Judges and the Common Laws of the Environment—At Home and Abroad

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ABSTRACT

Judges have long had a central role in developing and enforcing effective laws for the protection of the environment and ensuring access to justice for its champions. The response of British judges to the problems created by the Industrial Revolution in the 19th century, using the tools of the domestic common law, has been mirrored in recent years by the responses of judges round the world to the environmental challenges of their own countries, using a range of legal mechanisms, derived from their varied constitutions or statutory codes. In developing and enforcing those laws, judges have needed to temper principle with realism, and progress has often been slow. They have sometimes been criticised for not respecting the proper limits of the judicial role, when dealing with issues of political controversy or allocation of economic resources. With the support of United Nations Environment Programme, judges have been at the forefront in programmes for improving judicial capacity in the field of environmental law, and for sharing skills and experiences. Although the legal frameworks may differ, many of the problems and their solutions are of universal application. The emerging principles can be seen as the foundation of a system of ‘common laws of the environment’ suitable for the daunting environmental challenges of the modern world.

KEYWORDS: judges, environmental law, courts

The great Birmingham Corporation case of 1858¹ is famous for its assertion of the rights of the individual to defend his environment against nuisance, regardless of any countervailing public interest. The action was brought by Charles Adderley who was the owner of a large estate through which ran the River Tame. Raw effluent was being discharged into the River Tame from the sewers of the Birmingham Corporation, which was finding it very difficult to cope with the needs of its growing population. The court appeared to show remarkably little concern about

¹ Attorney General v Birmingham Corporation (1858) 4 K&J 528.
those problems. The rights of the individual must prevail. In the words of Page Wood V-C it was:

> a matter of almost absolute indifference whether the decision will affect a population of [250,000]...I am not sitting here as a committee for public safety, armed with arbitrary power to prevent what it is said will be a great injury to Birmingham only, but to the whole of England; that is not my function...²

In an illuminating article on the case and its sequel, Ben Pontin³ has suggested that, given the atmosphere (physical as well as metaphorical) in which the case was argued, the result was never in doubt. The problem for counsel for the Birmingham authority was not simply the lack of legal precedent, but the lack of clean air in which to deploy such precedent as there was:

> The problem for defence counsel was the courtroom itself: the thick drawn curtains, the dim oil lighting, the aroma of chloride of lime. This told of the arrival of London’s Great Stink bringing with it such calamitous consequences for the nation’s capital that any real chance had disappeared of persuading a court that it was in the public interest for pollution of this kind, albeit on a provincial scale, to go unremedied.⁴

He points out in a footnote that such was the odour of sewage from the Thames that there was talk of removing all hearings to the ‘fragrant comfort of St Albans’.⁵

Reading that, I found myself making comparisons with the environment of Delhi at the time of the famous case in 1998 in which the Indian Supreme Court took drastic action to address the problems of air pollution, by ordering that all buses in the city must be converted from diesel fuel to compressed natural gas (CNG).⁶ There is no record of how those conditions were felt in the court room itself, although the judges would have been only too aware of their impact on their journey to work.

There are other important parallels between the two cases, over a hundred years apart. Underlying each was the fundamental issue of the protection of the living environment in the face of modern development. Both depended on the championship of a public-spirited individual with the resources to carry on the fight—the determination of Charles Adderley in the 19th century was mirrored by that of the great Indian environmental advocate, M C Mehta, in the 20th century. In both cases, their advocacy found its match in the uncompromising response of strong and independent judges, willing to put the interests of the environment above arguments of convenience or cost. Both cases helped to lay the foundations of legal principles

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² ibid 539.
⁵ ibid.
which have since become part of a common and enduring legacy. But in both instances, the working out of the judicial decisions showed principle and practicality as uneasy bedfellows, and justice took a very long time to achieve its objectives.

Although Charles Adderley was nominally suing as a landowner in his own right, he also took on the role of representative of some 27,000 tenants within his ancestral estate and more generally as an MP for the area, his efforts fuelled also by deep personal convictions in relation to the environment. These came to the fore some years later, when he made perhaps an even more important contribution to the development of environmental law as chairman of the Royal Sanitary Commission. Its report to Parliament laid the basis for the first comprehensive legislation in this field, in the great Public Health Act 1875, the precursor of many that that have followed and still the foundation of much of modern environmental law. In explaining the Bill to Parliament, Adderley described it as recognising Parliament’s general duty to protect ‘the right of the public as a whole to clear water, air and land’7—words which have been echoed in many modern constitutions.

The Vice-Chancellor’s judgment in 1858 was on its face an affirmation of the principle that private interests are not to be overridden by public interest considerations, however strong, unless that interference is sanctioned by Parliament. However, it seems that the remedy imposed by him was not quite as drastic as his words might have suggested. The injunction required the defendant to take such steps as may be necessary and proper, ‘due time being allowed’, to prevent the continuation of the nuisance.8 In the meantime, the injunction was in effect suspended. So life in Birmingham did not grind to a halt over night. Sewage did not cease to pour into the River Tame.

The judgment marked the beginning of a long period of post-action negotiations and procrastinations, during which the Corporation (and other authorities across the land, faced with similar difficulties and similar legal actions) struggled to find adequate and longer term technical solutions to their problems. In fact, as Pontin records, it was not until the 1870s, after Adderley had returned to the Chancery Division to enforce the original injunction, that the council devoted serious time and money to sewage treatment.9 The corporation’s consultant failed in 1874 to persuade the court that the discharge from its sewage works was (in his words) ‘inodorous, colourless and clearer than the water of the river Tame’10 (words that have a note of familiarity for those of us who have heard modern water consultants giving evidence at inquiries over the years). Eventually, as Pontin explains, ‘after a series of eclectic but unconvincing experiments, the council stumbled upon what must now be recognised as one of Britain’s first systems of tertiary treatment’.11 It was not until 1895, 37 years after the original decision, that the treatment was deemed adequate to enable the injunction to be discharged.12

7 HC Debates 25 July 1871 col 238.
8 Pontin, Nuisance and the Environment (n 3) 45.
9 ibid 47.
10 ibid 48 in fn 127.
12 ibid 50.
A century on, the Delhi case was one of a remarkable series of Supreme Court cases beginning in about 1985, many involving M C Mehta, which can be said to have formed the foundation for the development of environmental jurisprudence in India and indeed South Asia today. The court used the guarantees of a right to life under Article 21 of the Indian Constitution as the basis for developing a powerful set of principles for the protection of the environment.

Litigation concerning air pollution caused by traffic in Delhi began in 1985. The underlying contention was that the government had an obligation under the Constitution to take active steps to reduce pollution. As in England in the 19th century, things moved rather slowly. It was 13 years before in 1998 the court took the drastic step of ordering that all buses in the city must be converted from diesel fuel to CNG by 2001. In 2002, the court reaffirmed its order after what it termed the unacceptably slow rate of progress due to an ‘imaginary shortage’ in the availability of CNG. After consultation with the main manufacturers, it ordered the immediate installation of 1500 CNG buses and the replacement of 800 diesel buses each month until the entire fleet was converted. In October 2002, the Delhi government announced a plan to introduce 4000 CNG powered buses, and to spend 25% of its state budget on transport and related infrastructure over the next five years.

That account comes from an article written in 2003: ‘Can the Supreme Court Manage the Environment?’ The authors, while applauding the interventions of the Indian Supreme Court, see the case as showing ‘how difficult it is for a court – even the Supreme Court – to manage the environment for a nation of one billion people’. The court’s action, they suggest, ‘seems likely to impede capacity building in the pollution control agencies, and thereby to compromise the development of sustained environmental management in India’.

Worries about the capacity of the court itself to solve such problems in India have gained some further force in the light of experience over the ensuing decade. There is evidence that the solutions developed by the Court were at best short-term. The New Delhi Journal in December 2012 reported that the previous month ‘an acrid blanket of grey smog had settled over India’s capital...India’s Supreme Court promised action, and state officials struggled to understand why the air had suddenly gone so bad’. A spokesman was reported as saying that the previous reforms had ‘plucked the low hanging fruits’ and that it was now time for ‘aggressive, second generation reforms’.

Such worries about the role of the courts do not seem to have troubled another remarkably activist court, the Philippines Supreme Court. In the famous Oposa

14 M C Mehta v Union of India AIR 2002 SC 1696.
16 ibid 91.
17 ibid.
19 ibid.
the court memorably upheld a challenge to the state’s policies for granting consents to fell in the countries’ virgin forests, brought by some 43 children from all over the Philippines, on behalf of themselves and ‘generations yet unborn’.

More recently in December 2008, the court upheld an action by a group of citizens for an order requiring the government to clean up Manila Bay. The court ordered the government to prepare a plan of action to remedy the environmental degradation in the bay and restore the productive state of its marine resources. The government was required to submit to the Supreme Court written reports every 90 days on progress. Three years on in 2011 the Chief Justice and other justices took a tour of the bay to inspect progress for themselves.

In the Philippines, the legitimacy of the court’s intervention in such matters is underpinned by broadly expressed constitutional provisions. The future Chief Justice, Hilario Davide Jr, as a member of the Constitutional Commission, had been party to the inclusion (in the Philippines’ 1987 Constitution) of a ‘right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature’. Similar provisions are found in many modern constitutions. Such thinking was taken a stage further in Bolivia’s Mother Earth law (‘Ley de derechos de la Madre Tierra’). Mother Earth is defined as

...the dynamic living system formed by the indivisible community of all life systems and living beings whom are interrelated, interdependent, and complementary, which share a common destiny...

For the purpose of protecting and enforcing her rights, Mother Earth is given ‘the character of a collective subject of public interest’ so enabling actions to be taken on her behalf.

In the UK, we have no express constitutional provisions of this kind. But the common law may sometimes fill the gap. In a recent case in our own Supreme Court, Lord Hope highlighted the need for the law to protect nature for its own sake, apart from direct property or financial interests of particular litigants. He gave as an example...
example the plight of an osprey, whose routes to a favourite fishing lock might be threatened by windfarm development affecting its routes to a favourite fishing loch. As he said:

...environmental law...proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.28

This world tour would of course be incomplete without a visit to the Australian state of New South Wales, where a leader in the development of general principles of environmental law has been the Land and Environment Court.29 Established in 1980 it has proved the model for a proliferation of specialist environmental courts or tribunals across the world.30 A succession of Justices have drawn from national and international sources in moulding the common law to meet modern environmental challenges.31

I take one example, the remarkable judgment of Chief Justice Preston in the 2006 Telstra case.32 The issue was the familiar one of a proposed mobile telecommunications antenna in the genteel Sydney suburb of Cheltenham, and the fears of the local community of harm from radiation caused by electromagnetic energy. Before allowing the proposal to proceed, the judge not only conducted a detailed examination of the technical evidence, but also took the opportunity for a discussion of the principles of what he called ‘the basic concept of ecologically sustainable development’, as embodied in the relevant statute.33 He outlined six basic principles: in summary, (1) sustainable use, (2) integration (ie, the effective integration of economic and environmental considerations in the decision-making process); (3) the precautionary principle; (4) the principle of equity, including inter-generational equity; (5) the conservation of biological diversity; and (6) the internalisation of environmental costs—the need for full account to be taken of the short-term and long-term costs of any major project.34 Although derived from the interpretation of local legislation, these principles are of much wider application and can be found in other jurisdictions in both law and policy.35
Finally, to the USA, where in modern times the disputes between government, industry and the environmental justice movement have probably generated more litigation than anywhere else, and more academic literature. Two recent articles are of special interest in this context are Liz Fisher (JEL Editor) on climate change litigation\textsuperscript{36} and Haydn Davies on a similar subject in the UKELA E-law newsletter for January 2013.\textsuperscript{37} According to Liz Fisher, climate change litigation has become an ‘obsessive’ preoccupation for many legal scholars. Her article reviews the intense debate triggered by the landmark case of Massachusetts v EPA.\textsuperscript{38} The claim was brought by 12 states against the Environmental Protection Agency to compel them to regulate emissions of greenhouse gases. On one view, the case turned on relatively narrow issues about the construction of the word ‘pollutant’. But on another it went wider, the judgments giving judicial recognition at the highest level to scientific theories linking the rise in global temperatures with man-made emissions of greenhouse gases, and the need to take action to deal with it. Also important was the majority’s affirmation of the standing of the States to bring such proceedings, citing Justice Holmes’ reference in a case 100 years before to the State’s role as ‘quasi-sovereign’ with an interest ‘independent of and behind the titles of its citizens, in all the earth and air within its domain, with the last words as to whether its mountains shall be stripped of forests and its inhabitants shall breathe pure air’.\textsuperscript{39} The case had the effect in due course of leading the EPA to revise its view, to identify six greenhouse gases which were potentially a danger to public health, and to resist a further challenge in the US Court of Appeals by a body tellingly named the Coalition for Responsible Regulation, with the support of another group of states.\textsuperscript{40}

Haydn Davies describes the more mixed fortunes of recent attempts to use the common law of public nuisance to bypass or supplement the more less flexible regimes imposed by statute. In Kivalina Village v Exxonmobil,\textsuperscript{41} a group of Alaskan villagers failed in their attempt to claim common law damages for the effects of climate change on their community, inundated due to the loss of its protection of pack ice. It was held that the common law was displaced by the specific controls under the Clean Air Act, following Supreme Court authority in American Electric Power v Connecticut.\textsuperscript{42} Davies quotes Justice Ginsburg in the American Electric Power case on the problems of using Federal tort law to set emission standards, a task better left to the expertise of the EPA, than to individual district judges issuing ad hoc case-by-case injunctions.\textsuperscript{43} He is sceptical about the ability of the courts to do much to address environmental inequality, beyond some ‘prodding and pleading’.\textsuperscript{44} As he says,
it is an economic and political responsibility that can only be undertaken by the legislature and the executive.\textsuperscript{45}

These examples dating from the 19th century to the present show what a potent force national judges can be in moulding the law of the environment and the public’s response to it. As Judge Weeramantry said in his introduction to the United Nations Environment Programme (UNEP) \textit{Judicial Handbook on Environmental Law} published in 2004:

The judiciary is…one of the most valued and respected institutions in all societies. The tone it sets through the tenor of its decisions influences societal attitudes and reactions towards the matter in question. This is all the more so in a new and rapidly developing area. Judicial decisions and attitudes can also play a great part in influencing society’s perception of the environmental danger and of the resources available to society with which to contain it.\textsuperscript{46}

Judge Weeramantry was the Sri Lankan judge of the International Court of Justice, and who sat on that Court in the ground-breaking judgment in the \textit{Hungarian Dams} case.\textsuperscript{47} The court took the opportunity to reaffirm its statements that the environment ‘is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations yet unborn’; and that the ‘general obligation to ensure that activities within their jurisdiction and control respect the environment of others states or areas beyond national control is now part of the corpus of the international law of the environment’.\textsuperscript{48}

Judge Weeramantry’s concurring opinion\textsuperscript{49} is a powerful survey of (in his words) ‘environmental wisdom…derived from ancient civilisations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific and Australia – in fact the whole world.’\textsuperscript{50} He starts with a fascinating account of the irrigation-based civilisation of Sri Lanka, based on an extraordinary system of waterworks developed over more than 1500 years from around 500 BC. His thesis is that sustainable development, including the principles of trusteeship of earth resources, of intergenerational rights, and the principle that development and environmental conservation must go hand in hand, is not merely a principle of modern international law but is ‘one of the most ancient ideas in the human heritage’.\textsuperscript{51}

I was privileged to act as co-chair with him of the judicial committee which oversaw the preparation of the UNEP manual. The Handbook was one of the initiatives which came out of the Global Judges Symposium on Sustainable Development and

\textsuperscript{45} Davies (n 37) 16.
\textsuperscript{47} Case concerning the \textit{Gabčíkovo-Nagymaros} project (Hungary/Slovakia) [1997] ICJ Rep 7.
\textsuperscript{49} ibid 88.
\textsuperscript{50} ibid 95.
\textsuperscript{51} ibid 107.
the Rule of Law, convened by UNEP in Johannesburg in August 2002.\textsuperscript{52} That was 10 years on from the adoption of Rio Declaration on Environment and Development\textsuperscript{53} that included Principle 10, which affirmed the right of all citizens to participate in decisions about their environment and to have effective access to judicial and administrative proceedings to enforce their rights. Another product of that conference was the Johannesburg Principles on the Role of Law and Sustainable Development.\textsuperscript{54} Those principles affirmed the central role of the independent judiciary in the development and enforcement of environmental law but identified a deficiency in the knowledge, relevant skills and information which needed to be addressed by international action.

Under the leadership of another remarkable Sri Lankan lawyer, Lal Kurukulasuriya, UNEP established an international task force of 25 judges, and organised nine regional planning meetings in different parts of the world to develop programmes to improve judicial capacity in respect of environmental law.\textsuperscript{55} I was a member of the task force, and as such I attended a number of seminars at that time, notably a meeting in Rome which led to the formation of the EU Forum of Judges for the Environment.\textsuperscript{56}

The \textit{Judicial Handbook} was an attempt to bring together shared principles of environmental law from many different legal systems, in a form which would be accessible to, and useable by, judges at all levels. I was at first sceptical about the practicality of the exercise but I was won over by the enthusiasm of my fellow judges on the supervising committee, and the skill and apparently encyclopaedic knowledge of our two distinguished academic authors, Dinah Shelton and Alexander Kiss. It remains, I think, a very useful guide, although in need of updating and translating.

More recently, a UNEP congress of judges, law enforcers and auditors, held in parallel with the 2012 Rio +20 Conference provided an opportunity to review the progress of this programme since 2002. Writing in the \textit{Guardian} on line (22.6.12) I said:

While politicians may have failed to agree any headline-grabbing commitments in the main event at Rio this week, a sister conference quietly showed how judges in courts and tribunals across the world are adapting to give practical effect to laws for the protection of the environment.\textsuperscript{57}


\textsuperscript{54} Full text can be found at (2003) 15 JEL 107.

\textsuperscript{55} Lal Kurukulasuriya and Kristen Powell, ‘History of Environmental Courts and UNEP’s Role’ (2010) 3 J Court Innovation 269. The regional planning meetings were held in Thailand, Argentina, Nairobi, Johannesburg, Auckland, Cairo, Jamaica, Rome and Lviv.

\textsuperscript{56} <http://www.eufje.org> accessed 3 April 2014.

I pointed to the proliferation of specialist environmental courts or tribunals in many countries, including recent additions such as Bolivia, Belgium, China, Paraguay, the Philippines, South Africa and Thailand;58 and the recognition of the Aarhus principles (a legally-binding framework for access to information, the right to participate in environmental decision-making and access to justice to challenge the legality of environmental decisions), not only across the enlarged Europe but also internationally.59

The principles have since been embedded in guidelines endorsed by UNEP’s governing Council.60 The congress was followed in November 2012 by the establishment by UNEP of an International Advisory Council on Environmental Justice (of which I am a member), which in turn provided input in February 2013 to the meeting of UNEP’s Governing Council.

These peregrinations may all seem a long way from the day to day concerns of a national legal audience in a jurisdiction such as the UK. So let me come back to base. In highly sophisticated systems of environmental laws and administrative regulation, such as we have in this country and the European Union, the judge’s role is perhaps more limited. Nevertheless, one of the most important role of the courts, in all countries including our own, is to hold decision- and policy-makers to account for the consequences, good and bad, of their own decisions and policies.

Let me illustrate that by reference to a judgment of my own, relating to the dispute over the then government’s decision to support the provision of a third runway at Heathrow airport.61 Although the actual decision was overtaken by a change of government policy following the General Election, it remains a useful example of the law’s capacity to resolve the tensions between conflicting political aspirations. The problem was that the government’s wholly legitimate commitment to a third runway made in 2003, had been overtaken by its equally legitimate aspirations in relation to climate change, embodied in the Climate Change Act 2008. The two were not irreconcilable but their interaction needed to be addressed. An observer might have gained the impression of two different Departments of State (responsible one for transport and the other for climate change) steaming ahead with separate agendas with little reference to each other. My modest contribution was to suggest that both common sense and the law required that a commitment made in 2003, before those major developments in climate change policy, should be subject to review in the light of those developments.

In such cases the task of the judge is straightforward. It is not to substitute his or her views for those of the policy-makers, but to judge them by objective standards of accuracy, relevance and coherence. It is not for us to substitute our own views on

58 Pring and Pring (n 30).
61 R(Hillingdon LBC) v Transport Secretary [2010] EWHC 626 (Admin).
policy for those of the policy-makers, but rather to give their views full effect—in other words, it is for us to have the courage of their convictions.

Finally, let me attempt to draw the threads together. As this survey shows, the courts have for more than 150 years been seeking to mould the law to respond to the environmental challenges of a developing world. The responses of the English judges to the increasing environmental problems of the 19th century find a parallel in the inventiveness of the judges of the Indian and Philippines Supreme Courts in more recent times. It is true of course that our primary job is to decide the cases before us, and we search for the most suitable legal tools to enable us to do so within our own legal systems. Other judges in other countries may use different legal tools. But the objectives are the same and the underlying challenges are common to all.

With the recent memory of the devastation caused by the 2013 typhoon in the Philippines, it is apt that I should return there for my concluding remarks. In the Oposa case, the Supreme Court made clear that the rights of the unborn to protection of their future environment were not dependent on any particular constitutional structure or legal system. Such rights, the court asserted, concern

...nothing less than the right to self-preservation and self-perpetuation...the advancement of which may even be said to predate all government and constitutions...these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind...62

Commenting on those words in a speech in 2011 Justice Hilario Davide Jr said—alas all too prophetically:

This pronouncement from the Supreme Court of the Philippines rang true in 1993 when the decision was rendered. Today, and in the years to come, especially with the global, catastrophic, and devastating effects and consequences of climate change, the pronouncement will ring even more real and true.63

ACKNOWLEDGEMENTS

This article is based on the Garner lecture was given on 19 November 2013 at Freshfields, hosted jointly by UKELA, PEBA and the Journal of Environmental Law. Professor Jack Garner was a leading environmental lawyer and one of the founders of the UK Environmental Law Association.

62 See n 20, 1.
63 Davide (n 22) 595.