this article that I introduced the concept of the "three generations" of rights. The first generation encompasses the classic freedom rights, which emerged from the American and the French Revolutions: the rights of the citizen and the free person. This notion is fundamental to your *Constitution*. People refer sometimes to the "firstness" of your First Amendment, which provides for freedom of speech and freedom of religion. It does not deal with education, with housing, with health. It establishes a particular vantagepoint or conceptual platform from which to see all the other rights. Social and economic rights are not included.

The second generation of rights emerged in Germany under Bismarck, an authoritarian leader of the late 19th century who established a scheme of welfare rights for German workers. Later reinforced by the impact of the Russian Revolution, these rights came to be central to national policy in the so-called welfare states of the 20th century. The recognition of rights to education, to health, to housing, and to the other minimum decencies of life drew strong support after the Second World War from *the Universal Declaration of Human Rights*. Such rights, were ultimately entrenched in the *International Convention on Economic, Social and Cultural Rights*, and although this document has not been ratified by all the states in the world, it is widely accepted as containing universally recognized principles of human rights. The phrase "third generation" of human rights was coined by a Czech functionary in the United Nations whose object was principally to advance environmental rights, such as the right to a clean, healthy environment. He argued for solidarity rights, which belonged to the whole community, not just to individuals, including the right to development. Initially I argued strongly for recognition of all three generations of human rights. That initiative has now come back to haunt us! We are not simply pushing for what we believe should be day be in a new South African *Constitution*. We are interpreting the actual text of an explicit g document containing clear constitutional commitments. If someone asks: "Who was that stupid person who introduced the three generations notion in the first place?" I have to answer, "It was me!" Certain critics contend that if you speak about three generations of rights, you suggest that the second generation is less important than the first generation, and the third generation even less important. Others argue that aspirational and unenforceable socio-economic rights dilute *the Bill of Rights* as a whole, and undermine the classic first generation rights. Yet at the international conference on human rights in Vienna, a decade ago, it was accepted that social and economic rights are indivisible from and interdependent with civil and political rights.

Social and economic rights were in fact written into the final text of our *Constitution* in extensive and explicit form. The great battle was not so much over *whether* social and economic rights should be incorporated, but over who they should be incorporated as justiciable rights in the ordinary way, or as mere *Directives* of state policy. When the Irish won independence from Britain and drafted their *Constitution*, they said in effect: We want to have social and economic rights, but not as the kind of rights that you can go to court over in order to get an injunction in our favor in the ordinary way. So we will put them in the *Constitution* not as a justiciable part of a *Bill of Rights*, but as *Directives* of state policy as pragramatic indicators rather than enforceable rights." Thus, a grand preambular section elaborating the functions and the duties of goverment included.

India followed, producing a strong *Constitution* that has stood up to many social fissures and strains, one that has been creatively interpreted by an outstanding Supreme Court. India has simple *Directives* of state policy in its *Constitution* expressing non-justiciable rights, but the Judges used the *Directives* of state policy as a means of interpreting the justiciable rights. Some say they smuggled socio-economic rights in through the back door and down the chimney or through the window.

A very famous case concerning the eviction of pavement-dwellers in Bombay illustrates this. The people facing eviction slept on the streets, sheltered at night under the little barrows from which they traded. The Indian Supreme Court said that the right to life does not just mean the right not to be killed. The concept does not imply only that the state cannot take your life away without due process: it affirms the principle that you have a right to a livelihood, to some minimum decencies, of which you could not be deprived without due process. The Indian Court thus used the *Directives* of state policy as guiding texts for the interpretation of the fundamental right to life as set out in the section of justiciable rights.

We in South Africa, went beyond that. We expressly included the right of access to adequate housing and access to health and other welfare rights in the text of our *Bill of Rights*. We made it clear however, that these rights would not be enforceable in the same, self-executing way as other rights. The provisions say that the state is under a duty to make these rights realizable through reasonable legislative and other measures, which must serve progressively to enhance access to these rights, bearing in mind the financial capacities of the state. It should be noted that the section on children's rights provides in an unqualified way that children have rights to nutrition and shelter, and does not speak about progressive realization of the rights within available resources.

About eighteen months ago, Mr. Soobramoney approached our Court. He was suffering from chronic renal failure, aggravated by heart disease and blood sugar problems. His story was as follows: when he collapsed, he went to a state hospital and received life-saving treatment. But when he returned on a later occasion, he was told:

...We can only give *emergency* care once; chronic patients like yourself have to line up in a queue for access to equipment that is expensive to operate and requires a large staff. In practice our resources only allow us to treat thirty percent of the patients who present themselves to us, and we give priority to those who could benefit in future from renal transplant - - Which unfortunately rules you out...

To which Mr. Soobramoney said: The *Constitution* says I have a right to life. It says no one shall be refused access to emergency medical treatment, and grants everyone a right of access to healthcare, I insist on my constitutional rights.

This was a most painful case. The Court's decision could help prolong his life or else induce his early death. We had no precedent to help us. Our sole guide was the *Constitution*. We decided first that he could not claim emergency medical treatment on an open-ended basis that would give him an unqualified right to indefinite medical assistance. The notion of a constitutionally protected, unqualified and immediately realizable right to emergency treatment applied to someone who collapsed with a sudden heart attack, or who was the victim of trauma. Such persons could not be turned away from casualty wards, certainly not from those in state hospitals. If all chronic illnesses were to be treated as emergency medical cases entitled to treatment on demand at state expense, then there would be no funds left over for mother and child care, nothing for health education or Immunization, and desperately little for amelioration of AIDS-related illness, Tuberculosis, or Cancer. That could not have been what the *Constitution* required. In a concurring judgment I stated that being placed in a queue for access to scarce resources is not to find yourself being subject to a limitation of your right, but to be put in a position to enjoy your right together with others. You do not ration free speech or the vote, but you have to ration access to resources. So, provided that the queue is fairly established, and the criteria are rational and non-discriminatory, it was not up to us as Judges to say that we thought Mr. Soobramoney should go to the head of the queue. That would have involved arbitrarily substituting our distant and untrained judgment, for that of the qualified medical officers concerned on the spot. The situation was almost the inverse of that in your well-known case on the right to withdraw treatment-here

it concerned the right to have treatment. Yet, the underlying principles were the same. I quoted from Justice Brennan's minority judgment in following the notion that these agonizing decisions should be taken not as a matter of abstract principle by the court, but by those most intimately involved with the situation, provided that the procedures and criteria they used met constitutional standards of fairness.

Two days later Mr. Soobramoney died. The public was angry with the Court—they felt it should have done something, anything to save a life! It mattered not that to have upheld his claim as against others waiting for treatment could well have meant in practice that those with the most money could go to court to get help and leave the disadvantaged without treatment. What we insisted upon was that the criteria for selection for expensive treatment be fair and non-discriminatory. Nevertheless, the NGOs and Human Rights' lawyers, while reluctantly agreeing that the actual decision was inevitable, indicated that they wanted some kind of statement from the Court that would pressurize the state to fulfill social and economic rights, rather than to provide a formulation which would enable the state to avoid its responsibilities.

On the 11th of May, the *Grootboom case* will go well beyond the issues in the *Soobramoney* matter and confront us with the question of the enforceability of social and economic rights in what the photographers call "full-frontal mode." A community of about a thousand persons referred to in South Africa as 'squatters,' lived in shacks on a piece of water-logged land. More than half, were children. They are just some of the millions of people in South Africa without secure tenure, all moving from one backyard or piece of land to another. One day, because of the intolerable conditions, they decided to move to a more hospitable area. It turned out, however, that this newly occupied land had in fact been earmarked for a housing development scheme intended for other poor people like themselves. Thus, in a sense, they could be seen as "jumping the queue." They were then evicted from this land and settled on a nearby sports field, since there was nowhere else for them to go. They could not return to the land that they had previously occupied, because others now occupied it. Their case was supported by the Legal Resources Center, an organization initially established to fight cases, which challenged various aspects of apartheid. It felt that this was an appropriate case to test what is meant by the social and economic rights in our *Constitution*.

This is where the chickens come home to roost. It was one thing in the 1980s to tell people fighting for liberation and transformation that a *Bill of Rights* need not only mean restriction on government's power to act, but could also mean that government has an obligation to right the wrongs of the past. When we argued in favor of constitutionalizing social and economic rights, and not simply to make them *Directives* of state policy, we said that these rights were indivisible from, and as important as, other fundamental rights. Now, we have to give some kind of concrete meaning to these affirmations, otherwise people will ask what the point is of having social and economic rights in the *Constitution* at all. This is not the place for me to anticipate the arguments we will hear, or to deliver any views in advance. But what I can do is to indicate some of the broad themes that I feel might be relevant. It is said that "the first shall be the last, and the last shall be the first." In a sense, we were the last, but now we are the first. You were the first, and some critics might say that you are becoming the last! To me, for that to result would be the greatest of pities. The United States was the first to constitutionalize and give judicial protection to fundamental rights of the classic kind that I mentioned, the liberty rights, You were also the first to see equal protection as something that needed to be guaranteed by the *Constitution* and enforced by the courts. It might be looking back, that the separate-but-equal doctrine was not one of the most brilliant features of your jurisprudence, but nevertheless the issues were debated, and eventually *Brown v. Board of Education* was decided. The case is regarded by many as providing the greatest legal decision of the 20th century for its sweep, compassion, focus, and its insistence on the role of deep, principled morality at the heart of government. Yet, the discourse in the United States today on expanding concepts of rights so as to include social and economic rights,

is extremely limited. The illumination that you could provide is lost, and not only to yourselves, but to the world.

I believe that 21st-century jurisprudence will focus increasingly on socio-economic rights. Not long ago, I heard someone describe the 19th century, as the century where the Executive established control over society; The 20th century, as the century where Parliament gained control over the Executive, and the 21st century as the century where the Judiciary will establish principles and norms controlling both Parliament and the Executive. You might not be surprised to hear that the speaker was a Judge, in fact, she was a member of the French Constitutional Council! I believe she is right. There is growing acceptance all over the world that certain core fundamental values of a universal character should penetrate and suffuse all governmental activity, including the furnishing of the basic conditions for a dignified life for all. Let me run through some of the problems facing us. The first one involves accountability and the extent to which intervention by an unelected Court is appropriate. If we decide that these families must be given tents, housing, or some other form of shelter or accommodation, that will cost money. People will ask, "Who are the judges to require that? They are not accountable." These kinds of decisions are normally the prerogative of democratically-chosen bodies, whether it be the local council, or the provincial or national government. Exactly which organ of government is responsible is a technical question, which depends on our particular Constitutional text and our legislation. In general, however, if these organs of state are not performing their duties properly, then the remedy is to refuse to re-elect them. If the Court gives a bad judgment, however, we are independent, and we cannot be removed. We are not accountable. I do not believe this problem can be resolved in a formal, abstract, and categorical way. When it comes to matters of deep principle, our lack of accountability actually becomes a virtue. We are not running for office, and electoral popularity is of no concern to us. We defend deep core values, which are part of world jurisprudence and part of the evolving constitutional traditions of our country. Our lack of accountability in these circumstances actually becomes a "plus." The difficulty, however, is to distinguish between the special cases which deal with these deep values, and the ordinary issues of deciding how to allocate resources among many worthy claimants.

Secondly, the problem of institutional competence arises. What do Courts know about housing, about land, about queues; What do judges in general know about the practicalities of low cost construction, of erecting one's own shelter, of subsidies and sewage? We know about fundamental rights, about constitutional law. We eleven judges can actively handle legal concepts and ideas, yet we have no special expertise on complex socio-economic matters which frequently have a strong technical dimension requiring experts on the spot to work out appropriate procedures and priorities. Recognition of our limited capacities in this area requires a corresponding judicial modesty. We cannot be philosopher kings and queens who go around telling government how to function. Where we do have a voice is "when situations of homelessness go to the core of a person's life and dignity." In this respect we may be even better equipped than the experts, who are, and correctly so, animated by more bureaucratic and operational considerations. Indeed, the very nature of our decision-making is different from theirs. Decisions made by officials and legislatures have to build in compromise; there is nothing inherently wrong with that, compromise is good in public light. It is right that elected officials be directly responsive to the electorate, but we cannot and should not be, especially when we are defending fundamental rights. Thus, the compromises they appropriately effect, when reconciling different interests are different in nature from the balancing we set out to achieve when harmonizing competing principles.

Thirdly, there are separation of powers considerations. If we insist on money being provided for helping Mrs. Grootboom's community, this requires taking money away from other items in the budget. Is that not what parliament should control? Again, one cannot have a purely formal response. There are many cases in which ordinary decisions of the courts have budgetary



implications. If for example, we insist on legal aid for indigent Defendants facing long prison sentences, this costs money. Similarly, we recently had a case dealing with the rights of prisoners to vote. The independent electoral authority said that prisoners could vote in principle, since the legislature had not limited their right, but it could not set up registration centres and polling stations in the prisons, because it would cost too much money to do so. And we held that in fact the right to vote could not be negated merely by a combination of Parliamentary silence, bureaucratic difficulties, and administrative expense. The result was that the money was found, and maybe 30 percent of the prisoners voted.

In the *Grootboom case*, however, we are not just dealing with the right to vote, which is a one off thing we are dealing with right of access to housing, which is endless. We have millions of homeless people. When do we intervene, if at all, and force what could be massive redirection of funds on the Legislature and the Executive? Are social and economic rights just a pie in the sky? Or, are the provisions which set them out no more than beautiful words that in reality diminish the prestige of the *Bill of Rights* because they are unrealizable and promise something that cannot be achieved? I do not take that pessimistic view. At the very least, the whole density, tonality, and sense of rightness of the *Bill of Rights*, is affected by the inclusion of these rights. Is the *Constitution* about welfare or is it concerned with freedom? It relates to both. We do not want bread without freedom, nor do we want freedom without bread; we want bread and we want freedom. The *Bill of Rights* must be constructed around the interpretation of both these dimensions, so that each reinforces rather than undermines the other. As Amartya Sen has pointed out, conditions of freedom in poor countries prevent hunger from turning into famine, because there is public accountability for food distribution. Similarly countries with a reasonable standard of living for all tend to be supportive of openness and pluralism.

Secondly, these rights serve as immediately defensible negative rights. The state is prohibited from taking away housing or destroying education facilities. There have to be programmes of progressive realization of the promised entitlements. Retrogression is constitutionally unacceptable. That principle is relatively easy for courts to apply. You cannot just knock down a school or destroy a hospital. We are used to negative restraints on the state.

Thirdly, these rights apply in the overall interpretation and development of the common law, for example, in deciding whether or not a contract violates public policy, as well as generally in the interpretation of *statutes*. Thus, they suffuse and influence the whole judicial enterprise in all its manifestations, ensuring that the protection of human dignity is always at the center of what courts do.

Fourthly, our *Constitution* gives our Court the right to declare that the President or Parliament are in dereliction of a constitutional obligation. This implies that even if we do not compel the President to act in a particular way, or order Parliament to pass a particular law, we have the power to declare that they have failed to fulfill their constitutional responsibilities. Then it is up to the political organs to act. It remains to be seen how this provision will be applied, but it 'has considerable potential for the future.

Fifthly, there is enforcement through monitoring and reporting. The *Constitution* gives the Human Rights Commission, the duty to monitor social and economic rights, and to report annually on its findings. This is common in international instruments of this kind. The monitoring involves both inspection and introspection, and again, it is left to political pressure to ensure compliance with recommendations.

Eventually, when *Mrs. Grootboom's case* is heard in our Court, we will have to decide whether we can grant relief that will impact on the budgets and decision-making of democratically-elected bodies. I will mention the kinds of factors that might be influential.

First, is the state directly implicated in the situation in which the applicants find themselves? If the state itself was directly involved in rendering people homeless, then it might be easier to demand that the state remedy the situation it has caused. If for example, the state's machinery is used to evict people and destroy their shacks, a case can be made for saying to the state, 'Hold on you cannot do this. Even if you are not intending to promote homelessness as the state, your machinery is being used to diminish enjoyment of social and economic rights.' One can think of other areas where the state might be implicated, for example, in the case of prisoners. If the state deprives you of liberty, it must feed you and shelter you. Similarly, people in state hospitals have certain rights to have their needs attended to.

The United Nations committee dealing with social and economic rights refers to a duty of the state to provide a "minimum core" of basic rights for all. Alternatively, there might be a special claim by certain groups that are particularly vulnerable. Your classic *Carolene Prodlers case*- where the claimants are part of a discrete and insular minority who are politically powerless and need the protection of the court in order to secure their basic dignity and rights. Next, it might be easier to justify intervention where the invasions of rights touch on race and gender, or where they affect your right to life, or are so egregious as to precipitate desperation or extreme urgency. It might be that the consequences are so calamitous that any fair-minded person would say, "Give them at least some protection, even if it affects the budget. We cannot live in a society that allows human beings to be treated like that." Finally, one can develop procedural rights and rights to information in creative ways to advance the interests of deprived sections of the community.

One can introduce flexible remedies, as was done in *Brown v. Board Education*, and has been done in India. We have power to make just and equitable orders. You give maximum flexibility to the organs concerned in terms of how to comply with an order, but comply they must.

Well, these are our roosters that are crowing, or our eggs that are being hatched. It might be interesting for you to see eventually what emerge from the South African Constitutional Court decision after 11th of May. Thank you for helping me to think my way into this subject. And, please please as Americans do not exclude yourself from what is going to be, think an extremely important debate for the world and for your country as well.

Justice Sachs, I just want to thank you for that wonderful nuanced, and very thoughtful presentation of one of the difficult subjects: I think courts face. Thank you very much.

### III. EXCERPTS OF SELECTED CASES

#### 1. THE CERTIFICATION CASE

##### 1. In re: Certification of the *Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC)

Once the South African *Constitution* had been drafted by the Constitutional Assembly, the Constitutional Court had to certify whether or not it complied with a set of constitutional principles. One of the objections raised by some parties before the Court was to the inclusion of socio-economic rights.

The objectors argued that socio-economic rights were not universally accepted fundamental rights, that the inclusion of these rights would breach separation of powers by allowing the Judiciary to encroach on the area reserved for the legislature and executive and that the rights are not justiciable, particularly because of their budgetary implications. While the Court accepted the validity of certain other objections to the *Constitution*, it rejected those relating to socio-economic rights.

## 2. Extract from the judgment of the Court

[76] Sections 26, 27 and 29 in the [constitutional text] provide rights of access to housing, healthcare, sufficient food and water, social security and basic education. [Section] 28, among other things, provides such rights specifically to children. These rights were loosely referred to by the objectors as socio-economic rights. The first objection to the inclusion of these provisions was that they are not universally accepted fundamental rights. As stated, such an objection cannot be sustained because [Constitutional Principle II] permits the [Constitutional Assembly] to supplement the universally accepted fundamental rights with other rights not universally accepted.

[77] The second objection was that the inclusion of these rights in the [constitutional text] is inconsistent with the separation of powers required by [Constitutional Principle VI] because the Judiciary would have to encroach upon the proper terrain of the legislature and Executive. In particular the objectors argued it would result in the courts dictating to the government how the budget should be allocated. It is true that the inclusion of socio-economic rights may result in courts making orders, which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a *Bill of Rights*, a task is conferred upon the courts so different from that ordinarily conferred upon them by a *Bill of Rights* that it results in a breach of the separation of powers.

[78] The objectors argued further that socio-economic rights are not justiciable, in particular because of the budgetary issues their enforcement may raise. They based this argument on [Constitutional Principle II] which provides that all universally accepted fundamental rights shall be protected by "entrenched and justiciable provisions in the *Constitution*. It is clear, as we have stated above, that the socio-economic rights entrenched in [sections] 26 to 29 are not universally accepted fundamental rights. For that reason, therefore, it cannot be said that their "justiciability" is required by [Constitutional Principle II] Nevertheless, we are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion. In the light of these considerations, it is our view that the inclusion of socio-economic rights in the [constitutional text] does not result in a breach of the [Constitutional Principles].

### 2. THE SOOBARAMONEY CASE

#### 1. **Soobramoney v Minister of Health, KwaZulu-Natal, 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC)**

Mr *Soobramoney* was an unemployed man in the final stages of chronic renal failure that had approached a hospital with a view to receiving ongoing dialysis treatment in its renal unit. Although his life could be prolonged by means of regular renal dialysis, he hospital in question had refused him admission to its renal unit. Because the hospital did not have enough resources to provide dialysis treatment for all patients suffering from chronic renal failure it followed a set policy in regard to the use of dialysis resources. When determining which persons with chronic renal failure would be given dialysis treatment, the primary requirement was eligibility for a kidney transplant. Such persons would be provided with dialysis treatment until a donor had been found and a kidney transplant performed To be eligible for a kidney transplant the patient had to be free of other "significant disease." Mr *Soobramoney*, who suffered from other conditions including a heart disease, failed to meet this requirement.

Mr Soobramoney unsuccessfully approached a division of the High Court for an *order* directing the hospital to provide him with the treatment he desired and interdicting Respondent from refusing him admission to the renal unit of the hospital. He then appealed to the Constitutional Court, basing his claim on section 27(3) of the *Constitution* which provides that “no one may be refused emergency medical treatment” and section 11 of the *Constitution* which provides that “everyone has the right to life.”

The Court held that the provisions of the *Constitution* meant that the obligations imposed on the State by sections 26 and 27 of the *Constitution* dealing with the right of access to housing, healthcare, food, water and social security were dependent upon the resources available for such purposes, and the corresponding rights themselves were limited by reason of the lack of resources. Given this lack of resources and the significant demands made on them by high levels of unemployment, inadequate social security and a widespread lack of access to clean water or to adequate health services, an unqualified obligation to meet these needs would not at present be capable of being fulfilled: it was within this context in which s 27(3) of the *Constitution* had to be construed.

The Court therefore held that s 27(3) should not be given a broad construction which would include ongoing treatment of chronic illnesses for the purpose of prolonging life. It could also not be read with the right to life to allow everyone requiring life-saving treatment who was unable to pay for such treatment herself or himself an entitlement to have the treatment provided at a State hospital without charge. Such a construction would make it substantially more difficult for the State to fulfil its primary obligations under S 27(1) and (2) to provide healthcare services to ‘everyone’ within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the State for purposes such as preventative healthcare and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening.

The Court held that in a context of budget constraints and cutbacks in hospital services in KwaZulu-Natal there were many more patients suffering from chronic renal failure than there were dialysis machines to treat such patients. Guidelines were therefore established to assist medical personnel to make the agonising choices, which had to be made in deciding, who should receive treatment and who not. These guidelines were applied in the present case. By using the available dialysis machines in accordance with the guidelines more patients were benefited than would be the case if they were used to keep alive persons with chronic renal failure. If all the persons in South Africa who suffer from chronic renal failure were to be provided with dialysis treatment the cost of doing so would make substantial inroads into the health budget.

The provincial administration which was responsible for health services in KwaZulu-Natal had to make decisions about the funding that should be made available for healthcare and how such funds should be spent. These choices involved difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it was to deal with such matters.

It had not been shown that the State’s constitutional obligations had been breached and the appeal was dismissed

#### **Section 27-** Healthcare, food, water and social security

- (1) Everyone has the right to have access to-
  - (a) healthcare services, including reproductive healthcare,
  - (b) sufficient food and water, and

- (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance,
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment,

**2. Extracts from the Judgment of the Hon. Chaskalson P:**

(8) We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the *Constitution* was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

(9) The constitutional commitment to address these conditions is expressed in the *preamble* which, after giving recognition to the injustices of the past, states:

...We therefore, through our freely elected representatives, adopt this *Constitution* as the supreme law of the Republic so as to :-

- Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
- Improve the quality of life of all citizens and free the potential of each person...

This commitment is also reflected in various provisions of the *Bill of Rights* and in particular in sections 26 and 27 which deal with housing, healthcare, food, water and social security.

(II) What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, healthcare, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This is the context within which section 27(3) must be construed.

(19) If section 27(3) were to be construed in accordance with the Appellant's contention it would make it substantially more difficult for the state to fulfill its primary obligations under sections 27(1) and (2) to provide healthcare services to "everyone" within its available resources. It would also have the consequence of prioritising the treatment of terminal illnesses over other forms of medical care and would reduce the resources available to the state for purposes such as preventative healthcare and medical treatment for persons suffering from illnesses or bodily infirmities which are not life threatening. In my view much clearer language than that used in section 27(3) would be required to justify such a conclusion.

[20] Section 27(3) itself is couched in negative terms -it is a right not to be refused emergency treatment. The purpose of the right seems to be to ensure that treatment be given in an emergency, and is not frustrated by reason of bureaucratic requirements or other formalities. A person who suffers a sudden catastrophe which calls for immediate medical attention, such as the injured person in *Paschim Banga Khet Mazdoor Samity v State of West Bengal*, should not be refused ambulance or other emergency services which are available and should not be turned away from a hospital which is able to provide the necessary treatment. What the section requires is that remedial treatment that is necessary and available be given immediately to avert that harm.

[25] By using the available dialysis machines in accordance with the guidelines more patients are benefited than would be the case if they were used to keep alive persons with chronic renal failure, and the outcome of the treatment is also likely to be more beneficial because it is directed to curing patients, and not simply to maintaining them in a chronically ill condition. It has not been suggested that these guidelines are unreasonable or that they were not applied fairly and rationally when the decision was taken by the Addington Hospital that the appellant did not qualify for dialysis.

(28) The provincial administration which is responsible for health services in Kwa-Zulu Natal has to make decisions about the funding that should be made available for healthcare and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.

(31) One cannot but have sympathy for the Appellant and his family, who face the cruel dilemma of having to impoverish themselves in order to secure the treatment that the Appellant seeks in order to prolong his life. The hard and unpalatable fact is that if the Appellant were a wealthy man he would be able to procure such treatment from private sources; he is not, and he has to look to the State to provide him with the treatment. But the State's resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the Appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security. These too are aspects of the right to "human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity."

The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.

(37) The following order is made. The appeal against the order made by Combrinck J is dismissed. No order is made as to costs.

### **3. Extracts from the concurring Judgement of the Hon. Madala, J:**

(46) The fundamental issue is whether this Court, as the guardian of the *Constitution*, as the protector of human rights and as the upholder of democracy, should in this case require a health authority, acting through its authorised medical practitioner, to adopt a course of treatment which in the bona fide clinical and incisive judgment of the practitioner will not cure the patient but merely prolong his life for some time. Dr Naicker's qualifications as head of the Renal Unit at Addington Hospital are undoubted and her 18 years experience as a specialist physician in the field of renal medicine puts her in a singular position when it comes to the exercise by her of her own professional judgment on renal matters. She states in her affidavit in the present matter that patients who suffer from chronic renal failure, the condition which has afflicted the appellant, have as their only hope, either an organ transplant or long-term dialysis. It is always envisaged when such patients are put on the dialysis programme, that in due course a suitable cadaver transplant may be carried out or that organ donation may be made by a suitable living person. The Appellant is not a suitable candidate for renal transplant; also he does not qualify for long-term dialysis because of the scarcity of facilities and his state of health.

(48) Private hospitals and clinics which offer haemodialysis programmes play an important role in cases such as the present. They do afford end-stage renal failure patients with haemodialysis

treatment where the public sector cannot. The private sector criteria for acceptance onto a dialysis programme are not as strict, but naturally the patient must have the funds in order to sustain treatment. It seems to me that it would alleviate the problem of the public sector if more patients were given by the private sector alternative possible treatment of providing catheters and bags, which go with CAPD. The appellant in this case alleges that he was never advised about this option. If this were so, it would, in my view, be a serious indictment for the private sector which offers private renal dialysis programmes. However, the private sector is not before us and we cannot condemn it without hearing it.

#### 4. Extracts from the concurring Judgment of the Hon. Sachs, J:

(52) In a case such as the present which engages our compassion to the full, I feel it necessary to underline the fact that Hon. Chaskalson P's judgment, as I understand it, does not merely defer to the lack of resources. In all the open and democratic societies based upon dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to healthcare.

[54] Healthcare rights by their very nature have to be considered not only in a traditional legal context structured around the ideas of human autonomy but in a new analytical framework based on the notion of human interdependence. A healthy life depends upon social interdependence: the quality of air, water, and sanitation which the state maintains for the public good; the quality of one's caring relationships, which are highly correlated to health; as I well as the quality of healthcare and support furnished officially by medical institutions and provided informally by family, friends, and the community. As Minow put it:

...Interdependence is not a social ideal, but an inescapable fact; the scarcity of resources forces it on us. Who gets to use dialysis equipment? Who goes to the front of the line for the kidney transplant?...

Traditional rights analyses accordingly have to be adapted so as to take account of the special problems created by the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights bearers. When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights (which would then have to be justified in terms of section 36), but as defining the circumstances in which the rights may most fairly and effectively be enjoyed.

#### 3. *THE GROOTBOOM CASE*

##### 1. **Government of the Republic of South Africa and Others v Grootboom and Others, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC)**

The Respondents were a group of 510 children and 390 adults who had been evicted from their informal homes situated on private land earmarked for formal low-cost housing. They had previously lived in an informal squatter settlement called Wallacedene under lamentable conditions: they had no water, sewage or refuse removal services, only 5% of the shacks had electricity and the area was partly water-logged. Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years. Despite numerous enquiries from the municipality no definite answer was given. Faced with the prospect of remaining in intolerable conditions indefinitely, the respondents began to move out of Wallacedene at the end of September, 1998. They put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing. They did not have the consent of the owner and in December 1998, he obtained an ejection order against them in the Magistrates'

Court. At this stage they had nowhere to go as others had filled their former sites in Wallacedene. In May, 1999, the Respondents were forcibly evicted at the municipality's expense. This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The Respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings.

The Respondents went and sheltered on the Wallacedene sports field under such temporary structures as they could muster. Within a week the winter rains started and the plastic sheeting they had erected afforded scant protection. The next day the Respondents' attorney wrote to the municipality describing the intolerable conditions under which his clients were living and demanded that the municipality meet its constitutional obligations and provide temporary accommodation to the respondents. The Respondents were not satisfied with the response of the municipality and launched an urgent application in the High Court on 31 May 1999. The High Court ordered the three tiers of government involved in the case to provide shelter to the children and their parents. The judgment provisionally concluded that "tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum." The government appealed to the Constitutional Court.

At the hearing of the matter in the Constitutional Court, the appellants made an offer to ameliorate the immediate crisis situation in which the respondents were living. at a later stage, and before judgment was given, the Court, after communication with the parties, crafted an order putting the municipality on terms to provide certain rudimentary services to ensure that the offer was fulfilled.

The claim of Ms Grootboom and the others was based on two provisions of the *Constitution*: s 26 of the *Constitution*, which provides that everyone has the right of access to adequate housing, thereby imposing an obligation upon the State to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources; and s 28(1)(c) of the *Constitution* which provides that children have the right to shelter. The government contended that they had complied with the obligation imposed upon them by s 26 of the *Constitution* and placed evidence before the Court of the legislative and other measures they had adopted concerning housing.

The Court unanimously held that government had not met its obligations under s 26. In particular, the Court held that the State was obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. The *Housing Act 107 of 1997* made no express provision to facilitate access to temporary relief for people who had no access to land, no roof over their heads, living in intolerable conditions and in crisis because of natural disasters. These people were in desperate need. The Court held that the absence of a component catering for those in desperate need may have been acceptable if the nationwide housing program would result in affordable houses for most people within a reasonably short time. This was, however, not the case and housing authorities were unable to state when housing would become available to those in desperate need. The immediate crises was accordingly not being met and the consequent pressure on existing settlements resulted in land invasions by those in desperate need; thereby frustrating the attainment of the medium and long term objectives of the nationwide housing program.

As at the date of the launch of the application, the State had not been meeting the obligation imposed on it by section 26 of the *Constitution* within the relevant area. In particular, the programs adopted by the State fell short of the requirements of s 26(2) in that no provision was made for relief to the categories of people in desperate need. The *Constitution* obliged the State to act positively to ameliorate these conditions. This obligation was to devise and implement a coherent, coordinated program designed to provide access to housing, healthcare, sufficient food and water



and social security to those unable to support themselves and their dependants. The State also had to foster conditions to enable citizens to gain access to land on an equitable basis. Those in need had a corresponding right to demand that this be done. However, s 26 (and also s 28) did not entitle the respondents to claim shelter or housing immediately upon demand.

Therefore, the Court issued a *Declaratory Order* to substitute the High Court order stipulating that s 26(2) of the *Constitution* required the State to act to meet the obligation imposed upon it by the section to devise and implement a comprehensive and coordinated program to progressively realise the right of access to adequate housing. This included the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need within its available resources.

### **Section 26 -Housing**

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished; without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

### **Section 28 -Children**

- (1) Every child has the right –
  - (c) to basic nutrition, shelter, basic healthcare services and social services,

### **2. Extracts from the Judgment of the Hon. Yacoob, J:**

(1) People of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The *Preamble* to our *Constitution* records this commitment. The *Constitution* declares the founding values of our society to be “[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms.” This I case grapples with the realisation of these aspirations for it concerns the state’s constitutional obligations in relation to housing; a constitutional issue of fundamental importance to the development of South Africa’s new constitutional order.

[2] The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the *Constitution’s* promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country’s housing shortage.

#### *[Justiciability]*

[19] These rights need to be considered in the context of the cluster of socio-economic rights enshrined in the *Constitution*. They entrench the right of access to land, to adequate housing and to healthcare, food, water and social security. They also protect the rights of the child and the right to education.

[20] While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our *Constitution* as construed in the Certification judgment. During the certification proceedings before this Court it was contended

that they were not justiciable and should therefore not have been included in the text of the new *Constitution*. In response to this argument, this Court held:

“[T]hese rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.”

Socio-economic rights are expressly included in the *Bill of Rights*; they cannot be said to exist on paper only. Section 7(2) of the *Constitution* requires the state “to respect, protect, promote and fulfil the rights in the *Bill of Rights*” and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our *Constitution*, but how to enforce them in a given case. This is a very difficult issue, which must be carefully explored on a case-by-case basis.

[21] Like all the other rights in Chapter 2 of the *Constitution* (which contains the *Bill of Rights*), section 26 must be construed in its context. The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the state to promote access to adequate housing and has three key elements. The state is obliged: (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realisation of this right. These elements are discussed later. The third subsection provides protection against arbitrary evictions.

[24] The right of access to adequate housing cannot be seen in isolation. There is a close relationship between it and the other socio-economic rights. Socio-economic rights must all be read together in the setting of the *Constitution* as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them.

[25] Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality.

#### *Minimum Core Obligations*

[31] The concept of minimum core obligation was developed by the [United Nations Committee on Economic, Social and Cultural Rights] to describe the minimum expected of a state in order to comply with its obligation under the [*International Covenant on Economic, Social and Cultural Rights*]. It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a “minimum essential level that must be satisfied by the states’ parties. The committee developed this concept based on “extensive experience gained by [it] ...over a period of more than a decade of examining States parties’ reports.” The general comment is based on reports furnished by the reporting states and the general comment is therefore largely descriptive of how the states have complied with their obligations under the *Covenant*. The committee has also used the general comment “as a means of developing a common understanding of the norms by establishing a prescriptive definition.” Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law.

[32] It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, and availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. The committee developed the concept of minimum core over many years of examining reports by reporting states. This Court does not have comparable information.

[33] The determination of a minimum core in the context of “the right to have access to adequate housing” presents difficult questions. This is so because the needs in the context of access to adequate housing are diverse: there are those who need land; others need both land and houses; yet others need financial assistance. There are difficult questions relating to the definition of minimum core in the context of a right to have access to adequate housing, in particular whether the minimum core obligation should be defined generally or with regard to specific groups of people. As will appear from the discussion below, the real question in terms of our *Constitution* is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our *Constitution*. It is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.

[34] I consider the meaning and scope of section 26 in its context. Its provisions are repeated for convenience:

- (2) Everyone has the right to have access to adequate housing.
- (3) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (4) No one may be evicted from their home, or have their home demolished, without an *Order* of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

Subsections (1) and (2) are related and must be read together. Subsection (1) aims at delineating the scope of the right. It is a right of everyone including children. Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The negative right is further spelt out in subsection (3) which prohibits arbitrary evictions. Access to housing could also be promoted if steps are taken to make the rural areas of our country more viable so as to limit the inexorable migration of people from rural to urban areas in search of jobs.

[35] The right delineated in section 26(1) is a right of “access to adequate housing” as distinct from the right to adequate housing encapsulated in the *Covenant*. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a

dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

[36] In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between sections 26 and 27 and the other socio-economic rights is most apparent. If under section 27 the state has in place programmes to provide adequate social assistance to those who are otherwise unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights.

[37] The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.

[38] Subsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. The extent of the state's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures;" (b) "to achieve the progressive realisation" of the right; and (c) "within available resources."

#### *Reasonable Legislative and Other Measures*

[39] A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.

[40] Thus, a coordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the *Constitution*. It may also require framework legislation at national level, a matter we need not consider further in this case as there is national framework legislation in place. Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations. In particular, the national framework, if there is one, must be designed so that these obligations can be met. It should be emphasised that national government bears an important responsibility in relation to the allocation of national revenue to the provinces and local government on an equitable basis. Furthermore, national and provincial government must ensure that executive obligations imposed by the housing legislation are met.

[41] The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.

[42] The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

[43] In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.

[44] Reasonableness must also be understood in the context of the *Bill of Rights* as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore, is most in peril and must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the *Constitution* requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.

#### *Progressive realisation of the right*

[45] The extent and content of the obligation consist in what must be achieved, that is, "the progressive realisation of this right." It links subsections (1) and (2) by making it quite clear that the right referred to is the right of access to adequate housing. The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately. But the goal of the *Constitution* is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial

hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses. The phrase is taken from international law and Article 2.1 of the *Covenant* in particular. The committee has helpfully analysed this requirement in the context of housing as follows:

...Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the *Covenant* should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the *Covenant* which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the *Covenant* and in the context of the full use of the maximum available resources...

Although the committee's analysis is intended to explain the scope of states parties' obligations under the *Covenant*, it is also helpful in plumbing the meaning of "progressive realisation" in the context of our *Constitution*. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our *Constitution* and there is no reason not to accept that it bears the same meaning in the *Constitution* as in the document from which it was so clearly derived.

#### *Within available resources*

[46] The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources. There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

#### *The State Housing Programme*

[53] What has been done in execution of this [government housing] programme is a major achievement. Large sums of money have been spent and a significant number of houses has been built. Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery. It is a programme that is aimed at achieving the progressive realisation of the right of access to adequate housing.

[54] A question that nevertheless must be answered is whether the measures adopted are reasonable within the meaning of section 26 of the *Constitution*. Allocation of responsibilities and functions has been coherently and comprehensively addressed. The programme is not haphazard but represents a systematic response to a pressing social need. It takes account of the housing shortage in South Africa by seeking to build a large number of homes for those in need of better housing. The programme applies throughout South Africa and although there have been difficulties of implementation in some areas, the evidence suggests that the state is actively seeking to combat these difficulties.

[56] This Court must decide whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. This must be done in the context of the scope of the housing problem that must be addressed. This case is concerned with the situation in the Cape Metro and the municipality and the circumstances that prevailed there are therefore presented.

[64] The housing development policy as set out in the *Act* is in itself laudable. It has medium and long term objectives that cannot be criticised. But the question is whether a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established by the section.

[65] The absence of this component may have been acceptable if the nationwide housing programme would result in affordable houses for most people within a reasonably short time. However the scale of the problem is such that this simply cannot happen. Each individual housing project could be expected to take years and the provision of houses for all in the area of the municipality and in the Cape Metro is likely to take a long time indeed. The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide housing programme.

[68] Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper co-operation between the different spheres of government.

[69] In conclusion it has been established in this case that as of the date of the launch of this application, the state was not meeting the obligation imposed upon it by section 26(2) of the *Constitution* in the area of the Cape Metro. In particular, the programmes adopted by the State fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need identified earlier.

*Section 28(1)(c) and the [children's] right to shelter*

[70] The judgment of the High Court amounts to this: (a) section 28(1)(c) obliges the State to provide rudimentary shelter to children and their parents on demand if parents are unable to shelter their children; (b) this obligation exists independently of and in addition to the obligation to take reasonable legislative and other measures in terms of section 26; and (c) the State is bound to provide this rudimentary shelter irrespective of the availability of resources. On this reasoning, parents with their children have two distinct rights: the right of access to adequate housing in terms of section 26 as well as a right to claim shelter on demand in terms of section 28(1)(c).

[71] This reasoning produces an anomalous result. People who have children have a direct and enforceable right to housing under section 28(1)(c), while others who have none or whose children are adult are not entitled to housing under that section, no matter how old, disabled or otherwise deserving they may be. The carefully constructed constitutional scheme for progressive realisation of socio-economic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand. Moreover, there is an obvious danger. Children could become stepping-stones to housing for their parents instead of being valued for who they are.

[77] It follows from [section 28 1 (b)] that the *Constitution* contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate cares only where that is lacking. Through legislation and the common law, the obligation to provide shelter

in [section 28(1) (c) is imposed primarily on the parents or family and only alternatively on the state. The state thus incurs the obligation to provide shelter to those children, for example, who are removed from their families. It follows that section 28(1) (c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families.

[78] This does not mean, however, that the state incurs no obligation in relation to children who are being cared for by their parents or families. In the first place, the state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. This obligation would normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28. In addition, the state is required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to healthcare, food, water and social security in terms of section 27. It follows from this judgment that sections 25 and 27 require the state to provide access on a programmatic and coordinated basis, subject to available resources. One of the ways in which the state would meet its section 27 obligations would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances.

*[The Negative Component of the Right]*

[88] There is, however, no dispute that the municipality funded the eviction of the respondents. The magistrate who ordered the ejection of the respondents directed a process of mediation in which the municipality was to be involved to identify some alternative land for the occupation for the New Rust residents. Although the reason for this is unclear from the papers, it is evident that no effective mediation took place. The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the *Constitution*. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt. I have already said that the provisions of section 26(1) of the *Constitution* burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.

[92] This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a state structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable. Reasonableness must be determined on the facts of each case.

**Summary and conclusion**

[93] This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The *Constitution* obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.

[94] I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the *Constitution*, which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the



*Constitution* obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.

[95] Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand. The High Court order ought therefore not to have been made. However, section 26 does oblige the state to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.

[96] In the light of the conclusions I have reached, it is necessary and appropriate to make a *declaratory order*. The order requires the state to act to meet the obligation imposed upon it by section 26(2) of the *Constitution*. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.

[97] The Human Rights Commission is an *amicus* in this case. Section 184 (1) (c) of the *Constitution* places a duty on the Commission to "monitor and assess the observance of human rights in the Republic." Subsections (2) (a) and (b) give the Commission the power:

- (a) to investigate and to report on the observance of human rights;
- (b) to take steps to secure appropriate redress where human right have been violated.

Counsel for the Commission indicated during argument that the Commission had the duty and was prepared to monitor and report on the compliance by the State of its section 26 obligations. In the circumstances, the Commission will monitor and, if necessary, report in terms of these powers on the efforts made by the state to comply with its section 26 obligations in accordance with this judgment.

[99] The following order is made:

1. The appeal is allowed in part.
2. The order of the Cape of Good Hope High Court is set aside and the following is substituted for it: It is declared that:
  - (a) Section 26(2) of the *Constitution* requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.
  - (b) The programme must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Programme, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.
  - (c) As at the date of the launch of this application, the state housing programme in the area of the Cape Metropolitan Council fell short of compliance with the requirements in paragraph (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.
3. There is no order as to costs.

#### 4. THE TREATMENT ACTION CAMPAIGN CASE

##### 1. Minister of Health and Others v Treatment Action Campaign and Others CCT 8/02 - Judgment of 5 July 2002 -currently unreported

Government, as one of its responses to the HIV-AIDS pandemic, devised a programme to deal with mother-to-child transmission of HIV at birth and identified nevirapine as its drug of choice for this purpose. The drug was available free to government and its administration was simple: a single tablet taken by the mother at the onset of labour and a few drops fed to the baby within 72 hours after birth. Nevirapine had been registered for this use by the Medicines Control Council of South Africa indicating that it was safe and effective and was recommended for this use by the World Health Organisation.

The government's programme imposed restrictions on the availability of nevirapine in the public health sector. The use of nevirapine to reduce the risk of mother-to-child transmission of HIV was confined to mothers and newborn children at hospitals and clinics included in the 18 research and training sites (with 200 linked access points). At all other public hospitals and clinics the use of nevirapine for this purpose was not provided for. Public hospitals and clinics outside the research and training sites were not supplied with nevirapine for doctors to prescribe for the prevention of mother-to-child transmission. Only later would a decision be taken as to whether nevirapine and the rest of the package would be made available elsewhere in the health system. That decision would depend upon the results at the research and training sites.

The Treatment Action Campaign, a civil society organisation, contended that the measures adopted by government to provide access to healthcare services to HIV-positive pregnant women were deficient in two material respects: first, because they prohibited the administration of nevirapine at public hospitals and clinics outside the research and training sites; and second; because they failed to implement a comprehensive programme for the prevention of mother-to-child transmission of HIV including voluntary counselling and testing, antiretroviral therapy and the option of substitute feeding.

This judgment deals with the public healthcare rights afforded to the individual by the *Constitution* (in section 27) and with the corresponding obligations imposed on the state to take reasonable measures progressively to realise these rights within available resources. The judgment analyses afresh the nature and content of such socio-economic rights and obligations in the light of its previous judgments in the *Grootboom* and *Soobramoney* cases and reaffirms the duty and power of the courts under the *Constitution* to consider whether the state's conduct in this regard has been reasonable. The Court also reaffirms that in exercising such power, courts do not trespass on government's prerogative to formulate and implement policy but perform the duty entrusted to them by the *Constitution* of giving effect to the *Bill of Rights*.

The High Court upheld this challenge by the applicants and ordered government to make nevirapine available to pregnant women with HIV who give birth in the public health sector, and to their babies, where in the judgement of the attending medical officer, acting in consultation with the medical superintendent of the facility concerned; this is medically indicated and where the woman concerned has at least been appropriately tested and counselled. The High Court further ordered government to plan an effective and comprehensive national programme providing for progressive implementation throughout the Republic and to deliver reports to the Court setting out the steps taken and to be taken in this regard.

On appeal, government argued that the High Court order infringed the doctrine of separation of powers and that the government decision to limit the supply of nevirapine to the pilot sites for the

research period and to defer expansion of the supply programme until the research period had expired was consistent with its obligations under the *Constitution*.

In a unanimous judgment by all the judges of the Court, the Court concluded that, notwithstanding the ostensible multitude of disputed questions of fact and conflicting medical and related expert opinions, it was clear on the government's own showing that its policy was indeed defective in the two respects identified. Government's programme was unreasonable in not enabling nevirapine to be made available outside its 18 test sites to try to save the lives of newborn babies of HIV-positive mothers who live out of reach of the sites and cannot afford to obtain the drug in the private sector. The policy of restricting such supply irrespective of whether the requisite HIV-testing and counselling facilities are available and the medical personnel in charge call for its use, infringes the right of such mothers and their babies to the access to healthcare guaranteed by the *Constitution*. By like token, the decision to adhere to the 18 sites for two years and only thereafter to consider expanding the programme for the supply of nevirapine and the accompanying package of public health services to the country at large is unreasonable and infringes the rights of all those who would otherwise have had access to this particular form of healthcare. The Court therefore decided to make a *declaratory Order* defining these two infringements, and outlining the need to use the extra funds made available, to provide for the training of additional counsellors. The Court also made a mandatory order instructing the government to remedy the situation.

#### **Section 27 -Healthcare, food, water and social security**

- (1) Everyone has the right to have access to-
  - (a) healthcare services, including reproductive healthcare
  - (b) sufficient food and water and
  - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.

#### **Section 28 -Children**

- (1) Every child has the right
  - (c) to basic nutrition, shelter, basic healthcare services and social services,'

#### **2. Extracts from the judgment of the Court:**

##### *[Justiciability]*

[25] The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are. The question is whether the applicants have shown that the measures adopted by the government to provide access to healthcare services for HIV- positive mothers and their newborn babies fall short of its obligations under the *Constitution*.

##### *Minimum core*

[26] It is necessary to consider a line of argument presented on behalf of the first and second amici. It was contended that section 27(1) of the *Constitution* establishes an individual right vested in everyone. This right, so the contention went, has a minimum core to which every person in need is entitled. The concept of "minimum core" was developed by the United Nations Committee on Economic, Social and Cultural Rights which is charged with monitoring the obligations undertaken by state parties to the *International Covenant on Economic, Social and Cultural Rights*.

[28] [The argument was that this] minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court.

[29] In effect what the argument comes down to is that sections 26 and 27 must be construed as imposing two positive obligations on the state: one an obligation to give effect to the 26(1) and 27(1) rights; the other a limited obligation to do so progressively through “reasonable legislative and other measures, within its available resources.” Implicit in that contention is that the content of the right in subsection (1) differs from the content of the obligation in subsection (2). This argument fails to have regard to the way subsections (1) and (2) of both sections 26 and 27 are linked in the text of the *Constitution* itself, and to the way they have been interpreted by this Court in *Soobramoney* and *Grootboom*.

[30] Section 26(1) refers to the “right” to have access to housing. Section 26(2), dealing with the state’s obligation in that regard, requires it to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” The reference to “this right” is clearly a reference to the section 26(1) right. Similar language is used in section 27 which deals with healthcare services, including reproductive healthcare, sufficient food and water, and social security, including, if persons are unable to support themselves and their dependants, appropriate social assistance. Subsection (1) refers to the right everyone has to have “access” to these services; and subsection (2) obliges the state to take “reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”. The rights requiring progressive realisation are those referred to in sections 27(1)(a), (b) and (c).

[34] Although [in *Grootboom*] Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable. The socio-economic rights of the *Constitution* should not be construed as core be provided to them. Minimum core was reasonableness under section 26(2), and not as under section 26 (1) entitling everyone to demand that the minimum thus treated as possibly being relevant to a self-standing right conferred on everyone.

[35] A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a “core” service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio- economic rights identified in sections 26 and 27 on a progressive basis.

[36] The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the *Constitution* requires in section 1. As the *Bill of Rights* indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable. As this Court said in *Grootboom*, “[i]t is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations”.

[37] It should be borne in mind that in dealing with such matters, the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. As was said in *Soobramoney*:

“The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.”

[38] Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The *Constitution* contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

[39] We therefore conclude that section 27(1) of the *Constitution* does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to “respect, protect, promote and fulfil” such rights. The rights conferred by sections 26(1) and 27(1) are to have “access” to the services that the state is obliged to provide in terms of sections 26(2) and 27(2) [46] *In Grootboom*, relying on what is said in the *First Certification Judgment*, this Court held that “[a]lthough [section 26(1)] does not expressly say so, there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.”

That “negative obligation” applies equally to the section 27(1) right of access to “healthcare services, including reproductive healthcare.” This is relevant to the challenges to the measures adopted by government for the provision of medical services to combat HIV mother-to-child transmission.

#### *Considerations relevant to reasonableness*

[67] The policy of confining nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to healthcare services required by those who do not have access to the sites.

[68] In *Grootboom* this Court held that

...[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right...

The fact that the research and training sites will provide crucial data on which a comprehensive programme for mother-to-child transmission can be developed and, if financially feasible, implemented is clearly of importance to government and to the country. So too is ongoing research into safety, efficacy and resistance. This does not mean, however, that until the best programme has been formulated and the necessary funds and infrastructure provided for the implementation of that programme, nevirapine must be withheld from mothers and children who do not have access to the research and training sites. Nor can it reasonably be withheld until medical research has been completed. A programme for the realisation of socio-economic rights must “be balanced and flexible and make appropriate provision for attention to ...crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.”

[69] The applicants do not suggest that nevirapine should be administered indiscriminately to mothers and babies throughout the public sector. They accept that the drug should be administered only to mothers who are shown to be HIV-positive and that it should not be administered unless it is medically indicated and, where necessary, counselling is available to the mother to enable her to take an informed decision as to whether or not to accept the treatment recommended. Those conditions form part of the order made by the High Court.

[70] In dealing with these questions it must be kept in mind that this case concerns particularly those who cannot afford to pay for medical services. To the extent that government limits the supply of nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences.

[71] The cost of nevirapine for preventing mother-to-child transmission is not an issue in the present proceedings. It is admittedly within the resources of the state. The relief claimed by the applicants on this aspect of the policy, and the order made by the High Court in that regard, contemplate that nevirapine will only be administered for the prevention of mother- to- child transmission at those hospitals and clinics where testing and counselling facilities are already in place. Therefore this aspect of the claim and the orders made will not attract any significant additional costs.

[72] In evaluating government's policy, regard must be had to the fact that this case is concerned with newborn babies whose lives might be saved by the administration of nevirapine to mother and child at the time of birth. The safety and efficacy of nevirapine for this purpose have been established and the drug is being provided by government itself to mothers and babies at the pilot sites in every province.

#### *Children's rights*

[76] Counsel for the government, relying on these passages in the *Grootboom* judgment, submitted that section 28( 1)( c) imposes an obligation on the parents of the newborn child, and not the state, to provide the child with the required basic healthcare services.

[77] While the primary obligation to provide basic healthcare services no doubt rests on those parents who can afford to pay for such services, it was made clear in *Grootboom* that "[t]his does not mean. ..that the State incurs no obligation in relation to children who are being cared for by their parents or families."

[78] The provision of a single dose of nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are "most urgent" and their inability to have access to nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are "most in peril" as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to nevirapine.

[79] The state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the state to make healthcare services available to them.

### *Evaluation of the policy*

[80] Government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of nevirapine at the time of the birth of the child. A potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered within the available resources of the state without any known harm to mother or child. In the circumstances we agree with the finding of the High Court that the policy of government in so far as it confines the use of nevirapine to hospitals and clinics which are research and training sites constitutes a breach of the state's obligations under section 27(2) read with section 27(1)(a) of the *Constitution*.

[81] Implicit in this finding is that a policy of waiting for a protracted period before taking a decision on the use of nevirapine beyond the research and training sites is also not reasonable within the meaning of section 27(2) of the *Constitution*.

[94] We are also conscious of the daunting problems confronting government as a result of the pandemic. And besides the pandemic, the state faces huge demands in relation to access to education, land, housing, healthcare, food, water and social security. These are the socio-economic rights entrenched in the *Constitution*, and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. In the light of our history this is an extraordinarily difficult task. Nonetheless it is an obligation imposed on the state by the *Constitution*.

[95] The rigidity of government's approach when these proceedings commenced affected its policy as a whole. If, as we have held, it was not reasonable to restrict the use of nevirapine to the research and training sites, the policy as a whole will have to be reviewed. Hospitals and clinics that have testing and counselling facilities should be able to prescribe nevirapine where that is medically indicated. The training of counsellors ought now to include training for counselling on the use of nevirapine. As previously indicated, this is not a complex task and it should not be difficult to equip existing counsellors with the necessary additional knowledge. In addition, government will need to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

### *The Powers of the Courts*

[96] Counsel for the government contended that even if this Court should find that government policies fall short of what the *Constitution* requires, the only competent order that a court can make is to issue a declaration of rights to that effect. That leaves government free to pay heed to the declaration made and to adapt its policies in so far as this may be necessary to bring them into conformity with the court's judgment. This, so the argument went, is what the doctrine of separation of powers demands.

[97] In developing this argument counsel contended that under the separation of powers the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the Executive to pursue a particular policy.

[98] This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the Legislature, the Executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.

[99] The primary duty of courts is to the *Constitution* and the law, "which they must apply impartially and without fear, favour or prejudice." The *Constitution* requires the state to "respect, protect, promote, and fulfill the rights in the *Bill of Rights*." Where state policy is challenged as inconsistent with the *Constitution*, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the *Constitution* to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the *Constitution* itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so.

[101] A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the *Constitution*. If it finds that policy is inconsistent with the *Constitution* it is obliged in terms of section 172(1)(a) to make a declaration to that effect. But that is not all. Section 38 of the *Constitution* contemplates that where it is established that a right in the *Bill of Rights* has been infringed a court will grant "appropriate relief." It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1)(a) a court may also "make any order that is just and equitable".

[106] We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction.

[113] South African courts have a wide range of powers at their disposal to ensure that the *Constitution* is upheld. These include mandatory and structural interdicts. How they should [114] A factor that needs to be kept in mind is that policy is and should be flexible. It changed at any time and the Executive is always free to change policies where it considers appropriate to do so. The only constraint is that policies must be consistent with the *Constitution* and the law. Court orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the Executive from making such legitimate choices.

#### *Transparency*

[123] Three of the nine provinces have publicly announced programmes to realise progressively the rights of pregnant women and their newborn babies to have access to nevirapine treatment. As for the rest, no programme has been disclosed by either the Minister or any of the other six MECs, this notwithstanding the pertinent request from the TAC in 2001 and the subsequent lodging of hundreds of pages of affidavits and written legal argume This is regrettable. The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshalled, inspired and led. This can be achieved only if there is proper communication, especially by government. In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its content must be made known appropriately.



(135) We accordingly make the following orders.

1. The orders made by the High Court are set aside and the following orders are substituted.
2. It is declared that:
  - a. Sections 27(1) and (2) of the *Constitution* require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.
  - b. The programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV. Counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and appropriate treatment available to them for such purposes.
  - c. The policy for reducing the risk of mother-to-child transmission of HIV as formulated and implemented by government fell short of compliance with requirement sub-paragraphs (a) and (b) in that:
    - (i) Doctors at public hospitals and clinics other than the research and training sites were not enabled to prescribe nevirapine to reduce the risk of mother-to-child transmission of HIV even where it was medically indicated and adequate facilities existed for the testing and counselling of the pregnant women concerned.
    - (ii) The policy failed to make provision for counsellors at hospitals and clinics other than at research and training sites to be trained in counselling for the use of nevirapine as a means of reducing the risk of mother-to-child transmission of HIV.
3. Government is ordered without delay to:
  - a. Remove the restrictions that prevent nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.
  - b. Permit and facilitate the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled.
  - c. Make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of nevirapine to reduce the risk of mother- to-child transmission of HIV.
  - d. Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother- to-child transmission of HIV.
4. The orders made in paragraph 3 do not preclude government from adapting its policy a manner consistent with the *Constitution* if equally appropriate or better methods become available to it for the prevention of mother- to-child transmission of HIV.

## 10. UNEP EXECUTIVE DIRECTOR'S BACKGROUND PAPER TO THE GLOBAL JUDGES' SYMPOSIUM

*Dr Klaus Toepfer, UNEP Executive Director*

### I. INTRODUCTION

Law is the most prevalent and enduring foundation for orderly responses to global, regional and national environmental problems. International Environmental Law is the principal means by which the community of nations builds and expresses international consensus on environment and development issues. At the national level, law remains the most effective means for translating Sustainable Development policies into action. A Judiciary well informed of the rapidly expanding boundaries of Environmental Law and law in the field of Sustainable Development, and sensitive to its role and responsibilities in promoting the rule of law in regard to environmentally friendly development, can play a critical role in the vindication of the public interest in a healthy and secure environment through the interpretation, enhancement and enforcement of Environmental Law. All these were among UNEP's laudable primary goals when it held various Judicial Symposia on Environmental Law and Sustainable Development.

*Agenda 21*, Chapter 8 reaffirms the primacy of law as an instrument for translating environment and development policies into action at national level, as well for the implementation of international agreements in the field of environment and development. It also recognises that effectively to integrate environment and development in the policies and practices of each country, it is not only essential to develop and implement integrated, enforceable and effective laws, but it is equally critical to develop workable programmes to review and enforce compliance with the laws, regulations and standards that are adopted. *Agenda 21* also recognises that technical support may be needed for many countries to accomplish these goals, including legal information, advisory services and specialised training and institutional capacity-building. Among the activities envisaged include the development of effective national programmes for reviewing and enforcing compliance with national, state, provincial and local laws on environment and development and the establishment of judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and the provision of access to justice to individuals, groups and organisations with a recognised legal interest.

The *United Nations Millennium Declaration* adopted by the United Nations General Assembly at its Fifty-fifth session in 2000, also throughout its text, reaffirms commitment to the rule of law in promoting the goals of the *Charter of the United Nations* and specifically recognises that developing countries and countries with economies in transition face special difficulties in responding to these challenges. Among the principal thrusts of the *Millennium Declaration* is fully implementing international consensus reached through *international agreements*, including *multilateral environmental agreements*, national policies and *regulations* for realising sustainable development and natural resource conservation, and human rights.

Since the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in June, 1992, gave political legitimacy to the concept of Sustainable Development, there has been a pressing demand for the further development of international and national environmental law to meet the challenges it poses. While international environmental law moves in the direction of sustainable development, it has inspired a number of innovative ideas, concepts and principles, as well as facilitating and enabling mechanisms. The *Stockholm Declaration on the Human Environment of 1972* and the *Rio Declaration on Environment and Development* twenty years

later are widely regarded as not only heralding, but even consolidating these new principles and also laying a strong foundation for their further reinforcement and wider application. Many of these principles have since found expression in major *environmental conventions* developed and adopted under the aegis of the United Nations Environment Programme (UNEP), and other international organisations, in the run-up to and following UNCED. At the national level, new laws and regulations have been enacted, and top judges have delivered many landmark judgements giving shape and content, as well as legal effect to these principles.

Compliance with and enforcement of international and national environmental law, is widely recognised as one of the principal challenges facing nations in the pursuit of Sustainable Development in the twenty-first century. During the past two decades, almost all the countries in the world have enacted environmental legislation and become parties to a large number of global and regional environmental *conventions, agreements* and *protocols*. The Judiciary remains a crucial partner for promoting compliance with and enforcement of international and national environmental law.

## II. UNEP'S ROLE IN THE DEVELOPMENT OF ENVIRONMENTAL LAW

Since its establishment following the United Nations Conference on the Environment in 1972, within the United Nations system, UNEP has been the principal body that has promoted the development and implementation of *environmental conventions* and other legal instruments. It has also carried out a wide range of capacity building activities in environmental law, including the strengthening of environmental legislation, legal training and information dissemination. Its current mandate in the field of environmental law is embodied in *The Programme for the Development and Periodic Review of Environmental Law*, adopted by the Governing Council of UNEP by Decision 21/23. This Mandate requires priority to be given to assist countries, especially developing ones and particularly the least developed ones whose economies are in transition. The assistance ranges from development, adoption and implementation of international legal instruments; at their request, the provision of technical advice and assistance, enacting national environmental legislation and setting up environmental machinery; to collecting and disseminating information and promoting education and training in the field of environmental law. UNEP's role and responsibilities in the area of environmental law have been reaffirmed in *Agenda 21*, the *Nairobi Declaration* on the future role and mandate of UNEP adopted at the Nineteenth Session of its Governing Council, and endorsed by the Special Session of the United Nations General Assembly held in New York, in June, 1997, the *Malmo Ministerial Declaration* adopted at the First Global Ministerial Environment Forum and most recently, at the UNEP Governing Council's Seventh Special Session held in Cartagena, in February, 2002.

These developments demonstrate the critical importance of the interaction between international environmental law and sustainable development. They also demonstrate the central role that UNEP has been called upon to play in supporting the efforts of the community of nations to develop international, regional and national legal regimes to promote the goals of sustainable development.

For most of the past three decades, UNEP has been in the vanguard of the progressive development of environmental law. This contribution by UNEP has been widely appreciated by the international community. In fact, the United Nations' Secretary General, Mr. Kofi Annan, applauded UNEP's efforts in the *UN Reform Proposals* that had been placed before the United Nations General Assembly in 1998. In doing so, he expressly recognised UNEP's "contribution to the initiation, negotiation and support of some of the most important treaties that have been agreed in the international field," *as one of its most notable achievements*.

It is well known that most of the major global and several important regional environmental *conventions* and *agreements* have been negotiated under the auspices of UNEP. These include the

*Vienna Convention and the Montreal Protocol on Ozone Depletion, the Basel Convention on transboundary movement of hazardous wastes, the Convention on Biological Diversity, the Stockholm Convention on Persistent Organic Pollutants (POPs), the Rotterdam Convention on the Prior Informed Consent Procedure (PIC) in regard to trade in toxic chemicals, the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on Conservation of Migratory Species (CMS), and at a regional level, the ASEAN Haze Pollution Agreement, the Lusaka Agreement on enforcement operations directed at illegal trade of wild fauna and flora and fourteen (14) Regional Seas Agreements.* UNEP has also made a significant contribution to *environmental conventions* negotiated under United Nations auspices, such as those dealing with climate change and desertification. Following decisions of the respective Conferences of Parties, UNEP provides *convention* secretariats for the *Biodiversity, Ozone, and Basel Conventions, CITES, CMS, Lusaka Agreement, the Chemicals Conventions on Prior Informed Consent and Persistent Organic Pollutants, and the Regional Seas Agreements.*

An equally important aspect of UNEP's work in environmental law is capacity building, originally mandated by *Resolution 3436 (XXX)* of the United Nations General Assembly and reaffirmed by the UNEP Governing Council and by UNCED. These activities focus on assistance to developing countries and countries with economies in transition, to strengthen national legal and institutional regimes for environmental management and human resource development in the area of environmental law and policy. Under this programme over 100 countries have been assisted in a variety of ways in the further strengthening of national environmental legislation. Other capacity building activities include training programmes at global, regional and national levels, a computerised environmental law information service in partnership with IUCN accessible world wide through Internet, and several important environmental law publications with a distinct practical slant. Several of these are also now being translated into and published in national languages of developing countries in order to reach a wider audience that would otherwise have hardly any access to books and materials on environmental law. The major UNEP publications include *the Register of International Treaties and Other Agreements in the field of environment*, two volumes of texts of *Multilateral Environmental Agreements, UNEP's New Way Forward: Environmental Law and Sustainable Development*, published to commemorate the Fiftieth Anniversary of the United Nations, *an Environmental Law Training Manual*, several global and regional Compendia of National Environmental Legislation and *Environmental Case law, Handbook on Environmental Law*. The latter has several versions suited to different regions and sub-regions and legal and institutional reports.

Since UNCED, the technical assistance programme on Environmental Law of UNEP has been refocused to respond to the challenges of strengthening the legal and institutional framework for Sustainable Development. To facilitate even more focused and effective technical assistance, the programme is being increasingly regionalised. Partnership with UN and other agencies with specialisation in environmental law and capacity building is being vigorously pursued with a view to combining the comparative advantages and specialised experience of these institutions and avoiding duplication. Regional focus has been intensified through a Joint UNEP/UNDP Project and Institutions on Environmental Law in Africa. It is now known as Partnership for the Development of Environmental Law and Institutions in Africa (PADELIA), the UNEP/SACEP/NORAD Joint Project in South Asia and the UNEP-Hanns Seidel Foundation Joint Project for the Mekong Countries, and expanding programmes carried out in partnership with UNEP's Regional offices and in collaboration with regional partners in Asia and the Pacific, Latin America and the Caribbean as well as in the Gulf region and in Central Asia.

The UNEP Guidelines for Enhancing Compliance with and Enforcement of Multilateral Environmental Agreements adopted by the UNEP Governing Council at its Seventh Special Session held in Cartagena, Colombia in June 2002 highlights Training for enhancing enforcement capabilities. The Guidelines specifically mention the following important areas of training:

1. Training for public prosecutors, magistrates, environmental enforcement personnel, customs officials and others pertaining to civil, criminal and administrative matters, including instruction in various forms of evidence, case development and prosecution, and guidance about imposition of appropriate penalties;
2. Training for judges, magistrates and judicial auxiliaries regarding issues concerning the nature and enforcement of environmental laws and regulations, as well as environmental harm and costs posed by violations of such laws and regulations and
3. Training that assists in creating common understanding among regulators, environmental enforcement personnel, prosecutors and judges, thereby enabling all components of the process to understand the role of each other.

### III. UNEP SPONSORED REGIONAL SYMPOSIA ON THE ROLE OF THE JUDICIARY IN THE DEVELOPMENT AND IMPLEMENTATION OF ENVIRONMENTAL LAW

The Judiciary is a crucial partner in bringing about a judicious balance between environmental and developmental considerations and thereby promoting Sustainable Development. In many countries, the Courts of law through their judgments and pronouncements have demonstrated sensitivity to promoting the rule of law in the field of sustainable development. The many advantages of securing the active support and cooperation of the Judiciary, within the framework of its constitutional boundaries, for international and national efforts to promote the goals of Sustainable Development are self-evident and include:

- Promoting compliance and enforcement of environmental legislation,
- Balancing environmental and developmental considerations in judicial decision making,
- Giving an impetus to the incorporation of contemporary developments in the field of environmental law for promoting Sustainable Development, including access to justice, right to information and public participation, interpretation and application of the *Stockholm* and *Rio Principles*,
- Networking among judiciaries to exchange of judgements and information on environmental law and policy, and international developments in the field,
- Promoting national policies and strategies for environmental management in the context of the respective socio-economic and cultural realities, through judicial pronouncements,
- Promoting the implementation of global and regional environmental conventions,
- Strengthening the hand of the executive in enforcing environmental legislation, in the face of improper influences which could stifle executive action and
- Developing further, and applying principles of environmental law.

Recognising this fact, and in pursuance of the mandate given to it by the Governing Council through the Montevideo Programmes I (1981), II (1992) & III (2001), UNEP provided an impetus to judicial capacity building in the area of environmental law by organizing and convening six Regional Symposia on the Judiciary's role in promoting Sustainable Development: The first, a Symposium for Judges from African Countries - divided into two modules for anglophone and francophone countries respectively - was held in Mombasa, Kenya, in September, 1996 under the Joint UNEP/UNDP Environmental Law and Institutions Project for Africa. The second, for countries in South Asia, was organized in collaboration with the South Asia Co-operative Environment Programme (SACEP), under the Joint UNEP/SACEP/NORAD Environmental Law Project for South Asia and was held in Colombo, Sri Lanka, in July, 1997. The third, a Symposium for Judges from the ten Southeast Asian countries was held in Manila, Philippines in March, 1999. The fourth Judicial Symposium on Environmental Law and Sustainable Development: Access to Environmental Justice in Latin America, was convened by UNEP's Regional Office for Latin America and the Caribbean (ROLAC) in January, 2000 in Mexico City. The fifth, a Caribbean Judges Symposium was convened by ROLAC and other partner agencies in St. Lucia, in April, 2001. The sixth Symposium for Judges from the Pacific Island States was held in February, earlier

this year, in Brisbane, Australia. It was hosted by the Office of the Premier of Queensland through the Hon. Peter Beattie. Altogether, over fifty Chief Justices and other Senior Judges from around the world have participated in these Judicial Symposia.

During the Regional Judges Symposia, several Chief Justices and other Senior Judges expressed their deep appreciation regarding efforts to sensitize the judiciaries around the world to developments in this relatively new area of law. They have called on UNEP and partner agencies to give priority to this area of work. It will be recalled that the International Court of Justice has also referred with appreciation to the UNEP Judges Symposia in its Judgement in the *Hungary-Slovak Case* relating to the sharing of Danube's water. It will also be recalled that UNEP's Governing Council in its *Decision 21/23* on the Programme for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty-first Century (Montevideo Programme III) called on UNEP to give priority to securing active judicial involvement in promoting the rule of law in the area of Environmental Law and Sustainable Development.

The purpose, objectives, and outputs of the Regional Symposia may be summarized as follows:

1. Provide a forum for Judges from different regions to exchange views, knowledge and experience in promoting the further development and implementation of environmental law in the region,
2. Examine contemporary developments in the field of environmental law - both international and national- that have implications for promoting the goals of environment and development,
3. Review the role of the Courts in promoting the rule of law in the area of sustainable development, including an examination of some of the important judgements.
4. Set in train a scheme for regional co-operation among judiciaries in the South Pacific Countries, including the collation and dissemination of information and material on Environmental Law among Judges from the region.

The following are among some of the important legal issues that were discussed at the six Regional Symposia.

- public participation, including substantive and procedural matters relating to public interest litigation,
- public's right to information,
- the importance of promoting public awareness and environmental education at secondary and tertiary levels.
- incorporation of the principle of sustainable development, the polluter pays principle, the precautionary principle, and the principle of continuous mandamus in the corpus of international and national law,
- invocation of the extraordinary jurisdiction of the Supreme Court in environmental matters,
- the *erga omnes* character of environmental matters and the problem of applying *inter partes* procedures in environmental dispute resolution,
- limits of the concepts of "aggrieved person" and "*locus standi*" in regard to environmental damage,
- inter-generational and intra-generational equity,
- court commissions to ascertain facts and an authoritative assessment of the scientific and technical aspects of environment and development issues,
- interpretation of constitutional rights including right to life and right to a healthy environment,
- obligation for continuous environmental impact assessment,
- application of the public trust doctrine in regard to natural resources and the environment,

- corporate responsibility and liability and
- approaches to judicial reasoning in environment related matters including the importance of traditional values and ideas.

Having regard to the limited time available at these Symposia and the wide range of issues that could be usefully addressed, the agreed methodology provided the participants to engage in a dialogue to share experiences, learn of contemporary approaches adopted by other regions and also lay the foundations for regional judicial co-operation in the field of environmental law. Accordingly, each delegation was requested to prepare a Country Report structured along the lines of a template provided by UNEP, which provided information on the status of national environmental legislation, participation in *environmental conventions*, the challenges faced in securing compliance with and enforcement of environmental law and the incorporation of contemporary approaches such as public participation, access to justice and information, and summaries of environment-related judgements of the Courts. These Country Reports were subsequently included in the Reports of the Symposia. The Country Presentations were followed by examination of other subjects of special relevance to countries in the respective countries, and regions through structured discussions, often led by Panels of external resource persons, Judges and members of the Bar.

These Regional Symposia attracted the participation of over fifty Chief Justices and other Senior Judges from around the world, as well as the enthusiastic support of a considerable number of international organizations within and outside the United Nations, and several national governments, is itself a fact that is the most eloquent testimony to the relevance and importance of this initiative. The Reports of the Symposia are replete with repeated calls from Chief Justices and other Senior Judges for UNEP and other interested organizations to redouble their efforts to strengthen the capacity of judiciaries in their respective regions to participate actively and on a well informed basis in carrying out their responsibilities as the final arbiter in balancing environmental and developmental considerations through the Courts of Law.

The immediate outcome of these Symposia may be summarized as follows:

1. Initiating and fostering of widespread judicial dialogue among the Bench and the Bar and exchange of experiences in the field of environmental law at national level and in each region with sensitivity to the cultures and traditions of the region.
2. Promoting discussion on possible conceptual and procedural advances, which will facilitate the development and application of environmental law jurisprudence by the courts and promote compliance with and enforcement of environmental law.
3. Establishing the basis for networking among the Judiciaries, the legal profession and Law Faculties in universities in the region, to share information and material on environmental law.
4. Establishing a basis for developing and disseminating widely in each region and beyond, through written and electronic means, environmental law publications of particular relevance and importance to the region including environmental law reports.
5. Through the above means, promote the more vigorous and effective application of environmental law as an instrument for translating Sustainable Development policies into action.

#### **IV. THE GLOBAL JUDGES SYMPOSIUM TO BE HELD IN JOHANNESBURG, SOUTH AFRICA IN CONNECTION WITH THE WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT**

Building on the achievements of the Regional Judges Symposia that have been held since 1996 in Africa, South Asia, Southeast Asia, Caribbean, Latin America and the Pacific, UNEP is convening

the Global Judges Symposium on Sustainable Development and the Role of Law in Johannesburg, South Africa from 18-20 August, 2002.

The positive outcome of the Regional Symposia has amply demonstrated the potential for the world's Judges to provide vital input into the work of the WSSD. The Global Judges Symposium will therefore focus attention on the fundamental role that the Judiciary can and does play in ensuring the implementation of environmental law in the context of Sustainable Development at the national level. The Judiciary's perspective and contribution in this area, given the unique role it plays in matters of good governance and in the functioning of the Rule of Law, could greatly enhance the work of the WSSD. Consequently, the Symposium will examine issues relating to the Rule of Law and Governance, in the context of Sustainable Development law. This will take full advantage of the Judiciary's vast and varied experience in this field in all regions, both developed and developing and will seize the opportunity to share this experience and inform and guide the work of the WSSD.

The Global Symposium also aims to galvanise international cooperation and donor support for capacity building among the judiciaries especially in developing countries. The objective is to foster a better informed and more active Judiciary. Such a Judiciary will support and further advance the Rule of Law, in the area of Sustainable Development. Further, the incorporation of emerging environmental norms, principles and mechanisms will merge into contemporary national jurisprudence, including the principles of the *Rio Declaration* on Environment and Development.

Chief Justices and other Senior Judges who participated in the above Regional Symposia, have widely supported the idea of a Global Judges Symposium. Other international fora such as the Joint UNEP Office of the High Commissioner for Human Rights (OHCHR) Seminar on Environmental Law and Human Rights held in Geneva in January 2002 also manifest this support. Such a landmark event, organised under the leadership of UNEP with a number of partner organisations and attended by Chief Justices and other Senior Judges from around the world will provide a global perspective to the importance of the role that the Judiciary plays in promoting Sustainable Development and also contribute to:

- Harmonising the different approaches that are taken by the Judiciary to implement the vital elements of governance delineated in *Rio Principle 10* (on access to information, public participation and access to justice),
- Globally recognizing and accepting the emerging jurisprudence on Environmental Law and Sustainable Development, and judiciously appreciating the advances made in the ten years since UNCED, in regard to the application of *the Rio principles*,
- Laying a foundation for a well structured, co-ordinated and sustained programme of support for capacity strengthening of judiciaries around the world, especially in the developing countries and countries with economies in transition, in the area of Environmental Law and Sustainable Development,
- Developing an inter-agency cooperative mechanism to pool their comparative advantages and specializations for implementing a regionalised, country-driven judicial training programme that is result oriented and practical and
- Paving the way for presenting the recommendations of the Global Judges Symposium on strengthening the capacity of the global Judiciary for promoting the rule of law in the area of sustainable development, to the United Nations World Summit on Sustainable Development as well as to all national judiciaries and relevant regional judicial mechanisms.

Convening the Symposium in Johannesburg, immediately before the World Summit on Sustainable Development is likely to draw maximum international attention to this important initiative and



to enhance prospects for enlisting the interest and support of the donor community, for implementing the outcome of the Symposium, especially in regard to capacity building.

The overriding objective of the Global Symposium is to foster a better informed Judiciary advancing the rule of law in the area of Sustainable Development. This will be achieved in two ways: through information sharing and awareness enrichment at the Symposium especially among judges from different regions of the world and also through the triggering of follow up activities under a plan of action flowing from the Symposium.

The specific objectives of the Global Judges Symposium are the following:

1. To examine and review notable judicial decisions embodying emergent environmental law principles, with particular reference to the application of the *Rio Principles* on Environment and Development.
2. To assess the dispensation of environmental justice, the capacity, competence and the personnel of the Judiciary to respond to and deal with environmental causes and matters.
3. To ensure global endorsement of the critical role the Judiciary plays in balancing environmental and developmental considerations through its judgements.
4. To ensure global recognition of the important role of the Judiciary in the application of laws affecting the environment.
5. To galvanise international co-operation and donor support for strengthening the capacity of judiciaries in the field of environment.
6. To identify the broad features and elements of a global programme for judicial capacity building that is region-specific and country-driven.
7. To make recommendations as appropriate for strengthening global environmental justice through:
  - (a) Eliminating procedural and technical obstacles in the administration of environmental justice.
  - (b) Securing effective compliance with and enforcement of judicial decisions relating to the environment.
  - (c) Achieving a judicious balance between development and the environment in consonance with the *Rio Principles* and ensuring the maximum support of the Judiciary as a powerful and authoritative organ for sustainable development.
  - (d) Capacity building, especially in the judiciaries of the developing countries and
  - (e) Promoting international co-operation in the use and development of environmental law and jurisprudence for the enhancement of global environmental justice.

The following are some of the principal outputs that are expected from the Global Symposium:

- a set of recommendations for concerted international action required to sensitize judiciaries at all levels and in all countries, but especially in developing countries and countries with economies in transition, to the new branch of law in the field of Sustainable Development,
- the broad outline of a programme of action to implement those recommendations, including a global network linking judges active in this field,
- Publications and sharing globally of papers, proceedings and related materials resulting from the Symposium.

The Regional Judges Symposia have provided a sound basis in concept, experience, and direction for the Global Judges Symposium. The Symposium in Johannesburg will continue this work, and more importantly, initiate a global programme that gives greater efficacy, coherence and stability

to national efforts to build capacity among the judiciaries around the world in the field of environment and Sustainable Development.

## V. WAY FORWARD

Without dissent, the fifty or so Chief Justices and other Senior Judges from around the world who participated in the six (6) UNEP Regional Judges Symposia on Sustainable Development and the Role of Law, held in Africa, Asia and the Pacific, and Latin America and the Caribbean, affirmed that the Judiciary as well as other related stakeholders who participate in the judicial process, can play a critical role in the vindication of the public interest in a healthy and secure environment, through the interpretation, enhancement and enforcement of environmental law. It would however require that it be well informed of the rapidly expanding boundaries of both Environmental Law and Law in the field of Sustainable Development. Also requisite, would be a degree of sensitivity to their roles and responsibilities in promoting the effective enforcement of laws, regulations and international agreements relating to environmentally friendly development.

Strengthening the capacity of the stakeholders engaged in promoting the implementation and enforcement of environmental law is a cornerstone of the UNEP Programme for the Development and Periodic Review of Environmental Law for the First Decade of the Twenty-first Century, adopted by the UNEP Governing Council by *Decision 21/23*, on 9<sup>th</sup> February 2001.

Consequently, following the UNEP Global Judges Symposium and based on its recommendations and those of the six Regional Judges Symposia, UNEP will provide leadership to the development and implementation of the programme of work designed to improve the implementation and enforcement of environmental law including multilateral environmental agreements at the national level, in developing countries and countries with economies in transition.

This would be achieved by strengthening the capacity of several key stakeholders. The said stakeholders play a critical role in the process of implementation and enforcement of environmental law, including multilateral environmental agreements (MEAs) at national level, especially the judicial process. Within the latter category, the same includes Judges, Prosecutors, legal NGOs that espouse environmental causes in Courts of Law, and Enforcement officers. The judicial process is the principal mechanism for achieving more effective enforcement of Environmental Law, and the Judiciary as well as other related stakeholders involved in the judicial process (monitoring, verification, investigation, prosecution and enforcement), are the crucial partners for promoting compliance with, implementation and enforcement of, international and national environmental law.

Such a programme of work will aim at realising the following tangible results:

1. Achieving a demonstrable and measurable improvement in compliance with, implementation and enforcement of, environmental legislation and multilateral environmental agreements at national level in the developing countries and countries with economies in transition.
2. Improving the level of public participation in environmental decision making, access to justice for the settlement and vindication of environmental disputes and rights, respectively. Also securing access to relevant information, and generally strengthening the legal-institutional capacities of countries to cope with problems of national environmental governance and effective law making and law-applying in the field of environment and sustainable development.
3. Improving the capacity of national stakeholders involved in the process of enforcement of environmental law, such as, judges, prosecutors, enforcement officers, NGOs espousing

environmental causes in courts and tribunals, to carry out their functions on a well informed basis, equipped with the necessary skills.

4. Strengthening sub-regional, regional and global co-operation and networking among groups of stakeholders, with a view to benefiting from each others' knowledge, experience and expertise for realising improved implementation, compliance with and enforcement of national and international environmental law in the context of sustainable development.

The programme would be developed globally, in partnership with other International and Regional organisations, within and outside the United Nations system, incorporating national and regional inputs of activities required to be carried out at national and regional levels to achieve the above objectives. It would be coordinated by UNEP through regional mechanisms, and delivered at national level through appropriate national mechanisms, using appropriate national institutions. Monitoring, would also be carried out at regional and national levels.

The areas of focus of such a follow-up programme, based on the recommendations of the Regional Judges symposia would include:

#### **1. TRAINING**

- 1) The training activities tailored to the needs of each of the stakeholder groups such as Judges, Prosecutors, Lawyers, Enforcement Officers, and Civil Society Groups that espouse environmental causes before the courts of law.
- 2) National Institutions (e.g. National Judges Training Institutes) mobilised to carry out the training activities, supported by expert advice and materials from the Partner Agencies.
- 3) Regional "Training-the-Trainers" programmes held to create the necessary reservoir of national experts who would be able to carry out national training activities, in national languages, with the support of international experts from UNEP and the partner agencies.
- 4) UNEP and the partner agencies pooling their comparative strengths and advantages to develop appropriate Training Materials, using modern Information Technology based training methodologies.

#### **2. INFORMATIONAL SUPPORT**

- 1) The UNEP-IUCN Environmental Law database, ECOLEX, further strengthened and expanded to facilitate collation and dissemination of information and material on international and national environmental law to a wider audience, especially in developing countries and countries with economies in transition.
- 2) National Focal Points established for the contemporaneous entry of national environmental information and materials (laws and regulations, policy documents, case law) in to the ECOLEX Data base.
- 3) Having regard to the fact that the needs of many developing countries and countries with economies in transition, especially the least developed among them, must be considered. In this regard, it will require hard copy books in national languages to be developed and disseminated to meet the information needs of the relevant stakeholders, since they still have not got wide access to computers and neither have they developed a culture of working on line through computers.
- 4) Materials are also to be developed for purposes of public information on matters of environmental law and MEAs.

### 3. INSTITUTIONAL STRENGTHENING

#### 1) *Judiciary-*

The Judiciary comprises several levels, from local magistrate Courts to the Superior Courts. This programme through its capacity building activities will strengthen the Judiciary as a whole in carrying out their judicial functions.

#### 2) *Prosecutors-*

These officials comprise Prosecuting officers in the offices of the Attorney-General's departments, legal officers in national/state/provincial environment officers. The programme will strengthen the institutional capacity of the prosecutors.

#### 3) *Civil Society Groups-*

The people most affected by environmental degradation are the poor, who are unable to defend themselves. Civil Society Groups (NGOs) often act on their behalf and espouse their causes in the courts of law. The programme will seek to strengthen their capacity to defend the environmental rights of the weaker sections of society that are affected by environmental degradation.

#### 4) *Enforcement Officers-*

These comprise environmental enforcement officers, customs officers, police officers and other inspectors. The institutional basis of these disparate groups needs to be strengthened, so that they can benefit from each other's experience and expertise and coordinate their enforcement functions. The programme will strengthen the institutional capacity of all these enforcement officers.

### 4. ENVIRONMENTAL EDUCATION

Environmental education in schools and universities- in the long term the youth of today, in schools and universities, will be crucial in realizing a shift in mindset towards sustainability in every human action. Education is the key to achieving this. The benefits of the work that is done to develop information and material for the training and other capacity building programmes for the principal stakeholders could be used to provide educational materials to schools and universities at little extra cost, and will be a real value added to this programme.

### 5. PUBLIC AWARENESS

A secondary benefit of this programme will be to use the materials developed for the capacity building of the primary stakeholders for use in public awareness campaigns by regional and national groups dedicated to this activity. The programme coordinators will tie up with such groups to provide the inputs from the programme for such public awareness work, through the media and other outlets.

## 11. SUSTAINABLE DEVELOPMENT: AN ANCIENT CONCEPT RECENTLY REVIVED

*The Hon. H.E. Judge Christopher G. Weeramantry,  
Vice-President of the International Court of Justice*

Hon. Speaker, Hon. Ministers, Distinguished Chief Justices and Judges, Your Excellencies and Distinguished Participants.

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

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

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

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

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

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

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

The concept of Sustainable Development is a new concept, which is fast gathering momentum and has now become part of accepted International Law. A principle becomes absorbed into International Law in a variety of ways. Among these is its acceptance in *treaties*, and in international practice. There is now a sufficient body of *treaties, declarations* and recognition in international practice for Sustainable Development to be accepted as a recognised legal concept. Principles 4,5,7,8,10,28,20 and 21 of the *Rio Declaration*, all formulated this principle of Sustainable Development. The Global Conference on the Sustainable Development of Small Islands States, 1994, the Copenhagen World Summit on Social Development, 1995, and a whole host of *declarations* which probably are numbered by the dozen likewise recognises it. The *North America Free Trade Agreement, the Convention on Biological Diversity, the Treaty of the European Union, the Convention to Combat Desertification* -all of these speak of the concept of Sustainable Development. International financial institutions such as the World Bank, the Asian Development Bank, and the Multilateral Investment Guarantee Agency all accept the concept of sustainable development, and State practice rounds this edifice so to speak by the recognition of the concept in practical terms by States in their practical ordering of their affairs. For example, the *Dublin Declaration on the Environmental Imperatives of the European Community* in 1990 spoke in specific terms of the principle of Sustainable Development as being one of the objectives of the European Community. Therefore, the recognition of the concept of sustainable development is worldwide.

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

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

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

They are the only bearers of rights in our modern legal systems. That is indeed a very limited view. It does not accord with the philosophies that traditional wisdom has bequeathed to us. Those philosophies teach us that there is a duty on the present generation to look beyond itself to those who are to come after us as well as to look back at the past and respect those who went before us. This is very beautifully expressed in the traditional African concept which Bishop Tutu has referred to in his sermons - that the human community consists of three elements - those who went before us, those who are with us here and now, and those who are yet to come. All three

together constitute the human community and if you lose sight of any one of those component parts of the trinity you then get a lopsided view of the human endeavour. That is a very important tradition, which I believe we must weave into our environmental law and I may have something to say about that later.

Another rather narrow attitude of modern law is to hold that it is only human beings that have any recognisable rights. No other creatures which inhabit this planet, which is our common home, have any rights at all which are recognised by modern legal systems. That was not the case in traditional law. Especially in our part of the world there was a very deep understanding of the rights of other living creatures to this planet which we all share. In the traditions of this country there were very strong items of State conduct which showed a recognition of this principle. The establishment by our kings of hospitals for animals showed that there was a strong understanding that human duties are not concentrated on human beings alone, and that one must in devising a legal system, think a little beyond the confined vision that human beings are the only creatures that mattered on this planet.

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

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

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

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

Take the idea of absolute freedom of contract: A mining company makes a contract with the owner of land, or with the Government and proceeds to mine the land. It has its rights under the contract and proceeds to use those rights to the absolute limit to which they can be stretched, irrespective of what happens to the land. The notion of responsibilities that go with those rights is unknown. That is one of the causes of the environmental devastation we see all over the world today. The concept of absolute ownership likewise tells you that if you own an item of property,

you have the absolute right to do with it what you will. The same concept is extended to land and you can treat land, if you are its owner, in the same way that you can treat movable property. The owner of movable property can destroy it if he so pleases. Likewise, the owner of land can mine it to destruction, bury noxious waste in it, fell primeval forests and reduce it to wasteland. He can do what he will, for he is the absolute owner. Modern law with its concept of individual ownership permits this. Traditional law would not have tolerated such treatment of land. That is one of the factors that have led to environmental problems on the present enormous scale.

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

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

Now, perhaps, I should say a word in relation to the International Court. The International Court derives its jurisdiction from the *Charter of the United Nations* and from the *Statute of the Court*. Most of the cases we have are disputes between two States, because we have no jurisdiction to hear disputes between individuals. In disputes between States, matters of an environmental nature are sometimes brought before the Court. Currently, we have an environmental case between two States in relation to the damming of a river and the environmental consequences that arise as a result. Two States can have two rival views in relation to environmental consequences and they can come before that court in that way.<sup>17</sup>

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

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

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<sup>17</sup> This case, between Hungary and Slovakia, has since been decided by the Court - see Judgement of 24 September 1997. See, also, the Separate Opinion of Judge Weeramantry which deals in detail with some of these issues.



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

In the past, we could have functioned internationally on the basis of co-existence. We tolerated the existence of the other State as a necessity of life. The other State was there and we had to co-exist with it whether we liked it or not. We reconciled ourselves to that situation and International Law worked out rules for co-existence with those States. We have now passed out of the era of co-existence into the era of cooperation and not merely passive cooperation but active cooperation because if we are to save our global inheritance we have to do so actively. We need for this purpose to avoid dependence on ideas of sovereignty and the desire of each State to claim complete dominion over everything going on within its borders. We need to surrender some part of that sovereignty to the rest of the world and to accept common guidance by the global community. Hence, because the environment knows no territorial boundaries we have to live as a cooperative group of States - at any rate so far as environmental law is concerned.

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

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

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

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

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

There is also the feeling that land has a vitality of its own. Land lives and grows with the people. If the land withers and dies so also do the people, because the health of a community is dependent on the health of the land and the health of the land is lost unless you pay due regard and reverence to that land and look after it as you would look after a living thing.

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

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

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

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

I also recall from a conversation that occurred when I was a visiting Professor in the University of Papua, New Guinea. In Port Moresby there were pockets of land within the city (which is the capital city and quite built-up) which were not developed. One day in the common room the conversation turned to the reason why these lands were left undeveloped and they turned out to be land belonging to various family groups. One of the young lecturers in the Law Faculty was a family member of one of those groups and therefore one of the co-owners of this valuable piece of undeveloped land in the heart of the capital. Somebody said to him 'do you realise you are sitting on a gold mine. Has it ever struck you that if you sold this land you would have a fortune?' This produced an outburst from the lecturer who said "Do you not understand our traditions in this country. This land belonged to our ancestors and belongs to our posterity, How can you suggest that I have the right to sell it? I have to respect the rights of those who will come after me."

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

I pass now to the Amerindian traditions which we read of in modern books on environmental law. A letter of the Cherokee Chief to the President of the United States is often referred to in these books. I refer you to the book on environmental law by Professor Lakshman Guruswamy and Mr. Geoffrey Palmer, the former Prime Minister of New Zealand. This famous letter is reproduced in this book, and I quote from it. Apparently, the President of the United States had sought to buy some land belonging to the Cherokee tribe and the Chief of this tribe wrote this letter to the President saying:

"How can you suggest that I sell this land? It is like asking me to sell you a part of the sky or a part of the flowing rivers. Every part of the earth is sacred to my people, every part of the earth is of the Red Man, every shining pine needle, every sandy shore, every mist, every humming insect is holy in the memory of my people. One portion of land to you is the same as the next and the Earth is not your brother, but your enemy and when you have conquered it you move on. But we treat Earth as a mother and brother and the earth and sky are not things to be bought and sold like sheep or bright beads. These are entities that have a living life of their own. The community respects it because that is the source from which the community gathers nourishment."

So those are some of the traditions that are very important in this field and I think that modern International Law can draw upon such traditions under many heads of International Law.

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

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

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

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

The teachings of Buddhism go even further, for they require a compassion for all living things, even to the extent of recognising the rights of animals to freedom from fear. The sermon of the Arahata Mahinda to King Devanampiyatissa at the time when buddhism was brought to this country spoke in terms of these rights. The concept of freedom from fear is an advanced human rights concept. Yet more than 2000 years ago the king was told "Remember that these animals are also as much inhabitants of this island as you are." The king was also told that he was only a trustee of this land, and not the owner of it. Trusteeship is one of the basic principles of modern environmental law. Yet, it was anticipated over two thousand years ago. This basic concept of environmental law is thus deeply ingrained in our traditions having been incorporated in the very first sermon that was preached at the time when Buddhism was brought into this country.

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

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

From a practical point of view the environmental damage that might have been done by irrigation works was looked after, because the ancient engineers had their answer to the question of silting. Because silting interferes with river systems, silting is a great environmental danger. The ancient engineers invented the *bisokotuwa*. This was a way in which silt was collected and there were also erosion control tanks for the protection of the environment. Then again, there were tanks for wild life - they were called forest tanks. The forest tank was built for the benefit of the wild life of the forest for it enabled animals to get water from those tanks without coming into the protected areas and disturbing the crops. There was also the customary law which prohibited the construction of permanent buildings on prime agricultural lands. There is also a lesson for modern development law when we consider the purpose of this wonderful system of tanks. Our ancient chronicle, the *Mahawansa* says "this irrigation system was undertaken for the benefit of the country and out of compassion for all living creatures." What better formulation can there be of the concept of development, which is meant not for economic gain but for improving the lot and increasing the happiness of all?

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

These enormous irrigation works - some of them enclosing an area of water which might run to areas of up to 10 square miles had retaining structures sometimes several miles long and 50 feet high. The Sea of Parakrama for example has a retaining bund which is 8 1/2 miles long. These enormous structures were linked to 25,000 to 35,000 small tanks. We call them tanks here, after

the Portuguese word *tanque* which means a reservoir. These 25,000 - 35,000 small tanks were linked by hundreds of miles of canals to these enormous reservoirs. We see from all this that the rulers of that age were extremely concerned with what today we call development. As development projects go, some of these are larger than many modern development projects. While they were aimed at development, at the same time they combined development with the protection of the environment. They did not neglect one or the other, but pursued both and they struck a happy balance between the two concepts in a manner, which has lasted for centuries.

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

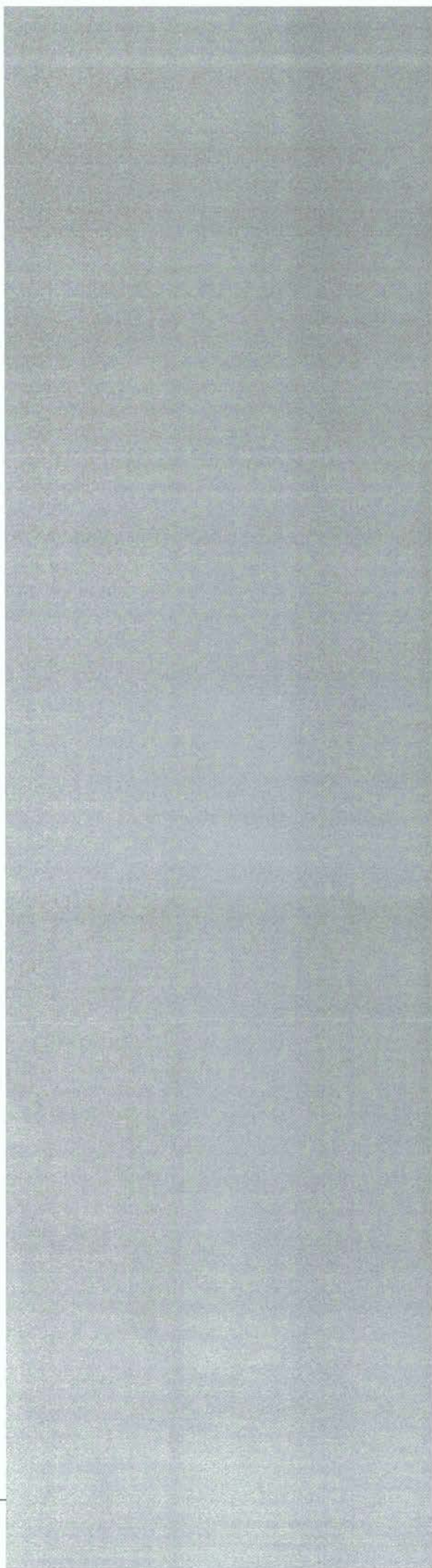
Let us not neglect examples from the past both in this country and other civilisations of the world from which we can derive enormous benefits. Let us not lose sight of the fact that in European civilisation as well there was a great love of nature and this was lost sight of during the industrial revolution.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

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

Thank you.

**IV. COUNTRY PAPERS  
(IN ENGLISH AND IN ALPHABETICAL  
ORDER)**

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## 1. LEGAL AND INSTITUTIONAL FRAMEWORK PROMOTING ENVIRONMENTAL MANAGEMENT IN BANGLADESH

*The Hon. Justice Mainur Reza Chowdhury, Chief Justice of Bangladesh*

### I. INTRODUCTION

The United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro from 3 to 14 June 1992, recognized the entitlement of human beings to a healthy and productive life in harmony with nature.<sup>18</sup> The threshold of the *Rio Declaration* was the recognition of right to development<sup>19</sup> and more importantly Sustainable Development. With the adoption of the *Rio Declaration*, the global community committed itself to integrate environmental issues into mainstream economic and social policy,<sup>20</sup> and to reduce and eliminate unsustainable patterns of production and consumption.<sup>21</sup>

Commitments recorded in the *Rio Declaration* call for legal and judicial activism. When commitment to Sustainable Development suffers, judicial review can be sought on the basis of the Rio principles of 'common but differentiated responsibilities,'<sup>22</sup> 'polluter pays,'<sup>23</sup> 'precautionary approach'<sup>24</sup> and 'EIA.'<sup>25</sup> While the *Rio Declaration* in Principle 11 requires the states to enact effective environmental legislation and standards, access to judicial and administrative review processes becomes relevant<sup>26</sup> to uphold people's rights. Right to participation and access to environmental decision making processes<sup>27</sup> need express legal recognition, which the Judiciary can safeguard in appropriate instances.

The post-*Rio* developments in the legal and judicial arena in Bangladesh have showed respect to the *Rio* commitments and also the framework of *Agenda-21*, which requires the protection of fragile eco-systems and resources.

This paper will highlight the legal and judicial interventions in Bangladesh that have contributed to promoting sustainable development and environmental management, which the global community, in various *international conventions, treaties and protocols (CTPs)* has pledged to do.

### II. THE GENERAL DEVELOPMENT AND ENVIRONMENT CONTEXT OF BANGLADESH

Bangladesh, with a total surface area of 147570 sq. km, is home to some 140 million people, 49 per cent of whom are women. The country's network of 230 rivers, runs across 24140 km.<sup>28</sup> Forest comprises 14 percent of the total land area.

18 Principle 1 of the Rio Declaration on Environment and Development

19 *ibid*, Principle 3

20 *ibid*, Principle 4

21 *ibid*, Principle 8

22 *ibid*, Principle 7

23 *ibid*, Principles 13 and 16

24 *ibid*, Principle 15

25 Principle 17

26 Principle 10

27 *ibid*

28 Statistical Yearbook of Bangladesh, 2000, Bangladesh Bureau of Statistics, January, 2002, Dhaka



Eighty percent of the population is rural. One half of the population lives in poverty and one third in extreme poverty. A further 20 percent of the population are tomorrow's poor: those who, given the current trends of development and ecological degradation, will join the ranks of the poor: 47.5 percent are income poor while 76.9 percent capability poor.<sup>29</sup>

The agrarian economy of Bangladesh accounts for one-third of the GDP and employs two-thirds of the labour force.<sup>30</sup> The fisheries sector employs about 1.2 million people<sup>31</sup> while the employment in the forests sector is about 2 percent of the total labour force.<sup>32</sup> Fish still remains the major source of protein for 60 percent Bangladeshis.

Life and livelihood in Bangladesh, especially for the poor depends deeply on nature. Any undue interference with water, land, forest, fishery and other environmental resources inevitably impacts on the lives of the people. The relationship of the people of Bangladesh with nature cannot be overemphasized and can be expressed in the words of the Secretary General of the UN Mr. Kofi Annan:

... The great majority of Bangladeshis live in rural areas, on the frontlines of resources management, natural disaster and environmental awareness. For them the relationship between human beings and the natural world is a daily reality, not an abstract idea. Our biggest challenge in this new century is to take an idea that seems abstract - sustainable development - and turn it into a daily reality for all the world's people...<sup>33</sup>

Over time, the gradual degradation of resources, particularly land, the contamination of water, the loss of fisheries, the loss of traditional species and the depletion of forests has become visible in Bangladesh, with adverse impact on lives and livelihoods. In the last decade or so, environmentalists in Bangladesh, the state organs and the citizens groups have rightly identified the depletion of environmental resources as a major cause of poverty in the country.

There are certain environmental concerns and factors in Bangladesh that are the result of activities originating beyond the frontiers of Bangladesh. These include issues relating to the use of natural resources like the waters of shared rivers, and issues relating to environmental hazards like the frequent floods, droughts and salinity, global warming, climate change and so on. The efficacy of the environmental legal system is, in certain areas, dependent on the attitudes of neighboring countries and so cannot be redressed unilaterally. The *Constitution* of Bangladesh affirms commitments to international laws and principles, and Bangladesh is a signatory to most major *international conventions, treaties, and protocols* on the environment.

### III. THE MAJOR ENVIRONMENTAL ISSUES FACING BANGLADESH<sup>34</sup>

#### 1. AT THE REGIONAL/GLOBAL LEVEL

- Ecological changes due to disputes over shared water resources;
- Maritime boundary disputes and a weaker regime on marine resources;
- The effect of greenhouse gases, global warming and climate change and the effect of these changes on Bangladesh;
- The impact of refugees and migration;

29 UNDP Human Development Report, 1996 for 1993

30 Chapter XIII-A-1, Fifth Five Year Plan (1997-2002), Planning Commission, Ministry of Planning, Government of Bangladesh, June, 1997, Dhaka

31 Chapter XIII-C-28, *ibid*

32 Chapter XIII-E-43, *ibid*

33 BELA Newsletter, Vol VIII, June 2000-May, 2001

34 Farooque. Mohiuddin, Reflections on the State of Environment and Environmental Law

- Ecological effects caused by trans-boundary acts and
- International trade and environmental regimes arising from such instruments as those dealing with Trade Related Intellectual Property Rights (TRIPs), General Agreement on Tariffs and Trade (GATT), World Trade Organization (WTO), Climate Change, the Convention on Biological Diversity and so on.

## 2. AT THE NATIONAL LEVEL

- Population and poverty;
- Degradation of resources (arising from inadequate policies);
- Conflict between development and environment;
- Pollution of water, air and soil;
- Destruction of mangrove, tree cover and firewood;
- Loss of fisheries;
- Unplanned human settlement;
- Unplanned urbanization and industrialization;
- Loss of wildlife;
- Natural hazards (also to include river erosion) and
- Contamination of ground water

## IV. ENVIRONMENTAL LAW IN THE LEGAL REGIME OF BANGLADESH

### 1.1 Sources of Environmental Laws

The main sources of environmental law in Bangladesh are the *Constitution*, *statutory laws* and *bylaws*, customs, traditional perceptions and practices, *international conventions*, *treaties* and *protocols*.

An investigation into the *statutory laws* prevailing in Bangladesh reveals that there are about 187 laws, which deal with, or have relevance to the environment. The compartmentalized administration of the statutory enactments places the laws on environment under several heads. These include land-use and administration, water resources, fisheries, forestry, energy and mineral resources, pollution and conservation, wildlife and domestic animals, displacement, vulnerable groups, relief and rehabilitation, local government, rural and urban planning and protection. The laws on the physical environment also address issues like occupational rights and safety, public safety and dangerous substances, transportation and safety, cultural and natural heritage and so on.

The environmental legislation, especially the substantive and administrative rules are sectorally compartmentalized. The procedural rules for the courts to administer these laws are derived mostly from the same general codes, e.g., *the Civil Procedure Code, 1908*, *the Criminal Procedure Code, 1989* and *the Evidence Act, 1872*.

### 1.2 Recent Developments in the Legal Regime

The law that deals specifically with the environment is the *Environment Conservation Act (ECA)*, 1995.<sup>35</sup> The *Act* came into force in June 1995 and to some extent, has recognized the *Rio* principles of precaution, polluter pays and people's participation. The *ECA* has replaced the earlier *Environment Pollution Control Ordinance, 1977* and has added a new dimension to environmental management by making a shift from 'pollution control' to 'environmental conservation.' The recent amendment of the *Act* in 2002, has given the provisions of the law overriding effect over all other laws.<sup>36</sup>

<sup>35</sup> Act No. I of 1995

<sup>36</sup> Section 2 A of the Environment Conservation (Amendment) Act, 2002 (Act No. IX of 2002)

According to section 2(d) of the *ECA*, "environment" shall include water, air, land and physical properties. The inter-relationship among and between these components of environment and human and other living beings, plants and micro-organisms are also included in the broader definition of environment.

The *ECA* has established the Department of Environment (DoE) and has authorized its Director General (DG) to take all such steps as are necessary for the conservation of the environment, improvement of environmental standards and control and mitigation of pollution.<sup>37</sup> In line with Section 11 of *Agenda 21*, which calls for conservation and management of resources for development, the *ECA* at Section 5, authorizes the Government to declare an area of great ecological importance as an Ecologically Critical Area. Such legal authority would allow the government to declare fragile eco systems as critical or protected areas and bring them under a special management system.

Section 5 of the *ECA* reads as follows:

...Declaration of Ecologically Critical Area -

- (1) If the Government is satisfied that due to degradation of environment the eco-system of any area has reached or threatens to reach a critical state, the Government may, by notification in the official Gazette, declare such area as an ecologically critical area.
- (2) The Government shall specify, in the notification provided for in subsection (1) or in any other separate notification, which of the operations or processes shall not be carried out or shall not be initiated in the ecologically critical area...

Under Section 5, the Ministry of Environment and Forests (MoEF) has already declared 8 areas including one mother fishery (a wetland) and a fragile coral island, which is part of world's largest mangrove forest, as ecologically critical areas<sup>38</sup> and has brought them under special protective measures. Such initiatives of the Government of Bangladesh indicates strong commitment by the Government expressed under the various CTPs including the *Convention in Biological Diversity, 1992* and the *Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 1971*. Most recently, the cabinet on 22 July 2002, approved the International Convention on Oil Pollution Preparedness Response and Cooperation, 1990, paving the way for the Government to protect its territorial waters from oil pollution.

Section 2(1) of the *Act* defines 'wastes' and authorizes the Government to determine the standard for discharge and emission of waste, including radioactive wastes [Section 20(2)(e)]. Hazardous substances has also been defined [Section 2(i)] and the Government has been authorized to lay down rules for the environmentally sound management of hazardous substances and toxic wastes. Although the Government is yet to exercise its rule making powers, these legal developments correspond to the accepted framework of *Agenda 21*, calling for environmentally sound management of hazardous wastes and substances. On the national frontier, the Government, in exercise of its powers under the *Agricultural Pesticides Ordinance, 1971*,<sup>39</sup> has banned the import of ten pesticides on account of their hazardous impact on vegetation, human and animal life.<sup>40</sup> It is also worth mentioning that Bangladesh has ratified the *Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and their Disposal, 1989*. On 23 May 2001, the country signed the recently adopted *Stockholm Convention on Persistent Organic Pollutants, 2001*.

<sup>37</sup> Section 4(1) of the Environment Conservation (Amendment) Act, 2002 (Act No. IX of 2002)

<sup>38</sup> Gazette Notification of the Ministry of Environment and Forest (MoEF), 19 April, 1999, memo No. pabama-4/7/87/99/245

<sup>39</sup> Ordinance No. II of 1971

<sup>40</sup> Section 9 of the Agricultural Pesticides Ordinance, 1971

Section 12 of the *ECA* incorporates the precautionary principle by requiring industrial units or projects to be established after obtaining environmental clearance from the DoE. Any unit violating this may be shut down by the DG, DoE. The amended *ECA*<sup>41</sup> empowers the Government to ban products that are harmful to environment and the Government, with active participation from the people, has been very successful in banning the production, use and sale of polythene products below 20 micron.

The most significant advances after the enactment of the *ECA* have been the setting up of quality standards for air, water, noise and soil and the formulation of environmental guidelines to control and mitigate pollution. The setting up of such standards has been done through the *Environment Conservation Rules* framed in 1997. The *Rules* have specified the developments for which an environmental impact assessment (EIA) would be necessary. This has made EIA mandatory for specified projects and industries although procedural details of EIA are yet to follow. The Government may think of making the EIA process participatory and ensuring access in the decision-making process.

The *ECA* has made it an offence to discharge excessive pollutants and cause damage, direct or indirect to eco-systems. Sections 7 and 9 of the *ECA* have in effect, incorporated the principle of 'polluters pay'. Under Section 7 the DG shall require any person including companies responsible for pollution to adopt corrective measures and also to make good the losses caused by such pollution. In the event of failure by the polluter to prevent the emission of excessive pollutants the DG shall initiate the needed remedial measures and the expenses incurred shall be recovered from the polluter as a public debt.<sup>42</sup>

The *ECA* ensures access to administrative proceedings and also to participation in the decision making process. Section 8 of the *ECA* allows a person affected or likely to be affected by the pollution or degradation of the environment, to apply to the DG to remedy the damage or apprehended damage. The DG may adopt any measures including a public hearing, for settling such grievance.

Under the original *Act*, cognizance of offence by the courts required a written report from the DG. The requirement of a report from DG, DoE would have adverse affect on right to justice. Fortunately, the original *Act* has been amended in a positive fashion. The requirement of a written report although still valid, may be relaxed at the discretion of the Judiciary if there appears to be a prima facie case and also failure on part of DoE to take proper initiative.

Amended Section 4A of the *ECA* has required all statutory agencies to render assistance and services to the DG at his request.

Violation of the provisions of the *Act* has been made an offence and may be visited with a penalty of Taka 10 lakh and/or 10 years of imprisonment.<sup>43</sup> The *Act* has recently been amended to provide for different punishments for violation of different provisions.

For the proper implementation of the *ECA*, it has been proposed to set up environmental courts in the six administrative divisions of the Country<sup>44</sup>. The proposed courts would administer the environmental offences under the *ECA* and also other laws as may be notified by the Government in the official Gazette. This revolutionary step aims at ensuring the speedy trial and disposal of

41 Section 6A of the Environment Conservation (Amendment) Act, 2002

42 Section 9 of the *ECA*, 1995

43 Section 15 of the *ECA*, 1995

44 Environment Court Act, 2000 (Act No. XI of 2000)

environmental cases. The *Act* provides in details the investigation and trial procedure for the Courts comprising of members of the subordinate Judiciary. Section 9 of the *Act* empowers the Environmental Courts to use the fines realized as compensation for the people affected by the environmental offence.

The judges for two environmental courts have already been appointed and it is expected that the system will start functioning soon.

An amendment to the *Forest Act, 1927*, carried out in 2000<sup>45</sup> has provided scope for public participation in environmental resource management. The newly added section 28A has given express legal recognition to the concept of social forestry and has empowered the government to make rules requiring an 'agreed upon management plan' for social forestry programmes. The rules are in the process of finalization.

Another significant piece of law enacted in 2000 is the *Open Space Protection Act, 2000*.<sup>46</sup> With proper implementation of the law, the respective authorities can protect the natural water bodies including the flood plains of the urban areas from being filled up for the sake of urbanization and development.

In addition, the legal regime on environment contains provisions recognizing customary rights over forest,<sup>47</sup> access to open water fisheries<sup>48</sup> and participation in the development process while finalizing water related schemes<sup>49</sup> and master plans for urban areas.<sup>50</sup> The legal regime provides punishment against pollution of territorial waters<sup>51</sup> and prohibits pollution of air, water and soil from agricultural, fishery, industry, vehicle and other sources.<sup>52</sup> Environmental resources like forest and fishery have been given special status for protection purposes.

## V. ENVIRONMENT IN THE NATIONAL BUDGET

Since the 1995-1996 fiscal year, environment has received attention in the national budget. In the national budget for 1998-99 fiscal year specific recommendations were made to protect biodiversity in the wetlands and the coastal belt. Emphasis was given to social forestry.

In the 1999-2000<sup>53</sup> fiscal year, tax was increased on importation of the polluting two-stroked engine vehicles. Allocation was made for a project on air quality management.

Special allocation for environmental projects was made in the national budget for the fiscal year of 2000-2001.<sup>54</sup> The budget identified loss of bio-diversity, pollution by the industries, air pollution, ground water contamination, use of polythene, deforestation and poverty as major reasons for environmental degradation. Allocation was made to address arsenic mitigation, air quality management and afforestation. Tariff on environment friendly machinery and pump was reduced and a ban placed on the import of two-stoked engine vehicles.

45 Forest (Amendment) Act, 2000 (Act No. X of 2000)

46 Act No. XXXVI of 2000

47 Sections 4,5,6,8,11,12,14,15,29,32 of the Forest Act, 1927 (Act No. XVI of 1927)

48 Gazette Notification of the Ministry of Land (MoL), Branch 7, 4 September 1995

49 Sections 7 and 8 of the Embankment and Drainage Act, 1952 (Act I of 1953)

50 Section 73 of the Town Improvement Act, 1953 (Act No. XIII of 1953)

51 Section 8 of the Territorial Waters and Maritime Zones Act, 1974 (Act No. XXVI of 1974)

52 Section 150 of the Motor Vehicle Ordinance, 1983 (Ordinance No. LV of 1983), section 8 of the Smoke Nuisance Act, 1905 (Bengal Act III of 1905), sections 6 and 7 of the ECA, 1995, section 3 of the Protection and Conservation of Fish Act, 1950 (Bengal Act XVIII of 1950)

53 Finance Act, 1999 (Act No. XVI of 1999)

54 Finance Act, 2000 (Act No. XV of 2000)

The budget for the fiscal year 2001-2002<sup>55</sup> allocated funds for bio-diversity conservation of the mangrove of Sunderbans (the world's largest mangrove forest) and St. Martin Island. Separate allocations were also made for mitigation of arsenic contamination and reduction of air pollution. The budget proposed to reduce the import duty on 4-stroke CNG-driven three wheelers to 15 percent from 37.5 percent. Duty on battery-operated three wheelers was also reduced. To discourage use of plastic products, duty on raw materials of polythene was increased to 30 percent up from 20 percent.

The budget for the fiscal year of 2002-2003<sup>56</sup> has also made allocation for environmental programmes on air quality management.

## VI. INSTITUTIONAL FRAMEWORK FOR ENVIRONMENTAL ADMINISTRATION

The administration of the laws on resource management is entrusted to respective ministries and public agencies. In 1989, a separate ministry called the Ministry of Environment and Forest (MoEF) was created with the following major functions:

1. Management of environment and ecology.
2. Matters relating to environmental and pollution control.
3. Conservation of forests and development of forest resources (government and private), forest inventory, grading and quality control of forest products.
4. Afforestation and regeneration of forest extraction of forest produce.
5. Plantation of exotic cinchona and rubber.
6. Botanical gardens and botanical surveys.
7. Tree plantation.
8. Planning cell - preparation of schemes and coordination in respect of forest.
9. Research and training in forestry.
10. Mechanized forestry operations.
11. Protection of wild birds and animals and establishment of sanctuaries.
12. Matters relating to marketing of forest produce.
13. Liaison with international organizations and matters relating to treaties and agreements with other countries and world bodies relating to subjects allocated to this Ministry.

The Department of Environment (DoE) established in 1977 under the *Environment Pollution Control Ordinance, 1977* still functions under the ECA. The DoE has been placed under the MoEF as its technical wing and is statutorily responsible for the implementation of the Environment Conservation Act, 1995. The Ministry of Planning also has an environmental section to check the environmental aspects of the projects of the Government of Bangladesh.

Decentralization of environmental governance, albeit at a nascent stage, has been attempted through the four tiers of local government proposed for the different administrative units<sup>57</sup>.

## VII. POLICIES AND INSTITUTIONAL RESPONSIBILITIES

Various policies adopted by the government give emphasis to the management and conservation of environmental resources. These policies though not enforceable, are taken as the basis for administration by the concerned agencies. Being more recent documents, these policies reflect the

55 Finance Act, 2001 (Act No. XXX of 2001)

56 Finance Act, 2002 (Act No. XVI of 2002)

57 The Chittagong City Corporation Ordinance, 1982 (Ordinance No. XXXV of 1982) and other City Corporation laws, the Paurashava Ordinance, 1977 (Ordinance No. XXVI of 1977), the Local Government (Union Parishad) Ordinance, 1983 (Ordinance No. LI of 1983)

progressive notions of environment and development. Policies on environment (1992), water (1999),<sup>58</sup> fishery (1998), energy (1996),<sup>59</sup> industry (1999),<sup>60</sup> agriculture (1999) require concerned administrative agencies to promote conservation and undertake development programmes and activities in harmony with nature and the eco-system.

## 1. COMMITMENTS UNDER THE POLICIES

**1.1 The National Energy Policy, 1996** commits to ensure environmentally sound sustainable energy development programmes causing minimum damage to the environment. The Policy admits that unplanned and uncontrolled use of biomass fuels (which contributed 65.5% of primary energy in 1990) are causing environmental degradation. It makes the commitment that the demand of bio-mass fuel which is in excess of sustainable limits is to be met by commercial fuels.

**1.2. Water Policy.** Water for environment is a notable feature of the **Water Policy**.<sup>61</sup> The Policy recognizes that continued development and management of the water resources should include the protection and preservation of the environment and its bio-diversity. As per the Policy, environmental needs and objects are to be treated equally with the resource management needs. All water related agencies and departments are required to give full consideration to environmental protection, restoration and enhancement measures consistent with the National Environment Management Action Plan (NEMAP).<sup>62</sup>

**1.3. The Industrial Policy** seeks to promote privatization and projects the government as a facilitator instead of a regulator. The Policy indicates that industrial development will be made sustainable from the point of view of environmental concerns and resource availability.

**1.4 Agriculture Policy.** Section 17 of the **Agriculture Policy** records concern over increased salinity of soil and excess use of chemical fertilizer and pesticides for more production. The Policy admits that saline water of the shrimp farms cause environmental pollution and calls for the mitigation of this through the proper implementation of the Fishery Policy.

**1.5. Land Use Policy.** Notified in the official gazette on 21 June, 2001 the **Land Use Policy** states the following objectives:

1. To prevent the current tendency for gradual and consistent decrease of cultivable land for production of food to meet the demands of the expanding population;
2. To introduce a 'zoning' system in order to ensure the best use of land in different parts of the country, according to their local geological differences, and to control logically the unplanned expansion of residential, commercial and industrial construction;
3. To ensure the best way of utilizing the *char* areas naturally rising out of river beds during dry months for the rehabilitation of the landless people;
4. To take necessary measures to protect land, particularly government-owned land, for different development programmes that might be necessary in the future;

58 Notified in the official Gazette on 10 May, 1999

59 Notified in the official Gazette on 6 January, 1996

60 Approved by the Cabinet on 5 April, 1999

61 Section 4.12 of the Water Policy, 1999

62 NEMAP is the only policy document of the GoB that has been prepared with full people's participation. The Policy document is now being implemented under the Sustainable Environment Management Programme (SEMP) of the MoEF and UNDP.

5. To ensure that land use is in harmony with the natural environment;
6. To use land resources in the best possible way and to play a supplementary role in controlling the consistent increase in the number of landless people towards the elimination of poverty and the increase of employment rate;
7. To protect natural forest areas, prevent river erosion and prevent the destruction of hill and hillocks;
8. Prevent environmental damage and pollution and
9. To ensure the minimal use of land for the construction of both government and non-government multi-storied offices.

For purposes of the main land use area in Bangladesh, the Policy identifies agriculture, housing, forests, rivers, irrigation and sewerage canals, ponds, roads and highways, railways, commercial and industrial establishments, tea estates, rubber fields, horticulture gardens, the coastal belt, sandy riverbeds and *char* areas.

To address the issue of land records, the LUP proposed a certificate of land ownership. It stated:

...Under the present system of land administration, the ownership of land is not complete or valid with any single document or registered deeds, survey records being parts of this process. Due to this, on the one hand, land-related disputes arise and lawsuits are filed frequently, while on the other hand, innocent and unsuspecting people fall victim to counterfeit documents and other land-related hassles. To prevent this situation from happening, a plan for a universal single document to protect the rights of landowners are being considered. If the Certification of Land Ownership (CLO) scheme is successfully implemented it can be hoped that the current tendency of the ownership of government land being illegally possessed by individuals can be prevented to a significant extent...

The Policy also emphasized the creation of a land database and its regular updating.

#### VIII. ADMINISTRATION OF ENVIRONMENTAL JUSTICE: THE COURT CASES

On the issue of activism by the civil society, the Judiciary in Bangladesh has started responding to cases seeking environmental justice. Judicial activism contributes to the proper implementation of environmental laws and allows the vast majority of the backward sections access to the justice system.

As a result of a progressive interpretation by the Judiciary of some constitutional and legal provisions, 'public interest litigation' (PIL) and 'right to environment' have received express legal recognition. The cases decided by the Judiciary have tended to activate the Executive, create wider awareness and affect the value system of the administration and the society. In the cases on environment decided so far by the Judiciary, directions have been given to the government agencies to perform their statutory functions. All these decided cases have addressed issues on sustainable development, precautionary principle, participation and access and are something of landmark decisions.

With an increased number of PILs in Bangladesh, it can now be said that the environmentalists and the civil society place confidence in the Judiciary in redressing the grievance of the downtrodden and the deprived. In deciding some of the cases the Judiciary has endorsed the innovations that justice require. In one recent incident, the High Court even intervened and issued *suo moto* rule to protect a public garden from encroachment.



### 1. ENVIRONMENTAL NUISANCE SHOULD BE MITIGATED

Judicial recognition for the protection of environment was first recorded by the High Court<sup>63</sup> in a case that challenged nuisance during an election campaign. The Judiciary disposed of the case on the assurance from the Attorney General that he would take measures against the defacing of public and private property in the name of an election campaign.

### 2. RIGHT TO ENVIRONMENT

The Judiciary, while deciding on a case involving importation of radiated milk<sup>64</sup> attached broader meaning to the constitutional 'right to life' and held: "Right to life is not only limited to the protection of life and limbs but extends to the protection of health and strength of the workers, their means of livelihood, enjoyment of pollution-free water and air, bare necessities of life, facilities for education, development of children, maternity benefit, free movement, maintenance and improvement of public health by creating and sustaining conditions congenial to good health and ensuring quality of life consistent with human dignity."

### 3. ACCESS TO JUSTICE: OPENING UP THE HORIZON OF PUBLIC INTEREST LITIGATION (PIL)

In an appeal from the judgment of the High Court Division dismissing a writ by a local environmentalist group on ground of *locus standi*, the Appellate Division of the Supreme Court of Bangladesh, in an historic judgment dated 25 July, 1996, granted standing to the group.<sup>65</sup>

In allowing the appeal, the Judiciary interpreted the constitutional requirement of "aggrieved" in a way that went beyond the strict traditional concept. The appeal that was allowed was a landmark decision in addressing the constitutional knot and riddle that have prevailed for last twenty four years history of our *Constitution* on the threshold question of: who is an "aggrieved person."

The decision opened up the horizon for PIL in Bangladesh and since then the Judiciary has entertained a good number of cases dealing with environmental grievances.

### 4. RIGHT TO PARTICIPATION

On an application from a local environmental group, the High Court Division (HCD) of the Supreme Court also intervened to determine the legality of a development project called the Flood Action-Plan-20.<sup>66</sup> The petitioner accused the authorities of violating a number of laws that ensure people's participation in the decision making process, provide for compensating affected people for all sorts of loss and protecting the national heritage. The Court delivered judgment on 28 August, 1997 and observed, "in implementing the project the respondents (the Government) cannot with impunity violate the provisions of law." The Court directed the authorities to execute the work in compliance with the requirements of law that guarantee the right to participation and compensation.

### 5. SUO MOTU RULE AGAINST GRABBING LAND OF A PUBLIC GARDEN

The Court has been active in protecting the environment in specific class actions, and has also given rules *suo motu*, questioning blatant violations of the state's obligations to protect and preserve the environment.

63 Dr. Mohiuddin Farooque Vs. Bangladesh and others 48 DLR, 434 HC

64 Dr. Mohiuddin Farooque vs. Bangladesh and others, 48 DLR 438 HC

65 Dr. Mohiuddin Farooque Vs. Bangladesh and Others, 49 DLR (AD) 1

66 Dr. Mohiuddin Farooque Vs. Bangladesh and Others, 1998 DLR 84 HC

In one such case, the High Court Division (HCD) issued a *suo moto* rule, when in violation of an earlier order of the Court to maintain the status quo, hoodlums attempted to encroach upon 2.8 acres land of the only public garden of old Dhaka for construction of a hotel therein.

#### 6. PROTECTING RIVER FROM ENCROACHMENT

On application from an environmentalist group<sup>67</sup> seeking judicial intervention to protect the only river flowing through Dhaka from illegal encroachment, the HCD directed the concerned statutory authorities to submit before the Court an action plan setting out definite time frame and measures to be undertaken for removing the encroachers.

Following the petition, the government acted to remove the encroachers and the river now stands free from illegal occupation. Taking from the example of this case, the Government has constituted an inter-ministerial committee to remove illegal occupations from the other rivers of the country.

### IX. CHECKING INDUSTRIAL POLLUTION

In a recent decision, the HCD gave directions to check indiscriminate pollution of air, water, soil and the environment by 903 industries. These industries were identified polluters by the Ministry of Local Government, Rural Development and Co-operatives (LGRDC). The 14 sectors include tanneries, paper and pulp, sugar mills, distilleries, iron and steel, fertilizer, insecticide and pesticide industries, chemical industries, cement, pharmaceuticals, textile, rubber and plastic, tyre and tube and jute.

An official notification of the Government had directed the Department of Environment (DoE), the Ministry of Environment and Forests (MoEF) and the Ministry of Industries to ensure within three years that appropriate pollution control measures were undertaken by the identified polluting industries. The Notification also required the said authorities to ensure that no new industry would be set up without pollution fighting devices. When no measure was taken even after the lapse of eight years, the above petition was filed.

After a lengthy hearing, the Court directed implementation of the directions given in the notification. To ensure implementation of the Court order, it was required from the respondents to report to the Court after six months by furnishing concerned affidavits showing compliance. The Court held it imperative on the part of the DG, DoE to take penal action against such department or persons responsible for not implementing the ECA, 1995.

The HCD, in a recent decision, gave a comprehensive judgment<sup>68</sup> to fight vehicular pollution at different fora. The six *Directives* of the Court required the authorities to -

- Phase out all two-stroke vehicles from city streets of the Capital by December 2002
- Convert all petrol and diesel-fuelled government vehicles into Compressed Natural Gas (CNG) powered vehicles within six months
- Enforce the prohibition on use of pneumatic horns within 30 days
- Check fitness of vehicles using computerized system with immediate effect
- Follow international standards of fuel by reducing or eliminating toxic elements
- Set up an adequate number of CNG filling stations within six months and ensure that all cars imported since July 2001 are fitted with catalytic converters.

67 Writ Petition No. 4098 of 2000, Bangladesh Environmental Lawyers Association vs. Bangladesh and others

68 Writ Petition No. 300 of 1995, Bangladesh Environmental Lawyers Association vs. Bangladesh and others, Judgment Delivered on 27 March 2002

This petition also has been kept pending for further monitoring.

The other pending cases on environment involves preservation up of lakes, flood flow zones and rivers, encroachment over rivers, violation of construction law, pollution from brick fields, environmental hazards of shrimp cultivation, destruction of hills, gas explosion without environmental impact assessment (EIA), compensation for environmental damages and so on.

## X. CONCLUSION

The society in Bangladesh is responding to the global call for the protection of the environment. With the adoption of new sets of laws and rules, the legal regime as it stands today sounds more progressive and sensitive. With a demand to implement the law, overcome the shortcomings and ensure adequate institutional and policy support, the civil society activism is developing vigorously. Such activism will support and foster changes in the law and the institutions. Further, the gradual rise in public awareness is expected to ensure responsible behaviour from all sectors. The judicial commitments to uphold constitutional values will continue to develop a proper environmental jurisprudence with due regard to human rights and human dignity.

Bangladeshis have always demonstrated a spirit to fight back against hazards and disasters. But in the changing scenario of the global environment, there are factors that remain outside the control of any particular community or state and require activism on the part of the global community. Sea level rise is one such phenomenon that has special pertinence to a low-lying delta like Bangladesh. The scientists apprehend that a one meter rise in the sea level would displace 11% of the population and inundate 17.5% of the total land area of Bangladesh. While there is need to continue with the process of legal and judicial activism at the national front, it is also of crucial importance that the global community should advance the principle of 'common but differentiated responsibility' to address challenges like this. Otherwise, all our achievement may be undermined on account of the 'greed' of a few and at the cost of the deprived.

## 2. BRAZIL: ENVIRONMENTAL MANAGEMENT

*The Hon. Justice Vladimir Passos de Freitas\**

### I. INTRODUCTION

The history of Environmental Law in Brazil is similar to that in other countries, especially the countries of Latin American. In the beginning we had *statutes* protecting the water and the forests, but only with economic objectives. For example, since 1940 our *Criminal Code*, in its article 271, punishes, the pollution of the potable water and the infractor can be sent to prison for 5 years. However, after the historic Congress of Stockholm, in 1972, Brazil enacted important laws protecting the environment.

Then on August 31, 1981, we had the Law n. 6,938 with an environmental national policy. In 1985, another important law was enacted. It was Law n. 4,347 of 24 July, 1985 that defined a special and quick procedure to resolve cases concerning the environment. This is the so-called *Public Civil Action Law* and its model was the North-american law of class action. In 1988, on October 5, Brazil adopted a new *Constitution*. The new *Magna Carta* has a lot of articles protecting the environment, including the integrated participation of the Union, States and Counties (Brazil is a federal State), establishing criminal sanction for juridical persons and demanding environmental impact statements in special situations. Finally, in 1988, on February 12, we had Law 9.605 with criminal sanctions. This *statute* was revolutionary, because it brought many innovations, for example, the substitution of imprisonment for the restoration of the damage to the environment.

### II. BRAZIL, A SPECIAL SITUATION

The situation of environmental protection in Brazil, although similar to other countries has important particularities. First of all, it is a country of 8,511,996 km<sup>2</sup> with various ecosystems. Besides this geographical aspect, Brazil has different economic and populational regions. Obviously, these factors generate several perspectives on the protection of the environment.

However, in spite of these differences, Brazil has a uniform legal system. Only the Federal Government can make criminal and civil laws. The States cannot enact criminal and civil laws but can only make administrative laws on environmental questions. The federal laws are very good and this is a factor leading to effectiveness. For example, the law of Public Civil Action allowing Prosecutors to bring suits, extended this right also to the Federal Union, to the States, to the Counties and to environmental organizations. This is very important, because in many countries only the citizens have legitimacy to bring suits and we know that a person on his own cannot make many things.

In short, in spite of its problems, Brazil has good laws and effectiveness in the environmental protection.

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## 1. PERFORMANCE OF THE JUDICIARY

In Brazil it is not easy to evaluate the guidelines of the Judiciary, because the country has 27 State Courts spread throughout the territory, 5 Federal Courts of Appeal and also the Superior Court of Justice and the Federal Supreme Court, both of them in Brasilia, the federal capital city. All these courts and hundreds of 1<sup>st</sup> instance judges are competent to decide environmental penal offenses.

Federal and state laws regulate the administrative infractions. Since 1999, after the enactment of *Regulation no/3,179*, of September 21, 1999, the sanctions have become more severe. The penalties can be up to US\$ 16 million (Article 41) in the more serious cases of pollution. Moreover, the environmental agencies have the power to suspend or stop the activities of an enterprise.

The civil cases are the most important method of enforcing the restoration of the damage. There are thousands of Public Civil Actions and the results are excellent. The Prosecutors have the power to promote the actions and this is the principal reason for the success. In Brazil, Judges and Prosecutors are admitted by means of public exams and they have all the possible securities and guaranties in their work: they cannot be removed from their location of work; their salaries are irreducible and their jobs are lifelong. The compensation from the civil actions go into a fund and are used in the restoration of environmental damages. However, personal damages are not common in Brazil. The victims of environmental damages do not usually bring actions personally in the courts. This is an aspect that deserves attention.

The repression against environmental crimes developed greatly after the adoption of Law 9,605, of 1998. In fact, now in Brazil, we have criminal cases against juridical persons, directors of corporations and public officers, too. Besides, we have a great number of cases that end by amicable settlement between the Prosecutors and the Defendants. If the crime has a penalty of up to one year in prison (small infractions) it is possible to reach a settlement with the Prosecutor and the case will end. If the crime has the minimum penalty of one year in prison, it is possible to suspend the penal action for two years, and if the Defendant repairs the damage and fulfills other requirements the case can be ended. These innovations are allowed and regulated by a *Law of 1995, no. 9,099*. The results are very satisfactory because a lot of cases are solved without formalism.

## 2. CASES ON ENVIRONMENTAL MANAGEMENT

In Brazil we have thousands of precedents of environmental cases. In fact, since 1990 the number of judgements has been increasing constantly. But the Court's decisions never make references to sustainable development. It is possible to say that we do not have any precedents with this kind of reference. In reality, sustainable development is an expression used by politicians, businessmen and sometimes by writers of articles on the environment, but not by judges. But sometimes in the judgement the question is decided taking this aspect into account, even if no reference to it is made. Here are some cases:

**1.1 Court of Justice of Santa Catarina State.** In the State of Santa Catarina, south of Brazil, a dairy products industry was caught discharging industrial effluents into a river that crosses the area. In the same place, one of the owners bred around 300 pigs and used to throw the pigs manure into the river. Taken by surprise by the Environmental Police, the owners were charged together with the juridical person, with the crime of pollution. The 1<sup>st</sup> instance judge rejected the charge against the juridical person. The Prosecutor appealed and the State Court reversed the decision, determining that the accusation should be admitted and the juridical person and the partners should be charged. This decision is important for two reasons: 1) it accepts the penal

liability of the juridical person; 2) it doesn't allow the pollution in the river, even knowing that pig rearing is extremely important for the economy of the west region of Santa Catarina.<sup>69</sup>

**1.2. Superior Court of Justice.** An association of residents in a neighbourhood in São Paulo (NGO) revolted against the permit given by the municipality for the construction of a cemetery near the reservoir, which supplies the city with water. The constructor alleged that the NGO's statutes didn't include the objective of protection of the environment, so that it did not have legitimacy to bring the action. The Superior Court of Justice decided that this kind of association, even if it was not appointed for the defense of the environment, can bring a Public Civil Action. With this approach, the Court gave a broad interpretation to the article of the statute that mentions the preservation of good quality of life, recognizing the NGO's legitimacy to bring suits. The need for the construction of a cemetery didn't prevail, even taking into account the generation of employment.<sup>70</sup>

**1.3 Court of Justice of Rio Grande do Sul State.** In the city of Caraá, RS, the Mayor ordered the urgent building of an avenue, and without the licence of the environmental agency, caused the destruction of 28,245m<sup>2</sup> of forests in an area of permanent preservation. He was accused of an environmental crime (Law 9,605, Article 38, of 1998) and he alleged that there was urgency for the building of a public health center and area for sports. The defense was not accepted and the Mayor was convicted and fined approximately U\$ 130. The importance of the decision lies in the fact that the Court did not accept the allegation of the need to sacrifice the environment, in favour of public buildings. In addition, the conviction was against the Mayor, the highest authority in the city, and not against the employees of the municipality.<sup>71</sup>

**1.4 Superior Court of Justice.** The Association for Environmental Defense and Education, an NGO located in the city of Maringá, Paraná State, filed a Public Civil Action to constrain the owner of a rural area to save 20% of his property for the restoration of the forest which existed on the site. The action was based on an article of the *Brazilian Forest Code*, which requires all landowners to save 20% of the total area for the preservation of native vegetation. There is great resistance by landowners to this, because they cannot cultivate this area, and therefore their profits are reduced. In this case the deforestation had happened before this landowner bought the land, and he did not allow the native vegetation to grow in 20% of the area. The action was quashed in first instance, but reversed in the second instance. The landowner appealed to the Superior Court of Justice, which ruled that the person who buys a property is responsible for the environmental damage caused by the previous owner, on the basis of the *Forest Code*. The judicial decision as shown, chose the preservation of the environment over the unlimited exploitation of the land.<sup>72</sup>

**1.5 Federal Court of Appeal of the 4<sup>th</sup> Region.** The controversy brought to the Federal Justice referred to a Public Civil Action proposed by the Federal Prosecutor against a railway company, in order to make it take care of the buildings, stations, machinery and old equipment which were in a state of decomposition. The company alleged in its defense a lack of economic resources. The first instance judge ordered a number of measures. On appeal the Court found that the historic and artistic heritage should be preserved, and that the administrator should present a project to the Federal Manager, Council of the Diffuse Rights Defense Fund and use the resources available in this organ. The importance of this decision lies in the recognition that the old railway heritage should be preserved because it belongs to the cultural environment, in spite of the allegation of economic

69 Court of Justice of Santa Catarina State. Criminal Appeal 00.020969-6, São Miguel do Oeste, 1st Criminal Chamber, Relator Desembargador Solon d'Eça Neves, 13.03.2001.

70 Superior Court of Justice. Special Appeal 31.150/SP, 2nd Chamber, Relator Ministro Ari Pargendler, 20.05.1996.

71 Court of Justice of Rio Grande do Sul State. Criminal case 70000807727, 4th Criminal Chamber, Relator Desembargador Albuquerque Neto, 27.09.2001.

72 Superior Court of Justice. Special Appeal n. 222.349/PR, 1st Chamber, Relator Ministro José Delgado, 23.03.2000.

difficulties. On the other hand, it was a realistic and fair solution, because it determined the proposal to be addressed to the organ in charge of distributing funding in cases such as this one.<sup>73</sup>

### III. HOW TO AROUSE JUDGES' SENSIBILITY TO ENVIRONMENTAL PROBLEMS

The protection of the environment in Brazil and in most countries, depends on a conscious and effective Judiciary. It happens because usually the offenses to the environment are discussed in a law court. In order to show the judges the importance of the subject and specific information, it is advisable to take some strategic measures. This does not mean that judges are influenced in their decisions, but they are made aware of the importance of the environmental issues. Here are some suggestions:

1. **TRAINING COURSES.** They are essential to the transmission of knowledge. They should ideally be carried out somewhere outside the office, in order to focus attention exclusively on the studies. It is important besides the participation of experts in Environmental Law, to include professors from interdisciplinary areas, such as biologists, chemists or agronomists. In this respect, the actions of international organizations such as the PNUMA, has been very effective. It is also necessary to mobilize national organs, not only from the public sector but also foundations and corporations interested in propagating an image of social commitment to environmental protection.

2. **SENSITIZING THE SUMMIT OF THE JUDICIARY.** The support of the directive organs of the Judiciary makes easier any initiative in this area. It is not recommended that judges be invited give lectures if they are not experts in Environmental Law. Since it is a recent subject, usually the oldest judges haven't studied it. A good idea is to invite them to chair panels in congresses.

3. **RECAPTURING THE HISTORY OF THE ENVIRONMENTAL LAW.** It is necessary to check which was the first judicial decision protecting the environment and during a congress or another important occasion, pay homage to the judge who took that decision. The same procedure can be taken with another professional in the field of law field who has collaborated in the study of Environmental Law, for example, the person who created and organized the first environmental congress in the country.

4. **MONOGRAPH CONTEST.** With the sponsorship of a public or private institution, a monograph contest on Environmental Law for judges of all levels is a good initiative. The prize should be something related to the subject for example, participation in an international environmental congress with all the expenses paid by the sponsor.

5. **COURSES ABROAD.** Although more complex, this is a very good initiative. A Court or a Judge's association could organize a course abroad, in countries where Environmental Law has a high degree of development, selecting the participants by means of their curriculum vitae or monographs. The first three judges classified could have all or part of their expenses paid. I have organized four courses like these, three in the USA and one in France with excellent results. Many participants have become great experts in Environmental Law.

### IV. CONCLUSION

The consciousness of the Judiciary on the issue of environment is crucial for the development of environmental protection and to turn it into reality, it is our duty to take all the measures within our reach.

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<sup>73</sup> Federal Court of Appeal of the 4th Region. Appeal n. 2001.04.01.058985-9/RS, 3th Chamber, Relatora Desembargadora Marga Tessler, 18.12.2001.

### 3. ENVIRONMENTAL PROTECTION AND THE LEGAL SYSTEM IN CHINA

*The Hon. Zhang Jun, Grand Justice and Vice President,  
The Supreme People's Court of the People's Republic of China*

Dear Mr. Chairman, Hon. Messieurs, Grand Justices and Judges. I feel greatly honored to take part in this Global Judges' Symposium on Sustainable Development and the Role of the Law, on behalf of the Hon. Mr. Xiao Yang, the Chief Grand Justice and President of the Supreme People's Court of the People's Republic of China. On behalf of Hon. Mr. Xiao Yang, please allow me to make a brief speech on China's strategy, legislation and judicial activities in environmental protection (EP) and the legal system.

#### I. CHINA'S OPTIONS IN THE IMPLEMENTATION OF THE SUSTAINABLE DEVELOPMENT STRATEGY

China has been carrying out the drive to modernization with its huge population, relatively scanty per capita resources, backward levels of economic development and also science and technology. Since the 1970s, along with its population growth, economic development and consistently improving consumption levels, China's originally scanty resources and weak environment have been confronted with mounting pressure. Which road of development should be adopted? This has become a major historically consistent issue of vital interest to the contemporary Chinese and their descendents.

The Chinese Government attaches great importance to the environmental problems that emerge with the population growth and economic development. It has regarded environmental protection as one of the most important aspects in improving people's living standards. Since the beginning of the 1980s China has formulated and implemented a series of environmental protection principles, policies, laws and measures.

1.1 Setting Environmental Protection as a basic state policy: The Chinese Government has firmly implemented such a policy because preventing and controlling environmental pollution and ecological destruction while reasonably developing and utilizing natural resources has a vital bearing on the country's overall interests and long-term development.

1.2 Formulating the guiding principle of simultaneous planning of economic construction, urban construction and environmental construction to unify economic, social and environmental benefits: Implementing the three major policies of prevention first, prevention and control combined, making whoever causes pollution liable to remove it, and tightening up environmental management.

1.3 Promulgating and enforcing Environmental Protection laws and regulations, putting Environmental Protection in the context of the legal system, improving the environmental law system, strictly enforcing the procedures and guaranteeing the effective enforcement of the environmental laws and regulations.

1.4 Setting up a sound Environmental Protection organ in governments at all levels, forming a relatively complete system of environmental management and fully displaying the functional role of environmental supervision and management.

1.5 Speeding up the progress of environmental science and technology: Beefing up basic studies of theory, developing and disseminating the applied techniques of preventing environmental



pollution, fostering the advancement of Environmental Protection industries and initially shaping an Environmental Protection scientific research system.

1.6 Carrying out environmental publicity and an education awareness raising exercise on issues of the environment: Gradually popularizing primary and secondary school education on

environment, advancing on-the-job and professional Environmental Protection education and fostering professionals in environmental science and technology, and management.

1.7 Promoting international cooperation in the Environmental Protection field: Actively developing exchange and cooperation with other countries and international organizations in environment and development, conscientiously performing the international environment agreements and energetically pursuing China's role in international environment affairs. In August 1992, after the UN Conference on Environment and Development, the Chinese Government tabled ten major measures in connection with the Chinese environment and development. In so doing, it explicitly pointed out that sustainable development would have to be the inevitable choice of road that China would follow, both today and in the future. In March 1994 the Chinese Government approved the release of China's *Agenda 21*, or "*The White Book on China 21<sup>st</sup> Century: Population, Environment and Development*." In it, China put forward the general strategy, countermeasures and active program of sustainable development, proceeding from the concrete condition of the country in terms of population, environment and development. Departments concerned and localities also formulated action plans for the implementation of the sustainable development strategy. Facts have proven that it would be a correct orientation and of far-reaching significance for China to implement sustainable development as a major strategy in its modernization drive. The Chinese Government has scored more and more remarkable effects in the course of its active implementation.

1. China's environmental legislation has been consistently improving, initially shaping an environmental law system with Chinese characteristics. In September 1979, the national legislature adopted China's first *Environmental Protection Law* (for trial implementation). In December 1982, it adopted the *Current Environmental Protection Law* of the People's Republic of China. Drawing on the experience of other countries in environmental legislation, the Chinese Law stipulated the principles, basic system and management measures while defining the national management system and requirements. In formulating the national economic and development plan, all government departments and governments at all levels are required to make overall arrangements with regard to and according to law. Legislation has provided powerful guarantees for the advancement of China's environmental protection undertakings and for the co-ordinated development of the environment and the economy, setting the basis for the development of the Chinese Environmental Protection along the track of the legal system.

2. On the basis of the serious implementation of the basic law on environment, China's environmental legislation deepened with the comprehensive development of the national economy. It promulgated and enforced the *Law of Oceanic Environmental Protection* (1982), the *Law of Water Pollution Prevention and Control* (1984), the *Law of Atmospheric Pollution Prevention and Control* (1987) and the *Law of Solid Waste Environmental Protection and Control* (1995) and the *Law of Environmental Noise Pollution Prevention and Control* (1996). In particular, the Criminal Law amended in 1997 for the first time added fourteen criminal charges to the section on the crime of jeopardizing environmental resources. Thus, the environmental law system improved in the new period. To meet the needs of China's entry into the WTO, in June this year, the national legislature again adopted the Law on Promotion of Clean Production. Drawing on the legislative experience at home and abroad in preventing pollution, in comprehensively utilizing resources, in recovering and using wastes and in

economic cycling, the Law has made stipulations on practical issues to promote domestic clean production. It has particularly defined government responsibilities in promoting clean production, and made it compulsory for enterprises to carry out clean production. Meanwhile enterprises doing so, are given support and encouragement.

3. After exertions for two decades or more, China's environmental legislation has initially formed a framework for the environmental law system that suits the socialist market economy. By now, we have promulgated seven Environmental Protection laws, 10 laws of Resource Protection, over 30 Environmental Protection administrative regulations, over 90 regulations by governmental departments and over 1020 local regulations and government rules. China has concluded or acceded to over 30 international environmental agreements and formulated over 400 environmental standards. Under such a legal system the Chinese Government has effectively prevented and controlled the impact of economic development on the environment and avoided serious impact and damage to environmental quality as a result of sustained rapid economic development.
4. Chinese judges have provided strong judicial guarantee for national Environmental Protection. China's environmental protection judicial activities are carried out in ordinary courts. Judges engaging in environmental protection case trials try the cases in the criminal, civil or administrative courts according to the case's category. They have received systematic training on Environmental Protection criminal, civil and administrative laws and regulations and are well trained professionally.

China has established the three major systems of criminal, civil and administrative litigation and has established the independent power of judges to pass judgments independent of interference from any administrative organ, social organization or individual persons. Citizens and legal persons are all equal in terms of the law's application. Open trial and evasion and other important litigation principles and institutions offer ample guarantees for the clients to exercise their litigation rights and for the judges to make correct judgments. Considering the practical possibility that the victims of environmental pollution do not constitute a special group, the *Chinese Law of Civil Procedure* stipulates the implementation of representative litigation. Provided that the number of people involved is uncertain, when the Plaintiff lodges a civil complaint, the complainants in litigation belong to one and the same category. This will fully protect the legitimate rights and interests of the environmental pollution victims.

After revising the Criminal Law, through criminal judgments, the Chinese judges have lawfully punished a number of criminals for jeopardizing the environment. In September 1998, for example, the Yuncheng municipal court of Shanxi Province held a public court to handle the major criminal case of environmental pollution by Yang Junwu, director of Tianma Document Papermaking Mill. Yang, the Defendant, was the sole investor of the mill that discharged water contaminated by phenol and other poisonous and harmful substances into the trunk channel that flowed into the village reservoir. This caused the contamination of northern water supply system of Yuncheng City, the interruption of water supply for three days and a heavy loss of public property. The judge convicted the Defendant Yang Junwu, finding him guilty of major environmental pollution and sentenced him to two years imprisonment, and imposed a 50000 yuan RMB fine on him and over 350000 yuan RMB victim compensation.

This was the first case subjected to criminal investigation for environmental pollution, after the promulgation of the new Criminal Law. It aroused a great sensation in China and played a very good role in publicity and education. It sent out an important message: "Environmental pollution is also a crime. It is also subject to criminal responsibility according to law."

In June 1999, the Judges of the Tianhe District Court of Guangzhou Municipality tried a case of

complaint for compensation by Pan Shaolian and seven others against Tianxing Petrochemical Co. Ltd for pollution losses. In September 1997, a conveyer axis of the Company hired oil-tank vehicle fell off and broke down the oil pipe, causing the diesel to leak out and flow into the reservoir. As a result, the fish bred by Pan and seven others on commission in underwater breeding net boxes died in large numbers, causing an economic loss of more than 1.19 million yuan. The judges passed a verdict that the Company was to compensate Pan and the seven others a total amount of more than 1.19 million yuan and to clean up the polluted water body, thus fully protecting the legitimate rights and interests of the victims.

In April this year, the Tianjin Maritime Court tried a particularly serious case for compensation for pollution. The reason involved the argument that there was no exemption from charges for civil compensation, even if the emissions proved to be standardized. The Plaintiffs were Sun Youli and 17 other farmers. Large numbers of the scallops and fish they bred died abnormal deaths. The Defendant, Hebei Qian'an Chemicals Co. Ltd. neighboring the breeding site, could not testify that the discharge of polluted waters could not reach the breeding water areas, but it held a certificate proving it had attained the emission standards. It failed to testify there was no cause and effect between the polluted water discharged and the damages suffered by the Plaintiff.

Tianjin Maritime Court Judges held that the Defendant should be liable for civil compensation on account of the practical pollution damages, although he was immune from administrative punishment according to law because of discharges met the standards specified. After the trial the media referred to the verdict as the "first case of non-exemption from civil responsibility through the form of judicial judgment." It was regarded as "an important milestone in the process of the rule of law in Environmental Protection enforcement that made a creative contribution to the cause of environmental protection."

Environmental Protection departments of governments at all levels are special organs for monitoring, and administering and implementing environmental protection. It is one of the important functions and responsibilities of the Chinese Courts and Judges to supervise and support these departments in administering according to law. Through trying environmental protection administrative cases according to law, the Chinese judges support the state administrative organs in administering according to law.

After completion of its construction, the Baodao Music Conservatory of Quanzhou City emitted noise pollution on the outside. According to the monitoring results of an environmental monitoring station, the emission value reached 65.8 decibels and exceeded the state norm. For this reason, the Quanzhou Municipal Environmental Protection Bureau imposed a fine of 3000 yuan on the conservatory and levied an above-norm pollution discharge fine of 3200 yuan in administrative punishment. The conservatory refused to comply and lodged an administrative suit to the court in the district. After examination, the judges upheld the original decision according to law, maintaining that the Quanzhou Municipal Environmental Protection Bureau's penalty decision was legal in procedure and correct in law application.

Statistics show that from 1998 through 2001, Chinese courts had handled 21015 EP cases of all descriptions, criminal, civil and administrative. The average annual growth rate was 25.35%. Through judicial activities Chinese judges have provided strong judicial Environmental Protection guarantees, winning them universal respect and acclaim from the population. We firmly believe that along with economic development and social advancement, the global judges will play an ever more important role in the overall enforcement of Environmental Protection laws and regulations, in controlling environmental pollution and promoting sustainable economic development. The new century will always be springtime for China and the rest of the world in terms of the rule of law to promote Environmental Protection and sustainable economic development.

Thank you very much for your attention.

#### 4. SALIENT FEATURES OF ENVIRONMENTAL LAWS IN THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

##### I. OVERVIEW OF THE STATE OF THE ENVIRONMENT

The rural environment in Ethiopia is endowed with farmlands, lakes, rivers, forests, woodlands, grasslands, livestock, wildlife and plenty of open spaces. Approximately 60 percent of Ethiopia's land surface is classified as arid and semi-arid, the remaining 40 percent is sub-humid and humid and is thus of high agricultural potential.

In contrast to the rural areas, the urban environment is characterized by such variables as very high population, high density of housing, crowded market centers and contamination from industrial effluent. Of all the environmental problems, the country's most critical concern focuses on the management and utilization of its land resources. The intensive use of the limited arable land by subsistence farmers under past governments of uninformed interference has led to serious instances of land degradation.

Though air pollution has become a fairly serious localized problem in Addis Ababa, water pollution as well as domestic and industrial wastes are some of the problems that have resulted from the process of industrial expansion and social transformation taking place in the country.

##### II. EVALUATION OF THE LEGAL REGIME UNTIL 1994

Over the last five decades Ethiopia has enacted a wide range of laws aimed at protecting the environment. However, these laws had an insignificant contribution in preventing and avoiding environmental problems. The inadequacy or ineffectiveness of all these laws in relation to environmental management and protection can be attributed to several factors.

For instance, the laws impose a general duty of care to prevent harm on human beings and certain components of the environment. The advantage of this type of law is that it provides a basic standard against which conduct can be measured. Although, such obligations are useful as a broad statement of policy and in some cases intended to cover those responsibilities not specifically regulated, they are not, however, made readily suitable for enforcement.

Since 1943, the general trend and subsequent approaches towards the development of environmental law in Ethiopia seemed to bear a rule oriented approach. For instance, the 1948 *Penal Code* of Ethiopia prohibits activities that will have an adverse impact upon particular components of the environment and public health. On the other hand relevant conditions that would help people and enterprises to comply with their respective obligations, have not been regulated and that from the practical point of view, the said measure did not help halt or even slow down the problem.

The other feature of the laws is that they are primarily concerned with regulating the allocation and exploitation of resources, which are either for production or consumption. They do not place emphasis on sound management and rational uses. Furthermore, the criminal and administrative fines are no longer a deterrent because they have not been revised.

As a general rule where the magnitude of penalty is modest compared to the gains that accrue from non-compliance, criminal sanctions and administrative fines may not be effective. Obviously,

people will not change their usual behavior, unless they do not see a benefit associated with obeying the law or a cost associated with disobeying it.

To be effective therefore, the magnitude of penalty provided under the laws should have been regularly revised to conform to the actual environmental cost incurred on the current and the upcoming generations. Consequently, this failure not only reduces the deterrent value of the penalties but also imposes an unacceptable environmental cost on the society. The other drawback of the laws is attributed to their limitation in holding an offender or making a polluter pay for and correct or restore damages that he/she/it inflicted upon the physical environment.

### III. INTERNATIONAL CONVENTIONS

In the course of three decades, spanning from the year 1972 to 2002, a number of major multilateral environmental agreements have been adopted as a basis for state obligations with regard to Sustainable Development. In this context, Ethiopia has ratified the multilateral environmental agreements enlisted herein below:

- *The Convention on Biological Diversity;*
- *The Basal Convention on the Control of Transboundary Movements of Hazardous Wastes;*
- *The United Nations Framework Convention on Climate Change;*
- *The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa;*
- *The Vienna Convention and the Montreal Protocol for the Protection the Ozone Layer;*
- *The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; and*
- *The Stockholm Convention on Persistent Organic Pollutants.*

### IV. POLICY AND LEGAL REGIME SINCE 1994

Over the past few years, there has been a growing perception and commitment towards an improved natural resources management and environmental protection regime in the country. Consequently, in order to head towards Sustainable Development and address the environmental problems mentioned at the beginning of this paper, environmental protection has been adopted in Ethiopia since 1994, it could be characterized by a three-stage approach.

#### 1. CONSTITUTIONAL MEASURES

The first stage marked the incorporation of environmental issues into the supreme law of the land. In this regard, the current *Constitution* of Ethiopia has a large environmental scope has defined the environmental values that are to be preserved and protected.

The 1994 *Constitution* of Ethiopia under Articles 44 and 92 proclaims that all citizens shall have a right to live in a clean and healthy environment. Government and citizens shall have a duty to protect the environment. The design and implementation of programs and projects shall not damage or destroy the environment.

The Ethiopian *Constitution* incorporates a number of other provisions relevant for the protection, sustainable use and improvement of the environmental resources of the country. The incorporation of these important provisions into the supreme law of the land uplifted environmental concerns to the level of fundamental human rights.

## 2. POLICY MEASURES

The second stage was the formulation of national policy and strategy on environmental management and protection. The primary need in preparing national policy and strategy documentation on environmental matters, took into account the prevailing economic social and cultural situations of the country. It aimed at determining the objectives and strategies, which ought to be used, in order to ensure respect for environmental imperatives.

In this context, the Environmental Policy and the Conservation Strategy of Ethiopia have been prepared with a view to amplifying further the Constitutional provisions on environmental protection. These policy and strategy documents were adopted and approved on April 2, 1997, since they recognized and addressed environmental issues in a holistic manner.

## 3. LEGISLATIVE MEASURES

The third stage was the formulation of environmental protection laws: incorporating environmental rights under the *Constitution*, adopting Environmental Policy and the Conservation Strategy of Ethiopia, ratifying multilateral environmental conventions and establishing Environmental Protection Authority are some of the basic moves towards heading for environmental protection and sustainable development in Ethiopia.

The environmental crises however, may continue despite taking all the above-mentioned measures. This is because all the said measures constitute the nature of a framework and thus cannot be self implemented. What is needed is the formulation and implementation of laws, standards and guidelines.

Reiterating the third stage therefore, marks the formulation of environmental protection laws so as to reach the objectives fixed by the *Constitution* and the Environmental Policy as well as the Conservation Strategy of Ethiopia and the *environmental Conventions* to which Ethiopia is a party. In this regard the Council of Ministers recently deliberated upon and adopted the following draft Environmental laws submitted to it by the Environmental Protection Authority.

### 1.1 PROCLAMATION ON THE ESTABLISHMENT OF ENVIRONMENTAL PROTECTION ORGANS

*Draft Laws* main aim is to establish a system that fosters coordinated, but differentiated responsibilities among environmental protection agencies at both federal and regional levels, so as to foster sustainable use of environmental resources. This thereby avoids possible conflicts of interest and duplication of efforts. To this end, it assigns responsibilities to separate organizations for environmental development and management activities on the one hand, and environmental protection, regulation and monitoring on the other. It gives the Environmental Protection Authority the legal powers required for enforcing as well to spearhead the enforcement of and ensure compliance with environmental laws and standards.

### 1.2 ENVIRONMENTAL IMPACT ASSESSMENT PROCLAMATION

Environmental impact assessment is used to predict and manage environmental effects that proposed development activity might entail and thus, helps to bring about intended development. Furthermore, prior to the approval of a public instrument, assessing possible impacts on environment has been and still is recognized as providing an effective means of harmonizing and integrating environmental, economic, cultural and social considerations into a decision making process in a manner that promotes sustainable development.

To this end the *draft law* is prepared to facilitate the implementation of the environmental rights and objectives enshrined in the *Constitution* and the maximization of their socio-economic benefits by predicting and managing the environmental effects which a proposed development activity or public instruments might entail prior to their implementation.

### 1.3 ENVIRONMENTAL POLLUTION CONTROL PROCLAMATION

The *Draft law* recognizes the fact that some social and economic development endeavours may inflict environmental harm that could make the endeavours counter-productive. It also underlines the fact that the protection of the environment in general, and the safeguarding of human health and wellbeing, as well as the maintaining of the biota and the aesthetic value of nature, in particular, are the duty and responsibility of all. To this end the draft law aims to eliminate, or when not possible, to mitigate pollution as an undesirable consequence of social and economic development activities.

## 5A. THE INSEPERABLE LINK BETWEEN THE CULTURAL AND THE NATURAL ENVIRONMENT: THE GREEK EXPERIENCE

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### I. SUMMARY

The Hellenic Council of State's case law on environmental protection emphasizes the dominant role of culture and its interconnection with nature. Linkages between these two factors are traced in (a) the dual character of natural entities due to their association with historical or cultural events (b) the unity of monuments with their natural environment and (c) the embodiment of the set of values in the Greek culture.

### II. INTRODUCTION

Scholars and practitioners of environment and sustainability focus mainly on a man-to-nature relationship as human intervention impacts ecosystems, but neglects important interactions among man-made systems themselves. The vast majority of publications on the subject attests to this attitude. Even the definition of Sustainable Development provided by Agenda 21 and its related documents put an emphasis on what has been called "Natural Capital," which is a technical term for ecosystems.

Such a tendency narrows the scope of sustainability and results in an under-conceptualization of the situation. Human-made systems predominate over the other components of the global system, namely the Biological and the Natural. Given the importance of values in determining the behavior of man-made systems, sustainable development has to do more with the Value, Educational and Justice sub-systems of society than with the Economic and Natural Environment ones.

The three Natural, Cultural and Social parameters of the notion of Sustainability advanced by the Hellenic Council of State, provide respective criteria for a more comprehensive and consequently a more effective, management of the issues of environmental protection. The concept also stresses the strong interdependence of these parameters, especially between the Natural and the Cultural.

This paper gives a brief account of the Hellenic Council of State's jurisprudence on the protection of the cultural environment; first, in regard to its legal grounds and reasoning and second, in regard to applications. A number of selected cases that demonstrate the Court's contribution to the protection of the Country's cultural inheritance also refer.

### III. THE NOTION OF CULTURAL ENVIRONMENT AND ITS PROTECTION

Nothing is more indicative of the value system of a social complex, than cultural notion. Being commonly defined as the set of values and norms proper to a social system, culture includes: world views, religious, ethical philosophical and aesthetic beliefs, basic concepts, political ideologies, legal systems, technical practices and economic attitudes, interalia. Culture is embedded in the minds of peoples; it is also embodied in various human artifacts and customs such as monuments, buildings, and works of art, technology and social events. These constitute the so-called cultural environment.

According to a definition stemming from the Greek Council of State rulings, the Cultural Environment includes the monuments and all other products of human activity that comprise



the historical, aesthetic, technological and intellectual legacy of the country. Evidently, the protection of cultural inheritance provides historical continuity and stability of the man-made environment, thus safeguarding a country's cultural identity from constant change.

In the Court's opinion, legal protection of cultural environment means mainly two things:

1. That the State has a duty to perpetuate the existence of cultural elements.
2. That the law may impose restrictions, in order to avoid any damage, alteration or demolition of those elements.

Let us elaborate on the legal grounds and reasoning lying behind such.

#### IV. CONSTITUTION PROVIDES GROUNDS FOR THE PROTECTION OF CULTURAL ENVIRONMENT -LEGAL REASONING

By acknowledging the inseparable link between the natural and cultural environments, the 1975 Greek Constitutional lawmakers, in Article 24 avowedly pronounced the need for the protection of each of them. This Article demands that the State should take either preventive and/or repressive measures for their protection. The same Article also provides also for spatial planning throughout the country. The Council of State liberally constructed the above provisions, thus it received a meaning corresponding to all criteria of sustainability and its underlying philosophy. As a result, Article 24 of the Hellenic *Constitution* became the most effective tool available to the Judges for Environmental Compliance and Enforcement .

To be sure both Domestic (e.g. the 1931 *Charter of Athens*, the 1932 *Law on ancient monuments*) and International Law (e.g. the 1954 *European Cultural Convention of Paris*, the 1992 *Granada Convention on the Protection o Architectural Heritage of Europe*, ratified by Greece) provide for the protection of certain elements of cultural heritage. But these documents do not allow for as comprehensive and interlocking a notion of sustainability as the Hellenic *Constitution*, in the way it is interpreted. Moreover, the *Constitution* ranking at the highest level in the hierarchy of legal norms allows for the invalidation of any other law or act not conforming to its provisions.

Legal reasoning of the Court followed the steps stated below:

1. Broadly interpreted, Article 24 of the *Constitution* protects Environment that is both Natural and Man-made.
2. Constitutional protection is complete, in the sense that it embraces all the elements of Environment and the full extent of them.
3. Environment serves the public interests not only of the present, but also of future generations therefore, it prevails over other legal entities.
4. Unless it is intergrated in all public policies, Constitutional requirements for environmental protection cannot be fulfilled.
5. Without spatial planning, protection of Environment is inconceivable and vice-versa.
6. All three branches of Government are bound by Constitutional provisions.

In addition, the Court reached a number of specific rules pertaining particularly to the protection of Cultural Environment. These rules are:-

1. Protecting the Cultural Environment should be a major target of spatial and city planning.
2. Monuments should be protected from pollution.
3. Not only monuments but also their surrounding environment should be given proper consideration.
4. The State has a duty to restore damaged elements of cultural environment.

5. The legal status of protection should be effective, that is it should embody all proper kinds of control.

Along these lines the Hellenic Council of State provided protection to all conceivable elements of cultural environment both with respect to those of "High Culture," (creations of a global significance) and with respect to those of "Folk Culture" (products of the people). Judicial control had been carried out across the full range of the Court's Constitutional capacities.

## V. MANAGING PROTECTION OF CULTURAL ENVIRONMENT BY THE COURT:- CASES

After hierarchically ordering the objectives of the Master Plan of Athens, the Court judged that the most basic objective of all was to preserve the city's cultural identity. In this context, the Court rejected a law providing for such landuse and building conditions that were incompatible with the cultural and historical significance of the place, such as; along the Sacred Road (the road connecting Athens with the sanctuary of Eleusis) and the ancient Public Cemetery (the graveyard of eminent Athenians).

In order to protect monuments from pollution and any other kind of offence, the Court opposed the underground railways' installation of an air exhaust system (ventilation grid) next to the Athens Cathedral. It also denied a Tango Festival which was to take place in the courtyard of Kesariani Monastery, due to the erotic symbolism of this dance.

The range of protection was broadened extensively (e.g. summertime cinemas) as well as spatially. Instances of this latter category include:

- 1.1 Fulfilling a legal requirement for a construction-free zone around the archaeological site of Delphi,
- 1.2 Preventing the installation of a waste dump that was in view of the sacred precinct of Zeus on Mount Hellanium and
- 1.3 Prohibiting the presence of quarries near the archaeological site of Ramnus.

With respect to Folk Culture, the Court considered traditional settlements a significant part of the Country's cultural inheritance, stating that their protection includes not only buildings but also streets and squares. In the case of the township of the Holy island of Patmos, building was restricted on plots where previous buildings had stood.

A number of opinions and rulings of the Hellenic Council of State manifestly refer to the unity of the cultural and natural environment, while others point out the dual (natural and cultural) character of some protected elements of the environment themselves. For instance, in the *Hymmetus Regulatory Decree*, the Court mentioned "the inseparable link of the austere and delicate skyline of the mountain with the cultural capital of the area of Athens." The Court also referred to the "venerable Mount Pelion, a mount of imperative significance for Hellenism," in order to protect its traditional elements from construction of private swimming pools. In the case of Marathon, the Court stressed the unity of the archaeological site and the natural environment, including the shoreline, which was considered to be "a substantive feature of the location owing to the part it played in the conditions of the historic battle."

Perhaps the most holistic expression of the linkage between the cultural and natural environment can be found in the case of small islands, especially that of the Cyclades. The Court pointed out that these islands constitute fragile ecosystems, while they are simultaneously respected centres of a national civilization that dates back millennia, having unique features that need to be protected.

Therefore, any urban development on these islands should be mild and a result of comprehensive planning, which will incorporate criteria that refers to all aforementioned characteristics.

## VI. COMPLIANCE AND ENFORCEMENT

As striking as these cases may be, the respective assaults on environment by either the Legislature or administration are deplorable. Of the three branches of government in Greece, only the Judiciary, particularly the Fifth Section of the Council of State, demonstrated compliance to and enforcement of the needs of sustainability and environmental protection. In this, the Court had to battle against a prevailing attitude towards an idea of growth dominated by the spirit of market economy and its supportive values of accumulation of wealth, the acquisition of power and the creation of a society of masses seeking excessive consumption of commodities; this battle that led to an overt conflict between the Council of State and the Political System, which resulted in a revision of the *Constitution* in an effort to diminish environmental protection.

## VII. EPILOGUE

Sustainable Development rests on a set of values. These include justice, moderation and respect of nature values that are deeply embodied in the Greek cultural tradition. In this respect, apart from its impact on the objects and structures of the country's cultural heritage, the Hellenic Council of State's jurisprudence, itself constitutes an active affirmation of the very essence of sustainability.

## 5B. THE JUDICIAL CONTROL OF SUSTAINABILITY: THE GREEK EXPERIENCE

*Maria Karamanof, Councillor of the Hellenic Council of State*

In the slow and difficult course of mankind towards sustainability, the Greek judicial experience constitutes a significant step. It is only natural that since it is endowed with a unique natural and cultural heritage, in this field, Greece should take the lead from its European partners and other western countries. Since in the first place it is in fact a restoration of the classical ancient Greek values of justice, order, nature, measure and frugality, the new culture of sustainability destined to dominate the new millennium, is familiar to the Greek spirit. Until only recently, when the mania of ruthless development took over the country, these values have kept Greece's natural wealth almost unscathed. The rapid dissipation of our natural and cultural wealth compelled the Judiciary and particularly the Council of State (the country's Supreme Administrative Court,) to assume its responsibility and compensate for inadequate, non existent or even disastrous legislation.

The Council of State has had a long tradition in the protection of the natural and cultural environment and has been equipped with the necessary powers to exercise effective control. Moreover, the 1975 constitutional revision provided the Judiciary with a valuable legal tool a new article; Art. 24. It was enacted and it imposes preventive and suppressive protection of the environment, both natural and cultural, as well as spatial planning which is inseparably linked to it, and guarantees the quality of life of citizens.

The enactment of this pioneer legislation coincides with Greece's entrance into the European Union and ruthless 'development' drive, which followed immediately thereafter, although often encouraged by the Community's financial aid. Soon it became evident that traditional 'Stockholm type' jurisprudence was unable to cope with the gravity of the situation. The logic of judicial review appeared outdated, since it was limited to the conventional legal methodology of striking a 'reasonable' balance between private rights and public interests or among conflicting public interests themselves. Sustainability problems, however, cannot be dealt with on the basis of reasonable compromises but require a new logic.

The answer to the problem was provided by the Judiciary itself. Upon the proposal of the Vice President of the Court, Mr. Hon. Justice Michael Decleris, acting on the basis of a well studied system's project, a new "Environmental" Chamber (the V<sup>th</sup> Chamber) was instituted in the Council of State. It was empowered to control public decisions on all environmental matters, covering nearly everything related to sustainable development. These issues were brought before the Court either at the level of preliminary control of regulatory provisions, or at the level of regulatory disputes, thus providing the Court with an overall view of public policy and its pathologies and permitting it to formulate an integrated and consistent jurisprudence. The new Chamber was staffed with experienced judges, who were dedicated to the task. These judges were also introduced to the systems methodology and the sustainability problematic and worked in constant collaboration with scientific experts and the Administration in an atmosphere of fertile dialogue and creative problem solving.

The result was a real breakthrough in the Court's jurisprudence. Approached from the *Rio* perspective, ordinary legal problems revealed their true depth and complexity. In order to deal with them, the V<sup>th</sup> Chamber invoked article 24 of the *Constitution*, directly. It interpreted it in a novel way, in the light - as it said - of the principles of the *Rio declaration* and the provision of *Agenda 21*, as well as the legal provisions of the *Maastricht* and *Amsterdam treaties* concerning sustainable development. The basic requirement of sustainability is the harmonization of all public

policies and social practices and their convergence towards the coevolution of man-made systems and ecosystems. From the general legal concept of sustainability, the Court derived its logical implications for both public policy making and private decisions and converted them into twelve specific principles for sustainable development, namely the Principles of Public Environmental Order, Sustainability, Carrying Capacity, Obligatory Restoration of Disturbed Ecosystems, Biodiversity, Common Natural Heritage, Restrained Development of Mild Ecosystems, Spatial Planning, Cultural Heritage, Sustainable Urban Development, Aesthetic Value of Nature and Environmental Awareness. From those principles the Court proceeded to specify the appropriate criteria to be incorporated into the respective public and private decisions, depending on the sector of the public policy, or the nature of the private rights involved. In that way, the legal definition of sustainability is based on a rigorous delimitation of the natural, cultural and social capital that should be preserved, restored or improved by both public and private decisions and actions.

The former President of the European Commission, Mr. Jaques Santer, characterized the jurisprudence of the V<sup>th</sup> Chamber of the Council of State as pioneer. In fact, the novelty of this jurisprudence consists in that it made clear the distinction between the classical environmental problems of the Stockholm era, referring to relatively simple issues such as pollution, waste etc, and the complex problems of the Rio generation, referring to genuine sustainability issues. It is in the latter that the court contributed in a creative way, inspired by the vision and leadership of its President. The following analysis refers exclusively to such Rio generation problems, of which some characteristic examples are presented.

In order to compel the Administration to apply the principles of sustainable development to the design of every public policy, the Court rejected the fragmentary approach favored by the established clientelistic practices, and insisted upon sustainable spatial planning of the national, regional or sectoral level. In the Court's philosophy, sustainability means above all order in space, which alone allows for restrained intervention in the environment and judicious use of its resources. Thus the Court repeatedly invalidated development projects or public works, which were undertaken in an isolated way without being part of an overall plan covering the country or a broader region as a whole. In order to be sustainable, such a plan should begin with the delimitation of the natural and cultural environment to be preserved and should take into account criteria belonging to other interrelated areas of public policy, such as carrying capacity, compatibility or conflict of land uses, energy, communication and water recourses available in the area etc. In that context, the Court ruled that the construction of a new port must be the subject of a broader sectoral planning of the country's network of ports. Such a plan should take into account on the one hand the need for the port and on the other the principle of protection of the coastal and marine ecosystems influenced by the port, namely conserving natural capital, avoiding damage to cultural assets (e.g. marine antiquities), respecting the geomorphology and natural profile of the shoreline etc. The same principle was applied to the popular economic activity of fish farms in view of their intense interaction with the marine and coastal ecosystems, as well as quarries, waste disposal sites, the road network and even to prisons; the Court declared illegal the founding of a new prison which was not based on an overall regional plan for penitentiary establishments.

Another important innovation introduced in the sustainability theory by the jurisprudence of the V<sup>th</sup> Chamber is the principle of carrying capacity, applied both to human systems and ecosystems. The Court required that no human activity, public or private, could exceed the carrying capacity of the existing manmade systems and ecosystems and compelled the Administration to find and take into account the carrying capacity of all such systems affected by its policies.

The issue of carrying capacity was raised by the Court, particularly with respect to fragile ecosystems such as small islands, coasts, biotopes and sites of natural beauty, which constitute microcosms with unity and self-sufficiency and are thus the first victims of ruthless development.

The Court paid special attention to sustainability problems of small islands. On numerous occasions the court ruled that small islands must determine and monitor their carrying capacity and prepare long term plans permitting only their mild development and aiming at checking acute settlement pressures and mass tourism. In fact, the Court went as far as to formulate the sustainable model of such spatial plans for small islands integrating all public policies appropriately adjusted to the scale of the island.

In order to check the unrestricted urbanization of small islands used as summer residents by settlers from the mainland, the Court did not permit the construction of new settlements, unless proven that the existing traditional settlements cannot absorb the normal demographic increase of the indigenous population. In the case of the small island of Myconos, saturated from the point of view of both intense tourism and urban development, the Court declared that new tourist installations, peripheral roads and other development projects are not permitted because they exceed the carrying capacity of the island. In another case, residents of the same island challenged the government's decision to construct a large and luxurious marina near the traditional settlement, the Court invalidated the project on the ground that it would cause a direct and impermissible alteration of the traditional character of the settlement, an inseparable feature of which is its old harbour. The same principle was applied to prevent further deterioration of overdeveloped areas, such as the greater area of the city of Athens. The Court declared unconstitutional any further expansion of the city, banning the spread of settlements on the ground that it exceeded the carrying capacity limits of the relevant life support systems, i.e. the ecosystems which ensured the clearing of the atmosphere, recycling of water, management of waste etc. On the same grounds the court rejected the establishment of new industrial units in the Athens area.

Many hard sustainability cases refer to conflicts between incompatible public policies. In the Court's judgement the sustainability criterion in such cases consists in the ordering of public policies according to the hierarchical level of the legal values affected them. Thus, the Court did not permit the construction of a fish marina within the designated archaeological site of the coast of Marathon, on the ground that it would entail a certain danger of changing the historical shoreline, which is a substantive feature of the historical harbour in view of the part it played in the conditions of the historical battle.

In order to preserve the historical and traditional character of small islands, the Court ruled that it is the energy demand and not the energy supply that should be managed in a sustainable way. Thus the court prohibited a plan for an electric power supply complex among several small islands via a high voltage electric current network system established on the mainland, on the ground that it would inevitably render those islands mere extensions at the mainland by providing the infrastructure for their ruthless development. In another case, when a small mountain community complained that mining activities (extraction of bauxite) were destroying the natural and cultural environment of the historical mountain of Parnassus (site of Delphi), the court found the opportunity to order the harmonization of mining policy with forestry and cultural policy. Moreover, it lay down the principles for a sustainable mining policy, giving emphasis to the protection of scarce and irreplaceable material resources, such as bauxite. In the same contest, the Court's decision for the protection of the brown bear, an internationally endangered species which has retained two of its most important habitats in Greece, deserves special attention. The Administration invoking reasons related to speedy communications and cost effectiveness, decided that the Egnatia road, an important national motorway crossing the country, should pass by the Pindos mountain habitat of the bear, thus dividing it in two, a thing which would gravely endanger the survival of the bears according to zoological experts. The Court proceeded to the right ordering of public policies involved and gave priority to the protection of wild life against cost or technical considerations related to the construction of the road.

The rapid urbanization as well as the deterioration of the quality of life in the cities has given the Court the opportunity to formulate a system of principles for a sustainable urban environment. Thus the Court ruled on numerous occasions that the founding and extension of settlements cannot be permitted haphazardly nor can it be left to private initiative (private individuals or land development enterprises). On the contrary, it must be included in the planning of the settlement subsystems of the corresponding regional plan. It is not permitted to create settlements within fragile ecosystems such as forests, biotopes or areas of natural beauty. The further expansion of big cities must be checked, building conditions must not be made worse, priority must be given to improving degraded areas in cities, protection is accorded to natural life supporting systems in the cities (mountains, forests etc) as well as to cultural monuments and antiquities. Moreover, the jurisprudence of the Court strictly prohibits even the slightest reduction of open space and public areas in the cities and bans any use, even public, of forested areas around the city.

The above jurisprudence had a significant appeal both to the legal community and the public, in general. Court decisions on sustainability were analyzed and commented upon and became a standard subject of study in the Law Departments of the Universities, welcomed and publicized by the mass media they served to awaken the environmental sensitivity of the public and to empower the ecological movement in the country.

Vested with the authority of the Judiciary the values of sustainability gained broad public support and encouraged citizens and environmental organizations to bring more disputes to the Court. In a political system dominated by clientelism and party politics, the attitude of the V<sup>th</sup> Chamber of the Court gave back to the State some of its lost authority and credibility. The reaction however, was immediate. Only two years later, the political system, resenting the curtailment of its established clientelistic practices, attempted by statute to dismantle the V<sup>th</sup> Chamber of the court. The 'coup' failed since the Plenary of the Court declared the statute unconstitutional. For the next eight years the Court consolidated its power and authority, thus increasing the resentment of the political system. The constitutional revision of 2001 gave to the latter the opportunity to strike back. In order to deprive the Court of the legal foundation of its jurisprudence it attempted to amend the constitutional clause (Art. 24) for the protection of environment. It had, however, underestimated the impact of the court's jurisprudence upon public opinion. This time it was the spontaneous popular reaction manifested by mass action which forced the government to step back and withdraw the amendment. In view of the above it is not an exaggeration to say that the jurisprudential lead in sustainable development can change not simply the legal culture, but public values and attitudes as well.

## 6. GUYANA'S PROTECTION OF THE ENVIRONMENT

### *The Hon. Justice Desire Bernard, Chancellor of the Judiciary of Guyana*

Guyana is a country situated on the northern coast of the continent of South America. The Atlantic Ocean borders it on the north; Brazil borders it on the south; Suriname borders it on east and Venezuela on the west. Two-thirds of its 83000 square mile area is un-inhabited rain forest. The population of approximately 750,000 lives mainly on the coastlands, although there are sporadic settlements in the forested interior and savannahs, in the south.

The rain forest is largely unexplored and comprises thousands of square miles of virgin territory. Over the years some of it has fallen prey to logging and environmental destruction. Several laws were enacted in order to protect various aspects of the environment. They include the following:-

<i>Sea Defences Act</i> , Cap. 64:01	to secure the maintenance of the sea, river and outer dams of estates.
<i>Mining Act</i> , Cap. 65:01	to make provision for mining for all metals and minerals, precious stones mineral oils, asphalt, coal, etc.
<i>Blasting Operations Act</i> , Cap 65:03	to provide for the regulation of persons engaged in blasting operations.
<i>Radio-Active Minerals Act</i> , Cap 65:04	to regulate and control prospecting and mining for radioactive minerals and the export thereof and for purposes connected therewith.
<i>Petroleum (Production) Act</i> , Cap 65:05	to vest in the State the property in petroleum and natural gas and to make provision for search and purposes connected therewith.
<i>Forests Act</i> , Cap 67:01 <i>Export of Timber Act</i> , Cap. 67:02	this consolidated and amended the law relating to forests to provide for the inspection and marking of timber before export.
<i>Plant Protection Act</i> , Cap. 68:03	to provide for the prevention, eradication and control of diseases and pests affecting plants.
<i>Balata Act</i> , Cap. 69:07	to provide for the prevention of fraudulent dealings with balata and substances of like nature.
<i>Wild Birds Protection Act</i> , Cap.71:07	to provide protection of certain wild birds.
<i>Fisheries Act</i> , Cap. 71:08	to regulate fishing in the waters of Guyana.
<i>Petroleum Act</i> , Cap. 92:01	to regulate the importation, storage and sale of petroleum.



All of these pieces of legislation were enforced separately, and were not looked at holistically. Various regulations were formulated to give effect to the provisions of the *statutes* and breaches of them formed the basis of litigation in the courts brought by individuals.

Guyana's *Constitution* of 1980 expressly provides for protection of the environment. Article 36 reads as follows:

...In the interests of the present and future generations, the State will protect and make rational use of its land, mineral and water resources, as well as its fauna and flora, and will take all appropriate measures to conserve and improve the environment...

In 1996 the *Environmental Protection Act* (hereinafter referred to as the *Act*) was enacted to give effect to the provisions of the *Constitution*.

Its objectives are:

...to provide for the management, conservation, protection and improvement of the environment, the prevention or control of pollution, the assessment of the impact of economic development on the environment, the sustainable use of natural resources and for matters incidental thereto or connected therewith...

An agency known as the Environmental Protection Agency was established in accordance with the *Act*, which allocated to it several functions including the following to name a few:

1. to take such steps as are necessary for the effective management of the natural environment so as to ensure conservation, protection, sustainable use of its natural resources;
2. to establish, monitor and enforce environmental regulations;
3. to prevent or control environmental pollution;
4. to ensure that any developmental activity which may cause an adverse effect on the natural environment be assessed before such activity is commenced and that such adverse effect be taken into account in deciding whether or not such activity should be authorised and
5. To promote and encourage a better understanding and appreciation of the natural environment and its role in social and economic development.

In the exercise of its functions, the Agency is mandated among others, to "provide information and education to the public regarding the need for and methods of protection of the environment, improvement of the environment where altered directly or indirectly by human activity, and the benefits of sustainable use of natural resources."

The *Environmental Protection Act* also provides for environmental protection assessments and the establishment of an Environmental Assessment Board, which hears and determines appeals of developers from decisions of the Agency. Prosecutions and civil proceedings in a court of summary jurisdiction can be brought by the Agency or person authorised to do so by the relevant Minister. Offences are listed as general and specific, and are set out in great detail in Schedules to the *Act* including the penalties for such offences.

However, since the *Act* came into force as far as can be ascertained no prosecutions have been launched although investigations have been carried out.

In 1995, cyanide from mining operations had escaped and polluted a river, in the interior of the country. This resulted in several actions being brought by persons who had suffered loss and damage. A few actions were settled out of court, but hearings into others have not yet been completed.

In 1989, a very important development occurred in Guyana when the President of the day offered to set aside an area of 3,600 square kilometres at Iwokrama, which comprised pristine tropical rain forest for the international community, to be used as a demonstration area for ecological research. The forest is managed by the Iwokrama International Centre for Rain Forest Conservation and Development, which was legally created in 1996 and became operational in July, 1998. Its Mission Statement is "to promote the conservation and the sustainable and equitable use of tropical rain forests, in a manner that will lead to lasting ecological, economic and social benefits to the people of Guyana and to the world in general, by undertaking research, training, and the development and dissemination of technologies."

## 7. DEVELOPMENTS IN INDIA RELATING TO ENVIRONMENTAL JUSTICE

*The Hon. Justice B.N. Kirpal*

### I. AN INTRODUCTION TO INDIAN ENVIRONMENTAL LAW

The development of Indian environmental law has happened for the most part, over the last three decades, with a significant level of polarization around the latter half of this period. Therefore, a paper detailing "recent developments in India," would necessarily involve a thorough discussion of most relevant environmental issues and their consequences. In this area, the development of the law has seen a considerable share of initiative by the Indian Judiciary, particularly the higher Judiciary, consisting of the Supreme Court of India, and the High Courts of the States. The paper will dwell on this aspect and its effect on the strength of the legal framework.

Legislative schemes and initiatives have been created in most areas involving the environment, albeit with some degree of overlap. The role of the administration, although a critical factor in the success of any environmental management programmes, has seen its share of problems of scale and definition. The essence of the existing law relating to the environment has developed through legislative and judicial initiatives.[1] Since the latter is responsible for the most recent developments, this paper will attempt to lay the foundation for understanding through a discussion of legislation and administrative rules, and then detail development of the law and environmental principles through the discussion of judicial decisions.

### II. LEGISLATIVE INITIATIVE

#### 1. THE STATUTORY FRAMEWORK

It is possible to suggest with conviction that the beginnings of Indian environmental law were sown at the United Nations Conference on the Human Environment held at Stockholm in 1972, wherein India as a participant, developed some sort of realization that a framework of laws was necessary to deal with environmental hazards that would result from the stage of development that India was entering in the 1970s.[2] Prior to this phase, Indian environmental law mainly consisted of claims made against tortious actions such as nuisance or negligence. *The Water (Prevention and Control of Pollution) Act of 1974* gave the statute book its first real foundation for environmental protection. Other major enactments followed in 1980 (*The Forest (Conservation) Act*), 1981 (*The Air (Prevention and Control of Pollution) Act*), and 1986 (*The Environment (Protection) Act*).

#### 2. THE CONSTITUTIONAL FRAMEWORK

The Forty-Second *Amendment* to the *Indian Constitution* in 1976[4] introduced principles of environmental protection in an explicit manner into the *Constitution* through Articles 48A and 51A(g). Article 48A, part of the Directive Principles of State Policy[5], obligated the State to protect and improve the environment.[6] On the other hand, Article 51A(g) obligated citizens to undertake the same responsibilities.[7] As far as legislative power was concerned, the Amendment also moved the subjects of "forests" and "protection of wild animals and birds" from the State List to the Concurrent List.[8] The Stockholm conference is honoured by references in the *Air Act* and the *Environment Act* - a result of effective applications of Article 253 of the *Constitution*, which gives the Parliament (India's central legislature) the power to make laws implementing India's international obligations, as well as any decision made at an international conference, association or other body.[9]

### III. RECENT NOTEWORTHY INITIATIVES

**The National Environment Appellate Authority Act (1997) was enacted to enable the Union Government to establish the National Environment Appellate Authority. The Authority is empowered to hear appeals against orders granting environmental clearance in designated areas where industrial activity is restricted under the *Environment Act*.**

*The National Environment Tribunal Act (1995)* extends the principle of no-fault liability beyond the compensation limits prescribed under the Public Liability Insurance Act (1991). The Act deals with, *inter alia*, compensation related to accidents concerning toxic substances. The Tribunal set up under the Act has exclusive jurisdiction<sup>[10]</sup> over claims of compensation in these circumstances.

### IV. JUDICIAL INITIATIVE: THE ROLE OF PUBLIC INTEREST LITIGATION

#### 1. BIRTH

Failure on the part of the governmental agencies effectively to enforce environmental laws and non-compliance with statutory norms by polluters resulted in an accelerated degradation of the environment. Most of the rivers and water bodies were polluted, and large-scale deforestation was carried out with impunity. There was also a rapid increase in casualties due to respiratory disorders caused by widespread air pollution.

Such large-scale environmental degradation and adverse effects on public health prompted environmentalists and residents of polluted areas, as well as non-governmental organizations, to approach the courts, particularly the higher Judiciary, for suitable remedies.

#### 2. THE RELAXATION OF THE RULE OF LOCUS STANDI

There is near complete academic agreement that the concerted involvement of the higher Judiciary in India with the environment began with the relaxation of the rule of *locus standi*<sup>[11]</sup>, and the departure from the "proof of injury" approach.<sup>[12]</sup> The relaxation of the rule led to some important consequences, which were particularly pertinent to environmental matters. First, the court was able to look at the matter from the point of view of an environmental problem to be solved, rather than a dispute between two parties, since it was possible that there could be several petitioners for the same set of facts dealing with an environmental hazard or disaster. Second, the rule took care of the many interests that went unrepresented – for example, that of the common people who normally had no access to the higher Judiciary.<sup>[13]</sup> Also, the process brought into sharp focus the conflict of interest between the environment and development, and set the stage for a number of decisions that would deal with issues relating to this area in a more specific manner.

The relaxation of *locus standi*, in effect, created a new form of legal action, variously termed as public interest litigation and social action litigation.<sup>[14]</sup> This form is usually more efficient in dealing with environmental cases, for the reason that these cases are concerned with the rights of the community rather than the individual.<sup>[15]</sup> It is characterized by a non-adversarial approach, the participation of *amicus curiae*, the appointment of expert and monitoring committees by the court, and the issue of detailed interim orders<sup>[16]</sup> in the form of continuous mandamus under Articles 32 and 226 by the Supreme Court of India and the High Courts of the States respectively.

#### 3. THE CONSTITUTION AS SOUNDING BOARD: ARTICLE 21 AND THE PROTECTION OF HUMAN RIGHTS

The Judiciary, in their quest for innovative solutions to environmental matters within the framework of public interest litigation, looked to constitutional provisions to provide the court with the necessary jurisdiction to address specific issues. Furthermore, Article 142 afforded the

Supreme Court considerable power to mould its decisions in order that complete justice could be done. As the Supreme Court is the final authority as far as matters of constitutional interpretation are concerned, it assumes a sort of primal position in the Indian environmental legal system. For example, the fundamental right contained in Article 21[17] is often cited as the violated right, albeit in a variety of ways.

In *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*[18], Bhagwati, J., speaking for the Supreme Court, stated that:

*...We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings...*

In *Subhash Kumar v. State of Bihar*[19], the Court observed that:

*...The right to live is a fundamental right under Article 21 of the Constitution, and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution...*

The Supreme Court, in its interpretation of *Article 21*, has facilitated the emergence of an environmental jurisprudence in India, while also strengthening human rights jurisprudence. There are numerous decisions wherein the right to a clean environment, drinking water, a pollution-free atmosphere, etc. have been given the status of inalienable human rights and, therefore, fundamental rights of Indian citizens.

In *M.K. Sharma v. Bharat Electric Employees Union*[20], the Court directed the Bharat Electric Company to comply with safety rules strictly to prevent hardship to the employees ensuing from harmful X-ray radiation. The Court did so under the ambit of Article 21, justifying the specific order on the reason that the radiation affected the life and liberty of the employees.[21] In *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*[22], the Supreme Court based its five comprehensive interim orders on the judicial understanding that environmental rights were to be implied into the scope of Article 21.[23]

#### IV. DEVELOPMENT OF ENVIRONMENTAL LAW PRINCIPLES

The Court has successfully isolated specific environmental law principles upon the interpretation of Indian statutes and the *Constitution*, combined with a liberal view towards ensuring social justice and the protection of human rights. The principles have often found reflection in the *Constitution* in some form, and are usually justified even when not explicitly mentioned in the concerned statute. There have also been occasions when the Judiciary has prioritized the environment over development, when the situation demanded an immediate and specific policy structure.[24]

##### 1. THE PRECAUTIONARY PRINCIPLE

Beginning with *Vellore Citizens' Welfare Forum v. Union of India*[25], the Supreme Court has explicitly recognized the precautionary principle as a principle of Indian environmental law. More recently, in *A.P. Pollution Control Board v. M.V. Nayudu*[26], the Court discussed the development of the precautionary principle.[27] Furthermore, in the *Narmada* case[28], the Court explained that "*When there is a state of uncertainty due to the lack of data or material about the extent of damage or pollution likely to be caused, then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution.*"[29]

## 2. THE "POLLUTER PAYS" PRINCIPLE

The Supreme Court has come to sustain a position where it calculates environmental damages not on the basis of a claim put forward by either party, but through an examination of the situation by the Court, keeping in mind factors such as the deterrent nature of the award.[30] However, it held recently that the power under Article 32 to award damages, or even exemplary damages to compensate environmental harm, would not extend to the levy of a pollution fine.[31] The "polluter pays" rule has also been recognized as a fundamental objective of government policy to prevent and control pollution.[32]

## V. SUSTAINABLE DEVELOPMENT AND INTER-GENERATIONAL EQUITY

What is meant by the phrase "sustainable development?" The definition which is used most often comes from the report of the Brundtland Commission, in which it was suggested that the phrase covered "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*" However, different levels of societies have their own concept of sustainable development and the object that is to be achieved by it. For instance, for rich countries, sustainable development may mean steady reductions in wasteful levels of consumption of energy and other natural resources through improvements in efficiency, and through changes in life style, while in poorer countries, sustainable development would mean the commitment of resources toward continued improvement in living standards.

Sustainable development means that the richness of the earth's biodiversity would be conserved for future generations, by greatly slowing and if possible, halting extinctions, habitat and ecosystem destruction, and also by not risking significant alterations of the global environment that might – by an increase in sea level or changing rainfall and vegetation patterns or increasing ultraviolet radiation – alter the opportunities available for future generations.

How has this phrase been understood in India? Perhaps the answer lies in the decision of the Supreme Court in *Narmada Bachao Andolan v. Union of India*[33] wherein it was observed that "*Sustainable development means what type or extent of development can take place, which can be sustained by nature/ecology with or without mitigation.*" In this context, development primarily meant material or economic progress.

Being a developing country, economic progress is essential; at the same time, care has to be taken of the environment. Thus, the question that squarely arises is: How can sustainable development, with economic progress and without environmental regression, be ensured within the Indian legal framework? This can be achieved through the implementation of good legislation.

The courts have attempted to provide a balanced view of priorities while deciding environmental matters. As India is a developing country, certain ecological sacrifices are deemed necessary, while keeping in mind the nature of the environment in that area, and its criticality to the community. This is in order that future generations may benefit from policies and laws that further environmental as well as developmental goals. This ethical mix is termed sustainable development, and has also been recognized by the Supreme Court in the *Taj Trapezium* case.[34]

In *State of Himachal Pradesh v. Ganesh Wood Products*[35], the Supreme Court invalidated forest-based industry, recognizing the principle of inter-generational equity as being central to the conservation of forest resources and sustainable development.[36]

### 1.1 Holistic Adjudication

The Supreme Court, in recent years, has been adopting a holistic approach towards environmental matters. This is usually done through detailed orders that are issued from time to time, while

Committees appointed by the Court monitor the ground situation. The origin of this tendency may be seen in cases such as *Ratlam*[37] and *Olga Tellis*[38].

### 1.2 *Judicial Attitude to Policy*

To a substantial extent, the courts have had to fill in the gaps and doubt left by the absence of a clear governmental policy. However, there have been occasions when the court has considered it appropriate to disregard the policy and proceed with a decision that better accommodates constitutional values.[39] At other times, the Court has stated that it is not in the public interest to require the Court to delve into those areas that are the function of the executive.[40]

### 1.3 *The Right to Livelihood*

In certain cases, the Judiciary has to choose between the preservation of environmental resources in state, and the right of communities to extract value out of those resources. To facilitate this choice, the courts have evolved a right to livelihood[41] for communities affected by new state-run conservation initiatives. A clear position on this issue is not immediately forthcoming, as the decision depends heavily upon the factual matrix of each dispute.[42] The Court has also observed the environment-development debate, and stated that the most desirous position is a harmonious form of co-existence of these ends.[43]

### 1.4 *The Doctrine of Public Trust*

To further justify and perhaps extract state initiative to conserve natural resources, the Court enunciated Professor Joseph Sax's doctrine of public trust, obligating conservation by the state. In *M.C. Mehta v. Kamal Nath*[44], the Court held that the state, as a trustee of all natural resources, was under a legal duty to protect them, and that the resources were meant for public use and could not be transferred to private ownership.

## VI. CONCLUSION

Thus, the arrangement of environmental management is composed of a harmonious blend of initiatives from the legislature, the executive, and the Judiciary. The higher Judiciary plays a rather stalwart role owing to its unique position and power, and due to the circumstances of inefficiency within the executive and the existence of a skeletal legislative framework. The principles of Indian environmental law are resident in the judicial interpretation of laws and the *Constitution*, and encompass several internationally recognized principles, thereby providing some semblance of consistency between domestic and global environmental standards.

## VII. ENDNOTES

[1] With few exceptions such as Environment Impact Assessment (1994), Coastal Regulation Zone Notification (1991), and the Joint Forest Management Programme, the wealth of Indian environmental management stems from legislative and judicial actions. However, the Ministry of Environment and Forests is the nodal agency for virtually all environmental management processes set up by the legislature.

[2] This is in contrast to laws in countries such as England, which were sometimes a direct result of some mass environmental disaster; for example, the *Clean Air Act* of 1956 was the outcome of the deadly smog that killed over 4000 people in London in 1952. (The Act has since been replaced by the *Clean Air Act* of 1993). See Harish Salve, "Justice between Generations: Environment and Social Justice", *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, Oxford University Press, New Delhi, 2000, pp.360-380. Salve adds: "In the fullness of time, political upheavals brought home the realization that freedom can only survive if it honours basic human rights and is founded on principles of natural justice."

- [3] See the Preamble to the *Act* for a specific reference to the Stockholm conference.
- [4] See the *Constitution* (Forty-Second Amendment) Act of 1976.
- [5] For a detailed discussion on the *Directive Principles* of State Policy in the Indian *Constitution* in the context of the environment, see generally Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India: Cases, Materials and Statutes*, 2<sup>nd</sup> Edition, Oxford University Press, New Delhi, 2001, pp.45-46.
- [6] Article 48A: "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country." For a discussion of the legislative debate behind the origin of the amended Article, see also *ibid*, p. 45, n.21.
- [7] Article 51A(g): "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;"
- [8] The Seventh Schedule of the *Constitution* delineates legislative power between the Centre and the States. List I (the Union List) comprises subjects over which only the Centre shall legislate. List II (the State List) comprises subjects over which only the State shall legislate. List III (the Concurrent List) contains subjects over which both entities may legislate, subject to a preference for the Centre pursuant to the doctrine of "occupied field".
- [9] It has been pointed out that the Parliament has the power to legislate on virtually any subject in the State List by virtue of Entry 13 of the Union List, which covers participation in international conferences and the implementation of decisions made at the conferences. See *supra* n.5, p.47.
- [10] See Section 19 of the Act.
- [11] See *Mumbai Kamgar Sabha v. Abdulbhai*, AIR 1976 SC 1455; *Fertilizer Corporation Kamgar Union v. Union of India*, AIR 1981 SC 344.
- [12] See *supra* n.2, p.367 and p.370; See also *Bangalore Medical Trust v. B.S. Muddappa*, (1991) 4 SCC 54.
- [13] However, the taking up of interests by so-called third parties who were interested but not injured in the earlier strict sense also had its share of controversy. Some critics have claimed that public interest litigation has been misused by parties who were secretly interested in issues allied to the environmental matter, which were sometimes commercial in nature, thereby using the exalted platform explicitly created for the solution of environmental matters alone.
- [14] See Upendra Baxi, "Taking suffering seriously: Social Action Litigation and the Supreme Court", 29 *International Commission of Jurists Review* 37-49 (1982).
- [15] See generally G.S.Tiwari, "Conservation of Biodiversity and Techniques of People's Activism", 43 *Journal of the Indian Law Institute* 191 (2001). See also *Sheela Barse v. Union of India*, AIR 1988 SC 2211. (per Venkatachaliah, J.)
- [16] See for example *T.N. Godavarman Thirumulpad v. Union of India*, AIR 1997 SC 1228; *M.C. Mehta v. Union of India* (*Vehicular Pollution* case), (1998) 8 SCC 648.
- [17] Article 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law".



[18] AIR 1981 SC 746.

[19] AIR 1991 SC 420.

[20] 1987 (1) SCALE 1049.

[21] For a discussion of the widening scope of fundamental rights, see *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

[22] AIR 1985 SC 652.

[23] See also *T. Damodar Rao v. Municipal Corporation, Hyderabad*, AIR 1987 AP 171; *L.K. Koolwal v. State of Rajasthan*, AIR 1988 Raj 2.

[24] See for example *M.C. Mehta v. Union of India*, (1987) 4 SCC 463. The Court held: "life, public health and ecology has priority over unemployment and loss of revenue problem."

[25] AIR 1996 SC 2715.

[26] AIR 1999 SC 812.

[27] See also *S. Jagannath v. Union of India (Shrimp Culture case)*, AIR 1997 SC 811.

[28] *Narmada Bachao Andolan v. Union of India*, AIR 2000 SC 3751.

[29] See also P. Leelakrishnan, "Environmental Law", *Annual Survey of Indian Law*, Volume XXXVI, 2000, pp. 252-257.

[30] See also the explanation for the principle of absolute liability in *M.C. Mehta v. Union of India (Oleum Gas case)*, AIR 1987 SC 965, and its subsequent application in *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212.

[31] See *M.C. Mehta v. Kamal Nath*, AIR 2000 SC 1997.

[32] Ministry of Environment and Forests, Government of India, "Policy Statement for Abatement of Pollution", para 3.3, February 26, 1992.

[33] 2000 (10) SCC 664 at p.727.

[34] *M.C. Mehta v. Union of India*, AIR 1997 SC 734. (per Kuldeep Singh, J.).

[35] AIR 1996 SC 149.

[36] See also *Indian Council for Enviro-Legal Action v. Union of India (CRZ Notification case)*, (1996) 5 SCC 281. The Court noted that the principle would be violated if there were a substantial adverse ecological effect caused by industry.

[37] *Municipal Council, Ratlam v. Vardhichand*, AIR 1980 SC 1622.

[38] *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

[39] See for example *Sachidanand Pandey v. State of West Bengal (Calcutta Taj Hotel case)*, AIR 1987 SC 1109. The Court permitted the construction of a hotel near land belonging to the Calcutta

Zoological Garden, stating that tourism was important to the economic progress of the country, thereby underlining the constant controversy between development and the environment.

[40] See *supra* n.28 at 3828.

[41] See *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

[42] For decisions on either side, see *supra* n.22 and *Animal and Environment Legal Defence Fund v. Union of India*, JT 1997 (3) SC 298. The former returned a decision in favour of conservation, and the latter stated that conservation, though not secondary, must factor community livelihood and quality of life into ecologically oriented efforts. See also *Banawasi Seva Ashram v. State of Uttar Pradesh*, AIR 1992 SC 920.

[43] See *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1995 SC 2252; *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 5 SCC 281.

[44] (1997) 1 SCC 388.

## 8. SUSTAINABLE DEVELOPMENT AND THE ROLE OF LAW IN ITALY

*The Hon. Amedeo Postiglione, Judge of the Italian Supreme Court,  
Director ICEF (International Court of the Environment Foundation)*

### I. GENERAL FRAMEWORK OF ENVIRONMENTAL LAW IN ITALY

1. *THE ITALIAN CONSTITUTION*, which came into force on 1 January, 1948, made no explicit mention of the term "Environment." However, some provisions in it refer to important aspects of the environment, those that are driving forces in Italian culture:

- landscape (Art. 9) and
- historic, artistic and archaeological heritage (Art. 9).

A specific provision (Art. 32) refers to *health*, meaning both the subjective right of the individual and the interests of the community. Two other aspects were included in the *Constitution*:

- the first of a general kind, related to the *person* with the recognition and guarantee of *inviolable human rights*, as both an individual and in the society where he/she lives together with the associated irrevocable obligation of political, economic and social solidarity (Art. 2);
- the second relates to *development*, in the sense of social compatibility but not yet ecological sustainability (Arts. 41, 42, 43, 44, 45).

The just provision of the right of *free enterprise* (Art. 41) and the *right to private property* (Art. 42) were tempered by their necessary social function, in the sense that they could not be exercised "in conflict with social utility or in a way that would harm personal security, liberty and dignity."

This framework was recently reinforced by *Constitutional Law No. 3* of 2001, which formally included the environment in the Italian *Constitution*, giving the State exclusive legislative power in matters related to the *protection of the environment, of the ecosystem and of cultural heritage*.

The term "*Environment*" was used in the broad sense and therefore, also includes the landscape, while the reference to the ecosystem is absolutely novel, and is significant within the cultural and political approach to the protection of the overall sustainability of life on earth and of future generations (biodiversity, climate, desertification, pollution, genetic manipulation, etc.).<sup>74</sup>

2. *AT A NATIONAL STRUCTURAL LEVEL*, the Italian system of environmental protection provides for three separate bodies:

- *the Ministry of Cultural Heritage* instituted under *Decree* of the President of the Republic, *D.P.R. No. 805* of 3 December, 1975 );

<sup>74</sup> The legislative choice, at the highest level, follows a *principle of integration of legal systems*, that also applies to the environment. *With regard to international and Community systems*, the State is the point of reference; *with regard to the domestic system*, the Regions, Provinces and Municipalities or Metropolitan Cities (also having a constitutional dignity and autonomy) have as their only reference the exclusive competence of the State, in the sense that *subsidiarity* and *devolution* can and must co-exist with the role of the State.

*The State must avoid giving a "centralist" interpretation of its exclusive competence*, limiting its role to clear and basic general obligatory policies. The Constitutional Court will not fail to better define the proper and equilibrated interpretation of the rules whenever there is a dispute, above all with the Regions.

- *the Ministry of the Environment* (instituted under *Law No. 349* of 8 July 1986);
- *ANPA* (National Environmental Protection Agency), instituted under *Law No. 61/1994*).

Italy is divided into 20 regions, 100 provinces, and more than 8000 municipalities. The regions play a very important role having autonomous and delegated powers which they have exercised since 1972.<sup>75</sup> They have legislative and administrative powers in all sectors of the environment: air, environmental impact, foodstuffs, landscape, land use, manufacturing of toxic products, nature, noise, waste, and water and now also the environment, the ecosystem and cultural heritage on the basis of the *Law No. 3/2001* mentioned earlier whenever delegated by the State.

The Provinces and the Municipalities – deeply rooted bodies within the Italian historic tradition – constitute a network of local authorities that have their own *autonomy* under *Law No.142* of 8 June 1990. These bodies show signs of real institutional commitment to environmental protection due to the push from growing social sensitivity and demand and to the influence produced by ideas and initiatives at European Union and international level.

Environmental Protection Agencies also operate at regional level. The question of environmental control has made progress but the situation is still difficult because wide-spread environmental damage is not represented in an objective and transparent way to the public. The preoccupation remains the enactment of legislation rather than the management and control of the environment.

State, regional, provincial and municipal personnel carry out environmental controls. Environmental Associations however, assist them with voluntary workers.

There is a trend towards the technical specialisation of the controlling bodies (for example, the Corps of Carabinieri have adopted a special Environmental Task Force). The Army is also taking initiatives in support of the environment.<sup>76</sup>

The vast network of environmental provisions in Italy now covers all sectors of the environment.

The time period involved relates to the last 30 years, except for some laws passed before 1970 like those on things of artistic and historic interest (*Law No. 1089* of 1/06/1939), on places of natural beauty (*Law No. 1497* of 29/06/1939), on building regulations and town planning (*Law No. 1150* of 1942) and on foodstuffs (*Law No. 283* of 1962).

Starting from the 1970s, Community *Directive* influence on the Italian system has been considerable, but the influence of international rules should not be undervalued. In an initial phase, the rules against pollution prevailed, whilst in a later phase, structural laws for the conservation and management of the environment were passed:

- *Law No. 183/89* on land use and water basins;
- *Law No. 36/94* and *152/99* on water management;
- *Law No. 394/91* on the protection of nature;
- *Law No. 431/85* on the landscape.

<sup>75</sup> D.P.R. from 1 to 6 of 14/01/1972; D.P.R. from 7 to 11 of 15/01/1972; Law 22/07/1975 No. 382; Law 27/11/1976 No. 894; D.P.R. 24/07/1976 No. 616. See also Constitutional Law No. 3/2001.

<sup>76</sup> See document : “La tutela dell’ambiente in ambito difesa” [Environmental Protection in Defence] by the Ministry of Defence in “Giurisdizione e controllo per l’effettività del diritto umano all’ambiente”, edited by Amedeo POSTIGLIONE – ESI, Naples, 2001.

More recently, the Law establishing the Ministry of the Environment and on Environmental Damage was enacted (*Law 439/86*). In it, we find an initial implementation of the *Community Directive 337/85/EEC* on Environmental Impact Assessment. Unfortunately, one must acknowledge that there seems to be too much legislation, which is not always clearly expressed, since there is confusion between technical aspects and legal rules and there is no systematic consistency: only now with *Draft Law 17/98* of 19/10/2001, the government is of the opinion that the subject matter needs reorganising through framework laws at least in the most important sectors.

It should instead be underlined with approval, that there is a trend towards making economic penalties more effective relating to:

- demolition of illegal constructions (Art. 7 last para., *Law 47/85*);
- restoration of places in relation to the landscape (Art. 1 *sexies*, *Law 431/85*);
- obligation to reclaim polluted sites (Art. 51 *bis*, *Law No. 22/97* on waste and Art. 58, *Law 152/99* on water pollution).

There are criminal, civil and administrative penalties within the system. Offences are usually misdemeanours and only in some cases are considered serious crimes (trafficking in waste).

Although courts have been very active, even ordering measures such as sequestering illegal activities, they have considered it wiser to avoid playing the role of protagonists, or the substitute for competent administrative authorities, and therefore, encourage greater political autonomy and technical professionalism of the Public Administration. It is still, however, important to note that Italian courts retain a strong role in defending the constitutional value of the environment.

## II. THE ROLE OF CASE LAW IN THE EVOLUTION OF ENVIRONMENTAL LAW IN THE OBJECTIVE SENSE<sup>77</sup>

1. In Italy, there is the Constitutional Court, which is the body responsible for controlling whether laws are in conformity with the principles of the *Constitution* and when they are not to annul them. This Court has developed evolutionary case law on the environment and sustainable development. Whilst there was no explicit provision on the environment in the *Constitution* until recently when *Law No. 3/2001* was enacted, the Court had the merit of considering all of nature as a *legal and economic asset* of constitutional importance (*Cases No. 239/82; 94/85; 359/85; 151/86; 167/87; 210/87; 641/87; 127/90; 396/94*).

In several decisions, the Court laid down that the environment has a primary *value* and *unitary character* (*Cases No. 210/87; 302/88; 324/89; 391/89; 437/91*). The same Court recognised the necessity of balancing this value with other constitutional values (*Case No. 346/95*). A further merit of the Italian Constitutional Court was that of saving the main environmental laws passed by Parliament:

- *Law 349/89* on the institution of the Ministry of the Environment and on environmental damage (*Cases No. 210/87 and 641/87*);

<sup>77</sup> Italian environmental case law is stored in the data banks of the Centre for Electronic Documentation (CED) of the Italian Supreme Court, for both civil and criminal as well as administrative law aspects. There are several law journals that deal with the environment in Italy in which case law can be found and commented on..

A specific case book was published in 1997 by CEDAM PADUA, written by Amedeo POSTIGLIONE under the title of "Repertorio breve di giurisprudenza in materia di ambiente": this was an attempt to give autonomous scientific dignity to case law as a factor in the evolution of environmental law.

- *Law No. 183/89 on land use (Case No. 95/90);*
- *Law No. 203/88 on the atmosphere (Cases No.101/89 and 53/91);*
- *Law No. 36/94 on the management of water resources;*
- *Law No. 394/91 on parks, natural reserves and wet zones;*
- *Town Planning Law No.1150/42 separately from the matter of the landscape (Cases No. 142/72; 9/73; 175/76; 239/82; 94/85; 359/85; 151, 152 and 153/86).*

Thirdly, the Italian Constitutional Court has the merit of reconciling the role of the State with the powers of the Regions, through the introduction of the principle of *loyal collaboration*, avoiding in this way the temptation of excessive centralism (Cases 3359/85; 151/86 302/88).

2. The Italian Supreme Court has also played a role that is often more advanced than that played by local courts in promoting the environment. The Court's case law has tried to offer protection to the new environmental interests, even before specific rules were introduced by adapting already existing provisions created for other public purposes. And it has also been the merit of this case law to recognise procedural standing, that is, to give access to justice to various social groups such as environment protection associations, committees etc., which hold diffuse and collective interests. Standing has been assessed on a case by case basis in accordance with several parameters (continuous nature of the action, its public importance, and its adherence to the territory).

Even the concept of environmental damage as an offense arose, in the initial phase, out of case law: the Italian Court of Auditors found various administrations guilty of damage to State revenue caused by serious environmental abuses carried out in violation of their official duties.

*Law 349/86* has given the ordinary civil courts competence in cases of environmental damage.

**1.1. The case law on water is very rich and on the whole reasonably strict. Many problems regarding sustainable development in relation to water have been dealt with:**

- *the wide concept of discharge* (Cass. Sez. III, 24/02/1987, Nasciuti; Cass. Sez. III, 8/01/1990 No. 48, Zadra);
- *the concept of sampling* (Cass. Sez. III, 30/05/1990 No. 7430, Cortese; Cass. Sez. III, 11/05/1990, No. 6829, Pisetta);
- *the concept of analysis* (Cass. Sez. III, 17/04/1991 No. 4342, Bracco);
- *the concept of measurement* (Cass. Sez. III, 22/03/1989 No. 816, D'Allora);
- *the concept of permits for express and specific discharges* (Cass. Sez. III, 7/06/1990 No. 1714, Lazzaro);
- *the concept of strict liability, including that of the failure to adopt proper protective measures to avoid pollution;*
- *the exclusion of the relevance of technical breakdowns* (Cass. Sez. III, 16/04/1991, Minuti);
- *the exclusion of the relevance of technical impracticality* (Cass. Sez. III, 30/04/1990 No. 1219, Sassatelli and Cass. Sez. III, 24/01/1995 No. 771, Rinaldi);
- *the exclusion of the relevance of economic impracticality for excessive cost* (Cass. Sez. III, 28/11/1990, Bonazzi);
- *the exclusion of the relevance of social impracticality due to problems of the dismissal of workers* (Cass. Sez. III, 28/09/1995 No. 2694, Grimaldi);
- *the exclusion of the relevance of delegation except in very strict cases* (Cass. Sez. III, 3/05/1996 No. 4422, Altea);
- *the submission also of stock farms to legal regulation;*
- *the submission also of municipal purifying plants to regulations regarding water pollution* (Cass. Sez. III, 12/12/1995 No. 12234, Dalla Corte).

However, *Law 152/99* which transformed the exceeding of 33 limits in the tables of discharges from industrial plants and stock farms, from a criminal sanction to a derisory administrative sanction, should be noted as a very serious step backwards. This is because for over 25 years, the case law that the Italian Supreme Court has elaborated on the issue of liability for environmental damage has been nullified. Evidently, when case law becomes serious, consistent and strict, the legislator introduces forms of unjustified decriminalisation and does not even lay down dissuasive and proportionate administrative sanctions.

In *Case No. 42* of 19 December 2001, the *Turina case*, the full bench of the Italian Supreme Court held that decriminalisation was applicable, even in the transitional period of three years introduced into the new Law for existing plants.

In conclusion, in the sector relating to water, the legislator has moved without consistency and has left doubts about constitutional legitimacy and respect for Community principles.

**1.2. Also in the sector of waste**, the Italian Supreme Court has made an important contribution, through its strict interpretation of the law:

- *the need for a permit for municipal dumps* (Cass. Sez. III, 31/01/1995 No. 1015, Carpinelli; Cass. Sez. III, 23/10/1989 No.2560, Castaldi);
- *the need for a permit for vehicle demolition centres* (Cass. Sez. III, 14/06/1993 No. 6033, Zuliani);
- *the prohibition of using quarries for waste* (Cass. Sez. III, 8/02/1991 No. 337, Macchioni);
- *the thermo-destruction of medical waste* (Cass. Sez. III, 14/06/1993 No. 6020, Rossino); *the strict pre-conditions required for passing contingent and urgent ordinances* (Cass. Sez. III, 10/05/1994 No. 1468, Menaglia; Cass. Sez. III, 30/06/1995 No. 7392, Alfieri);
- *the concept of waste* (Cass. Sez. III, 29/03/1989 No. 838);
- *the recycling of waste* (Cass. Sez. III, 9/03/1995 No.2367);
- *the incineration of waste* (Cass. Sez. III, 7/12/1992 No. 2208, Fava);

Other interesting decisions relate to the transport of waste, its temporary storage, the prohibition of mixing waste, and the failure to reclaim polluted sites, etc.

**1.3. There are fewer decisions on air pollution despite the gravity of the situation due to the emissions from vehicles in urban areas and from manufacturing industries:**

- *the concept of air pollution* (Cass. Sez. III, 3/03/1992 No. 221 and Cass. Sez. III, 11/07/1995 No. 7692, Vinella);
- *the concept of a plant* (Cass. Sez. III, 15/06/1994 No. 1559, Colombo);
- *the concept of a permit* (Cass. Sez. III, 30/03/1995 No. 378);
- *the concept of the best available technology in relation to excessive costs* (see Case of the Constitutional Court No. 127 of 16/03/1990).

**1.4. The case law on land use has dealt, amongst other things, with:**

- *the need for a permit for quarries* (Cass. Sez. III, 31/01/1995 No. 1018, Agati);
- *the necessity to also have a licence for public works* (Cass. Sez. III, 8/11/1998 No. 2587, Matarazzo);
- *the obligation to demolish illegal constructions* (Cass. Sez. III, 20/10/1987 No. 1572, Lefonso);
- *the confiscation of lots which have been divided up unlawfully* (Cass. Sez. un., 3/02/1990, Cancellieri);

### 1.5. The case law on the protection of nature has demonstrated great sensitivity:

- *the powers and legitimation of national parks* (Cass. 14/12/1983 No. 7367, Soc. Stell and Cass. Sez. III, 14/04/1998 No. 4365);
- *the prohibition of hunting* (Cass. Sez. III, 17/05/1994 No. 1553, Marinelli and Cass. Sez. III, 7/08/1995 No. 2652);
- *the prohibition of altering woods and forests* (Cass. Sez. III, 30/11/1988 No. 2383, Poletto and Cass. Sez. III, 30/05/1989 No. 7781);

The trend in relation to cruelty to animals which considers them as living things capable of psycho-physical feelings and of suffering (Cass. Sez. III, 14/03/1990 No. 691, Fenati) should also be noted. On the issue of the importation of sparrows from China, the principle of territoriality prevailed despite the attempt in some decisions to give these birds the same absolute protection in force in Italy: in practice, it is prohibited to catch and eat sparrows in Italy, but the Italians are able to eat imported Chinese sparrows, without any assessment of the principle of the sustainability of the species.

### 1.6 The law on the landscape has been applied very strictly for:

- *ski runs* (Cass. Sez. III, 10/02/1987 No. 232);
- *roads* (Cass. Sez. III, 2/04/1997 No. 3065, Moretti);
- *land covered with woods* (Cass. Sez. III, 29/04/1997 No. 3975, Lui);
- *restoration of the state of places* (Cass. Sez. III, 12/04/1995 No. 3968);

1.7 In the sector of noise, there has been a serious delay with respect to the actual situation (traffic in the cities, airport systems, railways, highways, etc.). Criminal law cases deal with noise in the workplace. There are no penalties for external habitations.

## III. THE ROLE OF CASE LAW IN THE EVOLUTION OF THE RIGHT TO THE ENVIRONMENT AS A HUMAN RIGHT <sup>78</sup>

The Italian Supreme Court made the most of the constitutional provision on health (Art. 32) maintaining that it was directly applicable (Cass. 30/05/1973 No. 1616; 6/10/1979 No. 5172; 9/03/1979 No.1463). Health was considered not merely as the absence of illness, but as psycho-physical well being. Persons producing income are not the only ones worthy of protection, but also old people and children.

Not merely physical harm has been taken into consideration, but also moral harm regarding the person as a whole (so-called biological harm). Compensation for damages to health has been very frequently applied in the workplace (Cass. 3215/85); in the relationship between neighbours (Cass. 9811/87); in the case of the localisation of nuclear plants (Cass. Sez. I, 1463/79); and in the case of continual noise and disturbance (Cass. Sez. I, 89/87 No. 9811, Marrai).

78 The first volume published in Italy on "Diritto all'Ambiente" [The Right to the Environment] was written by Amedeo POSTIGLIONE, Iovene Editore Naples 1982. The same author published another volume in Italy entitled "Il Diritto all'Ambiente" [The Right to the Environment] ROME 1986. The Proceedings of "The International Meeting on the Human Right to the Environment" 23-25 June 1975 Bonn, organized by the Council of Europe on the Right to the Environment, directed by Alexander Kiss, in collaboration with W. E. Burhenne, IUCN, Environmental Law Centre Bonn - see: Erich Schmidt Verlag Berlin 1976, A-41 - Beitrage Zur Umweltgestaltung. Individualrecht oder Verpflichtung des states?



A similar evolutionary process can be seen in relation to the environment in the sense that the Court has recognised that it has a dual nature – both objective and subjective – with the result that environmental damage is held to involve harm not only to nature but also to the human being who lives in nature.

As early as *Case No. 421 of 20/10/1983 Sez. III, the Mazzola case*, the Italian Supreme Court interpreted the concept of the environment in a unitary and dynamic fashion:

...on the issue of environmental protection, the Constitution in Art. 9 links naturalistic (landscape) and cultural (promotion of the development of culture and protection of the historic and artistic heritage) aspects in a non static but dynamic vision, not merely aesthetic or extrinsic, but for the integrated and overall protection of natural values together with those consolidated by the testimony of civilisation; in the same way, in Art. 32, it elevates health to a fundamental right of the individual and an interest of the community whilst, from other points of view, it guarantees proper protection to environmental rights as an expression of the individual and social personality: environment as the place for participation (Arts. 2, 3, 5); an object for protection for all (Art. 24); the necessary foundation for learning, teaching, art, and science (Arts. 33 and 34); with restrictions on property and economic initiatives (Arts. 35, 41, 42, 43, 44); and the object of the coagulation of political forces (Art.49)....

More recently, the Italian Supreme Court has clarified even further its philosophy in *Case No. 1267 of 1/10/1996, the Locatelli case*, III Criminal Division, Reporter Judge Postiglione:

*“Environmental damage is not only an ‘endangering of the environment’ in violation of environmental laws, as expressed in Article 18 of Law 349/86, but it is, at the same time, also an ‘offence against the human being in his/her individual and social dimension,’ as held by the Constitutional Court in Cases No. 210 and 641 of 1987 and by this Court (Sez. III, 2560/89, in the Castaldi case).*

*...In its fundamental principles, the Constitution of the Italian Republic implements an “open” concept of inviolable rights of the human being “as both an individual and in the society where he/she lives”, in the sense that a “numerus clausus” is not established, but that which society produces in terms of sensitivity and culture is recognised. The Court holds that, at this time, our Constitution not only protects health (Art. 32) and the natural and cultural heritage of the nation (Art. 9), but recognises and guarantees the environment as a fundamental human right (Art. 2) and, therefore, grants all individuals the right to take action to protect this right (Art.24).*

*In the light of these principles, precisely because environmental damage is inseparable from harm to natural and cultural values and, at the same time, harm to the human and social values of every individual, the right to take action before the courts is not limited to public bodies only such as the State, Regions, Provinces, Municipalities, National Park Authorities, etc. (in the name of the environment as a matter of public interest) but it is also available to individuals or associations (in the name of the environment as a subjective fundamental right of every person).*

*The difficulty in differentiating the individual component in each case of environmental damage is not equivalent to the fact that it does not exist and it can be overcome in legal terms not only when the claim has as its objective an injunction or, where possible, restoration of places (a penalty that has general significance) but also when it is necessary to assess and quantify the environmental damage in monetary terms, because “compensation” can only be paid to public bodies, whilst individuals and associations can only ask for their costs and legal fees in bringing proceedings.*

*Environmental protection associations, including those of a local kind that are not officially recognised under Art. 13 of Law 349/86, may take part in proceedings and become civil Plaintiffs in a criminal action, when they have given proof of the continuous nature of their action, its adherence to the territory, and the importance of their contribution, but above all because of the social groups in which the personality of every individual dynamically grows, the individual as the person is entitled to the human right to the environment. Therefore, WWF is given standing in this case (see Case Sez. III, No.7691, ud. 11/07/1995, in the Mariotti case)...*

It is interesting to note the widening of the individual right to health up to the point that it includes a healthy environment (Cass. Sez. Un. Civili No. 5172/79): in this way, the human right

to the environment has substantive content corresponding to the right to a healthy environment, owing to the practical and logical link between individual health and the health of the habitat referred to.

This concept is interesting due to the epoch in which it was pronounced (1979), because as no proper legal basis existed in the Italian legal system to support an autonomous human right to the environment, the sphere of application was extended to health, that is, to a fundamental right recognised by the Italian *Constitution*.

The exploitation of an absolute subjective right for the environment met with obstacles in both legal authority and before the courts, considering it more realistic to attribute the environment with a constitutional value that could be properly balanced with other rights equally protected by the *Constitution* (in the first place, that of economic development). The Council of States has decided in this way in several cases (Sez. V, 523/70; Sez. V, 253/73; Sez. IV, 407/82)

The most noteworthy evolution can be seen in the decisions of the Italian Constitutional Court, in the sense that this institution found itself having to define the legal system's founding principles on the environment.

From the examination following here, although brief, it is possible to see the philosophy that inspires the approach of the Court which can be summarised as:

1. the unitary concept of the environment including all natural and cultural resources: this unitary character concerns some fundamental common aspects (for example, information, participation, access, environmental impact assessment, environmental damage) and it is not contradicted by rules in specific sectors (Constitutional Court *Case No.* 210/87);
2. the concept of the environment as a primary and absolute asset guaranteed by the *Constitution* for the community (*Case Nos.* 210/87; 641/87; 921/88; 53/91; 437/91);
3. the concept of the environment as a fundamental human right and a fundamental interest of the community with a dual subjective and objective nature (*Cases Nos.* 210/87 and 127/90);
4. the concept of the environment as an economic asset with the result that there is the duty to restore any damage caused to the environment (*Case* 210/87);
5. the preventive concept of environmental protection with the obligation of control by competent authorities through the use of a system of express and specific authorisations (*Cases* 194/93 and 96/94).

As we can see, the objective profile is defined better: legal, economic and social asset; constitutional relevance, fundamental public interest entrusted to the institutions, fundamental social interest entrusted to the active sensitivity of the community, of social groups and of individuals.

Also the vision of the environment as a human right in the sense of a right referable to every human being, a personal right, is most important. The content of this human right (whether only procedural or also substantive) has not been defined by the Constitutional Court and this is a strong point and a wise decision, because the full development of the legal concept of the environment is still in course.

Ordinary and administrative case law has made important contributions with regard to the procedural content of the human right to the environment:

- The individual's right to environmental information<sup>79</sup>
- The individual's right to participate in the environmental process<sup>80</sup>
- The right of access (legal standing) of individuals, NGOs, and local bodies<sup>81</sup>

In conclusion, the procedural aspects of the human right to the environment are accepted within the Italian legal system, and case law has used them to advantage in many cases with regard to effectiveness. The social role of individuals and NGOs as real defenders of the environment has also been taken advantage of.

#### IV. THE PRINCIPLE OF INTEGRATION WITH COMMUNITY ENVIRONMENTAL LAW

On the formal and substantive level, national legal systems have been strongly influenced in environmental matters by the institution of the European Union.

As is well-known, the *Treaty of Rome* of 1957 did not provide for the environment, but it became evident immediately that it was impossible to ignore it, if the harmonious economic and social development within the Community was to be ensured. In the 1970s, the environmental problem became important almost contemporaneously within the single Member States in Europe and at international level. The reason is obvious: the need to find a legal institutional answers to a common challenge. Through its organs (Commission, Council and Parliament), the European Union gave space to the environmental problem, despite the limitations in the *Treaty* and this occurred in two ways: through the enactment of a large amount of legislation (about 225 *Directives*, 51 *Regulations*, and 35 *Resolutions* according to a study presented on 17/07/1992 by the Directorate General of Research of the European Parliament) and through the beginning of a gradual and consistent policy in the sector through Action Plans (the current one is the Sixth and has the most significant title: "Environment 2010: Our Future, Our Choice.")

The large amount of legislation enacted on the environment would have remained without effect if the European Union had not had a special judicial body to actually enforce it (the European Court of Justice). It was this Court, with its decision of 7/02/1985 (Case 240/1983) that held that "environmental protection- - is one of the basic objectives of the Community," establishing an equilibrated link between development and environmental sustainability. The environment entered the constitutional structure of the Community (*Single European Act of 1986*; *Treaty of the European Union of Maastricht of 1992*; and now the *Draft Human Right Charter of the European Union, Art. 37*), whilst Community case law played an evolutionary role with interpretative decisions and sentences.<sup>82</sup>

79 *Tribunale Amministrativo Regionale (TAR) Emilia Romagna 12/05/1992, Giovannelli v. Provveditorato Regionale Opere Pubbliche e Ministero Lavori Pubblici*; *TAR Sicilia 9/04/1991 No. 118, Di Blasi v. Comune di Librizzi*; *TAR Lombardia 26/03/1991 No. 268, Monari v. Ministero Pubblica Istruzione*.

80 *TAR Sicilia 9/04/1991 No.118, Di Blasi v. Comune di Librizzi*; *TAR Lombardia 7/11/1991 No.809, ANMIC v. Ministero del Lavoro*; *TAR Sicilia 20/04/1985 No.367, Lo Bianco v. Ministero dell'Agricoltura*.

81 *Cassazione Sez. III, 11/04/1984 No. 3169*; *TAR Liguria 27/10/1986 No. 493, Botta v. Regione Liguria*; *TAR Marche 10/04/1986 No. 97, Perazzoli v. Comune di San Benedetto del Tronto*; *TAR Lombardia 27/06/1991 No. 490, Azolin v. Comune di Bolgare*; *TAR Toscana 19/06/1991 No. 303, Vicario v. Comune di Monte Argentario*; *TAR Abruzzo 20/02/1991 No. 166, Sborgia v. Regione Abruzzo*; *TAR Lombardia 17/01/1990 No. 15, Sartorio v. Regione Lombardia*; *Cass. Sez. III 14/04/1984 No. 2448*; *Cass. Sez. III 52/86 No. 1285, Leone*; *Pretura Palermo 27/02/1991 Lari*; *Consiglio di Stato Sez. V 20/11/1089 No. 741, Bernardini v. Comune di Acquasparta*; *Cass. Sez. III 17/03/1992 No. 590, Ginatta*; *Cass. Sez. 3 26/02/1991 No. 2603, Contento*; *Cass. Sez. III 23/10/1989, Cataldi*; *Cass. Sez. III 10/01/1990 No. 59, Monticelli*; *Cass. Sez. III No. 1267/96 relativa al WWF*; *Cons. Stato Sez. VI 72/86 No. 182, Codacons*; *TAR Lazio 20/01/1995 No. 62 Comitato di Quartiere*; *TAR Lazio 19/12/1990 No. 2235, Legambiente*; *TAR Toscana 21/01/1989 No.60020, Lipu v. Regione Toscana*; *TAR Lombardia 21/03/1989 No. 124, Associazione Italia Nostra v. Comune di Cernobio*; *TAR Toscana 11/07/1988 No. 1016, Soc. Farmoplant v. Comune di Massa*.

82 The European *Charter of Human Rights of the European Union* does not include the *human right to the environment* this is seen as the result of a mistaken view (see the study by CEDE Henri Smetz Funchal Juin 2001).

The Italian legal system has reacted positively to the novelty of a wider legal system and this took place in two ways: through passing legislation implementing the Community *Directives* and through the recognition of the supremacy of Community law over national law, also in environmental matters. The principle of integration began to operate on the level of legislation and of case law. The mechanism regarding conformity in Italy improved gradually: firstly through single laws; then through the enactment of a single Community law every year in expectation of future automatic conformity (except for express and limited reservations to be exercised within a fixed time). The principle of integration is also working at a structural level (with the creation of the Ministry for Community Policies) and with economic, technical, social and program-type political mechanisms.

Co-ordination between the Supreme Courts in the Member States and the European Court of Justice in Luxembourg is however lacking, together with that of the so-called incidental judgments interpreting the single Community rules.

## V. THE PRINCIPLE OF INTEGRATION WITH INTERNATIONAL ENVIRONMENTAL LAW

In the Italian legal system, adaptation comes about automatically through "generally recognised rules of international law." (Art. 10 *Italian Constitution*).

A similar system would be desirable for *Treaties and Conventions* (even if only on certain conditions) in order to avoid the need for Parliament to pass a special law for their ratification and enforcement.

In Italy, degree of conformity is high and even the time required for implementation is acceptable. On environmental matters, Italian law has received the following principles of international environmental law:

- Unitary concept of the environment
- Prevention
- Precaution
- Polluter pays
- Reparation for environmental damage
- High level of protection
- Subsidiary character
- Co-operation and assistance
- Advance notice of risks
- World heritage
- Fundamental human right
- Information
- Participation
- Access
- Equity among generations
- Rights of future generations
- Legal responsibility for transborder damage
- Environmental impact assessment
- Best available technology
- Sustainable development
- Collaboration with the United Nations and other International Organisations

If these are the principles, we must ask whether sustainable development constitutes only a general political objective of the International Community or whether it can be considered a positive legal principle. Opinions differ on this point: undoubtedly, we need to define more precise criteria

of reference; undoubtedly, the ecological sustainability of life on earth as a whole must be considered an absolute priority; undoubtedly, it is good that the principle of sustainable development is applied by all the States, even if with differing responsibility by the richer countries; undoubtedly, the life of future generations cannot merely be a "fashionable slogan," because it should indicate the choices that must be made today in equity and proportionality by the economy and politics.

Fundamentalist views against globalisation are dangerous: without economic freedom and without democracy there is not only no development but also no environmental protection.

In the light of these considerations, it seems preferable to consider the right to sustainable development as a new legal principle of international law: the novelty is to cover two real requirements (the environment and development), in relation to their necessary adaptation and reasonable and equitable balancing in individual cases.

From the theoretical point of view, it seems advisable to define the human right to the environment not only as a procedural right but also a substantive right: the former aspect is already actionable, the latter requires further thought.

The necessity of a right to food and to water of every human being on the planet cannot be denied: instead, we must discuss the extent of this right, and also the active and proper contribution of those who call upon others to recognise this right.<sup>83</sup>

## VI. SPECIFIC INITIATIVE PROMOTED BY THE ITALIAN SUPREME COURT

For over 20 years, the Italian Supreme Court has promoted the environment legally and culturally through various initiatives:

- Institution of a Criminal Chamber that mainly deals with environmental crimes;
- *Constitution* of an National ECO Data Bank, still operating today at the Centre for Electronic Documentation of the Court;<sup>84</sup>
- Participation – delegated by the Ministry of Justice and with the support of the Ministry of the Environment – in a project for a Community Data Bank on the Environment together with IUCN: 15000 abstracts of decisions of European Courts on the environment were collected in both original language and in English. This Data Bank requires updating;<sup>85</sup>
- Institution of a Scientific Secretariat for the Promotion of an International Court of the Environment also accessible to NGOs and individuals (with an appropriate filter, such as a specialised and not special Judge);<sup>86</sup>
- Promotion of International Conferences in Rome, Florence, Venice and Paestum and also in other countries on the subject of the effectiveness of international environmental law with the support of ICEF (International Court of the Environment Foundation);<sup>87</sup>

83 See the attempt by FAO to have an International Code of Conduct on the Human Right to Adequate Food approved by about 800 NGO's passed and submitted to the Governments at the Conference in Rome in June 2002.

84 See : "L'informatica giuridico-ambientale in Italia: realizzazioni e prospettive", by Amedeo POSTIGLIONE, Editore Giuffrè, Milan, 1992.

85 See : "La giurisprudenza ambientale europea e la Banca Dati ENLEX della CEE", edited by Amedeo POSTIGLIONE, Editore Giuffrè, Milan, 1988.

86 The Scientific Secretariat was set up under a Decree of the Chief Justice of the Italian Supreme Court on 24/09/1991.

87 ICEF has published numerous works beginning with the volume: "The Global Village Without", Giunti Editori Florence, by Amedeo POSTIGLIONE, presented at the UNCED Conference, Rio De Janeiro, June 1992.

- Collaboration, through an expert, with the European Community in a research project on the civil and criminal penalties related to toxic waste (in 1988);<sup>88</sup>
- Collaboration, through an expert, with the Council of Europe in a research project on the case law related to the application of the Convention of Bern and<sup>89</sup>
- Holding of Environment Days at the Court in 1988-1999-2000-2001, with the publication of the relative Proceedings, in collaboration with the Italian Environmental Protection Agency (ANPA).

## VII. CONCLUSION

It is very positive that UNEP has organised a "Global Judges Symposium on Sustainable Development and the Role of Law." The exchange of opinions among the Supreme Courts of Justice from the countries of different continents is valuable in verifying how the principle of integration of the legal systems works in environmental issues.

Co-operation is necessary because the role of law must acquire greater force. We must avoid the fact that environmental disputes remain without control and without sanctions.

This should also take place within the International Community. The environmental sustainability of the planet is undoubtedly threatened by phenomena such as: climate change, reduction of biodiversity, the advance of desertification, the water crisis and famine especially in Africa, and the increasing number of real or potential disputes over the use of common resources. The principle of sustainability is linked to the very essence of the law as proportion equilibrium and measures. This is so for all legal systems called upon in the name of the common value of the environment, to enter into a new dialogue in the interests of the sustainability of life on earth and of the life of future generations. Global environmental justice is a necessity and also a real opportunity in a globalised world.<sup>90</sup>

88 See "Controllo dei rifiuti pericolosi in Italia ed in Europa", by Amedeo POSTIGLIONE, Edizioni Scienza e Governo Centro Studi l'Uomo e l'Ambiente Padua 1986.

89 Workshop on "The Bern Convention and National Case Law: Effecting Implementation", Strasbourg, 28-28 June 1999 and the Project "Application de la Convention de Bern et Législations relatives à la conservation de la nature dans les Parties contractantes: compilation de références et résumés de décisions juridictionnelles nationales et communoutaires", by Amedeo POSTIGLIONE on behalf of the Council of Europe.

90 Let me call your attention to "Justice and the Global Environment: The Need for an International Court of the Environment", by Amedeo POSTIGLIONE, Giuffrè Editore, Milan 2001 and the bibliographical notes in it. The text has been translated into English and I hope to be able to have it published as soon as possible. Furthermore, I wish to call attention to the recent initiative proposed by the Italian Government for a Centre for the Prevention and Management of Environmental Disputes which is applauded and seen an important step towards greater protection of the environment.

## 9. THE STATE OF LEGISLATION AND JUDICIAL PRACTICE IN THE AREA OF THE ENVIRONMENT IN THE REPUBLIC OF KAZAKHSTAN

### I. GENERAL INFORMATION ON THE ENVIRONMENT IN THE REPUBLIC OF KAZAKHSTAN

The territory of Kazakhstan is 2 724.9 thousand square kilometres from west to east. It measures 3 000 kilometres – from the Caspian Sea and the lower reaches of the Volga to Altai, Dzhungar Altai and China, and from north to south it extends 1 700 kilometers from the southern part of the Western Siberian plain and the spurs of the Urals to the Tyan-Shan ranges and the Kyzylkum desert.

Kazakhstan has four types of geographical environments: forest steppe, steppe, semi-desert and desert.

The Republic has approximately *85 thousand rivers and water reservoirs*, including more than 8 thousand rivers that together are longer than 10 kilometers. The longest rivers are the Irtysh (4 248 km., of which 1 677 km is in Kazakhstan), the Ishim (2 541 km., of which 1 781 km. is in Kazakhstan), the Ural (2 428, of which 803 km is in Kazakhstan), the Syrdarya (2 212 – 1 627 km.), the Tobol (1 591 – 682 km.), and the Ili (1 001 – 815 km).

The *flora of Kazakhstan* includes a significant amount of grasses, a small percentage of trees and a large amount of bushes, shrubs and other grasses.

Although forest area is 11.4 million hectares, the forest is used mainly for protecting the soil and retaining water (in the mountains and in the steppe) and also for holding sand.

On the *fauna of Kazakhstan*, the rich variety of natural conditions in Kazakhstan allows for a diverse fauna. There are 178 types of mammals, 104 types of fish and 1 000 types of invertebrates. The fauna of Kazakhstan differs widely based on the environmental areas.

With regard to fish and animals for commercial purposes, *Kazakhstan is second* after Russia. Of the 22 types of hoofed wild animals found throughout the CIS and the Baltic countries, there are 13 in Kazakhstan (deer, maral, dappled deer, saiga, djeiran, arkhar, kulan, wild pigs and others).

*With regard to subsurface resources*, Kazakhstan possesses significant potential regarding natural resources. Proven reserves of oil, coal, ferrous ores and non-ferrous metals, and phosphorites ensure the long-term potential of the Republic. The subsurface resources of Kazakhstan, as a total percentage of CIS countries are up to 60% of tungsten, 50% of lead, 40% of zinc and copper, 30% of bauxite, 25% of phosphorite, 15% of iron ore and more than 10% of coal. For gold reserves, the Republic is sixth in the world, for gold in ore it is second after South Africa.

Kazakhstan is one of the world leaders in reserves of oil and gas. According to studies, reserves of the Northern Shelf of the Caspian Sea are: for oil, three to three and a half billion tones and for gas 22.5 trillion cubic metres.

The country's industrial sector is dominated by extracting enterprises and enterprises that carry out the initial processing of raw materials. The main sectors of the economy are the fuel and energy sector, mining and metallurgical, agro-industrial and the chemical sector.

## II. ENVIRONMENTAL LEGISLATION OF THE REPUBLIC OF KAZAKHSTAN

Following the declaration of state sovereignty of the Kazakh Soviet Socialist Republic (October 25, 1990) and the subsequent state independence of the Republic of Kazakhstan (December 16, 1991), significant achievements have been made in enacting legislation in the area of environmental protection. Such legislation is based on the *Constitutions* of the Republic of Kazakhstan (1993 and 1995,) and taking into consideration the social and economic transformations that have been carried out in the country.

The *Constitution* of the Republic of Kazakhstan (1995) provides that the land and subsurface resources, plant life and the animal kingdom, and other natural resources are owned by the state. The government is entrusted with protecting the environment and ensuring that the life and health of humans are protected.

The base law that determines the legal, economic and social grounds for protecting the environment is the *Law of the Republic of Kazakhstan of July 15, 1997, On Environmental Protection*. In case there are contradictions between this law and other acts regulating environmental protection, the latter may be applied only after the appropriate amendments are made into the law.

Another important *Act* in the area of environmental protection is *the Conception of Ecological Security of the Republic of Kazakhstan*, as approved by *Regulation No. 2967* of the President of the Republic of Kazakhstan of April 30, 1996. The Conception provides for a permissive procedure for carrying out production and other business activity which could threaten the ecological safety of the population or territory, requires a state economic and safety analysis of projects, construction programs, and the production of any goods. These provisions are included in a series of legislative and normative acts which regulate environmental protection relations.

The legal status of certain natural resources and environmentally protected areas are regulated by *special legislation*.

### 1. Land legislation

The principal areas of land reform are determined by the *Conception for the Rational Use and Protection of Lands of the Republic of Kazakhstan for 1994 and 1995* and for the period until 2010 (main provisions), as approved by *Decree No. 1149* of the Cabinet of Ministers of the Republic of Kazakhstan of October 11, 1994.

On January 24, 2001, the Law of the Republic of Kazakhstan "On Land" was adopted, in the framework of which a number of normative legal acts operate.

The Government of the Republic of Kazakhstan has approved a procedure for conducting a state land survey and monitoring land, transferring agricultural lands from one crop to another, a *statute* on the procedure for improving land and a procedure for determining compensation for losses for agricultural and timber production and losses caused to an owner or land user upon taking agricultural or forest land for purposes not associated with agricultural or the timber industry. The *statute* on the procedure for the state control of the use and protection of lands, and the procedure for taking, protecting and using polluted and violated lands, as approved by the Government of the Republic of Kazakhstan, are also important for protecting the land.

### 2. Legislation on subsurface resources and the use thereof.

*Decree No. 1381* of the Cabinet of Ministers of the Republic of Kazakhstan of December 7, 1994 approved the *Conception* for managing and regulating the use of the subsurface and protecting the subsurface and *the investment program for the geological study and exploration of mineral deposits*.



The main *Act* in this area is *Edict* No. 2828 of the President of the Republic of Kazakhstan, which has the force of law, of January 27, 1996, "*On Subsurface Resources and the Use Thereof.*"

The Government of the Republic has also adopted a number of sub-laws on protecting the subsurface, including a *statute* on the state control of protecting the subsurface, a procedure for conducting a state survey of buried pollutants, radioactive waste and sewage in the subsurface, and a procedure for issuing permission for building up areas around mineral deposits.

Important for the *state regulation* of subsurface use are, as approved by the Government of the Republic of Kazakhstan, a *statute* on the procedure for conducting a state survey of deposits and discoveries of minerals and a state survey of mineral formations, a procedure for maintaining a state balance sheet of minerals, a state study of the subsurface, geological information held by the state, and a procedure for its use for academic, research, commercial and other purposes, and the state monitoring of the subsurface.

### 3. *Water legislation.*

A *Water Code* adopted on March 31, 1993, is in force in the Republic of Kazakhstan.

The Government has approved the *Conception for the development of the water sector* of the economy and *water policy* until 2010 and has approved the sectoral program Drinking Water.

In order to develop the *Water Code*, the Government of the Republic of Kazakhstan has adopted normative acts concerning the procedure for allowing water reservoirs for special use, a procedure for agreeing to, and issuing permits for the special use of water, a procedure for using water for fire fighting needs, classifying water ways as navigable routes and for using reservoirs for air transport needs. The Government has approved lists of reservoirs (underground waters) that have health significance for the Republic and reservoirs that have special state significance or special scientific value, the granting of which for use is restricted or entirely forbidden.

Important for the state regulation of water relations, as approved by the Government of the Republic of Kazakhstan are a procedure for developing and approving plans for the comprehensive use and protecting of water; a procedure for conducting a state water survey; a procedure for the state recording of water and the use thereof; a statute on a procedure for calculating, levying and paying for the use of water resources of surface sources for sectors of the economy of the Republic of Kazakhstan.

Issues related to water protection are reflected in certain normative legal acts, as approved by the Government of the Republic of Kazakhstan, including a statute on water protected zones and areas, and regarding state control of the use and protection of water resources.

### 4. *Forest legislation.*

The principal legislative act with regard to the forest is the *Forest Code* of the Republic of Kazakhstan of January 23, 1993. In order to develop the *Forest Code*, the Government of Kazakhstan has approved a procedure for cutting timber in the forests of Kazakhstan, major harvest rules for mountainous forests, a temporary statute on the procedure for the holding of timber trading (auctions), a procedure for the use of land parcels for research and cultural/recreational purposes, and rules for hay cutting and pasture of lands in the territory of forests of the Republic.

In order to preserve forests, important laws are, as approved by the Government of the Republic of Kazakhstan, a statute on state forest protection, on the state control of the condition, use and protection of forests, on the structure, contents and procedure for monitoring forest ecosystems, on material liability for violating forest legislation and the illegal harvesting and damage to plants included in the Red Book of the Republic of Kazakhstan.

5. *Legislation on the Animal Kingdom.*

The Law of the Republic of Kazakhstan of October 21, 1993, "On the Protection, Replenishment and Use of the Animal Kingdom." In order to implement that law, the Government of the Republic of Kazakhstan has approved lists of types of water animals which are fished and which are endangered, and types and sub-types of animals which are included in the Red Book of the Republic of Kazakhstan, and types of hunted animals which can be harvested on the basis of licenses.

The Government of the Republic of Kazakhstan has approved a procedure for the state recording of animals and conducting a state survey of the animal kingdom, and has approved a statute on the Red Book of the Republic of Kazakhstan. In addition, it has approved a procedure for granting the right to hunt and rules for the fishing industry and other harvesting of water animals in the Republic of Kazakhstan.

6. *Legislation on Specially Protected Natural Territories.*

On July 15, 1997, the Law of the Republic of Kazakhstan "On Specially Protected Natural Territories" was adopted. It determines the legal, economic, social and organizational basis for the activities of specially protected natural territories and related natural objects which have special ecological, scientific and cultural value, as acknowledged as being a national treasure of the Republic of Kazakhstan.

7. *Legislation on Atomic Energy, Nuclear and Radiation Safety.*

In May 1990, the *Decree* of the Supreme Soviet of the Kazakh SSR "On Ending Tests at the Nuclear Testing Range in the Semipalatinsk Region and Measures to Protect the Public and Environment in the Region," was adopted, and subsequently followed by the Edict of the President of the Republic of Kazakhstan of August 29, 1991, "On Closing the Semipalatinsk Nuclear Testing Range."

On December 18, 1992, the Law of the Republic of Kazakhstan "On the Social Protection of Citizens who Suffered as a Result of Nuclear Tests at the Semipalatinsk Nuclear Testing Range" was adopted. In order to implement that law, *the Decrees* "On the Social Protection of Citizens who Suffered as a Result of Nuclear Tests at the Semipalatinsk Nuclear Testing Range," "On Additional Measures for the Medical Rehabilitation of the Public who Suffered as a Result of Nuclear Explosions at the Former Semipalatinsk Nuclear Testing Range," and "On the Program of Measures for the Medical Rehabilitation of the Public who Suffered as a Result of Nuclear Tests at the Former Semipalatinsk Nuclear Testing Range from 1949 through 1990" were adopted.

The Law of the Republic of Kazakhstan of April 14, 1997, "On the Use of Atomic Energy" determined the legal basis and principles for regulating relations in the area of atomic energy. It is aimed at protecting the health and life of people, protecting the environment, ensuring that nuclear weapons do not spread, and nuclear and radiation safety in using atomic energy.

The Law of the Republic of Kazakhstan of April 23, 1998 "On Radiation Safety for the Public" regulates relations in the area of ensuring the radiation safety of the public for purposes of protecting them from the dangerous effect of radiation.

Legislation on the Quality of the Environment and Emergency Ecological Situations: On March 11, 2002, the new law of the Republic of Kazakhstan "On Protecting the Atmosphere" was adopted. The Law determines measures for protecting the atmosphere, and issues related to the state recording of harmful effects on the atmosphere, the resolution of disputes and liability for violating legislation.

*Decree* of the Supreme Soviet of the Republic of Kazakhstan of January 18, 1992, "On Urgent Measures for the Fundamental Transformation of Living Conditions for the Public in the Priaral" declared a ecological disaster zone in the Priaral, which encompasses several regions of four then

existing regions. On June 30, 1992, the Law of the Republic of Kazakhstan "On the Social Protection of Citizens who Suffered as a Result of the Ecological Disaster in the Priaral" was adopted.

*Decree* No. 5.13 of the Cabinet of Ministers of the Republic of Kazakhstan of June 9, 1992, "On Additional Measures for Implementing Edict No. 409 of the President of the Republic of Kazakhstan of August 29, 1991, 'On Closing the Semipalatinsk Nuclear Testing Range'" declared an ecological disaster zone several cities and regions of four then existing regions.

The Republic of Kazakhstan has ratified 18 international agreements in the area of protecting the environment and the use of natural resources.

1. The Convention of the World Meteorological Organization (1993).
2. The International Convention on Civil Liability for Damages from Oil Pollution (1994).
3. The Convention on the Safety of Organisms in the Sea (1994).
4. The Convention on Bio-Diversity (1994).
5. The Convention on Protecting World Culture and Natural Legacy (1994).
6. The UN Framework Convention on Climate Change (1995).
7. The UN Convention on Desertification (1997).
8. The Vienna Convention on Protecting the Ozone Layer (1997).
9. The Montreal Convention on Substances Destroying the Ozone Layer (1997).
10. The London Protocol to the Montreal Convention on Substances Destroying the Ozone Layer (2001)
11. The Agreement to the Energy Charter and the Protocol to the Energy Charter on Issues Concerning Energy Effectiveness and the Corresponding Ecological Aspects (1995).
13. The Convention on International Trade in Types of Endangered Wild Flora and Fauna (1999)
13. The Convention on Prohibiting the Military and Other Harmful Use of Stimulants on the Environment (1995).
14. The Convention on Access to Information, Participation of the Public in Adopting Decisions and Access to Justice on Issues Concerning the Environment (2000).
15. The Convention on Evaluating the Effect on the Environment in the Trans-Boundary Context (2000).
16. The Convention on the Trans-Boundary Effect Industrial Accidents (2000).
17. The Convention on Protecting and Using Trans-Boundary Waterways and International Lakes (2000).
18. The Convention on Trans-Boundary Air Pollution at Long Distances (2000).

### III. LEGAL DISPUTE PRACTICE IN THE AREA OF ENVIRONMENTAL PROTECTION IN THE REPUBLIC OF KAZAKHTSTAN

A study of cases for damage due to violating environmental protection legislation shows that *the principal grounds for disputes* associated with violating environmental protection legislation are, most of all, enterprises' failure to comply with ecological requirements for business activity, current standards, and technical conditions and environmental quality norms, as a result of which enormous damage is caused to the environment. One of the most important factors is the careless attitude of enterprise directors with regards to following the law.

Violations of legislation to protect the environment are found in:

- Releasing into the atmosphere pollutants without the appropriate permit;
- Dumping industrial waste products without permission;
- Dumping into the environment treated drainage with above normal limits for oil products;
- The unauthorized releasing of substances into the atmosphere, etc.

Grounds for bringing suit against the timber industry are in the main leaving partially cut trees and wood waste products, failure to clean up cut areas, and the illegal use of state forest lands.

A study of court cases shows a noticeable tendency of increases of disputes in the area of environmental protection.

As a rule, violators of legislation are large industrial enterprises, companies which engage in using subsurface resources, commercial organizations, or private entrepreneurs which have the right to carry out some kind of activity.

For example, one of the largest companies made an illegal dump of pollutants into the water with water from melted snow. The cause of this violation was failure to observe the requirements for storing zinc concentrate at an industrial site. An ecological study found that the damage caused by this was 9 227 940 tenge (59 922 USD).

The same company committed illegal dumps of sewage into a river bed of a neighboring river, and not into a vaporizer pond especially created for this. As a result, damage was caused in the amount of 13 164 546 tenge (85 485 USD).

Due to the overflow of a large amount of oil products (diesel fuel), which along with water from melted snow entered a ditch, and then the river Ishim, one of the Republican enterprises caused damaged in the amount of 26 922 000 tenge (174 819 USD).

In another instance, as a result of the unauthorized release into the atmosphere of pollutants by diesel power stations of an electric power company, damage was caused, which was recovered for the state budget in the amount of 3 468 377 tenge (22 522 USD).

The absence of permission acquired following the established procedure for the special use of natural resources was not accepted by the courts as grounds for exemption of the natural resource user from making the appropriate payments.

For example, an enterprise that produced heating energy and hot water appealed to the Supreme Court. The appeal asked the court to reverse a lower court on the levying of 14 426 881 tenge (93 681 USD) fine for dumping without maximum allowed dumping, referring to the fact that, due to the absence of permission from a regional environmental protection administration for dumping, the enterprise was forced to act due to necessity.

According to legislation, in order to obtain authorization documents, it is necessary to submit a program, that has gone through expert study, for standards for maximum allowed dumping of pollutants of own production. The Defendant did not do this, due to which dumping without maximum allowed norms and permission is not allowed. In this regard, the ruling of the lower court for the lawsuit of the regional environmental protection administration against the enterprise to recover 14 426 881 tenge (93 681 USD) was left by the Supreme Court without any changes.

Following the procedure established by legislation, payment for polluting the environment above established limits may be levied in increased amounts.

In this regard, according to the Law "On Environmental Protection," amounts as compensation for damage caused to the environment are levied to funds to protect the environment, while damage caused in destroying fish and other water animals are levied to fishing industry management bodies, and in instances established by legislation - to the legal entity or the individual who suffered the damage.

In determining liability for damage caused by activity that creates increased danger for the environment, courts are guided by civil legislation.

According to the Law "On Environmental Protection", compensation for damage caused as a result of violating environmental protection legislation are to be made either *voluntarily* or by a *court ruling in accordance with the established rates and methods for calculating damage, and if there are no such established rates or methods – on the basis of actual costs to repair the damage done to the environment.*

On the whole, as judicial practice shows us, Kazakhstan courts in considering these types of cases have as a rule made timely and quality rulings on compensating damages due to violating environmental protecting legislation.

## 10. STRENGTHENING ENVIRONMENTAL LAW IN THE STATE OF KUWAIT: COUNTRY REPORT

*Dr. B. Al-Awadhi, Director The Arab Regional Centre for Environmental  
Law, ARCEL*

### I. INTRODUCTION

The State of Kuwait, with a total area of 17,820 km, lies at the head of the Arabian Gulf. It is bordered in the north and northwest by Iraq, in the southwest and west by Saudi Arabia and it overlooks the Gulf to the east. Kuwait has a desert climate characterized by a long, dry hot summer, with temperatures sometimes falling even below four degrees Celsius. The long-term average annual rainfall for the whole country historically was about 176 mm.

The Arabian (Persian) Gulf is 1,000 km by 200-300 km wide, and is oriented northwest – southeast. Very shallow, the average depth is only about 36 m.

The environment of Kuwait suffered the worst oil pollution events in human history. On August 2, 1990 Kuwait was invaded by Iraqi troops. The environmental damage resulting from the invasion and the subsequent liberation war have affected all ecosystems, as well as human health.<sup>91</sup>

Seven hundred and eight oil wells were either sabotaged or set on fire. Approximately two to three million barrels of crude oil, burned and unburned, were emitted daily during the liberation war for 300 days. Overall, 70 million barrels of oil contaminated 49 km of the desert as oil lakes. Around 953 km of the desert was oiled from the fallout of oily particles. The oil contamination of the terrestrial ecosystems reached levels on an unprecedented scale in the history of the planet. The impacts on the environment will take decades to partially disappear and their full effects may never be realized.<sup>92</sup>

The oil contamination of the sea has had less serious impact on the Kuwaiti marine environment, and the natural recovery has improved the situation over time. Currently, the coral reefs appear healthy and the quantity of shrimp harvested each year is similar to the ones recorded before the war. These findings do not identify the more long-term impact of the contamination on marine ecosystems and living species.<sup>93</sup>

Twelve years after the war, the appearance of the environment is much better. The marine resources still have a great potential and are a main contribution to the food supply in Kuwait. The oil production statistics demonstrate that oil production in Kuwait after the war has full recovered.<sup>94</sup>

The survey of the existing Environmental Laws and Regulations in the State of Kuwait indicates that there is evidence that some progress have been achieved during the last decade in the field of environment in general. However, these advances have been inadequate in particular in the area of the enforcement of environmental law by the executing authorities and also due to the reluctance of the judicial system to play a leading role in the interpretation (open versus conservative) of the present laws pertaining to environment and to the judges' capabilities in the field of environmental law.

91 For detail study of the Environmental damages of the Second Gulf War, See, the report prepared by Green Cross International. *An Environmental Assessment of Kuwait. Seven Years after the Gulf War.* Kuwait Foundation for the Advancement of Sciences. (1998).

92 Bertrand Chatter. GREEN CROSS INTERNATIONAL.

93 GREEN CROSS INTERNATIONAL

94 GREEN CROSS INTERNATIONAL, P. 64

## II ON THE NATIONAL LEVEL

Efforts to strengthen environmental law on the national level in Kuwait have been faced with several obstacles before and after the second Gulf war. The followings are the most importance hindrances:

### 1. POLICY OF THE PIECEMEAL ENVIRONMENTAL LAWS

Environmental laws have been dealt with on the basis of issuing selective laws and regulations to cope with certain and particular situations. Although Kuwait was one of the first countries in the Gulf to pass environmental legislation in 1964, the law had only focused on the marine environment. The 1964 law concerning the Prevention of Oil pollution of Navigable Waters which was amended on 1968, 1976 and lately in 1980 by increasing the maximum fine stated in Article (4) imposed on the polluter from 1500 K.D to 40000 K.D.

In 1980, Kuwait issued a new *Decree Law No. 62* regarding Protection of the Environment and the General Policy for the Protection of the Environment. *Law 62* consisted of (13) Articles. Article (2) of the law replaces the Committee of the Environment with Higher Council for the Environment (headed by the Deputy Prime Minister). The Higher Council's duty, among other things, is to be in charge of the submission of the General Policy of the Environment and to propose the *Draft Laws, Regulations* slated for the Protection of the Environment. The Council of the Environment has been entrusted with certain functions to enforce the law and to request the Court pronounce an order extending the sealing of any polluting installation for an interim or permanent period. In 1990 Iraq's illegal aggression caused a severe environmental damage and depletion of natural resources of Kuwait. This unprecedented catastrophe, posed a new burden on the national legal system to establish the legal basis of Iraq's liability for environmental destruction, although Resolution 678 (1991) of the Security Council and other relevant Security Council Resolutions establishes such liability, in addition to the international law of war.<sup>95</sup>

### 2. THE INADEQUACY OF THE ENVIRONMENTAL PUBLIC AUTHORITY (EPA) LAW

The development of national and international environmental principles were essential for the environmental claims and secures Kuwait rights to compensation pertaining to the environmental damages caused by Iraq's unlawful invasion and occupation of Kuwait on 2 of August 1990. The concerned Authorities, following the liberation of Kuwait carried out a very thorough examination of the existing Laws and Regulations. In 1995, a new *Environmental Law* was issued establishing the Environmental Public Authority to replace the *1980 Law* with limited powers: It consists of (21) Articles and considers the general legislation for protection of the environment. The present law contains several short comings, which hinder the application of the law in a very effective manner. In addition, the law deals mainly with the structure of the public authority and its functions more than it deals with the protection of the environment in Kuwait.<sup>96</sup> Other areas of the protection of the environment are governed by laws and Regulations, which have been amended consistently to cop with the scientific and economic developments in the country; for example, the law concerning Protection of the Fisheries Recourses of 1980, *the law of Kuwait Municipality of 1972, Law of Industries of 1965, the law Concerning the Conservation of the Petroleum Resources of 1973.*

95 STATEMENT OF LEGAL JUSTIFICATION IN SUPPORT OF CLAIM FOR DAMAGE TO MARINE AND COASTAL RESOURCES OF THE STATE OF KUWAIT BEFORE THE UNITED NATIONS COMPENSATION COMMISSION. CLEARY, GTTLIEB, STEEN & HAMILTON LAW OFFICES OF DR. BADRIA AL-AWADHI. JANUARY 1997.

96 Articles 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, deals with the structure and the Functions of the EPA and only four Articles concern with the protection of the environment. (10, 11, 12, 13).

Accordingly, Kuwait needs to intensify its efforts to implement the National Strategy for Biodiversity, and to enact new or amend existing environmental legislation. Priority must be given to environmental law research and to the enforcement of the international environmental and regional *conventions*, which becomes part of its national law after the ratification.

### 3. THE DEFICIENCY OF ENVIRONMENTAL JUDGMENTS

The lack of an independent Environmental Court in Kuwait with the power to review how *environmental laws* and *Regulations* have been applied and with a varied jurisdiction including judicial review and civil litigation on environmental matters, has undoubtedly influence the future development and effectiveness of environmental laws. The Environmental Public Authority is seeking views from Ministry of Justice on the issue of the need for a Court of competent jurisdiction to handle complex environmental matters. However, the issue appears to be facing several objections and it is very unlikely that such a proposal will be accepted in the near future.

The question of whether there is a need for an independent Environmental Court to be set out in Kuwait, or a division within the present Courts system has not been settled. It is clear that most of the judgments on environmental cases are not satisfactory, due to the traditional interpretation of the civil & commercial procedures law and reluctance of the Judges to uphold the environmental aspects of the case directly, but only through the evaluation of claims as to whether the administration's decisions are in order and legally correct and in the public interest. Example, in a recent case related to the prevention of terrestrial damage. The Administrative Court entered into the debate regarding the validity of the authority given to the Under Secretary of the Ministry of Trade & Industry to nullify the contracts on the basis of the Decision of the Council of Ministers to terminate certain Projects for Public Interest and Public Health and to prevent the depletion of the natural resources. (Including environmental damages). These decisions by the Administrative Court are in favor of the environment in the long term even the Court based its judgment on the discretionary power of the Administrative Body for the sound reason e.g. protection of the environment of Kuwait.<sup>97</sup>

The traditional approach to deal with environmental cases has been applied in the Civil & Commercial Court when it is confronted with environmental cases related to fish mortality in Kuwait in the summer of 2001. The Court rejected the case on the basis that the claimants did not have direct interest in civil litigation against the Defendants (Government Authorities) as required by *Civil & Commercial Procedures Law* in Kuwait.<sup>98</sup> It is clear from the Judgment that the Judges are not aware of the general interest of the public in conservation of the living resources of their countries. Therefore, they should have, as citizens, the constitutional right to seek from the Judiciary redress or indemnity for the depletion of natural resources due to the negligence of the polluters of the Kuwaiti Bay which caused the mortality of the fishes.<sup>99</sup>

The incapacity of the Judiciary system to deal with environmental damages claims becomes apparent from various judgments rendered by the Central Criminal Court and endorsed by the Appeals Court, after enactment of the *Law of 1964* as amended in 1968, 1976, and 1980. These Decisions provide the best example of how the Kuwait Judiciary addresses environmental pollution arising from the discharge of oil or oily ballast from oil tankers and vessels in the internal waters and territorial sea of the State of Kuwait.

<sup>97</sup> Court of Appeal Administration Division, Cases Numbers 594/1997 & 88/99 of 1998, 2000.

<sup>98</sup> Article (2) of Civil & Commercial Procedures of 1980

<sup>99</sup> Case No.1128 /2001, 29/12/ 2002, Court of First Instants.



From a survey of more than (300 Cases), decided by the Court and upheld by Court of Appeals from, 1965 to 2002, it is clear that the penalties provided under the existing law cannot be considered significant, the maximum fines imposed in general for the violation of the anti-pollution law do not exceed 3000 K.D (10,000 US\$).<sup>100</sup> For example, the Judges do not include restoration of the environment or recovery for permanent damage to the marine environment, in their judgments. Nor do they include the depletion of or damage to natural resources, such as fisheries, that have primarily commercial or economic value. However, it is apparent from the current trend in the judicial system in Kuwait that there is the no proper provision for mechanisms for the enforcement of the principles of strict liability for oil pollution of the marine environment therein. Nonetheless, the criminal responsibility of the polluter in accordance with the 4/1 Of the 1964 law as amended, is based on the presumed liability.<sup>101</sup> The *Anti-Pollution Law of 1964* is under review with others laws by the Preparatory Committee established this year by Public Authority for Environment to Draft a new General Environmental Law for Kuwait.

The fundamental question is whether there is a need for change. What kind of expertise is needed in the Magistrate Courts to make them able to handle environmental cases in Kuwait in future and to cop with recent developments in environmental law?

### III. ON REGIONAL LEVEL

#### 1. KUWAIT CONVENTION OF 1978 & ITS PROTOCOLS

In 1978, Kuwait recognized the importance of the regional approaches in protecting the marine environment. It called the eight countries surrounding Arabian Gulf for a conference within the State of Kuwait. This Regional Conference was under the auspices of UNEP within its Regional Seas Programme. An Action Plan was adopted with a legal component for the Area. The outcome of Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution was the Establishment of the Regional Organisation for the Protection of the Marine Environment (ROPME) and the Development of the Coastal Areas in Kuwait.

Furthermore, Article 111, Para (c) of the *Convention* calls upon the Contracting Parties to develop their national environmental laws.<sup>102</sup> In the followings years four *Regional Protocols* were adopted by the Members of ROPME in accordance with Article XIX of the *Convention* to stengenthen the implementation of the *Convention*. The *First Protocol* was one concerning *Regional Co-operation in Combating Pollution By Oil and Other Harmful Substances in Cases Of Emergency 1978*. The *Second Protocol* dealt with *Pollution Resulting from Exploration and Exploitation of the Bed of the Territorial Sea and its Sub-Soil and the Continental Shelf, 1984*. The *Third Protocol* in on *Combating Pollution from Land-Based Sources, 1989*. The *Fourth Protocol* deals with the *Transportation of Hazardous Wastes, 1995*.<sup>103</sup>

100 The maximum monetary fine in the amendment of the Law in 1976 fixed to 40000 K.D (120,000 US\$). For the summaries of the Cases on Marine Pollution, See, Center for Court Decisions Archives, Kuwait University, [www.kuwaitcourt.com](http://www.kuwaitcourt.com)

101 See, judgments, Case No. 98/69, 1632/68, 117/68 Al-Ahmadi. Court of Appeals .1969. Also Case No. 12/ 84 (1984), Case No. 90/92 (1992). Case No. 99/93 (1993) Appeals Court.

102 The writer service as the Deputy Executive Director and the Legal Consultant to the Regional Organization for the Protection of the Marine Environment (ROPME) in Kuwait. (From 1986 to 1993).

103 For detail study on the Legal framework for the Protection of the Marine Environment in the Gulf Region, See, *Legal Aspects of Maritime Pollution With Particular Reference To The Arabian (Persian) Gulf*. Dr. Badria Al-Awadhi. PH.D Theses, London University / University College. (1975)

## 2. THE ARAB REGIONAL CENTER FOR ENVIRONMENTAL LAW (ARCEL)

Kuwait, like most Arab Countries, still lacks a framework for environmental law. The existing *environmental law of 1995* deals mainly with the environmental management and outlines the functions of the public authorities for the management of the environment in addition to several environmental regulations regarding the conservation of the natural resources. This situation has a crucial impact on the role of the Judiciary in the development of environmental cases as is clear from the very few court rulings on the protection of the environment, the adoption of a conservative interpretation of the concept of direct interest in the environmental claims, and the disregard international environmental conventions even if they have been ratified by Kuwait, with the exception of the cases of the illegal discharge of the oily ballast by the oil tankers in the Territorial and Internal Waters. Therefore, it was essential that the newly established Arab Regional Environmental Law Center, established on 14 November 2001, (ARCEL) in Kuwait, include in its programs certain activities for the Judges. This center of excellence in environmental law is the first center in the Arab Region and was established under the IUCN Commission on Environmental Law's (CEL) programme for the development of regional "centers of excellence" all over world.

Many activities are planned for ARCEL working in collaboration with many other partner organizations. For instance, a symposium for judges from the Arab world on the role of the Judiciary in developing environmental law has been scheduled for October 26-28 2002, in Kuwait. This and other activities that have been lined up by the Centre will provide benefits not only to the Arab region, but also to the whole world.

The Conference on the Role of Judiciary in the Development of the Environmental Law is being convened with a view:

- To outline the importance role of the Judiciary in application of national laws relating to conservation of environment
- To build solid basis for co-operation among judicial bodies in Arab countries for strengthening the role of the Judiciary in conservation of the environment through the application of environmental law at the national level
- To highlight the Kuwaiti Court's approach in responding to the environmental cases on the national level
- To evaluate Kuwaiti Environmental claims before the United Nations Compensation Commission for Environmental Damages.<sup>104</sup>
- To review international practices in establishing specialized environmental law courts to settle environmental disputes from around the world and requirements for its success in the Arab Region.

## IV. CONCLUSION

This paper summarizes the Kuwaiti experience with conservation of the environment through legal instruments on the national and international levels, since Kuwait has ratified or signed, more than (28) international and regional environmental *conventions*. This approach will contribute greatly towards better understanding and appreciation of the importance of the environmental laws.

<sup>104</sup> The United Nations Compensation Commission is a subsidiary organ of the United Nations Security Council. It was established by the Council in 1991 to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait. Compensation is payable to successful claimants from a special fund that receives a percentage of the proceeds from sales of Iraqi oil. (25%). [UNCCWebmaster@uncc.ch](mailto:UNCCWebmaster@uncc.ch)

Furthermore, strengthening environmental law programs in Kuwait is probably the most cost-effective way of achieving support for better management of Kuwait environment. In addition, co-operation between the various responsible authorities involved in the enforcement of the environmental laws and regulations is also essential to unify their policies and to develop more effective national programs for the protection of the environment and to enhance environmental law.

Future strengthening of environmental law in Kuwait and in the Arab countries must take into account the role of the Judiciary from the point view of long-term protection of environment. It seems apparent that this important role has not been fully understood at the present, particularly by judicial systems in Kuwait as we have seen above, and it is the time that the Kuwaiti's judges must take environmental considerations into account when rendering judgments on environmental claims.

**11. STRENGTHENING THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR  
PROMOTING ENVIRONMENTAL MANAGEMENT, LAO PEOPLE'S DEMOCRATIC  
REPUBLIC: COUNTRY REPORT**

*The Hon. Mr. Davone Vangvichith,  
Vice-President of the People's Supreme Court of the Lao PDR*

**I. INTRODUCTION**

The Lao People's Democratic Republic is a land-locked country in Southeast Asia, encompassing about 236,800 square kilometres and sharing its borders with five countries. About 80% of the land area of the Lao PDR is in the Mekong Basin. The capital Vientiane is located near the border with Thailand. The population of the Lao PDR reached 5.4 million, in the year 2002, with an annual growth rate of 2.4%. The average population density is 21 per square kilometre, giving the Lao PDR the lowest population density in Southeast Asia. About 85% of the total population lives in the rural areas. Administratively the country is divided into 16 Provinces, 1 Special Zone and the Vientiane Municipality (Capital District). Those entities consist of 144 districts with a total number 11,564 villages.

In 1989, the government of the Lao PDR began to thoroughly reform the economic mechanisms and the legal system. It established the foundations for the transformation to a market economy and the rule of law. The *Constitution* of the Lao PDR was promulgated on August 15, 1991 which represented a milestone in the law reform process of the Lao PDR. In the course of this development, the government also began to revise its natural resources management policies as a result of its concerns over the sustainability of the country's natural resources. Subsequently, the Lao PDR became party to various international and regional legal instruments and enacted various national laws and decrees with the aim of protecting its natural resources and environment.

**II. INTERNATIONAL LEGAL COMMITMENTS AND OBLIGATIONS OF THE LAO PDR CONCERNING ENVIRONMENTAL MANAGEMENT AND PROTECTION**

*1. UNITED NATIONS CONVENTION ON BIOLOGICAL DIVERSITY, (CBD) 1996*

Lao PDR acceded to this *Convention* on 20 September, 1996. As a signatory to this *Convention*, the Lao PDR has agreed to the following:

- To develop a national strategy for conservation and sustainable use of the nation's biological diversity;
- To develop regulatory provisions for protecting threatened species and populations;
- To integrate conservation and sustainable use of biological resources into national decision-making;
- To conduct an Environment Assessment (EA) of proposed development projects with a view to minimizing harmful effects and
- To take measures for an equitable sharing of the results of research and development in genetic resources.

*2. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE (UNFCCC), 1992*

The Lao PDR acceded to this *Convention* on 5 January, 1995. As a signatory to this *Convention*, the Government agrees to conduct and publish national inventories of the mass balance of greenhouse gas emitted and removed by the nation's sources and sinks.

### 3. UNITED NATIONS CONVENTION TO COMBAT DESERTIFICATION, (CCD) 1994

The Lao PDR has been a signatory since 30 August, 1995 and acceded to the *Convention* on 20 September 1996. Under this *Treaty*, the Government agrees to adopt an integrated approach addressing the physical, biological and socio-economic aspects of desertification.

### 4. CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE, (WHC) 1972

The Government of the Lao PDR ratified this *Convention* on 20 March, 1987. Under this *Convention*, the Government agrees to take the appropriate legal, scientific, technical, administrative and financial measures necessary for identification, protection, conservation, presentation and rehabilitation of designated heritage sites in the Lao PDR.

### 5. THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER, 1987

The Lao PDR accepted accession to this *Protocol* on 21 August, 1998. The Government agrees to reduce emissions of industrial halogen gases by a specific amount by 2005. However, with low industrial capacity, the country is not a major producer of halogen emissions.

## III. REGIONAL LEGAL COMMITMENTS AND OBLIGATIONS OF THE LAO PDR CONCERNING ENVIRONMENTAL MANAGEMENT AND PROTECTION

### 1. AGREEMENT ON THE COOPERATION FOR SUSTAINABLE DEVELOPMENT OF THE MEKONG RIVER BASIN, 1995

Signatories to this *Treaty* agree that transfer of Mekong River and tributary water outside of the Mekong River Basin can occur only by consensus among the four-member country. The parties to the *Treaty* agree to coordinate in water project planning and monitoring of the Basin waters. The *Agreement* was signed on 5 May, 1995.

### 2. ASEAN AGREEMENT ON THE CONSERVATION OF NATURE AND NATURAL RESOURCES, 1985

This comprehensive agreement covers development planning, the sustainable use of species, conservation of genetic diversity, endangered species, forest resources, soil, water, air and processes of environmental degradation and pollution. To this end, the signatories have agreed to promote joint and individual state action for the conservation of the natural resources in the ASEAN region.

## III. THE NATIONAL LEGAL FRAMEWORK CONCERNING ENVIRONMENTAL MANAGEMENT AND PROTECTION

The Lao PDR's *Constitution* (1991) states that "all organizations and citizens must protect the environment and the natural resources: land, underground, forests, fauna, water sources and the atmosphere" (Article 17). Pertaining to environmental protection, this demands that environmental assessment give particular attention to the identification of potentially positive and negative environmental and socio-economic impacts associated with project development and to prevent and/or mitigate harmful impacts.

The *Environmental Protection Law* (1999) is the main piece of environmental legislation relevant to the Lao PDR at the national level. It contains measures for the protection, mitigation and restoration of the environment as well as guidelines for environmental management and monitoring. It specifically aims at protecting the nature, the health of the people, the richness of the country's resources and facilitating the process of sustainable development. According to that *law* the Science

Technology and Environment Agency (STEA) at the Prime Minister's Office has the right to and is responsible for environmental protection in the Lao PDR.

### 1. THE LAWS

The following key laws are also relevant to the natural resource and environmental protection and management in the Lao PDR:

- *Forestry Law (1996)*
- *Water and Water Resources Law (1996)*
- *Land Law (1997)*
- *Electricity Law (1997)*
- *Mining Law (1997)*
- *Road Law (1999)*

Other laws that cite environmental responsibilities include the *Agriculture Law (1998)*, *Industry Law (1999)* and *Urban Development Law (1999)*.

### 2. THE DECREES AND REGULATIONS

Implementation decrees and regulations have been prepared for some of these laws. These are important as they clarify the roles and responsibilities of the relevant implementing agencies.

Significant implementation decrees have been prepared for the following national laws:

- *Land Law (1999)*
- *Forestry Law (1999)*
- *Water and Water Resources Law (2001)*
- *Regulation on Environmental Assessment (2002)*
- *Environmental Protection Law (2002)*

Significant regulations include:

- *Industrial Waste Discharge (1994)*
- *Environmental Assessment in the Lao PDR*
- *Management of the National Biodiversity Conservation Area (NBCA)*

### 3. THE PENAL CODE

The *Penal Code* of the Lao PDR contains in its Chapter VII a series of provisions sanctioning those who violate the above-mentioned regulations of the Lao PDR aiming at the protection of the country's environment. The *Penal Code* is the tool with which the courts in the Lao PDR operate to implement the various international, regional and national regulations on environmental protection. The *Penal Code* therefore directly reflects the willingness of the Lao PDR to enforce its environmental commitments and obligations as set out in its various legal instruments. It is the role of the Judiciary by applying these legal instruments to assist with the protection of the country's nature and natural resources.

The *Penal Code* provides sanctions for forest destruction through illegal logging, setting fire or other means from 3 months to 1 year of imprisonment or fines according to the pertaining forestry regulations. In cases where severe losses of forest areas have occurred, the sanction might be increased to from 1 year to 5 years of imprisonment.

The *Penal Code* penalizes the hunting of animals without complying with the relevant regulations such as hunting protected species, hunting during the closed season or in forbidden areas with imprisonment from 3 months to 2 years, or a fine according to regulations on animal hunting. Illegal fishing or hunting of aquatic animals is also covered by the *Penal Code* and entails sentences from 3 months to 1 year, or fines according to fishing regulations. Bans exist for such practices such as using ordnance, poison or chemicals.

Illegal extraction of natural resources such as metals, minerals, rocks and forestry products is fined with 100.000 kip to 1.000.000 kip in less severe cases. In cases where considerable losses of natural resources occur the punishment ranges from 2 years to 5 years of imprisonment and fines from 500.000 kip to 5.000.000 kip.

It can be said, that cases involving forest destruction are particularly rigorously penalized and made public in the Lao PDR. The role of the courts in this matter is that of a legal custodian, helping to make the environmental protection laws respected within the Lao PDR.

In approving the 5<sup>th</sup> Socio-Economic Development Plan (2001) the government of the Lao PDR has again noted the importance of integrating environmental protection in the implementation of socio-economic development. The courts of the Lao PDR therefore have a clear mandate to continue with their task of assisting with the enforcement of regulations aiming at environmental protection and development for the benefit of the country and its citizens.

## 12. LESOTHO COUNTRY REPORT ON SUSTAINABLE DEVELOPMENT AND THE ROLE OF LAW

*The Hon. Justice S.N. Peete.*

### I. INTRODUCTION

Lesotho is a democratic Kingdom, in the South African subcontinent. It has a relatively small population of just over 2 million inhabitants. As a developing country, its economy is in transition and bold efforts are today necessary to create an environment conducive to sustain its development. We need political stability, good governance, corruption-free climate, and resources. Lesotho has an integral part of the subcontinent and is a long-standing member of the Southern African Development Community (SADC) and *African Union (previously Organization of African Unity [ OAU])*.

Lesotho has recently held its general elections at which the people of Lesotho chose their representatives under a mixed voting system (*Westminister's First Part the Post Model and Proportional Representation System*). In February 2001, Lesotho convened an important National Forum of all political, economic, social and cultural stakeholders to discuss the Lesotho 2020 National Vision, to lay foundations for the overall national development in the next twenty years. There is a general consensus that economic development and social upliftment should receive immediate attention regardless of party political agenda. Our experience has taught us a bitter lesson that petty political wrangling is divisive and achieves nothing but disservice to the national good.

Even though Lesotho attained its independence from the United Kingdom in October 1966, the pace of its economic development has been rather slow and erratic, mainly due to the unstable political climate spanning about thirty years.

On the 24th July 2002, Lesotho proudly launched the 13th UN Human Development Report at the National Convention Centre, in Maseru. The theme being "*Deepening Democracy in a Fragmented World*," the Conference was officially opened by the Prime Minister of Lesotho. Stakeholders from different sectors of the community attended and in their Thematic Groups discussed the important topics of the Report i.e. democracy, human development, good governance etc. "The Report offered a timely opportunity for political and other stakeholders to review dispassionately the challenges to and to agree on a national programme towards a more stable democracy in Lesotho" - *Mirror* -24th -30th July 2002.

A democratic *Constitution* was finally put in place in 1993 and this heralded a new era in Lesotho. Under this *Constitution* modelled along the Westminister model (with a constitutional monarch), separation of powers is guaranteed. The legal system of Lesotho is dual.

In Lesotho today, the most important priorities recognized at the National Vision 2020 are the following:

- (a) political stability;
- (b) economic development (social upliftment);
- (c) a democratic human rights culture under the new constitutional order;
- (d) good governance;
- (e) rule of law -legality;
- (f) a corruption-free environment;



- (g) transparency and accountability in public and private institutions and
- (h) a vibrant civil society.

## II. RECOGNITION OF SUSTAINABLE DEVELOPMENT BY LESOTHO'S COUNTRY REPORT(2001)

The Lesotho's *Country Report on Sustainable Development (2001)* recognizes that:

...political stability and democracy are the prerequisites for sustainable development and that SADC member states, including Lesotho, have in recent years accepted this reality through their commitment towards achieving political stability which in turn provides an enabling environment for sustained economic growth in the subregion...

The Report recognizes that lack of *political discipline* and *tolerance* have been the stumbling blocks that militate against political stability. To enhance virtues towards good governance in Lesotho, the Government in association with affected and interested stakeholders should adopt constructive measures towards nation-building, reconciliation and awareness-raising on principles of democracy at all levels of society. More importantly, security forces of Lesotho are presently undergoing an intensive retraining programme to ensure that they recognize their role in protecting the constitutionality in the country, rather than subverting it. Political stability and good governance everyone is aware, are a sacred and collective responsibility of the entire nation rather than of the Government on its own. The civil society should therefore be actively involved in all nation-building programmes, in order to ensure that these measures towards nation building are successfully implemented.

A dynamic economic development of any country invariably depends upon the political stability and political legitimacy of the incumbent government derived from the popular will of the country's people expressed through fair and free elections, periodically held according to the *Constitution* of the land. The government should fulfill its Executive functions in a *transparent* and *accountable* manner and in accordance with the laws passed by the Parliament.

The pivotal role of the courts of law under the *Constitution* needs no emphasis. It is upon the courts that the sacred judicial power is vested by the *Constitution* of the land. This judicial power involves an impartial determination of rights and duties of persons (the State included) under the law. The protection of the basic human rights is also the constitutional function of the courts of law; and in order to discharge these pivotal functions, the courts must enjoy and be guaranteed *judicial independence* against any undue influence. Section 118 of the Lesotho *Constitution* states as follows:-

1. The judicial power shall be vested in the Courts of Lesotho which shall consist of:-
  - (a) a Court of Appeal;
  - (b) a High Court;
  - (c) Subordinate Courts and Courts-martial;
  - (d) Such tribunals exercising a judicial function as may be established by Parliament;
2. The Courts shall, in the performance of their functions under this *Constitution* or any other law, be independent and free from interference and subject only to this *Constitution* and any other law.
3. The Government shall accord such assistance as the courts may require to enable them to protect their independence, dignity and effectiveness subject to this *Constitution* and any other laws.

The maintenance of democracy, rule of law and good governance depends upon a dynamic and activist Judiciary which applies the law in a purposive manner.

### 1. JUDICIAL ACTIVISM

The judicial activism epoch in the New African dispensation should emphasize the important social role of judges as “engineers” in the general socio-legal development. At times of constitutional crises involving political controversies, or in the implementation of what may seem to be restrictive or oppressive laws, or in purposively interpreting human rights provisions, the critical role of the judge will be determined by his judicial jurisdiction and other conventional restraints thereto. *Judicial activism* in the social context should be balanced with judicial restraint in order to maintain those lofty ideals of judicial independence and impartiality, (see Baxter - *Administrative Law* - (1994) page 337-339).

It is sometimes contended from certain quarters that the judicial independence excludes *accountability* and *societal responsibility*, whereas the latter attributes are essentially the integral part of judicial independence. Indeed, a Judiciary which is unsympathetic to and irresponsive to societal needs, is but a pariah of its nation; it slowly loses the public confidence and trust and soon people resort to self-help. Its authority will therefore be defied and undermined by all and sundry. A Judiciary that is politically manipulated and influenced soon attracts labels like “politically corrupt,” “receiver of bribes,” or plainly as “weak and inefficient.”

A nation should have that honour of taking pride in its Judiciary, because of the strength of the Judiciary its independence its impartiality and its probity. In the Judiciary every citizen and resident must repose the ultimate trust for the due protection of his or her rights under the law. It is incumbent upon the government to do its best to depoliticize judicial appointment processes and to protect the Judiciary if unjustly assailed or tarnished. The government also has a paramount constitutional duty to accord such assistance as the courts may require to enable them to protect their independence dignity and effectiveness. This should come by way of adequate resources (physical and human) and relevant training. It is a regrettable fact that in some of our developing countries the administration of justice ranks very low in the catalogue of national priorities. The Judiciary is often taken as less deserving in the country’s national programmes.

Economic development of any country requires the political stability, rule of law and good governance. It involves investment of various kinds- foreign and local; it entails distribution of resources and protection of vested rights. Under the laws of contract of companies of insurance and other commercial transactions large and small, our various legal systems have a myriad of rights that need the protection of the law; in the modern life these transactions are nowadays performed through electronic gadgets hitherto unknown to most of us. Today, complex frauds and computer/cyber crimes are perpetrated swiftly through nefarious manipulation of computers and other sophisticated methods to spirit away and siphon off huge amounts of cash. Investigation and prosecution and ultimate trial of the modern economic crime is therefore usually an extremely costly affair.

Our countries in the subcontinent today need to demonstrate a genuine political will and commitment to promote constitutionalism, rule of law and good governance for the very sake of our countries’ survival and development. Anti-corruption strategies in the SADC region have successfully recently been put in place in order to combat political, bureaucratic and corporate corruption in the public and private sectors. The modern scourge of corruption has been recognized, as sapping away of the meagre resources and aid intended for social development. Economic criminals thrive and roost in an environment where they know “they can get away with it” and where they also know that: their malpractices are going to be condoned, and they can prevail uninvestigated and unpunished once “the oiling of hands” has been timeously done to the right people!

The courts of law are possibly also targeted by the corruptors and are likely to be corrupted, if they are vulnerable. Vulnerable, they can become if the judicial appointments in the country are politicized and manipulated, or if the Judiciary is weakened and demoralized by inadequate remuneration, or by shaky security of tenure, or by lack of proper training and other essential resources.

In the Africa of the New Millennium, the Executive arm of government in our respective countries must respect and protect the independence of the Judiciary in a practical manner. In the same manner, the Judiciary must in turn be responsible, accountable and indeed be responsive to the national and societal needs and interests. In this regard, a vibrant legal profession, a vigilant media and civil society all can play an important role in bringing to light any malpractices in the public administration. Essential to these strategies are the basic institutional *codes of ethics* for the Executive, Judiciary and the public service that lay down proper standards of probity and integrity in the public affairs.

## 2. ACCESS TO JUSTICE

Justice is a service which a court is bound to administer expeditiously, in accordance with the law and it involves fairness and impartiality. Justice under the *Constitution* and under the laws of the land should never be a "high horse" inaccessible to the ordinary man. Justice is meant for all persons, without any distinction or discrimination. Access to justice has multiple meanings: it means that access to the courts of law for redress should be made cheaper, easier and quicker. It also means that the laws must be made more humane, just and simpler; over-regulation should be adequately reduced in order to facilitate a simpler and freer living. This means that multitudinous rules and regulations should not unnecessarily restrict human activity.

In the Africa, of today *access to justice* also has a practical facet that is the essential judicial services should be decentralized and located nearer the people. Courts of law and other law enforcement entities should be equitably and strategically located not only in urban centers but also in the hinterland, in order to reach out to the common people. As the saying goes: "*services must go to the people*" and not "*people to the services.*"

## 3. ACCESS TO INFORMATION

Under most modern constitutions, the citizen's right to public information is guaranteed. An informed public knows its rights and is unlikely to be ill-governed or exploited. The right to information should be guaranteed and underscored through ensuring adequate Executive/administrative transparency and accountability in the public affairs. The Executive and its administrative institutions should be under a duty to release and provide certain information with or without request. "*Ignorance of the law is no excuse,*" (*Ignorantia juris non excusat*) may be an empty rhetoric where there exists no enforceable right and access to information.

An informed public can legitimately exercise its supreme right to elect a government of its choice, or if necessary, to vote it out of office having accessed all the necessary information.

An ignorant, ill or misinformed populace is prone to be manipulated or exploited into making wrong choices. In this regard, a vigilant media and vibrant civil society can play an important role in bringing to light malpractices and in exposing corruption in the public domain. As we all know, corruption thrives under secrecy and that it flies away once transparency and accountability come to the fore.

Today, we all live in a global village whose problems are often transnational: Disease, poverty, unemployment or crimes are all but maladies common to all mankind. Poverty and unemployment

in one country may overflow as an immigration problem or crime into the neighbouring country. A scourge of corruption and economic crime respects no national frontiers and has international dimensions.

We need to strengthen our fledging economies nationally and regionally, in order to optimize the resources available in the region. A SADC of the future will indeed be an economic rather than a political union; and we also need to strengthen the capacity of the judiciaries nationally and regionally, for the promotion of the development of the rule of law in the subcontinent.

#### 4. COMMERCIAL JUSTICE

*"Commercial justice"* is today an important component to the economic development in which multitudinous stakeholders are important players in the commercial activity. This can achieve its full vibrance once this prevails an environment of legality, rule of law and fairness in the commercial world. In Lesotho, a commercial division of the High Court was brought into place in May, 2002 and is intended to deal expeditiously with commercial cases. The *"fast-track lane"* case management and disposal by the court is likely to augur well towards expediting commercial litigation through the courts of law in the country. The state has the paramount duty to protect every citizen in his or her person and property; the courts of law can only play a meaningful role in protecting these property rights as enshrined in the *Constitution*, if the law enforcement machinery is adequate and effective.

The donor community has recently admonished their Canada Meeting that it is likely to withdraw its aid and other forms of assistance from countries which permit lawlessness, and violations of the human rights and the rule of law. Any undue defiance of lawful court orders and unwarranted attacks upon the judiciaries in some of our countries must never be tolerated nationally or regionally. These should be condemned in no uncertain terms by all the right-minded persons and civil groups in the society.

Mutual judicial cooperation in the subcontinent is necessary especially in civil and other commercial litigation for the securing of evidence, witnesses and for the effective enforcement of court orders. Globalization brings along with it cosmopolitanism with beneficial and positive but also deleterious results e.g. improved international trade markets, immigration issues, international crime, corruption and other nefarious malpractices. Capacity building of the global Judiciary and other law enforcement agencies is therefore essential in order that judges and other officials from many legal systems can discuss common problems and to devise common strategies.

#### 5. JUDICIAL CORRUPTION

*Judicial corruption* also appears to be a paradoxical and perennial global problem, which systematically gnaws away at judicial independence and judicial integrity in our respective countries. It is a problem not restricted or endemic to any specific country or region. Empirical studies have however shown that manifestations of corruption seem to be at their worst and pervasiveness in the developing countries (the so called-countries in transition). It has also been empirically observed that primarily, judicial corruption is sometimes symptomatic of the general and endemic degeneration of public institutions in the various countries of the world.

Judicial corruption must be combated at all fronts and should never be allowed to gain systemic proportions. Bold efforts to strengthen the Judiciary must involve measures to restore public trust. Credibility and accountability without which judicial independence is meaningless. Accountability of the Judiciary can produce trust without compromising the principle of judicial independence. There must be a more explicit recognition that corruption and overall quality of judicial performance are significant problems that need to be addressed urgently in our countries.

Political expediencies must never be allowed to supercede and over-awe legality and constitutionality.

Judicial accountability is a complementary feature of judicial independence and is an essential requirement in a democratic society. The need to promote the accountability of the Judiciary to the public is today recognized as a crucial tool for combating corruption and as a necessary support to the principle of judicial independence. Accountability is also necessary to ensure that the Judiciary does not assume any untrammelled independence, in the sense that the Judiciary becomes too far removed or divorced from general society. In modern times, the civil society everywhere calls for more judicial accountability as matter of wider public interest. Justice is recognized primarily as "*a public affair*." A responsible and investigative media has been identified as an important instrument in the task of promoting judicial accountability to the public, and indeed this can have a positive result of discouraging any abuse of judicial power.

Another form of judicial corruption can manifest itself as indolent submission to political pressure and influence. This may occur in the appointment process whereby judges may feel a sense of obligation to a person or body responsible for their appointment, or when they need to lobby for appointment or promotion to a judicial office. This may increase their vulnerability and potentiality towards corruption. Thus where promotion is solely controlled by the government, the judges may end up becoming dependent on the Executive for their career advancement and they can therefore be exposed an undue to political influence and pressure in the long run. Ultimately, it should be realized by all of us that there can be no effective judicial independence, unless those that are entrusted with the dispensation of justice remain accountable and are seen to be so.

## 6 CIVIL SOCIETY

The civil society is major component of the nation. It consists of the ordinary man on the "omnibus" of non-governmental groupings, media, churches and other private professions and organizations. It emits the public opinion and also reflects the conscience of the populace. It is sometimes described as "the silent majority, inactive if not indolent." It is also affected by political struggles. Forces likes hunger, poverty, unemployment, crime, disease exploitation afflict it the most. It inadequately benefits from the national resources and other basic amenities.

Civil Society is the source of national manpower and constitutes the tax base in any country. The colonial heritage in Africa has left in its aftermath an empathetic populace without motivation and initiative, which exists on subsistence. It lacks creativity; its economic life is often in the hands of a few foreigners who control the destiny and fate of the nation's lifeblood.

We speak to day of affirmative empowerment which can only be realized if the government has a positive political will to put in place institutional structures and resources that create an environment conducive to opportunity and entrepreneurship. Opportunity can be positive if it is sustained with trained and resources.

It is most unfortunate that our countries even in this new Millennium still have communities of "haves and have nots." These imbalances in the long run are conducive to social ills like crime, corruption, hungers and disease. Affirmative action in all spheres of human activity is justified, perhaps on this single ground alone because unless this happens the gap between the "haves" and the "have not" will widen and the latter will forever wallow in quagmire of poverty and desolation. Indeed the proverbial "Social Contract," or partnership between government and the people should come into play. The role of the civil society must be re-activated and through transparency and accountability good governance can come about.

### III. CONCLUSION

In our respective countries, law must actively fulfill its essential role as an "instrument for social change." In the developing world of today, this role is even more important in order to balance competing interests, to protect the society against tyranny, arbitrariness or corruption and to create an environment conducive to political, economic and social development. In this process both the Executive and the Judiciary must enjoy trust and confidence of the general public.

#### 1. PROTECTION OF THE ENVIRONMENT

Protection of the global environment in Africa is one of the three main pillars of sustainable development (besides social development and economic development, due to be discussed at the forthcoming August- September 2002 World Summit on Sustainable Development. To be discussed should be programmes of action on priority areas such as poverty, health, agriculture, food security, desertification, water reserves, energy, pollution and sanitation. The pivotal role of government in pursuing these programmes is of great importance and political will shall need to be demonstrated to ensure action. Action means commitment, allocation and equitable distribution of national resources in order to put in place practical measures to alleviate or eradicate poverty in our countries especially at grass roots level. Involvement of and partnership with the civil society and other non-governmental stakeholders needs no emphasis, without their committed support all effort may prove futile.

Protection of the environment is a pre-requisite for the creation of a better world for everyone living in the country. Economic development without rules or legal infrastructure to protect the environment is doomed to disaster. Pollution of the air and water resources can lead to disease, expropriation of arable land for industry can precipitate scarcity of food supplies, and can lead to the pollution of the environment with catastrophic consequences.

Developing countries however face a serious dilemma of having to engineer economic development on one hand and also to protect their environment on the other. It ultimately becomes a battle and conflict of interests between the state and the multinational corporations. A healthy environment is conducive to a healthy population because an industrial development that creates hazardous pollution and waste is counter-productive, if not fatal and has no future.

Lesotho is a very small country with very little arable land. Soil erosion has taken its toll and has taken much of its precious soil and continues unabated because the country lacks adequate resources to combat the problem. Desertification in the subcontinent is also a serious problem to be reckoned with. In as much as Lesotho has abundance of water in its natural rivers and springs, not much benefit has been derived from this natural commodity.

"Due to its topography and variability of rainfall, Lesotho is extremely vulnerable to climate change which adversely affects agriculture, water resources and health." As early as 1987, Lesotho hosted an International Conference on Environment and Development with the support of the World Bank and African Development Bank and the main theme was how to "provide a framework for incorporating environmental considerations into the nation's economic development and to focus and facilitate the coordination of the nation's environmental endeavours."

In June 1992, at the Rio de Janeiro, Brazil, United Nations Conference on Environment and Development (UNCED), Lesotho reaffirmed its commitment to revitalize its National Environment Action Plan and to establish an administrative mechanism for its execution. At Rio, each country was expected to use *Agenda 21* as a blueprint to define for itself the measures that were needed to achieve sustainable development into the 21st Century.

## 2. ENVIRONMENTAL LEGISLATION

Lesotho has a plethora of *statutes* governing natural resources and protection of specific environmental components. These pieces of legislation some of which are antiquated, are currently being enforced by sectoral agencies like traditional chiefs and civil servants; and the civil society is seldom involved in the structuring of the national environment policy. Harmonization and comprehensiveness of laws is necessary because at present the environment laws focus on few areas like forestry, pastures, soil and water conservation.

Implementation of these laws also presents a problem; these laws it has been observed are also reactive rather than preventive. Civilian involvement through educational programmes in schools, villages and through the media is of pivotal importance in order to remove or change inherited attitudes and practices.

Witzsch and Ambrose 1992 state as follows:-

...Factors that contribute to poor enforcement include poorly trained personnel, inadequate financial resources, weak administrative and organizational structures, institutional conflicts (chiefs vs the central government) scarcity of monitoring equipment and lack of comprehensive and clearly articulated environmental education and public awareness programmes.

Our *Constitution* of 1993 (section 36) provides as follows a component of State Policy:-

...Protection of the Environment

Lesotho shall adopt policies designed to protect and enhance the natural and cultural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure to all citizens a sound and safe environment adequate for their health and well-being.

Even though this declaration merely constitutes a principle of state policy and is not enforceable in a court of law, the *Constitution* of Lesotho further dictates that:

...subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their functions with a view to achieving progressively, by legislation or otherwise, the full realization of these principles.

In Lesotho the *Environment Act* has since been enacted and constitutes a broader basis for institutionalizing the sustainable management of Lesotho's environment and natural resources and is guided by three principal objectives:

...To secure for all Basotho a clean and healthy environment. It is therefore noteworthy that the *Bill* expands on the constitutional mandate, by granting each individual the right to clean and healthy environment, and empowers all persons to take legal action against any activity that may jeopardize their well being. It also obligates a reciprocal duty on citizens to safeguard and enhance their environment.

To establish the institutional structures and administrative mechanisms that would enable government machinery to respond, in a co-ordinated and systematic manner, to prevailing environmental problems and arrest emerging one

To develop a comprehensive codification of legal provisions relating to the protection and sustainable management of ecosystems and natural resources and set-up a cross-sectoral regulatory framework based on a uniform and shared set of decision-making principles...

Underlying the objectives of the Environment Law is a series of guiding principles applicable to cross-sectoral decision-making and objectives. These are:-

- ...1. To assure every person living in Lesotho the fundamental right to a clean and healthy environment;
2. To ensure that sustainable development is achieved through the sound management of the environment;
3. To use and conserve the environment and natural resources of the Basotho Nation for the benefit of both present and future generations, taking into account the rate of population growth and the productivity of availability resources;
4. To maintain stable and functioning relations between the living and non-living parts of the environment through preserving biological diversity and respecting the principle of optimum sustainable yields in the use of natural resources;
5. To reclaim lost ecosystems where possible and reverse the degradation of natural resources;
6. To publish data on environmental quality and natural resources;
7. To encourage participation by the people of Lesotho in the development of policies, plans and processes for the management of the environment;
8. To ensure that waste generation is minimized and safely disposed of;
9. To prevent any interference with the climate and adverse disturbances measures for any unavoidable interference;
10. To take measures to preserve the cultural heritage of the Basotho Nation for the benefit of both present and future generations;
11. To establish adequate environmental protection standards and monitor changes in environmental quality;
12. To require prior environmental impact assessment of proposed projects or activities which are likely to have adverse effects on the environment or natural resources;
13. To ensure that environmental awareness is treated as an integral part of education at all levels;
14. To ensure that the costs of environmental abuse or impairment are borne by the polluter, and
15. To promote co-operation with other governments and relevant national, international and regional organizations and other bodies concerned with the protection of the environment...

By incorporating and promoting sustainable development objectives in a legal context, this Law demonstrates Lesotho's positive response to its environmental predicament. It has been recognized however, that environment legislation by itself does not guarantee a better environment, and that implementation with requisite determination and resources is also necessary.

...Embracing a sustainable development paradigm in political decision-making and economic planning is a long term process, requiring fundamental changes in attitudes and perceptions at all levels of society. Ultimately the determinant factor is the political will to implement the law as well as the effectiveness of monitoring systems and enforcing mechanisms in applying it. Otherwise, the laws will hardly make an impact and runs the risk of existing only on paper...

...The view of planet Earth from outer space as an unbroken biosphere reveals the artificial nature of national borders and exposes the ecological commonalities underlying humanity's collective fate - - Lesotho is not a significant user of ozone-depleting substances or a net producer of green house gases. However, the country remains equally susceptible to the damages of stratospheric ozone destruction and global warming -or even more so, as it lacks the resources and technology to withstand and mitigate major environmental impacts...

From a complex web of *international treaties or protocols*, Lesotho has to harmonise its laws in order to protect its environment for its own sake and of its future generations. Lesotho has ratified some of these *treaties* taking into consideration national and regional priorities and the kind of natural resources at its disposal.

### 3. LESOTHO ENVIRONMENT AUTHORITY (LEA)

As the principal agency for the management of the environment the Lesotho Environment Authority (LEA) is mandated to perform these specific tasks:-

LEA is mandated to undertake a series of specific tasks, of which the most important are the following:



Co-ordinate, monitor and supervise all sectoral activities in the field of environment;

Be responsible for the implementation of the National Environmental Policy;

Ensure the integration of environmental concerns in national planning through co-ordination with all line ministries;

Initiate legislative proposal, standards and guidelines on the Review and approve environmental, impact assessments and environmental impact statements submitted in accordance with the *Environment Act*;

Undertake research, compile and disseminate information about the environment;

Promote public awareness through formal and non-formal education on environmental management issues;

Advise the Government in the process of negotiating, ratifying or acceding to relevant regional and international environmental agreements;

Prepare and issue, every five years, a report on the state of environment in Lesotho; and Investigate reports of pollution and other related matters.

#### IV. CONCLUSION

Protection of the environment in our regional countries, on the continent and indeed the world at large, needs national, regional and international strategies. It needs political-will and commitment; it needs resources, human and fiscal; it needs the necessary and coordinated legal infrastructures and integration into overall socio-economic development. Above all, it needs total involvement of all stakeholders: government, industry and civil society.

Environmental problems, we should recognize, often transcend our national boundaries. We should all acknowledge the fact that we owe it to ourselves and to our future generations to preserve the environment of the planet to be as habitable and productive as possible. We are but a mere generation of the human species and we have absolutely no right to destroy the world environment today because our children and their children and indeed their grandchildren have all the right to live on this planet.

#### V. ADDENDUM

Salient features of the *Lesotho Environment Act No. 15 0/2001* (\*not yet in operation)

1. This *Act of Parliament* provides for the management of the environment and all natural resources in Lesotho. It makes statutory the following principles of environment management.

(1) The Authority shall ensure that the principles of environmental management set out in subsection are observed. (2) are observed.

(2) The principles of environmental management referred to in subsection (1) are as follows:- .

(a) to assure every person living in Lesotho the fundamental right to a clean and healthy environment;

- (b) to ensure that sustainable development is achieved through the sound management of the environment;
- (c) to use and conserve the environment and natural resources of the Basotho Nation for the benefit of both present and future generations, taking into account the rate of population growth and the productivity of available resources;
- (d) to maintain stable and functioning relations between the living and non-living parts of the environment through preserving biological diversity and respecting the principle of optimum sustainable yields in the use of natural resources;
- (e) to reclaim lost ecosystems where possible and reserve the degradation of natural resources;
- (f) to publish data on environmental quality and natural resources;
- (g) to encourage participation by the people of Lesotho in the development of policies, plans and processes for the management of the environment;
- (h) to ensure that waste generation is minimized and safely disposed of;
- (i) to prevent any interference with the climate and adverse disturbances of the atmosphere and take compensatory measures for any unavoidable interference;
- (j) to take measures to preserve the cultural heritage of the Basotho Nation for the benefit of both present and future generations;
- (k) to establish adequate environmental protection standards and monitor changes in environmental quality;
- (l) to require prior environmental impact assessment of proposed projects or activities which are likely to have adverse effects on the environment or natural resources;
- (m) to ensure that environmental awareness is treated as an integral part of education at all levels;
- (n) to ensure that the cost of environmental abuse or impairment are borne by the polluter; and
- (o) to promote co-operation with other governments and relevant national, international and regional organization and other bodies concerned with the protection of the environment.

2. Right to a clean and healthy environment is guaranteed under section 4 (1) which reads:-

4. (1) Every person living in Lesotho-

- (a) has a right to a clean and healthy environment, and
- (b) has a duty to safeguard and enhance the environment including the duty to inform the Authority of all activities and phenomena that may affect the environment significantly.

- (1) Every person may, where the right referred to in subsection
- (2) is threatened as a result of an activity or omission which is likely to cause harm to human health or environment, bring action against the person whose activity or omission is likely to cause harm to human health or the environment.
- (3) The action referred to in subsection (2) may:-

- (a) seek prevention or discontinuance of the activity or omission, which is likely to cause harm to human health or the environment;
- (b) request that the on-going activity be subjected to an environmental audit;
- (c) request that the on-going activity be subjected to an environmental monitoring;
- (d) request that measures to protect the environment or human health be taken by the person whose activity or omission is likely to cause harm to human health or the environment.

- (4) The court shall in exercising its jurisdiction, be guided by the following principles of sustainable development.
- (a) the polluter pays principle;
  - (b) the precautionary principle;
  - (c) the principle of eco-system integrity;
  - (d) the principle of public participation in the development policies, plans and processes for the management of the environment; and
  - (e) the principle of inter-generational and intra- generational equity.

Section 4 (2) therefore vests in any person the right to bring an action against any person whose activity or omission is likely to cause harm to human health or the environment.

3. The Act establishes certain institutions for its enforcement and implementation

- (i) National Environment Council (NEC)
- (ii) Lesotho Environment Authority (LEA)

The NEC is the supreme body for the formulation of environment policy, whilst the LEA is the principal agency for the management of the environment and for the supervision, coordination and monitoring all sectoral activities in the field of environment and indeed is responsible for the implementation of the national environmental policy.

4. Under environmental planning LEA is enjoined to prepare every five years a "National Environmental Action Plan" for cabinet consideration and approval.

5. This *Act* provides that every developer conducting a project scheduled e.g. urban and rural development project, building construction, hotels, roads bridges, dams, aerial spraying, mining, forestry, agricultural projects manufacturing industries waste handling and disposal etc. Shall "prior to commencing, carrying out executing or conducting the same, submit to LEA a project brief stating whether the project as proposed is environment friendly and the nature of the project. The developer is also required to submit periodic environmental impact statement" providing detailed description of proposed project or activity etc. -for which LEA is also empowered to conduct periodic environmental audit of activities of projects likely to have adverse effects on the environment.

6. The LEA is empowered also to establish criteria and procedures for the measurement of

- (a) Water quality -for drinking, industrial, agricultural recreational, fishery purposes.
- (b) Air quality reambient air quality, occupational, emission from various sources, air pollution
- (c) To minimize emission of green house gases

The *Act* penalizes anyone who emits or causes to be emitted a substance which causes air pollution in contravention of emissions standards under the *Act*. [penalty M5,000.00 or 2 years or M100,000.00 or 10 years] section 37 of the *Act*.

- (d) Soil quality -re: disposal of any substance or waste in the soil.
- (e) Standard of Noise -re: minimum standards for noise emission and vibration pollution, and other sub-sonic vibrations.
- (f) Standards for ionization/radiation re-minimization of ionization and radiation in the environment.
- (g) Noxious smells re: minimum standards for determination of noxious smells and their pollutant effects.

7. Pollution Control- The *Act* prohibits discharge of hazardous substances, chemical waste or other material into environment and imposes certain robust sentences.
8. Environmental Disasters are also provided for e.g. from industrial accidents, leakages or other natural disasters water pollution with any poisonous toxic, eco-toxic or obnoxious matter likely to cause harm to human health or aquatic environment is prohibited and robustly punishable.
9. Environmental degradation by soil erosion due to land terrain. Guidelines procedures and measures are put in place to provide for water catchment areas, regulation of pasturing, human settlement, forest.
10. Environmental restoration order: the LEA is also empowered to issue an environmental restoration order requiring a person whose activities have degraded effect on environment or natural resources to restore the environment status quo ante or to prevent him from such degrading activity; or awarding compensation to the victim of the degradation. The Chief Executive of LEA has power to inspect at reasonable time any premises for the purposes of determining whether an activity is harmful to the environment.
11. The LEA may initiate or prepare legislative proposals for considerations by Lesotho for purposes of implementing any international or regional agreements.
12. The Act also establishes the National Environment Fund whose object is to finance protection, enhancement and management of the environment and natural resources in Lesotho.
13. Also established by the *Act* is the Environmental Tribunal chaired by a lawyer (of at least five years experience) and other two persons one of whom holds a degree in environmental law and another who has experience in environmental issues. The Tribunal is an appellate body to decide on appeals by persons aggrieved by decisions of other person or bodies exercising functions under the *Act*.
14. The *Act* creates a multitude of offences e.g. obstructing environment inspectors, failing to submit an environmental impact assessment brief, contravening any environmental standards failing or refusing to comply with an environmental restoration order, corporate liability, forfeiture of equipment causing degradation, cancellation of licences.

The most important supremacy section 123 of the *Act* reads:-

"In the event of any inconsistency between the provisions of this Act and operation of any other law, the provisions of this *Act* shall prevail to the extent of the inconsistency. "

In 2000, a high-powered Land Reform Commission chaired by the Honourable Justice Ramodibedi of the High Court of Lesotho embarked on an intensive exercise to review land use and its resources in Lesotho and in its bulky Report tabled after a nationwide research and visits to Germany, Uganda and Malaysia the Commission made strong recommendations towards land reform in Lesotho so that the land law and optimum land utility could accord with modern objectives and be conducive to positive socio- economic and be human development in Lesotho. It is hoped that the Report's recommendations will be implemented as soon as possible in the new Parliament. Indeed, His Majesty King Letsie III, in his "*Speech from the Throne*," on the occasion of the opening of the First Session of the Sixth Parliament of the Kingdom of Lesotho (12th July, 2002) had this to say:

...My Government seeks to inject efficiency, effectiveness and economy in the use of land. In this regard, a *White Paper* based on the recommendations of the Ramodibedi Commission Report will be tabled. Driven by its commitment to the goal of adequate shelter for all, my Government will accelerate on-going initiatives to provide infrastructural services such as roads, housing water, electricity and telecommunications in existing and new settlements across the length and breadth of the country...

We applaud this Royal statement and hope that its implementation will be environmental friendly! A healthy environment is the source of our food, medicine, energy and our very subsistence.

### 13. NEW ZEALAND POSITION PAPER ON SUSTAINABLE DEVELOPMENT AND THE ROLE OF LAW

*The Hon Justice P. M. Salmon*

In New Zealand, the legislative foundation for the promotion of environmental management is to be found principally in: *the Resource Management Act 1991, the Hazardous Substances and New Organisms Act 1996, the Bio-Security Act 1993, the Conservation Act 1987, the Environment Act 1986 and the Energy Efficiency and Conservation Act 2000*. The subject of marine pollution is addressed in the *Maritime Transport Act 1994*. *The Marine Reserves Act 1971* provides for the creation of marine reserves around New Zealand's extensive coastline.

The *Resource Management Act* consolidated legislation relating to land and water use and to discharges into the air. The *Act* has an important overriding purpose in s.5 which provides:

#### 5 Purpose

- (1) The purpose of this *Act* is to promote the sustainable management of natural and physical resources.
- (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 reasonably 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 of activities on the environment.

The *Act* also contains an identification of matters of national importance in section 6.

#### 6 Matters of national importance

In achieving the purpose of this *Act*, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

- (a) The preservation of the natural character of the coastal environment (including the coastal marine area,) wetlands, lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development;
- (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use and development;
- (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna;
- (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes and rivers, and
- (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

That part of the *Act* incorporates other matters to which particular regard must be had. In s.8 there is a requirement that persons exercising functions and powers under the *Act* must take into account the principles of the *Treaty of Waitangi*. The *Treaty*, which was entered into in 1840, is often described as 'New Zealand's founding document.' It was signed on behalf of the British Crown and on behalf of the indigenous Maori.

The purpose of the *Act* reflects the report of the World Commission on Environment and Development in 1987 (the Brundtland Report). It will be recalled that that Commission defined sustainable development as development which met the needs of the present without compromising the ability of future generations to meet their own needs. The parallel in s.5 is obvious.

It does need to be emphasised however, that the *Resource Management Act* only deals with a small part of the total focus of sustainable development. The Brundtland Commission explained sustainable development as

... a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and the institutional change made consistent with future as well as present needs. ...

It is also important to note that the Brundtland Report and indeed, the *Rio Declaration* are concerned with sustainable development whereas the *Resource Management Act* has as its focus sustainable management. The difference perhaps reflects the management emphasis of the *Act*, which will be referred to later. It is also an acceptance of the much broader approach that is necessary to properly address sustainable development.

*The Hazardous Substances and New Organisms Act* is of particular significance because of its application to genetically modified organisms. A new organism is defined in s.2A as follows:

#### **A Meaning of term "new organism"**

- (1) A new organism is -
  - (a) An organism belonging to a species that was not present in New Zealand immediately before 29 July, 1998;
  - (b) An organism belonging to a species, subspecies, infrasubspecies, variety, strain, or cultivar prescribed as a risk species, where that organism was not present in New Zealand at the time of promulgation of the relevant regulation;
  - (c) An organism for which a containment approval has been given under this *Act*;
  - (d) A genetically modified organism and
  - (e) An organism that belongs to a species, subspecies, infrasubspecies, variety, strain, or cultivar that has been eradicated from New Zealand.
- (2) An organism ceases to be a new organism when an approval has been given in accordance with this *Act* for the importation for release or release from containment of an organism of the same kind as the organism.
- (3) Despite the provisions of this section, an organism present in New Zealand before 29 July, 1998, in contravention of the *Animals Act* 1967 or the *Plants Act* 1970 is a new organism.
- (4) Subsection (3) does not apply to the organism known as rabbit haemorrhagic disease virus, or rabbit calicivirus.

The purpose of the *Act* is to protect the environment, health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms. Section 7 requires a precautionary approach. It requires those exercising functions, powers and duties under the *Act* to take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects. It establishes an Environmental Risk Management Authority (ERMA) which has special responsibilities in relation to hazardous substances and new organisms.

The *Bio-Security Act 1993* is a more general provision directed at excluding, eradicating and effectively managing pests and unwanted organisms. It contains extensive provisions relating to the inspection of ships and aircraft arriving in New Zealand and of goods imported to this country and it provides for the preparation of national and regional pest management strategies.

The *Conservation Act 1987* establishes a Department of Conservation, the role of which is to promote the conservation of New Zealand's natural and historic resources.

The *Environment Act 1986* provides for the establishment of the office of a Parliamentary Commissioner for the Environment and the establishment of the Ministry for the Environment. The purpose of the *Act* is to ensure that in the management of natural and physical resources full and balanced account is taken of:-

1. The intrinsic values of eco-systems; and
2. All values which are placed by individuals and groups on the quality of the environment; and
3. The principles of the *Treaty of Waitangi*; and
4. The sustainability of natural and physical resources; and
5. The needs of future generations.

The *Energy Efficiency and Conservation Act 2000* has as its purpose to promote in New Zealand energy efficiency, energy conservation and the use of renewable sources of energy. It provides for the setting up of an Energy Efficiency and Conservation Authority and for the preparation of strategies related to the purpose of the *Act*.

The *Maritime Transport Act* contains provisions relating to the protection of the marine environment from oil spills and from pollution from ships. It also contains provisions relating to the protection of that environment from harmful substances, from hazardous ships, structures and off-shore operations and from dumping, incineration and storing of wastes.

One of the special features of the *Resource Management Act* is that it sets up an independent Environment Court to hear appeals and applications in relation to proposals under the *Act*. The matters which come before the Court, relate to the use of land, water and air. The Court consists of District Court Judges as Chairmen and lay members chosen for their knowledge and experience in matters coming before the Court. Over the years the Court and its predecessors have developed a high reputation for independence and quality of judgment. There is a right of appeal on questions of law from that Court to the High Court and a further right of appeal from the High Court to the Court of Appeal.

Most applications concerning resource use are made to and considered first by an elected Local Government Authority - either a District Council or a Regional Council. Those Councils too have responsibility for the preparation of plans containing policies and rules for the use of land, water and air resources. There is a right of general appeal from decisions of those Authorities to the Environment Court. An important feature of the *Act* and its procedures is the extensive provision made for public participation in resource management decisions.

One of the first steps taken under the *Resource Management Act* was to prepare a national coastal plan to provide guidelines for the use of the coastal resource. The policies set have been very valuable in helping direct and control development of New Zealand's coastline. Understandably, given the value of that resource, issues concerning the use of coastal land come before the Environment Court on numerous occasions and some have come to the High Court and the Court of Appeal.

Matters affecting resource management may also come to the High Court as a result of applications for judicial review. In that way Government decisions at all levels may be reviewed by the High Court. The right of review relates essentially to procedural matters, but this includes a review of the exercise of discretion. In environmental cases the exercise of discretion requires the decision-maker to be sufficiently informed prior to making the decision.

The *Resource Management Act* contains provisions relating to the enforcement of environmental requirements including penal provisions.

As might be expected the broad ambit of s.5 and the matters of national interest and other matters which must be taken into account, have led to comment from the Courts. In *New Zealand Rail Ltd v Marlborough District Council* (1994) NZRMA 70 the High Court observed that this part of the *Act* expresses in ordinary words of wide meaning the overall purpose and principles of the *Act*. It is not a part of the *Act* which should be subjected to strict rules and principles of statutory construction which aim to extract a precise and unique meaning from the words used. There is a deliberate openness about the language, its meanings and connotations, which is intended to allow the application of policy in a general and broad way.

More recently in *McGuire and Makea v Hastings District Council and Maori Land Court of New Zealand* (a decision of the Judicial Committee of the Privy Council given on 1 November, 2001), observations of significance were made by Lord Cook of Thorndon, formerly President of the New Zealand Court of Appeal. He said:

...Section 5(1) of the *RMA* declares that the purpose of the *Act* is to promote the sustainable management of natural and physical resources. But this does not mean that the *Act* is concerned only with economic considerations. Far from that, it contains many provisions about the protection of the environment, social and cultural well-being, heritage sites, and similar matters. The *Act* has a single broad purpose. Nonetheless in achieving it all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues...

The last comment was important in the context of that case. As the above judgment illustrates not all matters coming before the Environment Court concern conventional uses of land.

It has been necessary for the Courts on a number of occasions to determine the extent to which Maori culture and spiritual values should be recognised in Resource Management issues. As long ago as 1987, it was recognised that the effect of a proposal on the relationship of Maori with ancestral lands must be considered. (*see Royal Forest and Bird Protection Society v Hapgood* (1987) 12 NZTPA 76). It has been held that it is recognised good practice for applicants to consult where proposals may affect matters of Maori interest and concern. Indeed, the protection of indigenous interests is a feature of New Zealand's environmental legislation. I have already noted that the special relationship of Maori with the land is provided for in the *RMA* and that *Act* also recognises their role as *kaitiaki* or guardian. Similar provision is made in other resource-related legislation.

In the decision of *Kaimanawa Wild Horse Preservation Society Inc v Attorney-General* [1997] NZRMA 356, which involved a challenge to the proposed culling of wild horses in the Kaimanawa Ranges, the Environment Court held that the culling mustering and sale of horses was an activity within the meaning of the *Act* and that the imposition of a duty to avoid adverse effects on the environment arising from that activity would give effect to the purpose of the *Act*.

There have been a number of cases concerning the construction of cell phone towers and the radio frequency radiation emitted from them. In *Shirley Primary School v Telecom Mobile Communications* [1999] NZRMA 66 the Court held that the purpose of the *Act* was preventive, precautionary and proactive, and that purpose meant that in every appeal there was only one ultimate question to be answered, "Will the purpose of the *Act* be fulfilled?"



Similar issues can also come before the High Court in its general jurisdiction. For example, in *Varnier v Vector Energy Ltd* (an unreported decision) the Defendants sought summary judgment on the grounds that none of the causes of action in the Plaintiff's statement of claim could succeed. The proceedings alleged that electricity transmission lines emitted electromagnetic fields in excess of acceptable levels and that as a consequence the first Plaintiff's property could not be occupied for the purposes of residential accommodation. It was alleged that the occupants' health suffered and that electronic equipment within the house was interfered with. Relief was claimed under the heads of nuisance, trespass, negligence and the principle enunciated in *Rylands v Fletcher*. The Court held that it was not appropriate to grant summary judgment, and that there were arguable claims which should go to trial.

Genetic modification is the subject of intense political debate in New Zealand. It was a major issue in the recent New Zealand Parliamentary Election. In 2000 a Royal Commission was established to inquire into and report upon the following matters:

1. The strategic options available to enable New Zealand to address now and in the future, genetic modification, genetically modified organisms and products; and
2. Any changes considered desirable to the current legislative regulatory policy or institutional arrangements for addressing in New Zealand, genetic modification, genetically modified organisms and products.

The Commission was chaired by Sir Thomas Eichelbaum, a former Chief Justice and had as members a medical practitioner, a scientist and a Bishop of the Anglican Church.

The Commission heard extensive submissions and evidence. Its major conclusion was that New Zealand should keep its options open and should proceed carefully, minimising and managing risks. At the same time continuation of the development of conventional farming, organics and integrated pest management should be facilitated. Amendments were recommended to the *Hazardous Substances and New Organisms Act* and it was recommended that there be established a Parliamentary Commissioner on BioTechnology modelled on the successful precedent in New Zealand of the Parliamentary Commissioner for the Environment. An appropriate appointment to that position has now been made.

The Commission noted that debate on genetic modification issues in New Zealand was made unique by the partnership between Tangata Whenua (the indigenous people) and Tangata Tiriti (the rest of the population) created by the *Treaty of Waitangi*. The values held by Maori add special emphasis to the ethical and cultural objections many people have to the new technology.

Matters relating to genetic modification have so far come before the Court on only one occasion. In *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, the High Court was required to consider appeals against the approval by the Environmental Risk Management Authority of an application by the New Zealand Pastoral Agriculture Research Institute Ltd to field test a new organism. The Authority granted approval. The High Court held that there was a material error of law in the failure of the Authority to state the criteria of the methodology on which it relied in coming to its decision. On that ground the decision was set aside. The Court held that the proper emphasis of the precautionary approach under s.7 of the *HSNO Act* imposed an obligation to take into account the need for caution in managing adverse effects where there was scientific and technical uncertainty about those effects.

## 14. RECENT DEVELOPMENTS IN NIGERIA STRENGTHENING LEGAL AND INSTITUTIONAL FRAMEWORKS FOR PROMOTING ENVIRONMENTAL MANAGEMENT

*The Hon. M.L. Uwais, GCON, Chief Justice of Nigeria, Supreme Court of Nigeria*

### I. INTRODUCTION

Until the development of the National Policy on the Environment in 1989, Nigeria had no defined nor clearly articulated national policy goals for the nation's environment.

In September, 1988, the Federal Ministry of Works and Housing and the United Nations Environment Programme (UNEP) organized the International Workshop on the Goals and Guidelines of the National Environmental Policy for Nigeria. This marked the first major step taken by a committed administration to readjust the nation's relationship with the environment based on the principle of sustainable development and proper management of the environment and its resources.

The goals and strategies developed by the workshop were streamlined to meet the particular needs of the Nigerian environment in key areas such as - land use and soil conservation, water resources management, forestry, wildlife and protected natural areas, marine and coastal areas and resources, toxic and hazardous substances, occupational health and safety, energy production and use, mining and exploitation of mineral resources, agricultural chemicals and pesticides, guidelines for public participation, and legal and institutional arrangements for environmental protection. Ideas and principals espoused by major international efforts and reports also had significant influence on the proposed goals and guidelines.

The workshop came up with proposed goals and guidelines providing for a new and firm foundation for developing policies, laws and institutions for environmental protection and improvement which the Federal Government of Nigeria adopted and formally made public in November, 1989. The occasion coincided with the inauguration of the National Council on the Environment and the laying of the foundation stone of the National Headquarters of the Federal Environmental Protection Agency, in Abuja. The then President of the Federal Republic of Nigeria, General Ibrahim Babangida said that these events represent:-

...the consummation of our desire not only to protect our environment as a clean and healthy place for all of us to live in, but more importantly, to preserve it as a worthy legacy to bequeath to our unborn generations....

### II. NIGERIA'S ENVIRONMENTAL LAWS

Nigeria is a federation consisting of 36 States. The Federal and State legislative powers are contained in the *Constitution* of the Federal Republic of Nigeria, 1999 under the Exclusive Legislative List and the Concurrent Legislative List, respectively. While the Exclusive Legislative List applies exclusively to the Federal Government, the concurrent Legislative List is shared concurrently by the Federal and state Governments. Both the Exclusive and Concurrent Lists do not contain a specific item on protection of environment. There are however items which are akin to environment under both Lists which can give rise to legislation.

Nigeria was ruled for many years by the military. During that period the Federal Military Governments legislated by issuing *Decrees* while the States Military Governments legislated by issuing *Edicts*. The Federal Military Government had the power to legislate on any subject and once it did so, the *Decree* had the effect of covering the field. The *Decree* could not be challenged in court and it superseded any *Edict* promulgated by a State Military Government. In fact such an *Edict* was deemed to null and void.

It was under this arrangement that most of Nigeria's legislation on environment were promulgated. The most significant of which are the *Land Use Act, Cap. 202, the Federal Environment Protection Act, Cap. 131 and the Nigerian Urban and Regional Planning Decree, 1992*. These legislation now earn their validity as "existing laws" by the provisions of section 315 (1) of the *Constitution of the Federal Republic of Nigeria, 199* which reads:-

...315 (1) Subject to the provisions of this *Constitution*, an existing law shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of this *Constitution*...

### III. TRENDS IN NIGERIAN ENVIRONMENTAL LITIGATION

Prior to the promulgation of the *Federal Environmental Protection Act*, on 30<sup>th</sup> December, 1988, environmental legislation was a patchwork of *statutes* dispersed and tucked into a welter of specific legislation on particular subjects. Apart from public health and sanitation matters, which were the domain of public law, the rights and duties developed over many centuries and crystallizing in the law of tort, had been well established and formed the basis of which legal rights and duties of individual and corporate citizens rested in the area of injury to the property and person. In addition to these common law rights and duties, laws have been enacted to codify the statutory duties of all persons subject to law in relation to others. Using these laws, the courts were able to award compensation for certain types of environmental damage, as well as pronounce injunctive remedies to arrest the damage in appropriate cases.

In this setting, environmental law as a separate body of laws did not actually exist. The situation was succinctly put by Burnett Hall in his work - "Environmental Law" 1<sup>st</sup> Edition, 1995.

...The environmental law of the 19<sup>th</sup> century, both common law and legislation, was motivated not by the desire to protect and conserve the environment in the sense of the 20<sup>th</sup> century's "green movement," but rather emerged (out of necessity) to temper the insanitary living conditions of a rapidly urbanizing nation facing crisis...

Since the frame-work law in Nigeria is very young environmental litigation, in the context of "green movement" is at its infancy. It may even be said that apart from the environmental agencies the rest of the machinery needed to deliver "environmental justice" in the new context have yet to be created, in both human and material dimensions.

### IV. ADJUDICATORY CAPACITY

The ability of the courts to deal with environmental damage or prevention of damage is crucial. Perhaps the greatest deterrent to prosecution of environmental damage in Nigeria today, is scepticism with which prosecutors are likely to approach the courts having regard to what is known of the judicial posture. The scientific basis of environmental proof, requires that judges must be willing to assimilate and understand the evidence before them. Judges are thereafter, to apply "new" principles such as sustainable development and other germane environmental considerations to issues, in a way that goes beyond an unflinching devotion to the principles of the law of nuisance, negligence and trespass.

Until recently, it was not so clear whether our courts were ready for adventure in the areas into which environmental litigation is bound to take them. The decision in question is in respect of the case of *Shell Petroleum Development Company Ltd v Councillor F.B. Farah and 7 Ors*, (1995) 3 N.W.L.R. (Part 382) 148, where the company was engaged in oil procession, production and export. In 1970, there was an oil blow out from an oil well, which lasted for several weeks before it was brought under control. There was extensive damage to the land used by the Plaintiffs for farming and crude oil and other substances were deposited on their adjoining land, which they used for

farming and hunting. The Shell company accepted responsibility and paid to the Plaintiffs compensation for the crops and economic tress destroyed by the blow out but paid no compensation for the damage to the land. The area of the land impacted was over 13 hectares in size. The company undertook to rehabilitate the land by taking it over and later handing it back to the Plaintiffs. The company commissioned a team of experts for the exercise. The Plaintiffs sent a letter to the company as a result of which the company denied liability on the basis that the affected land had been returned to the Plaintiffs and that compensation of the sum of \$22,000 (twenty two thousand pounds sterling) had been paid to each individual Plaintiff. The company's case was that it discharged its obligation since it rehabilitated the land and paid compensation. It also set up the defence that since the blow out took place in 1970 and the rehabilitation exercise was concluded in 1975, the action which commenced by the Plaintiffs in May, 1989 that was 14 years after, was statute barred. At the trial of the case it was agreed by the parties that the trial High Court should appoint experts as referees to confirm if the land in dispute had been sufficiently rehabilitated. The Plaintiffs and the company were each to nominate an expert. This was done and the report was submitted by the expert's. By change of counsel, the new counsel of the company applied to the Court to set aside the experts' report, the trial court refused to do so. The trial judge found in favour of the Plaintiffs and awarded substantial damages under various heads amounting to \$4,621,307.00 (approximately 2.3 million pound sterling). The company appealed the judgement, but lost in the Court of Appeal.

## V. PRIVATE LITIGATION

Private action in environment matters is a subject deserving of an in-depth consideration. It is a double-headed specie of action and is one of the tools in which environmental law relies, for its development for a number of reasons. The two heads of private litigation are:

- (1) Actions relating to injury to private property and other personal rights and
- (2) Public interest litigation or "citizen standing."

With regard to issues involving the violation of private right, especially in land and water right, there has been no shortage of cases in Nigeria seeking declaration, compensation, restitution, injunction and other remedies within our legal system. These types of actions do very little in exposing or expanding the global issues of environment, even where opportunities to do so exist.

There is paucity of public interest litigation in Nigeria. A number of factors account for this. Some of them are because the greater proportion of the citizenry is oblivious of the environmental damage surrounding them especially when the damage is caused by "intangible" process. The cost implications of legal action including the cost of procuring technical evidence and the remoteness of institutions for redress deter even those who are aware of damage. Environmental damage palliatives which now exist and the belief that actions instituted against polluting facilities, in which government has an interest, is perceived as an action against Government itself. It is a combination of these factors that account for the paucity of public interest litigation.

## VI. FUTURE OF ENVIRONMENTAL LITIGATION

With the ever increasing levels of environmental awareness, not only of special interest groups, but also of the citizenry in general coupled with the rising profile and activity of the Federal and State environmental agencies, environmental litigation is bound to rise. The increase will be accounted for the instrumentality of command and control methods inherent in power of the State, the populism and altruism of special interest groups and the sharpened attitude of communities and individuals for compensation and remediation.

## VII. CONCLUSION

There is no doubt that the legal profession will eventually have its role in our courts, thus affording environmental litigation the opportunity to galvanize the old doctrines of law with the "new" issues, principles and applications of modern environmental law, all within the context of sustainable development.

## 15. LEGAL AND INSTITUTIONAL FRAMEWORK FOR THE PROTECTION OF ENVIRONMENT IN PAKISTAN

*The Hon. Justice Sh. Riaz Ahmad, Chief Justice of Pakistan*

### I. INTRODUCTION

Mankind, all flora and fauna are dependent for their survival on a perfect ecological balance of nature. The growth of economic power and unbalanced industrial expansion has exerted unbearable pressure on the limited natural resources, thereby causing the depletion of such precious resources and depriving future generations of their right to development. Further, such developmental activities result in environmental pollution thereby affecting mankind's most crucial fundamental right that is, right to life. Inherent in the depletion of natural resources and environmental degradation is the clear and present danger of threat to the survival of life on the planet earth. It is therefore desirable that mankind may exploit and enjoy the natural resources and carry out development work in a balanced manner with a view to getting optimal benefits and without having to compromise the future of succeeding generations.

The effects of not only mankind's continued and persistent interference with nature, but also mankind's development of science and technological innovations has caused the environmental imbalance an degradation to reach alarming proportions resulting in air, water and soil pollution, desertification, deforestation, and soil erosion.

Development and progress are desirable, but must be in harmony with the requirement of maintaining a proper ecological balance of nature. Natural resources are the bounty of nature and should be utilized in a gainful and un wasteful manner. Nearly one and half century ago, in response to an offer to sell his land to a White man, a wise Indian Chief stated:

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

This we know, the earth does not belong to a man; man belongs to the earth. This we know, all things are connected like the blood which unites one family. All things are connected. Whatever befalls the earth befalls the sons of the earth. Man did not weave the web of life; he is merely strand in it. Whatever he does to the web he does to himself....

This is indeed a profound statement and epitomizes the whole philosophy of the ecological balance of nature.

### II. INTERNATIONAL LAW

The ever-increasing problem of environmental pollution and degradation of the environment attracted the attention of international community and voices were raised calling for international efforts to respond to the emerging threat. The international community must be commended for the timely action. It succeeded in convening the United Nations Conference on Human Environment in Stockholm, in 1972, to deliberate upon the issues and problems of the environment. The participating states agreed upon collaboration and co-operation in preparing and launching an action plan to prevent the environmental degradation and preserve the nature. The *Declaration* issued by the Conference was indeed a laudable achievement of mankind. The *Declaration* states, inter alia, "man has the fundamental right to freedom, equality and condition of life and bear a solemn responsibility to protect and improve the environment." The Conference further emphasized individual and collective efforts to preserve the environment.

The Government of Pakistan has actively pursued the cause of Environmental Protection. It has been party to several *International Declarations, Agreements and conventions* on the subject. It signed and ratified the *U. N. Framework Convention on Climate Change*. It has also ratified the *Convention on Biological Diversity*. It participated in the 1992 Conference at Rio-de-Janeiro and played an effective role in preparing and finalizing the guidelines for adoption by the member states. Pakistan has also created structures and enacted rules for the implementation of various international environmental agreements such as: *International Plant Protection Convention, Rome, 1951; Convention Concerning the Protection of World Cultural and Natural Heritage (World Heritage Convention), Paris, 1972; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington, 1973; Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 1979; Vienna Convention for the Protection of the Ozone Layer, Vienna, 1985* and many others.

### III. DOMESTIC LEGISLATION

The *Constitution* of Pakistan contains provisions for Environmental Protection and Resource conservation. The *Constitution* mentions "Environmental Pollution and Ecology" as a subject in the *Concurrent Legislative List*, meaning that both the Federal and Provincial Governments may initiate and make legislation for the purpose.

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

Additionally, the Pakistan *Penal Code* 1861, which is a general criminal law and applies all over the country, contains specific provisions on the subject. Thus, it prohibits mischief by killing or maiming animals, or damaging works of irrigation or a river, a road, a bridge, or drainage or firing explosive substances with intent to cause damage. The *code* also prohibits public nuisance by acting negligently to spread the infection of disease disobeying quarantine rule, causing adulteration of food drink or drug, fouling water or making the atmosphere noxious to health, etc. The promulgation of the *Environmental Protection Ordinance 1983* was the first codifying legislation on the issue of Environmental Protection. This was indeed a consolidated enactment that plugged the gaps and removed the defects/deficiencies in the legislation.

#### 1.1 THE PAKISTAN ENVIRONMENTAL PROTECTION ACT 1997

Later, the Government passed and promulgated the *Pakistan Environmental Protection Act 1997*. The *Act* is fairly comprehensive, providing for the protection, conservation, rehabilitation and improvement of the environment. It contains concrete action plans and programmes for the prevention of pollution and preservation of clean and healthy environment. The salient features of the law are as follows:

##### 1. Salient Features

- (1) The *Act* covers the air, water, soil, marine and noise pollution including pollution caused by vehicles.
- (2) The *Act* provides for fixing the National Environment Quality Standards (NEQS) and their strict enforcement. For default, the Government has been empowered to levy a pollution charge.

- (3) The Government has been empowered to issue environmental protection orders so as to deal effectively with and respond to the actual or potential violation of the law leading to environmental degradation.
- (4) The law provides for an Environmental Impact Assessment (EIA) of various projects being launched in the country including the construction of roads, buildings, factories or other installations, any alterations, expansion or repair of the same, mineral prospecting mining or quarrying, etc. The law states that no project may be launched without an EIA being carried out and safeguards provided to the effect that the proposed project will not pollute the environment.
- (5) The importation of hazardous waste into the country has been banned and the transport of hazardous substances dangerous chemicals, toxic material or explosive substances etc. has been regulated, through licenses, under prescribed rules and procedure.
- (6) To ensure compliance with the NEQS, the law provides for an appropriate mechanism that include the installation of devices so as to control the pollution caused by motor vehicles.
- (7) A fairly high level body called Pakistan Environmental Protection Council, headed by the Prime Minister and comprising the Chief Ministers of the provinces, relevant Ministers of the Federal and provincial governments, representative of trade, commerce and industry and members of the academia, has been constituted to formulate policy and provide guidelines for enforcing the law.
- (8) For the effective implementation of the provisions of the law, the Pakistan Environmental Protection Agency, headed by a Director General with other staff has been constituted. This Agency is responsible for enforcing the policy and implementing the provisions of the law along the the law the same lines, Provincial Environmental Protection Agencies have been created in each province.
- (9) The Provincial Sustainable Development Fund has been established and is regulated and managed by a Board.
- (10) The Environmental Tribunals with exclusive jurisdiction to try serious offences have been provided. The law also provides for the appointment of Magistrates to try minor offences. Appeal against an order/judgment of Magistrate lies before the Court of Session, whose decision is final. Appeal against the judgment of Tribunal lies to the High Court. Stringent punishment through heavy fine and imprisonment have been prescribed.
- (11) The *Act* also empowers the Federal Government to make rules for the implementation of international environmental agreements and conventions to which Pakistan is a party.

## 2. Application of Law

The *Pakistan Environmental Protection Act 1997* has been duly operationalized. The requisite rules and regulations have been enacted including, *National Environmental Quality Standards (Self-monitoring and Reporting by Industries) Rules, 2000; Environmental Samples Rules, 2001; Provincial Sustainable Development Fund Board (Procedure) Rules, 2001; Pollution Charge for Industry (Calculation and Collection) Rules 2001; National Environmental Quality Standards (Environmental Laboratories Certification) Regulations 2000; Pakistan Environmental Protection Agency (Review of Capital IEE/EIA) Regulations 2000; Provincial Sustainable Development Fund (Utilization) Rules 2002; Composition of Offences and Payment of Administrative Penalty Rules 2002 and Hazardous Substances Rules, 2002.*

The Federal Government has established two Environmental Tribunals, each in Karachi and Lahore. The Karachi Tribunal has jurisdiction over the provinces of Sindh and Balochistan while the Lahore Tribunal covers the provinces of the Punjab and the NWFP. The High Courts have designated Senior Civil Judges as Environmental Magistrates to take all contraventions punishable, in respect of handling of hazardous substances and pollution caused by motor vehicles.

*Environmental Laboratory Certificate Regulation 2000* has been notified whereby a network of ethnically sound laboratories is being established throughout the country. The certified laboratories



will be authorized to test environmental samples and assist the public and private sector to get their levels of emissions tested.

### 3. Role of Judiciary

The Judiciary of Pakistan is alive to the situation and has extended a helping hand to the State in achieving the goals of the environmental law. The superior Judiciary and in particular, the Supreme Court of Pakistan, has played a positive and constructive role in preventing the degradation of the environment and preserving a sustainable ecological balance of nature. Several judgments have been rendered in cases relating to the prohibition of environmental degradation and the maintenance of a clean and pure environment. The Supreme Court of Pakistan also resorted to the exercise of extraordinary jurisdiction under Article 184(3) of the *Constitution* by entertaining petitions pertaining to maintaining a clean environment, this being an issue of great public importance. In the case of *Shehla Zia vs Wapda (PLD 1994 SC 693)* some citizens of Islamabad forwarded a petition to the Supreme Court of Pakistan, complaining about the construction of a grid station in their locality. The Court formulated two questions for resolution: First, whether any government agency has a right to endanger the life of citizens by its actions without the consent of such citizens, and second, whether zoning laws vest rights in citizens, which could not be withdrawn or altered without citizen consent? The petitioners relied on Article 9 of the *Constitution*, which guarantees right to life, liberty and security of person. While interpreting this Article, the Court observed that the word 'life' is very significant as it covers all aspects of human existence. Even though life has not been defined in the *Constitution*, it does not mean that it can be restricted only to vegetative or animal life or mere existence from conception to death, the Court added. It went on to state that life includes all such amenities and facilities, which a person born in a free country is entitled to enjoy legally and constitutionally. The Court therefore concluded that a person is entitled to protection of law from being exposed to hazard of electrical magnetic fields or in such hazards which may be due to installation of any grid station, in factory, power station or such like installations. In reaching this conclusion, the Court referred to two international declarations namely *the Declaration of UN Conference on Human Environment at Stockholm 1972* and *the Rio Declaration, 1992*. It expressed the view that an international instrument, even if it has not been ratified by the State, is of persuasive value and will be given due importance and weight. The Court added that the issue of environmental protection transcends national frontiers and requires cooperation of nations.

In another case (PLD 1998 SC 102) the Supreme Court took *suo moto* notice of a news report to the effect that certain businessmen were purchasing land in the coastal area of Baluchistan for use of dumping hazardous nuclear and industrial waste. The Court asked for a report on the matter from the Provincial Government. It turned out that there was no substance in the report. The Court nevertheless issued *directions* to the Government that no person shall be allotted land for dumping nuclear or industrial waste. The Court directed that the Government should submit a list of persons to whom land in the coastal area of Baluchistan has already been allotted. It further directed that a condition must be inserted in the agreement of allotment to the effect that the land should not be used for the dumping of nuclear or industrial waste. Furthermore, a similar undertaking was to be obtained from the allottee of the land in the coastal area, the Court concluded.

In another *Human Rights case* (1996 SCMR 543) the Supreme Court directed the Provincial Government of Sindh to take effective measures with regard to eliminating the pollution caused by the smoke emitting vehicles. The Court ordered that all vehicles, whether privately owned or owned by government departments, should be regularly inspected and checked. The Court further asked for emergency checks to be carried for the purpose by the concerned officials. The Court directed that motorcycles and auto-rickshaws must not be allowed to ply without silencers and that the use of pressure horns and multi-tones horns, must be prohibited.

In the case, *General Secretary, W. P. Salt Mines Labour Union vs Director, Industries and Mineral Development, Government of the Punjab* (1994 SCMR 2061) the Supreme Court expressed the view that the provisions of clean and unpolluted drinking water to the citizens was a fundamental right, enshrined in Article 9 of the *Constitution*, and that any effort or activity which deprives the citizens of this right is violative of the *Constitution*. The Court therefore, prohibited further mining in the area as it may contaminate the water reservoir or water course used for drinking water by the residents. The Court went on to elaborate that the *Constitution* provides for the right to life and ensures the dignity of man. With these two important rights, it would be difficult to conceive life in which a person does not get the minimum clean atmosphere and unpolluted environment. The Court further stated that it will not hesitate to stop the functioning of a factory which creates pollution and environmental degradation.

It is obvious thus that the Supreme Court of Pakistan has always sought to enforce the laws and regulations pertaining to the protection of the environment. In reaching its conclusion, the Court has relied not only on the law and *Constitution* of Pakistan, which are binding on the Court, but has also invoked *International Conventions, Declarations and Protocols*. In doing so, the Court favoured the International Conventions for the enforcement of internationally recognized standards of environmental protection. The issue of environmental protection is of vital importance not only to the people of Pakistan but the people of the world. This issue transcends national boundaries and geographical barriers. There is a growing consensus among the nations, and the people of Pakistan agree with this consensus, that there is a definite need to consolidate and strengthen the environment protection legislation. The Judiciary of Pakistan is alive to its responsibility and not only has it played its role but will continue to play its due role in preventing all forms of environmental nuisance, pollution, degradation and ecological disaster, so as to protect and safeguard the ecological balance of nature in our one and only planet, earth.

ROMANIA SUPREME COURT OF JUSTICE  
16. PRESENT ASPECTS OF ENVIRONMENTAL PROTECTION IN  
THE ROMANIAN LEGISLATION

I. THE LEGISLATIVE FRAME

1. Presently, Romania has a legislative frame in the area of environmental protection. It is based on internal normative acts as well as on many international acts to which Romania is party. These latter acts establishing fundamental human rights, are assimilated as internal laws and given judicial power, in compliance with the principle provided by article 11 of the Romanian *Constitution*.

2. It is important to emphasize that the *Constitution of Romania of 1991* establishes the state's obligation to guard the "regeneration and protection, as well as the preservation of the ecological balance," in Headline IV, Article 134, paragraph 2, (e). A further obligation is stated at letter f) wherein, the state has an obligation "to create the necessary conditions for a healthy environment." At the same time, according to Article 41, paragraph 6 of the *Constitution*, "the right of propriety implies the protection of the environment."

3. On the basis of these constitutional dispositions, important normative acts have been adopted, as the *Law of Environmental Protection no. 137/1995*, *Law no. 193/1996 on Hunting and Game Conservation*, the *Law no. 197/1996 on Conservation of the Water Resources*.

Special attention has been attached to the continuous improvement of the legislation, through successive modifications and additions to the *Law for Environment no. 137/1995*. An important purpose was to create internal regulations that reflect, as clearly as possible, the international principles in the area of environmental protection and sustainable development. Further, the internal regulations were also to reflect the compliance with the United Nations Organization documents and the necessity of controlling the *acquis communautaire*, in the perspective of the Romania's accession to the European Union.

Thus, during the year 2002, the *Law no. 137/1995* underwent an important number of amendments and additions through the adoption of the *Government Emergency Ordinance no. 91/2002*, published in the "*Official Gazette*" ("*Monitorul oficial*") no. 465, of 28 June, 2002.

4. The *Law no. 137/1995*, with all its ulterior amendments and additions, forms the general legal frame in the area of environmental protection and sustainable development. Article 3 establishes the strategic principles and elements constituting the regulation:

- The principle of caution in decision making;
- The principle of pollution prevention, reduction and control, using the best available technologies for industrial activities posing high environmental risks;
- The principle of conservation of biodiversity and eco-system specific to a natural biogeographic area;
- The principle "the pollution maker pays;"
- The elimination of all pollution factors seriously endangering the people's health;
- The creation of a integrated national system for monitoring the environment;
- The use of the natural resources;
- The preservation and improvement of the quality of the environment and rebuilding the damaged areas;

- The public participation in the decision making process regarding the environment and
- The development of international collaboration in order to assure the quality of the environment.

In accordance with the same Article 5, the state recognizes that all persons have the right live in a healthy environment and warrants for this purpose:

- The access to information regarding the quality of the environment;
- The right to associate in organizations defending the quality of the environment;
- The right to reciprocal consultation in order to take decisions regarding the development of environmental policies, legislation and norms, the release of environmental agreements and authorizations;
- The right to address oneself directly or through certain associations to the administrative or judicial authorities for preventing damage or in case that a direct or indirect damage has been produced and
- The right to compensation for the any damage endured.

## II. THE ROLE OF THE JUDICIAL COURTS IN THE AREA OF ENVIRONMENTAL PROTECTION

The environmental protection enforcement lies not only with the authorities of the central and local public administration, but also with natural and legal persons. It is significant that the activity of the public administration might be submitted, under the conditions provided by the *Constitution* and laws, to the control of judicial courts, especially to those of the administrative litigation.

According to *Law no. 137/1995*, with all its ulterior amendments, it is mandatory to ask and to obtain the notification for certain activities or projects, or as the case may be, the public authorities dealing with the environmental protection issue the environmental agreement or authorization.

The Judiciary and courts are in position to judge cases generated by the issue, revision, suspension of the environmental notice, agreement or authorization, and litigation is resolved according to the *Law of administrative litigation no. 29/1990*. It must be noted that the authorization procedure is public. According to Article 12 of *Law no. 137/1995*, recently amended, the information is open to the public in order to allow participation in the decision making regarding the specific activities in the area of environmental protection. This is in compliance with the provisions of the *Convention on the access to information, the public participation in the decision and the access to justice in environmental matters*, signed at Aarhus on 25<sup>th</sup> of June 1998, and ratified by Romania through the *Law no. 86/2000*. The public access to justice operates also according to the special procedure provided by the *Law of the Administrative Litigation no. 29/1990*.

We mention that judicial courts, including the Supreme Court of Justice of Romania has made several rulings on aspects concerning environmental protection and sustainable development, while deciding on environmental notices, authorizations and agreement. On matters of legality the administrative jurisdictions may not replace the administration in order to rewrite an act, but they may cancel the act or reject the action. The judicial courts have the obligation to present the administrative operations, no matter whether they are previous, simultaneous or ulterior to the issue of the contested administrative act (notices, evaluation studies, achievement of the public debate procedure). The judicial courts may also censor the legality of the refusal of an environmental notice, agreement or authorization and may order to the public administration the issue of these acts.

The jurisprudence crystallized until now proves that judicial courts have assimilated the principles constituting the basis for regulating the environmental protection. It also shows that keeping the integrity of the nature and its functional balance is a fundamental condition for the development of society and for protecting the health of the population.

### III. THE LAW NO. 137/1995 ALSO ESTABLISHES THE PRINCIPLE OF THE CIVIL CONTRAVENTION AND CRIMINAL RESPONSIBILITY, REGARDING THE VIOLATION OF LEGAL PROVISIONS IN THE AREA OF ENVIRONMENTAL PROTECTION

In the area of civil responsibility concerning ecological damage, in contrast to the general regulation of civil responsibility, contained in *the Civil Code*, the *Law no. 137/1995* establishes two specific principles: the objective responsibility irrespective of guilt, thus satisfying the fundamental principle according to which "the pollution maker pays" and the joint responsibility in the case of several authors.

Another feature of this system of civil responsibility is represented by the setting up of a special case of mandatory insurance allowing the payment of the reparation to be moved from the person responsible for the ecological damage to the insurance company. In this spirit, article 81, paragraph 2 of *Law no. 137/1995* provides that the insurance for possible damage to the environment is mandatory "for activities generating a high risk."

Regarding the *access to justice*, the law recognizes *the right of non-governmental organizations to actions aiming to conserve the environment*, to an equal extent of the party enduring the damage. Based on the fundamental right of people to a healthy environment and to the free access to justice, together with international organizations, any person may address oneself directly to the judicial instance. This may occur in order to prevent damages or in case of a direct or indirect damage already produced (against health, assess or environment).

Romanian jurisprudence hasn't had the opportunity to pronounce itself, until now, in a significant way on the issue of civil responsibility for environmental damage.

Together with the civil responsibility, the *Law no. 137/1995* establishes also a contravening and criminal responsibility, considered as a veritable "repressive right of the environment," aiming in first place for preventing or stopping the actions damaging the environment.

Although the categories of acts, sanctions and procedures are correctly established according to the contravening responsibility and do not raise any special practical problem, the Romanian legislation is incomplete regarding the criminal responsibility, since it does not establish the criminal responsibility of a legal person.

Romanian specialists in the environmental rights sustain especially the necessity to regulate the criminal responsibility of legal persons, in case of violation of legal dispositions regarding the environmental protection. It would be necessary to take prohibition measures (as the total or partial, definitive or temporary close-up of an enterprise or as the prohibition of the access to the public markets, limitations regarding some fiscal facilities etc.) to supervise the enterprise, to establish an ecological record. Consequently, the criminal right has to adapt itself to this specific area, not only creating a special category of offenses, but also instituting the criminal responsibility of the legal person for significant ecological offenses.

17. PRESENT AND FUTURE ROLE OF THE RUSSIAN JUDICIARY IN ENSURING SUSTAINABLE DEVELOPMENT THROUGH THE STRENGTHENING OF STATE INSTITUTIONS AT THE NATIONAL LEVEL

*The Hon. Vyacheslav Lebedev, President of the Supreme Court of the Russian Federation*

The international community is making concerted efforts to find ways of striking an optimal balance between the competing demands of economic development, the maintenance of social stability and the promotion of sustainable development. These include the development of legal and law-enforcement institutions.

As the world enters the twenty-first century, law is increasingly ridding itself of the constraints and conditions placed on it at the national level and is becoming more and more international. This process is manifested both in domestic legislation and in the norms of International Law. The role played by international judicial institutions and by the Judiciary within each country is growing stronger and stronger.

The Russian Federation also has comparable trends. Article 2 of the Russian *Constitution* states that the highest value is to be accorded to the person, and to his or her rights and freedoms. It is the obligation of the State to recognize, uphold and protect human and civil rights and freedoms. Upholding human rights and strengthening society are essential prerequisites for sustainable development. The Russian Federation is a social State with a policy geared towards the creation of conditions propitious to a decent life and the free development of its population; land and other resources are used in the Russian Federation as the basis for the life and activities of the peoples who inhabit the areas in question; in the Russian Federation, human rights and freedoms are recognized and guaranteed in accordance with the universally proclaimed principles and norms of international law. All citizens are declared equal before the law and the courts. The provisions of the Russian *Constitution* stipulate that the *Constitution* has supreme legal force and is directly applicable throughout the territory of the Federation. The universally recognized principles and norms of international law and the international treaties of the Russian Federation are an integral part of its legal system.

This also applies fully to issues relating to protection of the environment and of the country's ecology - vital factors in ensuring sustainable development.

On 4 February, 1994, the President of the Russian Federation ratified the basic principles of the Russian Federation's state strategy to protect the environment and ensure sustainable development. The Russian Government has adopted a blueprint for the country's transition to sustainable development. This blueprint is geared towards a balanced approach to the task of safeguarding a favourable environment and preserving the country's natural resource potential, so as to meet the needs of present and future generations of its citizens. The issue of sustainable development has been debated at parliamentary hearings in the State Duma.

A range of legislation has been adopted in the Russian Federation relating to the environment and measures to protect citizens from the consequences of its destruction. These include *statutes* on the destruction of chemical weapons, the protection of atmospheric air, the health and epidemiological well-being of the population, protection of the environment and others. They cover all the modern environmental standards accepted by the international community, reflect the goals and priorities of economic activity and ensure that both the tasks of protecting the environment and those of sustainable development are accomplished.

The measures adopted in the Russian Federation to tackle the issue of sustainable development are fully consistent with the provisions in the *Rio Declaration on Environment and Development*, adopted on 14 June, 1992, as well as those of the *United Nations Millennium Declaration* of 8 September, 2000.

In pursuing the goals of sustainable development, increasing importance attaches to efforts to ensure the safety of the public and to protect it from criminal behaviour, and to combat terrorism and all manifestations of extremism.

In the Russian Federation, the legal framework for the fight against terrorism is provided by the country's *Constitution*, the *Federal Statutes*, the universally recognized principles and norms of International Law, the *International Treaties* of the Russian Federation and the legislation adopted pursuant to those *Treaties* by the Federal authorities. Thus, in 1998, the *Federal Terrorism Act* was adopted. In interpreting terrorism broadly, it states that it is one of the most dangerous forms of violence, involving the death of people, the inflicting of considerable harm or the emerging of other socially dangerous consequences.

Russian criminal law proceeds on the assumption that terrorism is a multifaceted phenomenon, and for that reason alongside the offences listed above, the category of terrorist crimes includes: the destruction of energy supply systems and vital supply links to settlements and enterprises, the contamination of areas with radioactive or poisonous substances, the propagation of epidemics or epizootic diseases, and the causing of accidents and floods. Terrorism and the terrorist acts of which it is made up are categorized as serious and especially serious crimes, the commission of which entails strict punitive measures, even including life imprisonment.

A serious peril is also posed by extremism, particularly in its most pronounced forms, involving the use of violence to attain goals, the formation of armed units, the fostering of aggressive forms of behaviour, discrimination between people on ethnic grounds, and the fomenting of ethnic, racial or religious hatred or division. Earlier this year the Russian Federal Assembly adopted the *Extremist Activities (Countermeasures) Act*, designed to step up the campaign against this dangerous phenomenon.

As already noted, any effort to tackle the problem of Sustainable Development must go hand-in-hand with improving the institutions of State authority and enhancing the role of the law and of law-enforcement measures.

Pursuant to the *Constitution*, the Russian Federation's State power is exercised on the basis of the division into the Legislative, Executive and Judicial branches. In this division, the Judiciary is an autonomous branch of state power and exercises its own powers through the system of justice.

Efforts are made not only to protect citizens from the unlawful acts of other persons (including decisions by the authorities and administrative bodies), but also to safeguard the law itself from laws and subsidiary legislation that are themselves in breach of the law.

Russian Judges have the power not only to refrain from applying the laws of the constituent entities of the Federation and other laws and *regulations* which are in breach of the country's *Constitution*, but also to review their consistency with federal law. If any inconsistency is identified, the *statute* or *regulation* in question may be declared unlawful and no longer applicable. In other words, as well as considering traditional criminal and civil cases, the Judiciary in Russia is responsible for reviewing the Legislative substance of statutory and regulatory instruments issued by the Legislative and Executive branches.

There are two ways in which this judicial review process is carried out:

The first is in the form of mediated checking of legality. In consideration of specific cases this applies where, the court comes to the conclusion that a *statute* or piece of subsidiary legislation being applied or deemed applicable, is not in line with the *Russian Constitution* or universally recognized principles and norms of international law, or statutory instruments of a higher level. Decisions in such cases are taken in accordance with the *Russian Constitution* or statutory instruments with equal or subsidiary legal force to that of the *Constitution*.

The second is in the form of theoretical checking of legality. This applies when the substance of a case involves challenging a statutory or regulatory instrument, or an application or recognition that the act is inconsistent with federal law. Once the court has accepted the merits of the challenge, the disputed statutory or regulatory instrument is deemed invalid and no longer applicable.

This aspect of the authority of the Judiciary is of particular significance in the Russian Federation, since the strengthening of the federal system is a vital factor in ensuring the country's Sustainable Development. This is all the more important at a time when the country is being integrated into the global legal system. Obligations entered into on joining the United Nations, the Council of Europe and other international organizations require the Russian Federation to ensure that its domestic legislation. Further, the Federation is to ensure that the manner in which it is applied within this single and uniform legal space, should comply to the maximum extent with modern international standards, fundamental principles and the norms of international law. The process of judicial monitoring helps strengthen the role of the Judiciary in the state machinery of the Russian Federation and enhances the standing of its law.

The ability of courts correctly to perform all their tasks is only possible in a situation where the Judiciary is genuinely independent and self-standing.

A process of judicial reform is under way in the Russian Federation. Its primary outcome so far has been the confirmation of the independent and autonomous status of the Judiciary in the country's state machinery. Today, the Judiciary in Russia has all the essential attributes of state authority. It serves as a stabilizing force in the State, capable of safeguarding civil rights and freedoms and protecting society from civil conflicts.

As part of the reform process, attention was given to the need to facilitate access to justice. Citizens, legal entities and voluntary associations have been given virtually limitless possibilities to restore violated rights and lawful interests through the courts.

At the same time, the decision to strengthen the Judiciary and to enhance its role in the country's state machinery and in the process of upholding the rights and freedoms of citizens has necessitated efforts to raise the status of Judges. Judges have the sole responsibility for the exercise of judicial authority and they must therefore be furnished with real guarantees of their independence.

To this end, the *Status of Judges Act* has been adopted in the Russian Federation. This *Statute* makes provision for such guarantees of the independence of Judges as their irremovability; a legally prescribed procedure for the administration of justice; the prohibition under threat of prosecution of absolutely any interference into the process of the administration of justice; the inviolability of Judges; a system of Judges' Collegial Bodies; and the provision to judges by the State of social security and material allowances commensurate with their elevated status.

Judges may not be parliamentary deputies, neither may they join political parties, and no movements nor engage in any business activity. In this connection, I should point out that the Lower House of the Russian parliament - the State Duma, in which there is a range of diverse



political groups and party factions – does not participate in the process of appointing Federal Judges which therefore serves to guarantee that judges will not be appointed in accordance with political or party affiliations.

Without exception, all state bodies, voluntary associations, officials, legal entities and individuals are bound by the requirements and orders of Judges handed down in the exercise of their duties. Failure to comply with the requirements and orders of Judges will entail the liability established by law.

The *Status of Judges Act*, incorporates virtually all the positive experiences accumulated by democratic institutions in their endeavours to uphold not only the principle of the independence of Judges, but also the principle that safeguards the right of every citizen to a fair hearing by an independent tribunal. (The latter is enshrined in article 14 of the *International Covenant on Civil and Political Rights* and article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*). In this process, the measures adopted with a view to strengthening the independence of judges have been designed not to confer special benefits and privileges on judges, but to strengthen the guarantees of the judicial protection of civil rights.

Among the measures taken to guarantee the independence of the Judiciary, or particular importance, is the decision to provide financial and logistic support from the federal budget for the work of judges. The system of the Russian Ministry of Justice previously provided this support, in other words, it was provided through the Executive branch – which somewhat undermined the independence of judges and meant that their requirements were not always met, and this had detrimental consequences for the justice system. In order to give effect to the constitutional principle of the separation of powers, the functions of ensuring the work of the courts were withdrawn from the Ministry of Justice and legislatively placed under the direct control of the Judiciary itself.

A judicial department has been created under the Supreme Court of the Russian Federation. Together with its branches and divisions in the various constituent entities of the Federation, it is responsible for providing financial, organizational and material support for the work of judges and the judicial collegial bodies and assigning them professional staff.

In addition, under a legislative initiative taken by the Russian Supreme Court in January 1999, a *Federal Statute* been adopted, entitled the *Judicial System (Funding) Act*, which establishes the fundamental principles for the funding of the courts. Under the *act*, the Government is prohibited from making any cuts in budget expenditure on the funding of the courts, irrespective of any revenues that the courts might receive. It is also stipulated that budget reductions may only be made with the consent of the National Judicial Conference.

Now that the judicial department has been created and legislation adopted on the funding of the courts system, the procedure for ensuring the proper operation of the courts has started to respond more fully to the needs and interests of justice. The measures that have been adopted have helped strengthen the independence of the courts from other powerful state structures and to foster the necessary conditions for the full and independent administration of justice. Since 1998, funding for the courts has steadily increased.

The formation of a legal framework for the justice system is also of great importance for ensuring sustainable development. Legislation has been adopted in the form of the *Judicial System of the Russian Federation Act*, which regulates the way the federal courts system operates and determines its role and place among the various institutions of state power.

The *Act* lays down provisions on the independence and autonomy of the Judiciary. It stipulates that in the Russian Federation, the administration of justice is the exclusive province of the courts established in accordance with the *Constitution* of the Russian Federation and Federal Constitutional Law. The creation of extraordinary courts is prohibited.

Like the other branches of state power, the Supreme Court of the Russian Federation has the right to initiate legislation. It makes active use of that right in introducing *Draft Bills* to the country's Federal Assembly on a wide range of issues relating to improving public access to justice and to boosting the efficiency of the courts.

One problem which adversely affected the system of justice and the efficiency of the courts was the excessive workload placed on judges. The problem has been resolved by creating the system of lay judges or justices of the peace, who have been drawn as far as possible from the ranks of the ordinary population. The justices of the peace have responsibility for more than 60 per cent of all civil cases and 20 per cent of criminal cases, all of which were previously dealt with by federal judges. The lay judge system has meant that citizens' access to justice has substantially improved, the processing of cases has also speeded up and the federal courts' caseload is now greatly reduced.

Another system introduced in the Russian Federation is that of the judicial collegial bodies, which defend the interests of judges. The establishment of this system may be considered a signal achievement of the country's judicial reform process. A *Federal Statute* on these bodies has been adopted, entitled the *Judicial Collegial Bodies Act*.

The collegial bodies are composed of judges at all levels who form part of the country's judicial system, and include the National Judicial Conference, the Councils of Judges and the Judges' Licensing Boards. Their tasks cover such undertakings as: promoting improvements in the judicial system and operating of the courts; defending the rights and lawful interests of judges; and helping with the organization of the judicial system and providing of training and material resources. They serve to strengthen the authority of the Judiciary and help ensure that judges are able to meet the requirements placed on them by the Judges' Code of Ethics. Only these judicial collegial bodies, as represented by the Judges' Licensing Boards, have the power to institute disciplinary proceedings against judges for contravening the law and the provisions of the judges' Code of Ethics, and to remove Judges from office.

If the process of strengthening the Judiciary and enhancing the role of law is to succeed Judges, as those in whom judicial power is vested, must not only comply with all the ethical requirements placed on Judges, they must also be highly trained lawyers. To tackle this problem, the country's Judiciary has established the Russian Academy of Jurisprudence. The Academy's functions include the training of qualified professional staff for the courts; the further training of Judges and those employed in the judicial system; and the conduct of training and research through such facilities as the Academy's own postgraduate and doctoral programmes. Having the status of a national institute of higher education, the Academy's faculty of law offers degree courses and postgraduate qualification in law for specialists – namely, judges and other employees of the courts – preparing to work in the judicial system.

In this way, the comprehensive approach that has been taken to the problem of strengthening the Judiciary, ensuring the supremacy of the law and enhancing the system of justice serves the interests of the general public. It also promotes the development of the State and society and constitutes an essential element in the country's sustainable development.

## 18. SAMOA -COUNTRY REPORT ON SUSTAINABLE DEVELOPMENT AND THE ROLE OF LAW

### RECENT DEVELOPMENTS RELATING TO STRENGTHENING THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR PROMOTING ENVIRONMENTAL MANAGEMENT INCLUDING RELEVANT JUDICIAL DECISIONS

#### I. LANDS, SURVEYS AND ENVIRONMENT ACT 1989

In Samoa's recent times, the most important legislative measure undertaken towards strengthening the legal and institutional framework for promoting the protection, management and conservation of natural resources and the environment, has been the enactment of the *Lands, Surveys and Environment Act, 1989*. This *Act* gives statutory recognition not only to the significance of promoting the protection and conservation of the environment, but also to the need for sound and proper environmental planning, management and control. The *Act* in a real sense established a new government department known as the Department of Lands, Surveys and Environment, which replaces the Department of Lands and Surveys. A new unit known as the Division of the Environment and Conservation (DEC) is established under the *Act* within this new Department. Functionally, the DEC consists of three units: the Environmental Planning Unit, the National Parks and Reserves Unit and the Education and Training Unit. An Environment Board and Environment Fund have also been set up within the DEC. Samoa has for a number of years been outside the mainstream of thinking about the environment and how to protect, manage and conserve it, the *Act* may be seen as a significant step in progressing towards the mainstream.

Under the *Act*, the Minister of the Environment ( a new Cabinet portfolio,) the Environment Board, the Director of the Environment and Conservation Officers are given broad powers and extensive functions. These are aimed at, not only promoting the protection and conservation of natural resources and the environment, but also ensuring sound and proper environmental planning, management and control. The enforcement powers provided under *the Act* together with the sanctions provided for non-compliance with its provisions go to strengthen and make effective the exercise by the DEC of its powers and functions. Section 94(2) also provides that the provisions of the *Act* shall prevail over the inconsistent provisions of any other *Act*, or of any regulations or *bylaws*.

The establishment of an Environment Fund within the DEC gives the DEC some measure of financial independence. It goes to ensure that any financial assistance to the DEC from foreign countries or agencies for environment purposes are kept separately and applied only to meet and discharge the costs and expenses incurred by the DEC in the performance and execution of its environment-related functions.

When the DEC first came into existence in 1990, it had only one staff member, this figure has now increased to over twenty staff members. Environmental specialists from Japan, Australia, New Zealand and the US Peace Corps, have been working with and assisting the local staff. Recently, advisers from the World Bank and the Asian Development Bank programmes for institutional strengthening have been working with the DEC in reviewing the current legislation on the environment.

#### II. DRAFT ENVIRONMENT BILL

A *Draft Environment Bill* is currently under review and consideration by the DEC and the Samoan Government. The purposes of the *Bill* as they appear from its long title are to protect, conserve and enhance the quality of the environment of Samoa, with regard to the need to achieve

sustainable development. This will achieve an effective administrative structure and make provision for the development, administration and enforcement of effective legislation for environmental matters. If enacted into law in its present form, this *Bill* will establish a separate and independent Environment and Conservation Authority with its own registry to take the place of the DEC. The *Bill* will also provide for the appointment of environment inspectors and the establishment of an Environment and Conservation Council (ECC) whose functions include overseeing the implementation of the National Environmental Management Strategy (NEMS). The Director of the ECA, the ECC and the environment inspectors are given broader powers and much more extensive functions and responsibilities under the *Draft Bill* compared to the powers and functions of the existing DEC and Environment Board. There appears to be a reduction in the powers and functions to be exercised and carried out by the Minister under the new *Bill*. Overall, if this *Bill* is enacted, it will be a major legislative measure for strengthening the legal and constitutional framework for promoting environmental management, planning and control in Samoa. The penalties for the offences provided in the *Bill* are much more severe compared to the penalties for environmental offences provided under the existing *Act*. The Supreme Court is also given sole jurisdiction to deal with criminal and civil proceedings. There is provision to stop vessels that pollute and poses danger to the environment. In addition, such vessel can be detained. As for the *Ports Authority Act 1998*, s.57 makes it an offence, punishable by a maximum fine of \$25,000 or a term of imprisonment not exceeding two years or both, for any person to pollute the waters of any port with any harmful substance.

### III. RECENT BYLAWS

From 1997 to 2000, the Department of Agriculture, Forests and Fisheries issued a number of Fisheries *Bylaws*, pursuant to the provisions of the *Fisheries Act 1988*, to govern the conservation, sustainable management and development of fisheries and marine resources in a number of villages throughout Samoa. There are twenty-one such *bylaws* and each one relates to a separate village. Consultation was undertaken with the council of each village concerned, before the *bylaws* for each village were issued. The stated purpose of all these *bylaws* is to promote the protection, conservation, management and sustainable development of the fishery waters and marine environment of the villages concerned. Each set of *bylaws* creates and establishes a fishery reserve for the village to which it applies and defines its boundaries.

All *bylaws* prohibit as illegal, the use within the fishery waters of a village of such fishing methods as dynamite, poison and "faamoa/tuiga" and of all fishing practices, which may damage or destroy the marine environment. Some of the *bylaws* also prohibit the use of underwater torches to catch fish, and some go further and also prohibit the use of scuba diving gear. Six of the *bylaws* also prohibit any activity, which will cause damage or destruction to mangroves, that provide the feeding and breeding grounds for some fish and marine species. All *by-laws* prohibit the dumping of garbage, or the discharge of pollutants of any kind within the fishery waters of a village. A breach of any *by-law* is liable to a maximum fine of \$100 and a further maximum fine of \$20 for each day a breach continues.

Under some of the *bylaws*, a person who is responsible for discharging any pollutant within the fishery waters of a village is required to restore at his own expense the environment of the fishery waters of that village to its original state. If the pollution has caused some irreparable destruction to the environment of the fishery waters, the person responsible will also be liable to pay compensation.

Even before the promulgation of the aforesaid *by-laws* many of the villages throughout the country had issued edicts over the radio prohibiting the use of dynamites and poison for fishing within their fishery waters. The policing and enforcement of the aforesaid *by-laws* will depend in no

small measure on the councils of the villages concerned and their commitment to the protection and conservation of their fishery and marine resources.

#### IV. CONVENTIONS

As of 2001, Samoa was a party to seven *international environmental conventions*, which it has ratified and signatory only to seven other *conventions*. Of these seven *conventions* to which Samoa had only been a signatory, as of this year (2002), we have ratified the *Convention for the Protection of the World Cultural and Natural Heritage*, the *Ramsar Convention on Wetlands* and the *Cartegena Protocol on Biosafety*.

#### V. JUDICIAL DECISIONS

Environmental law has not been a very litigated area of the law in Samoa for civil litigants. Except for three cases in common law nuisance, there has not been another civil case in the recent past where an environmental issue has been raised for the Court's determination.

In the first of these cases, which was on nuisance by smell, in the second half of the 1980s the Court refused the Plaintiffs' application. It was an application for an interim injunction to restrain the Defendant from continuing with his poultry farm, which was allegedly causing foul smell to occupiers of neighbouring lands, pending the substantive hearing. The Court was not satisfied there was a nuisance enough to raise a serious question to be tried. The matter ended there. As the Court's judgment was given orally, there had been no record of it.

The other two cases concerned claims for nuisance by noise. The first of these noise cases was *Bernard v Wallwork* (1995) (Unreported Judgment). Herein, the Plaintiff, a landlady, complained that her tenant had left her property due to the noise from the lifting and dropping of heavy weights on a concrete floor and the playing of loud music, when the Defendant did his weight lifting exercises on his parents adjoining land. Despite several complaints by the Plaintiff, the noise continued and her tenant left to live elsewhere. The Court granted an injunction to stop the nuisance and awarded damages to the Plaintiff.

In the second case of *Kruse v. Aiafi* (2001) (Unreported Judgment), the Plaintiffs complained that the very loud music played at night, in the Defendant's night club, which was on adjoining land was causing substantial interference with their comfort and convenience. The Defendant tried to eliminate the nuisance by fixing up the roof of his nightclub. But the nightclub had no windows where the noise was coming from. The nuisance nevertheless still continued. The Court therefore granted an injunction to stop the nuisance. No damages were awarded as the Plaintiffs agreed to abandon their claim for damages.

To my knowledge, we have also had two prosecutions under *the Police Offences 1961* in the 1980s for water pollution. This involved the use of pesticides to catch shrimps in a water reservoir. One Defendant was convinced and sentenced to prison, the other did not appear at the trial and could not be located. There have also been two recent cases before the Samoan Supreme Court on an application for judicial review where the approach taken by the Court in those cases would be relevant to a similar application to review a decision made by a decision-making body in the area of environmental law.

The first of these cases is *Hunt v. Attorney-General* (1994) (Unreported Judgement). In that case, counsel for the applicant sought judicial review of the decision made by the Comptroller of Customs under the forfeiture provision of the *Customs Act 1977* not to exempt the applicant's imported goods from the forfeiture provisions of the *Act*. It was argued for the applicant that the Comptroller of Customs acted unreasonably, in that there were relevant factors that the

Comptroller of Customs failed to take into account in the exercise of his discretion, but which were favourable to the applicant's case. It was further argued that the Comptroller of Customs acted in breach of natural justice. The Comptroller of Customs under the forfeiture provisions of the *Customs Act 1977* took the decision not to exempt the applicant's imported goods from the forfeiture provisions of the *Act*.

In refusing the Application for Judicial Review, the Court said that while the failure of a decision-maker to take into account a relevant factor, or the taking into account of an irrelevant factor, when making his decision may overlap with unreasonableness and therefore, constitute a ground for review, those matters could also be independent grounds of review in their own right. The Court further held that even though the Comptroller of Customs was required to act in accordance with natural justice which is synonymous with the duty to act fairly, a formal hearing was not required in every case where a decision-maker is required to act fairly. The requirements of natural justice of fairness depend on the circumstances of the case at hand including its subject matter. The Customs authorities did hear the applicant's explanation and the explanations from his shipping agents but decided to disbelieve their explanations and thus the goods were forfeited. In those circumstances, there was no breach of the requirements of natural justice or fairness.

The second case was *Keil v Land Board* (2000) (Unreported Judgment). In it the applicant for judicial review submitted that the Land Board, established under the *Lands, Surveys and Environment Act 1989*, had no jurisdiction to grant a licence to the second respondent to reclaim the foreshore next to the applicant's land. The second respondent's reclamation was adversely affecting the applicant's enjoyment of his land. The real issue for the Court's determination was whether the Land Board had power under the *Act* to grant a licence to any person to reclaim the foreshore. It was decided the Land Board had no such power. The power to grant such a licence is vested by the *Act* in the Minister of Lands, Surveys and Environment. The decision by the Land Board to grant a licence to the second respondent was therefore illegal and declared void.

Finally, another case where the approach taken by the Samoan Supreme Court may be relevant in the area of environmental law is *Wagner v Radke* (1997) (Unreported Judgment). This was a case on international child abduction. Herein, the father, a German national, brought his son with him to Samoa without the knowledge or consent of the mother who had been granted custody of her son by a German Court. The mother came to Samoa and applied inter alia, to the Samoan Supreme Court for orders granting her custody of the child and for the return of the child to Germany. In granting the mother's application, the Court followed relevant applicable English, Australian and New Zealand authorities and took into consideration the terms and philosophy of the *Hague Convention on the Civil Aspects of International Child Abduction*, even though the *Convention* had not been applied to Samoa by domestic legislation.

A similar approach in my respectful view, may be taken in the field of environment. The Courts in an appropriate environmental case may have regard to the terms and policy of an *International Convention on the environment*, even though such *Convention* has not been adopted domestically by legislation. Whether a country should be a party or signatory to such *Convention*, before its Courts may take into consideration the terms and spirit of an *International Convention* is a moot point.

19. RIGHT TO HOSPITABLE ENVIRONMENT AND CHANCES FOR ACTUALLY  
VINDICATING THIS RIGHT IN SLOVAKIA

*The Hon. Stefan Harabin, President, Supreme Court, Slovak Republic*

I.

Since January 1, 1993 the Slovak Republic has been an independent country with its own jurisdiction. Part of the legislation related to environmental protection may be divided into the following main areas:

- Environment
- Government administration role in environmental issues
- State environmental fund
- Evaluation of impacts upon environment
- Nature conservation
- Air protection
- Waste management
- Water protection
- Forests
- Soil conservation
- Nuclear power engineering
- Territorial planning and building requirements
- Geological research and prospecting
- Noise abatement and vibration control
- Non-profit establishments

Recall that the first incentive for creating the European Union was based on the key idea of establishing a single market, although then environmental issues were not of primary importance. It soon turned out however, that the single market would function properly provided only that the conditions created be uniform. The exact obstacles impeding the development of a single market appeared to be the separate and differing levels accorded environmental protection in each of the member countries. A product manufactured under conditions of stringent environmental protection obviously being more expensive, would be less competitive when compared with other products manufactured in a country where the level of environmental protection is low. Consequently within the EU, accession to which the Slovak Republic has aspired, the area of legislation covering Environmental Protection is the third largest with approximately 300 *Regulations, Directives and Resolutions* on environmental issues. Adoption of EU environmental law however, involves the need for establishing an entirely new and extensive juridical field and very often such need may even involve seeking new legal institutes. Undoubtedly one of the most intricate problem areas related to the transposition of European Legislation is in the environmental area. This together with increasing pressure calling for speeding up this process in its evaluation reports exerted by the European Commission. Nevertheless, it should be noted that the approximation to the EU legislation, which extends well beyond the legislation covering environmental protection, only involves extremely intricate juridical work.

In 1998, Slovakia nationally appreciated the privilege of becoming host to the IV Conference of Member Countries that signed the *Treaty on Biodiversity (COP)*, in Bratislava. Dr. Klaus Toepfer, Executive Director of the UN Environment Programme was among the participants there. The 1359 delegates of the Summit Conference from all parts of the world had agreed to the formulations of the Biological Safety standard.

While *Act No. 17/1992 Law Digest* on the environment, determines the legal basis for the environment in the Slovak Republic, § 2 provides that “the environment may be anything creating the natural conditions for existence of any organic matter, including that of human beings, and which is indispensable for their further development.” The environment, however, comprises a number of components the atmosphere, water, stone bed and organic matter, in particular. Issues such as the ecosystem and ecological stability are defined under separate provisions of the *Act*. Nevertheless, “the right to hospitable environment” still remains to be discussed in more detail. The extent of “hospitality” should be considered ad hoc, since the definition such as “the right to clean water” for example, seems undoubtedly to be a good sounding *declaration*, but says very little about the definition of clean water, the extent of cleanliness, the purpose and use for which it is considered to be clean. On the other hand, there are a number of sources of “clean water” that exist in open nature without any human interference, but they still comprise such natural components that are harmful to life. Consequently, such water could never be provided for survival!

The *Charter of Fundamental Rights and Freedoms (Act No. 2/1993 Law Digest)*, provides the primary definition of “the right to hospitable environment.” Article 2 states that “Everyone has the right to hospitable environment;” and “Everyone has the right to receive timely and comprehensive information on a state of the environment and state of natural resources;” and that “No one is allowed to jeopardise or damage the environment, natural resources, natural wealth or cultural monuments while exercising his/her rights, except to the extent provided by law.”

From the above citations, it is obvious that the legislator has been aware of destructive impact human activities may have upon environment. Nevertheless, account has also been taken of the necessary development of human society, which is based on transformation of natural resources - i.e. “the damaging of natural resources is not allowed, except to the extent provided by law.” We may however doubt whether the extent of such damage is justified, or whether the criteria used is appropriate, because what we have witnessed too often is that the human society adheres to the following proverb: “Unless an event is fatal, surviving it will make us even stronger.” This is definitely not the desirable way of seeking “Sustainable Development.” [§ 6 *Act No. 17/1992*]. Accordingly, societal development is considered to be sustainable, only if the current and future generations retain the possibility of meeting their fundamental needs without too much harm to the natural diversity while the natural functions of ecosystems are preserved.

It is questionable however, why the Legislature did not include this right (Fundamental Rights and Freedoms within the *Act No. 2/1993 Law Digest* includes a *declaration* of this right under article 35) within one of the Articles at the beginning, rather than inserting it into a later Article “Economic, social and cultural rights.” And this is what might evoke another question, whether the right to hospitable environment is less important than the fundamental rights and freedoms? Because the extent of environmental pollution experienced today is generally high, and looks rather more like a “fight of the man against the nature.” I do believe that the right to hospitable environment should be put (by a considerable margin) ahead of any other areas of legislation - since living permanently in a sub-standard or inhospitable environment would mean either not living at all, or barely existing.

In the *Constitution* of the Slovak Republic, Part II, Chapter 6, Articles 44 and 45 the legislation concerning environmental protection and cultural heritage preservation is addressed in the following way:

[A]rticle 44

- (1) Everyone has the right to hospitable environment.
- (2) Everyone is obliged to protect and improve the environment and preserve the cultural heritage.



- (3) No one may endanger or damage the environment, natural wealth and cultural heritage except to the extent provided by law.
- (4) It is the state which assumes the responsibility for an economical use of natural resources, ecological balance and effective environmental policies.
- (5) Details concerning the rights and obligations pursuant to provisions under items 1 to 4 shall be as provided by the respective law.

#### Article 45

Everyone has the right to timely and complete information about the state of the environment, and the causes and consequences of this state...

As regards any reviewing of decisions taken by the public administration (including environmental issues, factual cognisance of the Supreme Court of the Slovak Republic, Regional and District Courts of Justice, is set by law. A separate part of the *Civil Procedure Code*, in Part V, designated as "Administrative jurisdiction," specifies the conditions and terms applicable to cases concerning reviewing decisions taken by public administration. On administrative matters provided by law to Government administration bodies, the Supreme Court of SR reviews decisions taken by central administrative authorities or authorities with a nation-wide cognisance. In practice, the Supreme Court of the Slovak Republic reviews most cases of this nature.

The Supreme Court of Slovak Republic accommodates the four separate panels: criminal, civil, commercial and administrative senate covering as many as nearly 30 different areas. The last of the four juries assumes the responsibility for reviewing decisions pertaining to the administrative category. One of the legislation areas within which the courts perform judicial reviews is the environment. The judicial reviews pertained to lawsuits against decisions provided by the Ministry of the Environment and decisions by Slovak Inspectorate of the Environment. Even if their implication upon the environment is only marginal, Decisions by other central administration authorities, however, may also be subject to judicial review. Most complaints involve issues related to fines imposed in connection with inappropriately run sites for waste dumping; for using such dumping sites without approval by a competent authority; improper designation of hazardous waste; violation of *the act on waste management*; violation of regulations concerning procurement of necessary permissions and failure to comply with requirements related to nature and landscape preservation etc. As such, the percentile of suits that are classified within the environment, is not comparatively great.

Most frequently, the reviews of the Supreme Court of the Slovak Republic involve examination of decisions made by public administration authorities on matters concerning a breach of *Waste Management Act*.

As may be assumed from the cases reviewed so far by the Supreme Court of the Slovak Republic, most relate to decisions by the Slovak Inspectorate of the Environment and thus focus their attention on specific issues related to nature and landscape conservation. This I regard to be very appropriate in today's world of highly sophisticated technologies, since we wish to ensure that the entire natural landscape of this country is safeguarded and preserved in a desirable manner. The above authority pursues this strictly in accordance with the jurisdiction in force. The Supreme Court considers decisions taken by this authority as appropriate and approximately 90 percent of the decisions reviewed are confirmed. Other areas of administrative jurisdiction have not accounted for such a high portion of judgments confirming original decisions taken by the government administration bodies.

Within its administrative jurisdictional functions, decisions by Ministry of the Environment of the Slovak Republic are in fact the resolutions by the Minister himself, who thus takes decisions on any cases of remonstrance against respective decisions approved by Ministry of the Environment, previously. However, the number of such cases is not large. Obviously, the reason

for this is the fact that any decision taken by Minister of the Environment may only be taken following at least two previous proceedings held on a lower level of administration (on a district, or regional level).

Attached to these documents please find a few decisions taken by the Supreme Courts of the Slovak Republic related to the environment. The aim of this is to help create an objective viewpoint towards the decision-making activities of this Court on very delicate issues concerning the environment of this little country, which is situated in the heart of Europe.

In conclusion, I would like to draw your kind attention to an analysis of the valid jurisdiction in the area of environmental protection, which reflects a new state of facts pertaining to the criminal acts against the environment. It was inserted into *the Penal Code* as early as in 1993, that is immediately during the first year of the Slovak Republic's existence as an independent country.

Permit me, as the President of the Supreme Court of the Slovak Republic, to thank you for your kind invitation to be a participant at the Global Judges Symposium on Sustainable Development and Role of Law. I appreciate this opportunity to contribute to such an important and useful event. I am convinced that the organization of such events shall contribute significantly to implementation of the most important parts of the global environmental policy and thus to the legislation amendments of particular countries. In the area of supporting and strengthening judicial competence in Environmental Law application in various countries of different continents, this is a fount of knowledge, since we are able to share the valuable knowledge and practical experience of Judges from the whole world.

Enclosure:

- selected Judgments of the Supreme Court Slovak Republic
- penal-legal protection of environment in the Slovak Republic

## II. JUDGMENT ON BEHALF OF THE SLOVAK REPUBLIC

The Supreme Court of the Slovak Republic, the Senate comprised of the Hon. Presiding Judge Mrs. Ida Hanzelová and the Hon. Judges: Mrs. Aneka Kellová, Mrs. Tatiana Aschenbrennerová, in a legal action between the parties: Futura, s.r.o. (Ltd.), Romanova 37, Bratislava - the Plaintiff, represented by Mr. Roman Hosovsky, a solicitor, domiciled at Mickiewiczowa 2, P.O.B 318, Bratislava, versus Ministry of the Environment of the Slovak Republic, Nám. L. Stúra 1, Bratislava - the Defendant, whereby the applicant asked for a review and reversion of a decision by Minister of the Environment of SR dated Jan 21, 2000, ref. No. 975/406/9-6.2/1, has taken the following

### RESOLUTION

The Supreme Court of the Slovak Republic has decided that the decision by Minister of the Environment of SR dated January 21, 2000, *reg. No. 975/406/99-6.2/1*, shall be reversed and the matter returned back to the defended administration authority for further proceeding.

The Defendant is obliged to pay the Plaintiff the cost of judicial procedure in the amount of 1,800 Sk, care of the Plaintiff's solicitor within 15 days following the decision effective date.

### CONCLUSION

The Minister of the Environment of SR had rejected the Plaintiff's counterclaim against the above mentioned decision and confirmed the previous decision taken by Ministry of the Environment on August 8, 1999 *reg. No. 975/406/99-6.2/ZS*, by which (in accordance with § 65, Article 2 of *Administrative Code* due to a breach of § 59, Article 1 of *Administrative Code*), the Ministry had

reversed the valid decision by the Regional Office of the Environment in Bratislava No. 288-Fx9/1998 dated August 5, 1998 on grounds that there was a need to reopen the case and take a new decision within an appellate procedure following the Plaintiff's appeal - submitted by Futura, s.r.o., Bratislava.

The Department of the Environment's Regional office in Bratislava, had complied with the Plaintiff's counterclaim against its decision that took effect by August 27, 1998 and reversed the decision taken by District Office of Bratislava 5 dated February 18, 1998 whereby the Futura, s.r.o. Company was imposed to pay the fine of Sk 2 million, on grounds that the stated company had been utilizing an accommodation facility located at Romanova 37, in Petralka, since January 17, 1997 in conflict with the operation permit (§106 article 3, item d) *Act No. 50/1976 Law Digest - Building Act*).

Within a period stipulated by law, the Plaintiff had submitted his complaint wherein he requested both a review and revocation of the Defendant's decision. The complaint was based on the assertion that the Defendant's action limited the Plaintiff's rights. Having referred to § 65, Article 1 of *Administrative Code*, an objection was raised against Defendant; the reason for which was explained as the appellate authority decision's lack of conviction and comprehension. It was not clear enough what the Ministry regarded as unconvincing with that decision, since its own decision did not explain this point. Furthermore, the Plaintiff stated that the Ministry discussed within its own decision the manner as to how the appellate authority should deal with the complaint within a new appellate procedure. However, he submitted the existing need for procuring some complementary documents - thus the Plaintiff reached the same conclusion i.e. that the current state of affairs did not provide for reaching a final decision. According to what the Plaintiff assumed, should there be a single doubt as to whether the reason for revocation of the decision by the appellate authority is justified and thus a subsequent need of returning the case for a review to the first instance administration authority, then such decision should no longer have been regarded as unlawful and may not have been subject to reversion following a non-appellate procedure (§59 and § 65 of *Administrative Code*).

At the end, the Plaintiff entered a protest against Minister's decision taken on January 21, 2000, whereby the Minister confirmed the previous decision by the Ministry, although the correct procedure should have resulted in its reversion (§59 article 2 of *Administrative Code*) and abatement of the action (§30 of *Administrative Code*). The claim was further supported by the fact that the District Office imposed the fine via its decision dated February 18, 1998. Thus the length of period during which the law offence persisted has been limited, in accordance with § 106 article 3 item d) of *Building Act* to a period extending from January 17, 1997 to February 18, 1998 only. In this respect and pursuant to § 107 Article 1 of *Building Act*, no fine could be imposed for periods extending beyond February 18, 1999. By not issuing the decision according to § 65 of *Administrative Code* before August 5, 1999, the competent ministry failed to take this fact into account i.e. only after expiration of a respective preclusion period.

Being a Defendant, the administrative authority failed to provide for any written statement except for having affirmed the submission of the relevant documents to the Office of Attorney General of SR with a standpoint supporting his incentive. At a subsequently summoned legal proceeding, the Defendant verbalized his standpoint and requested that the counterclaim should be refused.

The Supreme Court of SR as the judicial body cognizant in factual matters as regards the review of decisions taken by central administration authorities (§246 Article 2 item a) *Civil Code*), examined to the extent complying with reasons included in the counterclaim, the conflicting decision that the Defendant had taken and the procedure preceding this action, thence arriving to a conclusion that the counterclaim by the Plaintiff had been justified.

According to §32 Article 1 *Act No. 71/1967 Law Digest* on administrative proceedings, an administrative authority is obliged to ascertain the accurate and correct statement of facts, and for that purpose it should procure necessary details needed for taking a decision. However, in this respect, the administration authority shall not be restricted to suggestions provided only by the parties involved.

The decision by an administration authority must comply with the law and other legal regulations, the issuing body must be cognizant in the respective area, decisions must be supported by reliably examined evidence and include all the details as appropriate (§ 46 of *Act No. 71/1967 Coll.*).

The administrative authority shall provide the grounds of the decision that has been taken, including the supporting facts, considerations of major importance, and what evidence was available with respect to the corresponding legal regulations (§ 47 article 3, *Act No. 71/1967 Law Digest*).

The appellate authority shall examine the decision challenged by the Plaintiff in full, and if necessary provide for updates by complementing the proceeding, or removing any existing deficiencies (§ 59 article 1 *Act No. 71/1967 Law Digest*).

Any lawful decision may be subject to review by an administration authority on the nearest superior level toward the issuer of a decision, regardless of whether such review has been initiated of one's own accord or such incentive has come from another authority (§ 58), except when it comes for decisions taken by a central administration (a body pertaining to the National Council of Slovakia), there such reviews are the responsibility of the Chief Executive while suggestions are provided by a special committee established by himself/herself (§ 61 article 2). A competent administration authority in matters concerning reviewing decisions shall examine and subsequently either reverse or change a decision, unless compliance with the corresponding law, statutory rules or statutory orders is ensured. Appropriate attention must be given in order to avoid any unnecessary limitation of rights acquired in good faith, while reversing or modifying any decision (§ 65 article 1, article 2, *Act No. 71/1967 Law Digest of Building Act*).

The Defendant however, failed to proceed in accordance with the above provisions.

The issue which the Supreme Court of SR handled in particular, related to whether the Defendant's decision issued in accordance with the provision under § 65 and the subsequent paragraphs of *Administrative Code* was compliant with the law. They especially focused on whether the decision issued by the appellate authority, and which the Defendant had reversed, was not reversed in conflict with the law in force, statutory rules or statutory orders (§ 65 article 1 of *Administrative Code*).

In addition to other issues, the Regional Office in Bratislava, Department of the Environment, in its decision dated August 5, 1998, stated that the party submitting the appeal was sanctioned by decision of the administration authority of first instance, the sanction being imposed for utilizing since January 17, 1997 an accommodation facility located at 37 Romanova Street contrary to the operation permit, ref. No. 1523 - 327/86 - 87 Ny-2 dated February 19, 1987. The appellate authority had ascertained that the statement formulated in this way was inaccurate and not identical to the conclusion provided. The decision taken by authority of first instance had included, apart from other things, a mere citation of the fact that the first floor of the building was expected to house the offices of administrative division, while the floors II till X were expected to receive the accommodation division designed as a system with twin double rooms, each such two rooms being provided with a single hygienic facility. This decision generally, referred only to provisions under § 76 of *Building Act* and specifies the use of the building - as a hostel. Since the appellate authority never received a complete operation permit, nor approved project documentation, this

was unable to verify the facts and conclude whether claims by Building Control Department were correct and legitimate.

Therefore, the appellate authority should have come to a conclusion that a decision challenged might not be confirmed, or changed due to existing conditions, but any previous decisions or proceedings preceding the decision in question had not been complete. Thus in view of the Court, the appellate authority was justified in proceeding by reversing the decision challenged and returning the case to the administration authority of first instance, particularly so, if the appellate authority came to a conclusion that no further investigation or completing the proceedings were necessary on its level since a more suitable and economic approach might be assured if those steps were performed by the administration authority of first instance itself.

Pursuant to the rules included in provisions under § 59 of *Administrative Code*, the appellate authority was the Regional Court in Bratislava, thus no breach of the law occurred. The Ministry of the Environment of SR was therefore unable to revert to procedure according to § 65 and subsequent provisions of *Administrative Code*.

The court has adopted the view which is identical with that of the Regional Office in Bratislava by stating in its own decision that the description of the act in a decision considered lacks accuracy and besides, it is not identical to that stated in the conclusion. The statement included the statement about Plaintiff's failure to comply with the operation permit since January 17, 1997, while this document should have been issued only by February 19, 1997 i.e. after this date. Moreover, no information as to what has led the issuing authority to state that the utilization of the facility was illegal and to what extent the facility was used by the Plaintiff in this respect, was included in this statement. Although this condition of defining the act was in part met in the conclusion (by stating that it comes for a second and third floor of the building, and the way the facility is used, offices, for example, etc., which fact has been duly admitted by the Plaintiff himself, within his complaint). Notwithstanding the above it has not been fully ascertained what details of the explanation pertaining to the decision taken by the appellate authority have been found by the Ministry as inappropriate. None of the provisions of *Administrative Code* implied the obligation of using "unambiguous legal formulations," which were sometimes not even possible due to the fact that very often such formulations depend upon the actual state of affairs relevant to a particular case. The Ministry of the Environment of SR in its conclusion, dealt with what the appellate authority should in its opinion be obliged to do, within a new appellate procedure, by stating that the proceeding should be complemented because the current state of facts was incomplete.

Due to the above reasons, the Supreme Court of SR came to the conclusion that the decision made by the Regional Office in Bratislava, its Department of the Environment, on August 5, 1998 had been appropriate in drawing a conclusion that the conditions for reversing the decision being challenged were met and thus the case should be returned to the administration authority of first instance, while such decision is no longer considered as unlawful and thus becomes irreversible by an extra appellate procedure.

By his decision dated January 21, 2000, the Minister of the Environment who had confirmed the previous decision by Ministry of the Environment of SR dated August 3, 1999, erred. That latter mentioned decision had reversed the decision by the Regional Office, Department of the Environment dated August 5, 1998, instead of reversing (§ 59 of *Administrative Code*) and abating the procedure (§ 30 of *Administrative Code*).

The District Court in Bratislava V had imposed upon the Plaintiff a fine by its decision dated February 18, 1998. In accordance with § 107, Article 1 of *Building Act* such fines remain applicable only before February 18, 1999. The Ministry failed to take into account these important facts and did not make a decision according to § 65 of *Administrative Code* until August 3, 1999, i.e. after

expiration of a preclusion period according to § 107 Article 1 of *Building Act*. Any administrative procedure is deemed to be accomplished only after respective decision has become effective (§ 62 article 1 of *Administrative Code*). Periods included under § 49 of *Administrative Code* are periods with respect to rules of procedure and failure to comply with these do not have any implications upon rights of any of the involved parties.

Owing to the above, the Supreme Court of the Slovak Republic in accordance with § 250j Article 2 *Civil Code* had reversed the Defendant's challenged decision and returned the case for further proceeding. The doctrine of the court shall be binding for the administration authority throughout the further procedure (§250j article 3 *Civil Code*).

The Plaintiff succeeded in the procedure and was thus eligible to receive compensation of judicial cost comprising service fee of Sk 1,000, for submitting the complaint and the cost of Sk 600 related to solicitor's services (3 acts each for Sk 100 and 3 times Sk 100 incurred as overhead expense).

**I n s t r u c t i o n:** No legal remedy is permissible to revise this judgment.

In Bratislava, dated December 5,2000      Signed in person by: Mrs. Ida Hanzelová  
Presiding Judge of the Senate  
Taken down by : (illegible signature)  
Seal: Supreme Court of the Slovak  
Republic, Bratislava

### III. JUDGMENT ON BEHALF OF THE SLOVAK REPUBLIC

The Supreme Court of the Slovak Republic, the Senate comprised of the Hon. Presiding Judge Mr. Stanislav Lehoák and the Hon. Judges: Mr. Tomáš Valovi, and Mr. Igor Belko, in a legal action between the parties: Polovnícke združenie (Hunter's Association) Gajdoska Hronec, domiciled at Hronská 57, 976 46 Hronecka the Plaintiff, represented by Mrs. Jana Porosiinová, a solicitor, domiciled at Cikkerova 5, 974 01 Banská Bystrica, versus Defendant the Slovak Inspectorate of the Environment, the Head Office, registered at Karloveská 2, 842 22 Bratislava, whereby the applicant asked for a review of legitimacy with regard to the decision, *ref. No. 3397001100/533-00-D*, dated October 30,2000, has taken the following:

#### RESOLUTION

The Supreme Court of the Slovak Republic has determined on a nonsuit of the complaint.

The parties involved are not eligible to compensation of legal charges.

#### CONCLUSION

By challenging the decision issued by October 30, 2000, following the Plaintiff's appeal the complaint submitted by him was rejected and the original decision by the Slovak Inspectorate of the Environment – *Inspectorate of Nature Conservation, Banská Bystrica Reg. No. 3397301200/SIP-IOP-4/467/2000-54-Bál*, dated June 27, 2000, was confirmed. By that decision, a fine of Sk 15,000 in accordance with § 64 Article 3 item b) *Act of the NA SR No. 287/1994 Law Digest* on nature and landscape preservation (*hereinafter* referred only as the *Act*), was imposed upon the Plaintiff for failing to comply with the law. The applicant committed this act in conflict with provision § 26 Article 1 and § 24 Article 2 of the law, by having killed on October 13, 1998 in a locality of Gajdoska in the cadastral area pertaining to the municipality of Osrblie, one individual lynx which belongs to proprietary animal species (*Lynx lynx*).

The Plaintiff by his appeal dated January 4, 2001, had raised his claim requesting a review and reversal of a challenged decision on grounds that this decision was unlawful and the imposing fine was illegitimate. His assertion that the right to perform the hunter's activities did pertain to the association as such, but only to its members and therefore, the association might not be held liable for having committed the above act, supported his objection. The assertion further included a statement that the shooter could not have offended the law within the subject matter referred to in the § 5 Article 5 of the *Act*, i.e. the shooting of the lynx occurred under circumstances which excluded any possibility of unlawfulness, because of being directly endangered and his possessions in jeopardy. Unlawfulness of applying the regulation according to § 26, Article 1 of the act is reasoned also via referring to respective provisions of *Civil Code and Penal Code* on extreme distress situations.

The Defendant had suggested that the complaint should be dismissed on the following grounds:

- The hunter's association of *Gajdoska Hronec* (hereinafter referred only as *HA*) represents in accordance with the *HA's statutes*, an organisational unit of the Slovak Hunter's Union with a legal personality status. The principal task of the *HA*, according to its status, apart from other activities, is also "animal hunting on a leased chase." The rights to hunting within the chase pertains to the *HA*. The *HA* also prepares business plans, yearly plans of game breeding, hunting and care of game and ensures that the activities of the association are perfectly compliant with the above.

The proprietary animal was killed by one of the association members entitled, in accordance with the *statutes*, to participate on the rights pertaining to the *HA*. That member of association was granted a hunter's permission by the *HA*. Therefore, his action shall not be regarded as an unauthorised interference by a physical person into the association's rights concerning the hunting performed by the *HA* and subsequently his action shall be regarded as the responsibility of the *HA*.

Within its second part, the law regulates conservation of nature and landscape in general, i.e. also according to § 5, the Articles 1 and 5 of this *regulation*. Chapter three of the regulation deals with special requirements concerning the conservation of nature while chapter two addresses the issues related to preservation of particular animal species in accordance with § 24 and 26, article 1 of the act on protected animal species, which also applies to this case.

The Supreme Court of the Slovak Republic, as the court with the factual cognisance to the subject according to § 246 Article 2 item b) *Civil Code* for dealing with such decisions had reviewed the subject matter to the extent as provided by the complaint and came to the conclusion that the complaint has not been justified.

As the court ascertained from the documents provided in this respect: the *HA*, according to its status and in pursuance of the *Act No. 23/1962 Coll*, in wording of its most recent amendments, has a status of legal entity with the right to perform hunting within a leased chase of "Gajdoska Hronec." According to clause 4, Article 1, item c) of its status, the permission No. 3/98 was issued by February 1, 1998, whereby the member of the hunter's association, Mr. Ján Badinka, was authorised for shooting vermin, a wild-boar in particular, with the permission being effective since July 7, 1998. This permission, however, provided no authorisation for the member of the *HA* to shoot a lynx (see the *HA document* dated September 29, 2000). What may be assumed from statements provided by the *HA* representatives, the Chairman and Mr. J. Badinka when they arrived at the District Office in Brezno by June 1, 2000, is the following. The hunter during his round in the forest on October 13, 1998, came across as many as three lynxes, injuring one of them by shooting his rifle.

Subsequently, the hunter's dog attacked the injured lynx and the hunter killed the animal while it was fighting with his dog. It is obvious that it was not the lynx that attacked the dog or his master; instead the hunter injured the lynx with an intention of killing it. Thus the life of the hunter's dog or his own life was not in jeopardy, instead the lynx tried to save its life when it fought in its defence against the dog.

Preservation of certain animal species, the lynx in this particular case, has been regulated, apart from § 23, § 24 Articles 1,2,and 3, and § 26, Article 1 of the act also does so by a decree No. 172/1975 *Law Digest* in wording pursuant to the *Decree* No. 231/1997 *Law Digest* on protection and on periods, manner and conditions for hunting of specific game species.

Based on the above the Supreme Court of the Slovak Republic has provided a statement that no breach of the law occurred as a result of the original decision taken by the administration authority, later challenged by the Plaintiff's complaint, and therefore the judgment according to § 250j, Article 1 of *Civil Code* has decided on a nonsuit to the Plaintiff's complaint.

No compensation of the incurred legal charges shall be provided to the parties involved, which is in accordance with § 250k, Article 1 of *Civil Code*, the Plaintiff being not eligible to such compensation because of having not succeeded in the lawsuit while no expenses were incurred by the Defendant.

**I n s t r u c t i o n:** No legal remedy is permissible to revise this judgment.

In Bratislava, dated April 25, 2001      Signed in person by: Mr. Stanislav Lehoták  
Presiding Judge of the Senate  
Taken down by : (illegible signature)  
Seal: Supreme Court of the Slovak Republic, Bratislava

#### **IV. JUDGMENT ON BEHALF OF THE SLOVAK REPUBLIC**

The Supreme Court of the Slovak Republic, the Senate comprised of the Hon. Presiding Judge Mr. Stanislav Lehoták and the Hon. Judges: Mr. Igor Belko and Mr. Tomáš Valovi, in a legal action between the parties: UNIKOS, Co-operative Society, registered at Slatinka nad Bebravou 116 - the Plaintiff, represented by Mr. Pavol Trnka, a solicitor, domiciled at Novomeského 25, Bánovce nad Bebravou, versus Defendant the Slovak Inspectorate of the Environment, the Head Office, Department of Inspection of Waste Management, registered at Karloveská 2, Bratislava, whereby the Applicant asked for a review of legitimacy with regard to the decision, *ref. No. 43 960 046 00/100/Du*, dated September 7,2000, has taken the following:

#### **RESOLUTION**

The Supreme Court of the Slovak Republic has determined on a nonsuit of the complaint.

The parties involved are not eligible to compensation of legal charges.

#### **CONCLUSION**

By submitting a complaint dated October 6, 2000, the Plaintiff raised a claim for review concerning a decision *ref. No. 43 960 046 00/100/Du*, dated September 7,2000; wherein the Defendant rejected the Plaintiff's appeal and confirmed a decision by the Slovak Inspectorate of the Environment pertaining to case of waste management in *Nitra ref. No. 43 962 013 00 - Ha*. It was dated June 12, 2000, whereby a fine of Sk 120,000 was imposed upon the Plaintiff for committing a breach of the



*Act No. 238/1991 on waste management* in proper wording of its more recent amendments (hereinafter referred only as *Waste Management Act*).

The Plaintiff claims that issuing the decision imposing a fine by the Defendant resulted from a non-observance of respective provisions under § 47 of Act No. 71/1967 *Law Digest On administrative procedures*. Further, the said conclusion not reflecting the actual state of facts was worded in a manner that conflicted with the Defendant's explanation. The part of decision that dealt with the fine imposed according to § 11, Article 2, item e) of *Waste Management Act* was declared to be unlawful, since a fine of Sk 40,000 was regarded as being unreasonably rigorous.

In his statement concerning the complaint, the Defendant had explained why the administration authority should have proceeded in the said manner, and provided his viewpoint with respect of the counterclaim raised by the Plaintiff. The Defendant pointed out that there was reliable evidence about Plaintiff's handling hazardous waste within the said period, without having asked the competent statutory authority for permission, propelled further by having failed to provide accurate and complete information in this respect. The Defendant insisted upon legitimacy of the counterclaimed decision and as regards the challenged amount of the imposed fine, the Defendant's statement asserts that the fine imposed was close to the lower boundary of the applicable range specified by statutory regulations.

Being factually cognisant according to § 246, Article 2, item b) of *Civil Code* with respect to subject matter concerning reviews of decisions issued by administration authorities with the nationwide competence, the Supreme Court of the Slovak Republic has reviewed the challenged decisions as well as the entire procedure preceding the action and has concluded that the complaint has not been justified.

According to § 5, Article 1, item h) of *Waste Management Act* the polluter shall enable a competent statutory authority to be granted access into respective premises, interiors of buildings and facilities and provide, upon request, the relevant documentation as well as truthful and complete information concerning his waste management.

According to § 4, Article 1, authorization issuance concerning handling of the hazardous waste is the responsibility of a competent administration authority.

According to § 11, Article 2a) legal entities or physical persons with a business licence may have fines between Sk 20,000 and Sk 500,000 imposed by the respective administration authority if such entity or physical person failed to comply with provisions under § 5, Article 1, item h), § 6, Article 1, items a) and d), § 7, Article 2, item c) or § 8, Article 2, item f), by denying the competent statutory inspection authority the access into their premises, interiors of buildings and facilities; or if they failed to comply with the obligation of submitting the documentation related to waste management for inspection; or if they failed to provide truthful and complete information or handling a hazardous waste without permission by a competent statutory authority in accordance with § 4, article 1, item b) (§ 11, article item e).

As can be seen from a document enclosed herewith, the Slovak Inspectorate of the Environment, Inspectorate of Waste Management in Nitra (hereinafter referred only as SIE ZIWM Nitra (SIZP-IOH Nitra in the Slovak language version – translator's note), carried out an inspection on August 30, September 3 and September 9, 1999. Plaintiff's premises, during which it turned out that the Plaintiff had been handling the hazardous waste without the respective competent statutory authority's permission as required in accordance with § 4, Article 1, item b) of *Waste Management Act*. Because the Plaintiff had submitted during the verbal procedure held by December 9, 1999, permission for handling hazardous waste issued by the District Office at Bánovce nad Bebravou

on September 26, 1999, the SIE- IWM Nitra provided their decision whereby the procedure was reversed.

The District Office at Bánovce nad Bebravou had not notified the SIE-IWM Nitra of this fact, until November 2, 1999, under *ref. No. 1528/9* that the Plaintiff had received permission for handling hazardous waste. The number referred to by the Plaintiff designated a document pertaining to another applicant.

Based on this fact, that is that the original decision on reversing the procedure had been issued following an untruthful piece of evidence, the SIE-IWM Nitra had directed that due to the ascertained incompetence concerning handling of hazardous waste by the Plaintiff, the procedure should be retried.

Via decision *ref. No. 43 962 013 00 – Ha* dated June 12, 2000, in accordance with § 11, Article 2, item a) of *Waste Management Act*, the SIE-IWM Nitra imposed an Sk 80,000 fine upon the Plaintiff for failing to provide truthful and complete information concerning his waste management as required in accordance with § 5, Article 1, item h) and § 11, Article 2, item e) of *Waste Management Act*. Additionally, a fine of Sk 40,000 was imposed for handling hazardous waste without permission by a competent statutory authority issued according to § 4, Article 1, item b).

*General statutory rules of administration procedures* (§ 14 of the said *Waste Management Act*), regulate the procedures related to waste management. According to § 46 of *Administrative Code*, the decision must be comply with both the respective law and other legal regulations, the authority issuing the document should be cognisant in subject matter, pursue a reliably ascertained state of facts and include all the required details as appropriate.

According to § 47, Articles 1 and 2 of *Administrative Code*, the decision must include a statement, conclusion and instruction on raising counterclaims (remonstrance). As long as the claims by the parties involved have been complied with to the full extent, then a conclusion having explanation is unnecessary. The statement comprises the decision concerning the subject matter, including the legal regulations in reference, or possibly also the decision concerning the obligation as to whom falls the obligation to pay the judicial expenses and charges. However, the decision must also include which of the parties involved in procedure, is obliged to pay legal charges, the administrative authority shall also specify a period within which such charges must be paid; such period, however, must not be shorter than specified within a particular legal regulation.

The conclusive decision taken by an administration authority shall include the facts, which served to provide the grounds for coming to the particular conclusion; assumptions upon which an evaluation of available evidence was based and the legal regulations that the decision refers. (§ 47, Article 3 of *Administrative Code*).

In its statement, the administration authority had laid emphasis on the fact that the fine had been imposed for failing to ensure compliance with respective provisions of the *Act No. 238/1991, On Waste Management*, and further relevant statutory rules of general nature on the side of the Plaintiff within period extending from July 1, 1998 until inspection had completed i.e. by September 9, 1999.

As can be seen from this formulation, the action of the Plaintiff was found to be in conflict with the respective legal regulations in view of the administration authority, and this resulted in imposing the said fine, which was applied exactly to the above time period.

Without any doubt, the aim of a verbal procedure held on December 9, 1999, was to discuss issues related to the ascertained facts, during the said period, and even though these were provided

only after the said inspection period had been completed, it is only logical that the information and documents the Plaintiff provided during this session were applied to that period.

The Plaintiff was unable to deny that additionally, he should only submit the missing permission for handling hazardous waste, for evaluating the said period. Under presumption that the Plaintiff was handling hazardous waste during the said period with permission and that the competent authority was kept aware and had knowledge of this fact, the administration authority reversed possible sanctioning of the Plaintiff, upon these grounds.

Since it was later ascertained that the submitted document was a fake (its content failing to comply with the actual facts), implications arising from such legal status could not apply to a different time period from the period of inspection, to which the submitted document pretended to refer.

In view of the above facts, the inspection authority had duly reconsidered the legal status with respect to the period of inspection and since the ascertained status was not found to be in conflict as regards the framework of discretion competences granted, a reasonable fine was imposed pursuant to law in force. Under the given circumstances, any such objection raised by the Plaintiff on grounds that the decision fails to reflect the actual state of facts is found unreasonable and unjustified.

The Court took no account of the Plaintiff's objection that the imposed fine of Sk 40,000 was inappropriate in being too high, since this aspect is also subject to separate consideration by administration authority, which is reviewed by court only with respect to possible deviation from boundaries and aspects specified by law. The court may not deduct any conclusions that might be different from, or even in contradiction to normal procedure providing that the court duly observes the rules of logical thought.

The Defendant's action i.e. his rejection of the Plaintiff's counterclaim and confirmation of the decision by the administration authority of first instance as accurate, was therefore not found as doubtful.

In view of the above, the Supreme Court of the Slovak Republic has come to conclusion that there are no grounds that would justify reversing the challenged decisions and therefore the complaint was rejected as unjustified.

No compensation of the incurred legal charges shall be provided to the parties, the Plaintiff not having succeeded in the lawsuit, while the Defendant not being eligible to such compensation as provided by law.

**I n s t r u c t i o n:** No legal remedy is permissible to revise this judgment.

In Bratislava, dated May 30, 2001    Signed in person by: Mr. Stanislav Lehoták  
Presiding Judge of the Senate  
Taken down by : (illegible signature)  
Seal: Supreme Court of the Slovak Republic, Bratislava

## **V    J U D G M E N T   O N   B E H A L F   O F   T H E   S L O V A K   R E P U B L I C**

The Supreme Court of the Slovak Republic, the Senate comprised of the Hon. Presiding Judge Mr. Sergej Kohút and the Hon. Judges: Mr. Jozef Bella and Mrs. Elena Kováčová, in a legal action between the parties Albeta Brovová, domiciled at Banská Bystrica, Malachovská 63 - the Plaintiff, represented by Mr. Peter Púchovsky, a solicitor, domiciled at Banská Bystrica, Komenského 3, versus Defendant the Ministry of the Environment of the Slovak Republic, Bratislava, Námstúra

11, whereby the applicant asked for a review of legitimacy of the decision dated July 26, 2000, ref. No. 2200/936/2000- 6.2./Hia, has taken the following

## RESOLUTION

The Supreme Court of the Slovak Republic has determined that the decision by the Defendant taken by July 26, 2000 ref. No. 2200/936/2000 - .2./Hia be reversed and the procedure returned for further procedure.

The parties involved are not eligible to compensation of legal charges.

## CONCLUSION

The Plaintiff's complaint included a counterclaim requesting the review of the decision dated July 26, 2000. It was a decision taken by the defended administration authority, by which this authority had reversed a previous decision of the Regional Office, Department of the Environment in Banská Bystrica, dated March 24, 2000. Therein it stated that in the wording of its most recent amendments the procedure failed to provide for appropriate practices that complied with § 88-90 of *Building Act* No. 50/1976. It however also stated that addressing certain issues ought to be considered either by adhering to procedure according to § 87, Article 1 of this Act, or proceeding according to rules of a legal suit. In this vein, Plaintiff referred to dealing with the inadequacy of the reasoning of Defendant's decision. This was in regard to the fencing constructed by the neighbouring house owner, Mr. Juraj Palatínus, which not only substantially impaired the environment, but hindered Plaintiff's proper use of her premises.

The defended administration authority leaned towards confirming the appropriateness of the challenged decision. Regarding the modifications of the existing fence, the Defendant favoured them as long as they were according to specifications mentioned in § 97, Article 1 of *Building Act* or § 127, Article 1 of *Civil Code*.

According to § 246, Article 2 of *Civil Code*, and in regard to reviewing the lawfulness of the administrative authority's decision, the Supreme Court of the Slovak Republic not only examined the challenged decision, but also the procedure preceding the issuance of this decision.

The respective authority submitted an enclosure, or rather a document regarding the original November 24, 1998, Banská Bystrica's Department of Environment's District Office's decision ref. No. 898/02514-8SD, which required compliance within 4 months after it became effective.

Therein the co-owners of the fence who were a married couple, Mr. Juraj Palatínus and Mrs. Anna Palatínusová, were ordered to remove a part of the 2 metre high metal sheet fence, built along the common boundary. This is so since the couple owned lot No. 2895. The metal sheet fence was to be replaced by a 4 metre high metal wire fence. However, according to its March 24, 1999 decision, Reg No. 99/02303-JK, the Department of Creation and Protection of the Environment's regional office, pursuant to Mr. Juraj Palatínus' appeal, and also being the next level authority, reversed the first instance's authority.

However, reacting to the Regional Prosecutor's protest, the said Regional Office replaced the original March 24, 1999 decision, with a new one dated March 24, 2000, Ref. No. P-2000/03086-JA, Therein, the previous decision by the administration authority of first instance was reversed again and the suit returned for further procedure, in order to provide for a solution which would be in compliance with the law. This time, the Palatínus couple and a prosecutor from Regional Prosecutor's Office who raised a protest in this respect, challenged the new decision. After which the defended administration authority reversed the Regional Office's March 24,

2000, decision by its own decision dated July 26, 2000, *Ref. No. 2200/936/2000-6.2./Hia*. The suit was however not duly returned for further procedure. The defended authority pointed in its own conclusion, the fact that construction of the fencing was in accordance with valid legislation. This therefore meant any procedure according to §§ 88-90 of *Building Code* would be inappropriate, in this respect however, there was instead a justification for proceeding according to § 87, Article 1 of this *Act*, or alternatively, according to respective provisions of *Civil Code*.

The Defendant's decision was regarded as incomplete and not a subject of review, since it failed to address the following legal considerations regarding the legal status established by the preceding decisions: Reversing the above Regional Office decision without imposing an obligation to proceed further would result in a state of conflicting conclusions within the reversing decision, i.e. restoring the validity of the decision dated November 24, 1998, made by the authority of first instance, the District Office, Department of the Environment in Banská Bystrica; this would mean validity of the decision issued according to provision § 88, Article 1 of *Building Code* would be disaffirmed by the defended party. Thus, in the Defendant's view the inaccuracy of the procedure so far carried out consists of an incorrect approach, whereby the entire procedure should not have been initiated by pursuing §§ 88-90 of *Building Code*. Instead the procedure ought to have been based on provision § 87, Article of this *Act*, for example, in which respect the Supreme Court of the Slovak Republic refers to § 3, Article 2, which indicates that the administration authorities are obliged to provide the individuals and corporations with assistance and instructions needed for exercising their rights, to avoid any harm or damage due to lack of familiarity with valid legislation among public. Consequently, it is apparent that this procedure has not been in compliance with the above rules.

In line with the above reasons the Supreme Court of the Slovak Republic herewith reversed the challenged decision and decided to return the case for further procedure according to § 250j, article 1 of *Civil Code*.

Pursuant to § 250k, Article 1, clause 2, *Civil Code*, the Supreme Court of the Slovak Republic has determined that no compensation of the legal charges shall be provided in favour of these, due to the nature and performance of the parties involved.

**I n s t r u c t i o n:** No legal remedy is permissible to revise this judgment.

In Bratislava, dated February 22, 2001      Signed in person by: Mr. Sergej Kohút  
Presiding Judge of the Senate  
Taken down by : (illegible signature)  
Seal: Supreme Court of the Slovak Republic, Bratislava

## VI. CRIMINAL ACTS AGAINST THE ENVIRONMENT - CURRENT STATUS ANALYSIS

On a conceptual basis, the *Penal Code* has included criminal acts against the environment through an amendment to the *Act No. 177/93 Law Digest*. This established new facts on how the environment might be endangered by acts of a criminal nature: that includes via deliberate acts or acts of negligence (§ 181 a, §181 b) and also established criminal acts due to breach of the law on preservation of flora and fauna according to § 181c.

Having failed to comply with valid regulations regarding environment preservation, or natural resource management, whoever deliberately exposes the environment to danger which may result in a serious damage commits a criminal act against the environment according to § 181a of *Penal Code* (jeopardy to the environment). Should this result in damage of a more significant or large extent, the qualified facts of the case relating to criminal acts against the environment are subject to more stringent penal prosecution. If the damage results in substantial impairment of the

environment through pollution, contamination or as a result of alternate human activities beyond extent allowed by law, then any environmental damage is deemed to be of a significant extent.

Pursuant to § 89, Article 13 of the *Penal Code*, where damage suffered by the environment is not referred to, then the term "derogation to the environment" is used, in respect to evaluation criteria applicable to assessing consequences of damage to the environment. Preference is thereby accorded to a new interpretation criterion included under § 89, Article 14 of *Penal Code*, which term is explained in one of the further provisions.

The above facts of the case indicate that this refers to an act of a deliberate nature, whereby the intention of a person responsible for committing the offence is expected to be aimed towards exposure of the environment to a danger of being substantially damaged. Thus such act which has a jeopardizing effect is consequently a criminal act, according to a common standard.

Fundamental regulations governing environmental protection or management of natural resources include:-

- *Act No. 17/1992 Law Digest On the Environment*, in wording of its more recent amendments;
- *Act No. 287/1994 Law Digest On Nature and Natural Landscape Preservation*, in wording of its more recent amendments;
- *Act No. 277/1994 Law Digest On Healthcare*, in wording of its more recent amendments and
- *Act No. 184/2002 Law Digest On Waters (Water Act)* and many other legal regulations.

According to § 181a, Article 1 of the *Penal Code*, the interpretation of the following words "Who endangers the environment due to negligence on his/her part shows that a criminal act endangering the environment may also be a result of negligence as specified by § 181b, of the *Penal Code*."

Recitation of the overall facts of the case indicates that any act resulting in jeopardizing the environment is deemed to possess enough significance in this respect, contrary to deliberate forms of jeopardy, when the same classification of the act presumes damage of a more significant extent.

A more recent amendment specifying criminal acts associated with failure to comply with regulations and specifying obligations related to preservation of fauna and flora according to § 181c of *Penal Code* has been provided via amendment to the *Act No. 253/2001*, which became effective by August 1, 2001. A comprehensive specification of facts concerning possible types of law infringement has been included, in respect to providing for appropriate protection of nature and natural landscape against damage, devastation and other forms of infringement which may be detrimental to preserved vegetation and proprietary animal species or their biotopes and dwelling spots, or any similar damage or devastation of tree species.

Section 2 refers to penal prosecution that protects the preserved vegetation species and animal species by imposing equal penal rates.

The above amendment has been implemented so as to provide for a uniform terminology between respective designations and contents of facts of the case included in provisions under § 181c of *Penal Code*. Further, this will achieve compliance with the current legal status in the area of nature and natural landscape preservation. Penal rates have been increased to some extent to provide for the compliance with the actual significance of a preserved area. Some new facts of the case have also been amended.

Following the implementation of an amendment to § 89, Article 14 of *Penal Code*, a change of substantial nature, which is used as a new method of determining the extent of derogation with respect to criminal acts of this nature, pertains to the increase in the extent of damage suffered - now referred to as the derogation. This should be substantially greater for it is being considered a criminal act. What is required now, is that if such damage is referred to as derogation to the environment, such damage should be six times greater than the current minimum salary.

With reference to provisions such as the *Act No. 287/1994 Law Digest*, On Nature and Natural Landscape Preservation in wording of more recent amendments, in particular, this case also refers to a common standard governing the nature preservation. Furthermore, this is with respect to the preserved vegetation species, for example, as regulated by the *Act No. 285/1995 Law Digest*, with respect to preserved animal species, where the *Act No. 337/1998 Law Digest* applies etc.

Among provisions relevant for protection of the environment, those pertaining to criminal poacher's acts according to § 181b of *Penal Code* are found in wording of a most recent amendment to the *Act No. 253/2001 Law Digest*. Besides this, there are criminal acts pertaining to the banned import, export and transportation of goods according to § 181e of *Penal Code*. The criminal act related to unauthorised handling and management of waste according to § 181f of *Penal Code* and eventually the criminal act concerning breaches to water protection according to § 181g of *Penal Code*, are also deemed to be relevant to Environmental protection.

Criminal acts concerning possible jeopardy to the environment: In terms of § 89, Article 14 of *Penal Code*, where it is essential to use such methods of assessment, which emphasize social value of preserved vegetation and proprietary animal species and tree species, derived from their biological, ecological and cultural value with a due allowance to their scarcity and level of endangerment, the term "damage" failed to provide for an appropriate description of the specific character that could help in assessing the amount of damage resulting from criminal acts against the environment.

Therefore, *Act No. 253/2001 Law Digest* was modified by an *amendment* whereby to the end of § 89, Article 14 of *Penal Code* was the insertion as follows: The derogation as regards the criminal acts under § 181a, 181b, 181c, is an overall social value of a preserved vegetation species, proprietary animal species and trees species, which represents their biological, ecological or cultural value with a due allowance to their scarceness and level of endangerment assessed according to special regulation.

The term ecological derogation is defined under § 10 of *Act No. 17/1992 Law Digest*, On the environment; in wording of its more recent provisions. A separate legal regulation has been approved to provide for method of assessing the amount of ecological derogation with respect to preserved vegetation and proprietary animal species and tree species - Decree of the Ministry of the Environment of the Slovak Republic, *Act No. 93/1999 Law Digest*, On preserved vegetation and proprietary animal species and on method of assessment of the overall social value of the preserved vegetation and proprietary animal species and trees species, which introduced the term "social" value for the aims of assessment.

The above approach has been derived from the fact that the terms "damage" and "social value" are not identical to damage that one may suffer on property. Accordingly, the term that is currently included into § 89, Article 14 of *Penal Code* is based on the amount of derogation introduced via Decree by the Ministry of the Environment of the Slovak Republic, No. 93/1999 *Law Digest*. The wording of the second clause under § 89, Article 13 of *Penal Code*, describes this new method of assessment, which shall also be used for determining the amount of benefit, value of things and the extent of the impairment caused by a respective criminal act.

## 20. SUSTAINABLE DEVELOPMENT AND THE ROLE OF LAW IN THAILAND

### *The Hon. Justice Atthanitti Disatha-Amnarj, President of the Appeal Court, Thailand*

Many countries have realized that if no global environmental control measures are imposed, existing environmental problems will be further accelerated and impact this borderless world, everywhere. To develop an effective mechanism for preserving natural resources and global environment, the key conceptual orientation in this deliberation is that national development must proceed hand in hand with environmental control and protection of natural resources. Even though it is largely recognized that national development may impair natural resources and cause environmental problems, such development could not be withheld especially when industrial development is required as a strategy for tackling the problem of poverty.

Thailand is a good example; in an effort to upgrade our economy, we have developed from an agriculturally-based kingdom into an industrialized country. Since the inception of the fourth, Five-year Plan 1977, the country has gradually developed this economy up to the level of the so-called newly industrialized country. However, such economic development had borne negative impact in environmental problems and exploitation of natural resources. In realizing this problem, Thailand has developed and implemented various strategies for controlling and tackling them coupled with measures for environmental conservation. Some of the measures used are: **applying new technology**, utilizing **economic measures** to generate responsibility among industrial authorities, undertaking **social measures** to build up spiritual commitment among the general public in cherishing and preserving the environment, promoting people's participation in environmental conservation and protection of natural resources and adopting **legal measures** for controlling pollution and protecting national resources.

#### TWO KEY PIECES OF LEGISLATION

##### 1. CONSTITUTION

On legal measures, there are two key pieces of legislation, the *Constitution* and the *Enhancement and Conservation of National Environmental Quality Act, 1992 (ECNEQA)*. Firstly, the *Constitution*: following the adoption of 1997 *Constitution*, the State is under an obligation to protect the environment. The *Constitution* provides Thai people with rights, liberties and duties on environmental protection from the level of people all the way to the traditional community, private sector, private environmental organizations and local government organizations, as well as the duties of the state. For instance:

Section 56 states that:

...The right of a person to give to the State and communities participation in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his or her health and sanitary condition, welfare or quality of life, shall be protected, as provided by law...

Any project or activity which may seriously affect the quality of the environment shall not be permitted, unless its impact on the quality of the environment has been studied and evaluated, and opinions of an independent organization, consisting of representatives from private



environmental organizations and from higher education institutions providing studies in the environmental field, have been obtained prior to the operation of such project or activity, as provided by law.

As provided by Law under paragraphs one and two, the right of a person to sue a State agency, State enterprise, local government organization or other State authority to perform the duties as provided by law shall be protected.

Section 79 states that:

...The State shall promote and encourage public participation in the preservation, maintenance and balanced exploitation of natural resources and biological diversity and in the promotion, maintenance and protection of the quality of environment in accordance with the persistent development principle as well as the control and elimination of pollution affecting public health, sanitary conditions, welfare and quality of life...

## 2. *ENHANCEMENT AND CONSERVATION OF NATIONAL ENVIRONMENTAL QUALITY ACT, 1992.*

Secondly, *the Enhancement and Conservation of National Environmental Quality Act, 1992 (ECNEQA)* which could be regarded as the central law dealing with environmental problems comprehensively thus incorporates prevention, control, correction and protection of all aspects of the environment. Among measures for environmental management are enforcement of Environmental Impact Assessment (EIA) for all mega projects which may bear negative impact upon the environment, promotion of people's participation in environmental protection, executing strict liability to protect the loser's right in obtaining compensation under civil law, exercising the Polluter Pays Principle (PPP), etc.

Apart from the 1992 *ECNEQA*, natural resources management and environmental protection are also governed by a large number of laws which separately deal with a particular kind of natural resource such as forests, wildlife sanctuaries, soil, minerals, fish and water.

## 3. *OTHER MEASURES FOR ENVIRONMENTAL CONTROL*

Thailand seems to have a wide range of laws, which could be used as tools to meet most objectives for the protection of environment, human health, sustainable development and other matters. However, it is expected that in the near future there will be successive development and revision of Thai environmental control laws.

This will meet with current conditions and development of new technologies for environmental management such as promotion of clean technology. The adoption of economic measures for environmental control includes such measures as: pollution charge, user fee, or other protection measures such as EIA for each mega project, which must be clearly stated and its transparency is subject to be checked by the general public, class action provision, strengthening of people's participation in environmental conservation including protection and management of natural resources.

Also to be adopted are non-legal measures, particularly the stimulation of official awareness that environmental problems have to be taken into consideration. Moreover, the regional and international collaboration for controlling pollution and protecting natural resources have to be increasingly underscored.

21. RECENT DEVELOPMENTS IN UGANDA RELATING TO STRENGTHENING  
THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR PROMOTING  
ENVIRONMENTAL MANAGEMENT

*The Hon. Justice Alfred Karokora, Judge of the Supreme Court of Uganda*

1. INTRODUCTION

Environmental Management pertains to the administration of human activities as they affect and relate to the entire range of living and non-living factors that influence life on earth and their interactions.

The key actors in environmental management include, but are not limited to the State, local authorities, organisations and individuals.

II. LEGAL FRAMEWORK

In Uganda, strengthening the legal and institutional framework for promoting environmental management and with the promulgation of our *Constitution*<sup>1</sup> in 1995.

Article 245(a), (b) and (c) of the *Constitution* empowered Parliament to provide for measures intended to:

- (a) Protect and preserve the environment from abuse, pollution and degradation;
- (b) to manage the environment for sustainable development, and
- (c) to promote environmental awareness.

Our Parliament went ahead to pass a law<sup>2</sup> to provide for sustainable management of the environment. The said law also established an Authority called the National Environment Management Authority (NEMA). NEMA is a co-ordinating, monitoring and supervisory body for that purpose; and for other matters incidental to or connected with the foregoing.

Under Section 7(i) of the said law<sup>3</sup> the functions of the Authority are;

- (a) to co-ordinate the implementation of Government Policy and the decision of the Policy Committee;
- (b) to ensure the integration of environmental concerns in overall national planning through co-ordination with relevant ministries, departments and agencies of Government;
- (c) to liaise with the private sector, inter-governmental organizations, non-governmental agencies, government agencies of other states on issues relating to the environment;
- (d) to propose environmental Policies and Strategies to the Policy Committee;
- (e) to initiate legislative proposals, standards and guidelines on the environment;
- (f) to review and approve environment impact assessments and environmental impact statements;
- (g) to promote public awareness through formal, non-formal and informal education about environmental issues;

1 *Constitution of the Republic of Uganda* 1995;

2 The National Environment statute No. 4 1995;

3 *Supra*;

- (h) to undertake such studies and submit such reports and recommendations with respect to the environment as the Government or the Policy Committee may consider necessary;
- (i) to ensure observance of proper safeguards in the planning and execution of all development projects, including those already in existence that have or are likely to have significant impact on the environment;
- (j) to undertake research, and disseminate information about the environment;
- (k) to prepare and disseminate a state of the environment report once in every two years;
- (l) to mobilise, expedite and monitor resources for environmental management;
- (m) to perform such other functions as the Government may assign to the Authority.

As you can see, the Authority's task is quite detailed and enormous and touches on almost every facet related to the environment.

Section 45 (1) of our *Land Act*<sup>4</sup> provides that:

... the Government or the local government shall hold in trust for the people and protect natural lakes, rivers, ground water, natural ponds, natural streams, wetlands, forest reserves, national parks and any other land reserved for ecological and tourist purposes for the common good of the citizens of Uganda...

As you can see, anything done in contravention of the said laws calls for judicial intervention. Consequently, it is with authority that I must state that the legal framework for promoting environmental management has been set up in our country.

### III. COURTS' JURISDICTION

The jurisdiction to hear matters with regard to the enforcement of constitutional and other laws related to the environment lies with the Magistrates Court and the High Court. In the case of appeals against the decision of NEMA on environment impact assessment, the High Court has jurisdiction. However, the question arises as to how the jurisdiction can be determined given the penalties imposed by the *National Environment Statute*<sup>5</sup> namely imprisonment from 3 to 36 months, or a fine ranging from 300,000/= to 3,000,000/=, respectively.

In environmental litigation, the burden of proof lies on the Defendant. This position is entrenched in Section 4(4) of the *National Environment Statute*,<sup>6</sup> which does not require the Plaintiff to show that the Defendant's act, or omission has caused, or is likely to cause any personal loss or injury.

It therefore follows that all the Plaintiff has to do is to bring an action with regard to the Defendant's act (2) or omission(s) and the Defendant has the duty to rebut the complaint to a high standard of proof.

The Court is empowered to grant the following remedies;

- (i) An environmental restoration order against any person who has harmed, is harming or is reasonably likely to harm the environment;<sup>7</sup>
- (ii) Forfeiture of the substance, equipment and appliance used in the commission of the offence;<sup>8</sup>

<sup>4</sup> Supra

<sup>5</sup> Supra

<sup>6</sup> Supra

<sup>7</sup> Section 72 Supra

<sup>8</sup> Section 106(1) Supra

- (iii) Order the cost of disposal of the substance, equipment and appliance to be borne by the accused;<sup>9</sup>
- (iv) The cancellation of any licence, permits or other authorisation given under the *Statute*;<sup>10</sup>
- (v) That in addition to any fine, the accused does community work that promotes the protection of the environment;<sup>11</sup>
- (vi) The issuance of an environmental restoration order against the accused<sup>12</sup> and
- (vii) Imprisonment or a fine ranging from 3 months to 36 months, shs. 300,000/= to shs. 3,000,000/=, respectively.

There are other principles and doctrines governing environmental management that should be considered by the Court. These are:

1. *THE PUBLIC TRUST DOCTRINE:*

Those who hold common resources such as forests, rivers and wetlands in trust on behalf of the Public such as the State are under a legal obligation to protect them.<sup>13</sup>

2. *THE POLLUTER PAYS PRINCIPLE:*

The potential polluter must bear the financial costs of preventing pollution and those who cause pollution should pay for remedying the consequences of that pollution. This relates to pollution licensing.<sup>14</sup>

3. *THE PRECAUTIONARY APPROACH:*

The use of planning tools such as environmental impact assessment to determine and assess the impact of development projects and other activities before they are undertaken to ensure that potential damage can be evaluated and prevented or substantially minimised.<sup>15</sup>

4. *INTERGENERATIONAL EQUITY:*

The equitable access to environmental resources for the present generation as well as for the future generations, this determines *locus* in environmental matters.<sup>16</sup>

**IV. LOCUS STANDI**

After establishing the breach of the right to a clean and healthy environment, the pertinent question to entertain is "*who can take a case to court involving the environment?*"

Article 50(1) and (2) of our *Constitution* gives *locus* to any person whose rights or freedoms have been infringed or threatened to apply to a competent court for redress. Any person or organisation can bring an action against violation of another person's or group's human rights. Section 4(3) of the *National Environment Statute* empowers the National Environment Management Authority or

9 Section 106(2) Supra

10 Section 106(3) Supra

11 Section 106 (4) Supra

12 Section 106 (5) supra 6

13 Sections 35, 36, 37, 38, 39 and 40 Supra;

14 Sections 58(1)(2) and 10 1(a) & (b) Supra;

15 Sections 20,21 and 97 Supra;

16 Section 4(1)(2) Supra;

the local environment committees to bring an action against any person whose activities have or are likely to have a significant impact on the environment.

In *National Association of Professional Environmentalists vs AES Nile Power Ltd.*,<sup>17</sup> *Okumu Wengi J.* held that Section 72 of the *National Environment Statute* is an enactment of class actions and public interest litigation and abolishes the restrictive standing to sue and locus standi doctrines by stating that a Plaintiff need not show a right or interest in the action.

## V. CONCLUSION

With the little awareness so far raised in our country on environment related issues, it is expected that many cases involving the environment will be brought to courts.

There is need to intensify awareness of the new and emerging concepts and principles of environment management. It is believed that with symposia like these Judicial intervention in environment management matters is inevitable.

In Uganda, the National Environment Management Authority has so far conducted two workshops on environment litigation targeting advocates, academicians and the Judiciary. A Judicial Symposium on environmental law was organised for Judges from 14 to 15 May 2001. The intensification of such efforts is likely to produce good results.

Thank you for listening to me.

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<sup>17</sup> High Court Misc. Cause No. 268/1999

22. COUNTRY REPORT OF THE UNITED STATES OF AMERICA:  
THE ROLE OF LAW IN SUSTAINABLE DEVELOPMENT

*The Hon. Justice Wallace*

- I. The desire for economic development and the hope for environmental and future resource preservation are often in conflict.
  - A. The conflict presents a choice to be made between these two important values.
  - B. Economic development is fundamental, especially in a developing country, to improve its standard of living.
    - i. This usually requires outside investment and trade.
      1. Investors want a fair system in which a profit can be made.
      2. They want a system that is reliable, one that has stability in its law.
    - ii. It is hard to reject the benefits from investment with so much poverty and so many starving children.
  - C. At the same time, we have but one earth for our descendants and for us - it just makes good sense to preserve it in its best form and reserve a reasonable amount of our resources for development by our descendants.
- II. The question before us is the choice between the relative importance of each value and how this choice is to be made. Should judges and law have a part in the decision-making process? Does it? What is the "Role" of Law?
  - A. Dictators - even benevolent dictators, sometimes make law.
  - B. Law is sometimes made by courts without any constitutional or statutory basis.
  - C. These types of laws are not the Role of Law.
  - D. Rather, the Role of Law in this process should be the Rule of Law.
- III. The Rule of Law comes essentially from two sources: the *Constitution* and *Statutes*. Both of these evolve from the democratic process.
  - A. The *Constitution* defines how a people are constituted; those who choose to stay or join are bound by its precept, unless they are amended.
  - B. *Statutes* are adopted through electors who have been selected for the purpose; again, based on democratic principles.
  - C. The Rule of Law - rather than the rule of man - is fundamental in a democratic society.
- IV. How is the Rule of Law determined in balancing these two important virtues - resource development and preservation for future generations?
  - A. These are essentially social value choices, best left to the people through their democratically elected legislators.
  - B. A choice by a benevolent dictator (right or wrong by our present view) is still an undemocratic usurpation.

- C. Similarly, one must question a court's announcing of a right that is non-existent in the *Constitution* and imposing rule by unelected judges, unanswerable to the citizens for what they presume to be the better choice.
  - i. Is this the Rule of Law?
- V. What then can be done to encourage decision makers to adopt a proper balance between the two important social values?
  - A. Education and training of Legislatures.
    - i. We strengthen democracy by strengthening the democratically elected decision makers.
    - ii. Obviously all countries do not enjoy an effective democratic process - but we teach a wrong principle by abandonment of their social decision-making role in favor of what we perceive to be an easier or quicker solution.
    - iii. I applaud UNEP in its efforts to strengthen legislatures through valuable assistance in 100 countries.
  - B. We should also unite in building the judicial capacity of each country.
    - i. Enforcement of laws, which protect society, occurs only with an effective judicial system.
    - ii. The Rule of Law has no practical value if an aggrieved person must wait years for a court's decision.
    - iii. There are ways to improve the judicial process and we should work together to see that it happens.
- 1. For example, our Chief Justice has appointed the international Judicial Relations Committee for the express purpose of "Judiciary to Judiciary" interaction and improvement. I serve on that Committee and attest to its co-operative value.
  - iv. Certainly we can work together in judicial capacity building by sharing ideas and resources and by developing meaningful programmes to irradiate judicial corruption.
- VI. So my view is that the Role of Law should be observed through the Rule of Law.
  - A. The rule of law is best observed through sustaining and improving the democratic process.
  - B. It may take longer than a non-rule-of-law process, but in the long-run society and society's choices will be enhanced.



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