

INTRODUCTION

The Law and Our Shared Responsibility

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The environmental movement was one of the major social movements of the 20th century. Through a range of activities that included public demonstrations, legal reform and international cooperation, it raised the profile of conservation and sustainable development in a significant and profound way.

The movement is one of the big successes of recent times. While some of the old challenges remain and many new ones have emerged, the environmental movement succeeded in mobilising governments, private actors, the international community and even young children, to take concrete and definite steps towards conserving the environment and preserving it for future generations.

Today the environmental movement is engaging with people from all walks of life across the globe forcing them to re-examine modern lifestyles, take on added responsibilities, and ensure that the opportunities we create today are available with the same ease tomorrow and the day after.

Activism at the global level has catalysed action at the local level. In Sri Lanka, the law, public policy, social activism and legal education have all responded magnificently. While Sri Lanka has had laws on conservation that date to colonial times, new environmental challenges have required that new laws and polices be designed.

The National Environmental Act of 1980 was a turning point and marked the beginning of a new phase in environmental legislation in this country. The Act has been amended many times and has been the source of many important regulations. One of the features of the environmental law regime in Sri Lanka is the coexistence of older legislation with newer laws, both

capable of enforcement and implementation simultaneously and separately. The country now has in place a sound legal regime. Its implementation though remains a constant challenge and is one in which judge, lawyer, public official and activist, must all engage in and give priority to.

Environmental activism has grown in recent years. A number of organisations have emerged that have dedicated themselves to preserving nature's riches and protecting them for future generations. These organisations have used advocacy, the law, and public education as part of their strategies.

Legal education has also changed course and begun to offer dedicated courses, in Sinhala, Tamil and English, on environmental law. Many law teachers have travelled abroad and qualified themselves in the subject and environmental law is now a vibrant and growing legal discipline.

One of the most significant accomplishments of the environmental movement has been the growing public awareness. School child to grandmother, street vendor to industrialist, north to south, all have developed, at the very least, a basic understanding of some of the environmental challenges we face. Clearly we cannot make sustainable change unless there is a broad based public consensus on these issues and the public is motivated to act on their own accord. While the country has yet a long way to go, the first steps in this regard have been taken.

The Challenges of Modern Environmental Protection

Chapter 1 of this publication lays the groundwork for what follows. In this chapter Manishka De Mel and Nilshantha Sirimanne explore some of the environmental challenges we face at the current moment. The chapter discusses environmental change and interdependence and why there is an urgent need to act to protect the natural environment. Basic environmental concepts including environmental degradation, pollution, remediation, and restoration are considered and the impact on the health and wellbeing of the population discussed.

This chapter deals with the emergence of environmental law in Sri Lanka and discusses some important laws, policies and institutions. The doctrine of the public trust is also dealt with.

The authors examine the 'state of the environment' in Sri Lanka and the challenges posed by modern lifestyles including noise, air, soil and water

pollution. Mineral extraction and land degradation and the challenges of sustainable energy use are discussed. The management of solid, toxic and e-waste is also looked at. Some of the current challenges, especially those posed by climate change and the depletion of the ozone layer are considered by the two authors.

The chapter concludes with an analysis of some basic environmental principles which include the principle of sustainable development, the precautionary principle, the polluter- pays principle, the principle of preventive action, and the principle of accountability.

The Law and the Institutions

The enactment of the National Environmental Act marked the beginning of a new phase in environmental protection. Civil society was given an opportunity to participate in the processes leading up to the passage of the law and even though the legislation fell short of the ideal, it was yet an important legal event.

In Chapter 2 of this book Anandalal Nanayakkara analyses the several provisions of the National Environmental Act and the role of the Central Environmental Authority. He looks at the issue of licensing, the regulation of waste and the environmental impact assessment process. Public participation and public hearings are also discussed.

Air, water, soil, noise and marine pollution are examined in detail and the author analyses the legal regime in this regard. The Coast Conservation Act and the regulation of mines and minerals are considered. The legal regime in relation to the control of pesticides is also discussed. The author concludes by arguing that effective environmental protection requires us to draw on multiple sources of law. Older legislation coexists with newer laws. Both regimes have a role to play and courts should be willing to re-interpret some of the older legislation to meet changing social contexts.

Environmental Litigation in the Sri Lankan Courts

Environmentalists have sought to use the courts as instruments of change and this has resulted in a number of important judicial decisions on environmental law. The number of environmental matters being litigated before the courts of Sri Lanka has shown a sharp increase in recent years. The number of public interest cases on environmental law has also increased as both the Supreme Court and Court of Appeal have relaxed their rules on standing.

Judges have been required to interpret the constitution and relevant legislation and have thus generated a new and important body of jurisprudence on the subject. This body of jurisprudence is likely to grow as activists and others bring new issues to the notice of the courts. Some cases have also recognised international concepts on sustainable development, inter-generational equity and the doctrine of the public trust. This increased volume of litigation is one sure sign of the enhanced role that the law is beginning to play with regard to environmental protection in this country.

In Chapter 3, Ruana Rajepakse considers how environmental cases have been litigated before the courts of Sri Lanka. Environmental matters have been litigated as a fundamental rights violation despite the absence of an explicit right to a clean and healthy environment in the constitution. She discusses the case law of the Supreme Court in this regard and analyses some of the judicial approaches to constitutional interpretation. How the Supreme Court has exercised its 'just and equitable jurisdiction' under Article 126(4) is considered by the author.

The chapter also looks at some of the challenges to parliamentary bills where environmental issues have been under consideration and discusses how the Supreme Court has approached these issues. The author discusses whether the right to life could be used in environmental actions, in the backdrop of an implied right to life interpreted by the Supreme Court in other cases. In some other jurisdictions the right to life has been interpreted expansively to include within its ambit the right to a clean and healthy environment.

How the Court of Appeal has exercised its writ jurisdiction in environmental matters is also discussed. Cases of public nuisance under the Criminal Procedure Code are discussed and civil actions for private nuisance under the Civil Procedure Code and the Judicature Act briefly considered. The chapter concludes with a discussion of statutory offences under some of the environmental laws.

Scientific and Expert Evidence in Litigation

In Chapter 4 Jagath Gunawardana discusses the relationship between scientific evidence and environmental litigation. 'Proof' of facts in environmental litigation may often entail scientific reports or expert testimony. Judges are then called upon to evaluate the credibility of this evidence in deciding the case before them.

Inspection reports and analytical reports and the standards that should apply to these reports are discussed by the author. The author examines some of the challenges posed by these reports where they contain scientific data and some of the specific problems associated with interpreting scientific reports.

The processes involved in identifying plants, animals and other material is also discussed in Chapter 4. Problems of storage and transportation and the standards for ensuring the purity of the sample are also discussed.

The use of computer based evidence including satellite imagery, digital photographs, GPS and GIS are also considered and some of the challenges associated with these types of evidence discussed.

The author analyses the Initial Environmental Examination (IEE) and the Environmental Impact Assessment process (EIA) and looks at some of the shortcomings and the challenges.

Chapter 4 discusses the use of expert evidence and examines in detail the processes involved in assessing the credibility of expert testimony. The Sri Lankan case law on the subject is discussed by the author. The chapter concludes by exploring some of the challenges in computing costs in environmental cases. Questions of restoration and rehabilitation of an affected environment and the arrangements for redress and compensation for affected communities and people are discussed.

International Cooperation

International cooperation is vital if pollution and environmental degradation are to be addressed effectively. Led by the United Nations, the global community has forged a consensus on some of the applicable standards and come together to address some of the shared environmental problems.

Today there are in place over 500 agreements on the environment. Many of the agreements set standards of conduct and try to catalyse governments and private actors to structure their behaviour in accordance with the norms contained in these agreements.

In Chapter 5, Rukshana Nanayakkara, assisted by Wardani Karunaratne, surveys some of the major Multilateral Environmental Agreements and summarises some of their provisions. The chapter also looks at international environmental law and its relationship with the Sri Lankan legal system.

Monism and dualism are discussed briefly and the author discusses some examples where Sri Lankan courts have used international norms as interpretive aids.

Transboundary issues and the principles applicable are discussed. The author also discusses how some of the key concepts found in international environmental law, including the concepts of sustainable development, the precautionary principle, the polluter-pays principle, the principle on inter-generational equity and the public trust doctrine have been recognised through domestic legislation and judicial decisions. The chapter concludes by looking at the MEAs that Sri Lanka has signed.

The Role of the Judge

The last essay is an extract from a United Nations publication. In this extract, Judge C.G. Weeramantry draws from his several experiences as a judge of the Supreme Court of Ceylon, a professor of law, and a judge of the International Court of Justice, in examining the judicial role in environmental matters.

He examines the many roles that judges play and looks particularly at some specific challenges faced by judges in deciding environmental cases.

Judges and Our Shared Responsibility

'Environmentalism' is based on the notion that today's generation is a custodian of nature's riches and resources for tomorrow's generation. Similarly tomorrow's generation will be custodian for the generations that follow. It is a responsibility we all share and it is a responsibility we must all execute.

This book looks at the relationship between the law and its institutions, and the challenge of environmental protection. It brings together in a single volume, six important essays on the legal approaches to sustainability of the current environment.

Judges have a unique role in today's society. It is to the courts that we must go if we wish to preserve our democratic institutions. It is to the courts we also go when we want to protect, promote and realise human rights. It is also to the courts we go when we wish to sustain and preserve our natural resources. Judges, as custodians of the rule of law and interpreters of the constitution, legislation and public policy, have the capacity to make an

important impact on democracy, human rights and environmental protection.

Judges also operate at different levels of society and interact with varied cross-sections of society. Apex judges tend to engage in constitutional interpretation and the interpretation of macro issues, while lower court judges have an opportunity for closer contact with ordinary litigants.

The judgements of a court may offer relief to an aggrieved party or in public interest cases, to a group, a community, or the country at large. Yet judgements have an impact that go beyond offering relief in a particular matter. They can become ways to raise public awareness and can emerge as important educational tools. They have the potential to mobilise legal and public opinion. They can also establish crucial benchmarks for future public action.

In some environmental cases judges may require development planners and public officials to justify why a particular course of action has been adopted and ensure that best available option has been chosen.

The publication is aimed principally at judges. It looks at the role that the law plays and could potentially play with regard to environmental protection. It seeks to engage judges in a conversation and debate about current environmental challenges and the most effective methods of legal protection. It discusses some challenges that judges are likely to encounter in deciding environmental matters.

While this book is aimed mainly at judges it is likely to have an impact beyond the judiciary. Legal educators, students, policy makers, lawyers and environmentalists, among others, are likely to find its contents thought provoking.

The idea of publishing a handbook for the judiciary was a consequence of a workshop that the Environmental Foundation Limited had for the judiciary in early 2008. At the workshop there was a request from the judiciary for regular workshops to enhance the understanding of judges in this crucial area. There was also a request for relevant and current resource materials. This publication then is a result of these discussions and the first in a possible series of publications on the environment.

The law is a vital resource in our efforts at replenishing and rejuvenating the environment. The constitution, legislation, and subsidiary legislation, all play an important role as part of a larger legal regime. Judges, through their jurisprudence and as interpreters of this legal regime, help in translating the 'letter of the law' into practical action. This book seeks to engage the judiciary in this important process.

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