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Institutional Innovation for Environmental Justice

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COMMENT

Institutional Innovation for Environmental Justice

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I. INTRODUCTION

In this comment, I look at developments in the judicial protection of environmental rights since the Johannesburg Symposium in 2002. I consider the response of both judges and governments in developing laws and institutions to that end. The recent publication of a special edition of the *Journal of Court Innovation*¹ on the role of the environmental judiciary provides a valuable overview of the extent of progress since then, including the development of specialist environmental courts and tribunals. It also outlines proposals for the creation of an International Institute for Environmental Adjudication. The tenth anniversary of the Johannesburg Symposium calls for a renewed commitment by the United Nations Environment Programme (“UNEP”), working with judges internationally to achieve effective access to environmental justice for everyone.

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1. See Christopher Riti, *The Role of the Environmental Judiciary*, 3 J. CT. INNOVATION iii, available at <http://www.courts.state.ny.us/court-innovation/Winter-2010/index.shtml>.

II. THE JOHANNESBURG PRINCIPLES

The Global Judges Symposium in Johannesburg in August 2002 gave a new impetus to the role of judges in protecting the environment. Some 120 senior judges from around sixty countries met, at the invitation of UNEP, on the eve of the World Summit on Sustainable Development. At the end of the meeting, the judges adopted the so-called “Johannesburg Principles on the Role of Law and Sustainable Development,” which contained the following statement:

We affirm that an independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with and the implementation and enforcement of, international and national environmental law²

Their call to action was adopted by the governing council of UNEP, which in February 2003 convened a judicial task force, under Chief Justice Chaskalson of South Africa, to lead an extensive program of work designed to improve the understanding and practice of environmental issues among judges across the world.³

III. JUDGES AND THE LAW

Since then, there has been general acknowledgment that judges have a vital role to play in the protection of the

2. Global Judges Symposium on Sustainable Development and the Role of Law, Johannesburg, S. Afr., § 4, ¶ 7, U.N. Doc. UNEP/GJS/ELB/DPDL (Aug. 18-20, 2002).

3. For an account of UNEP’s activities in that period, led principally by their remarkable officer Lal Kurukulasuriya, see Lal Kurukulasuriya & Kristen A. Powell, *History of Environmental Courts and UNEP’s Role*, 3 J. CT. INNOVATION 269 (2010). I was privileged to work with him, *inter alia*, as a member of the Judicial Task Force and as co-chair of a Judicial Editorial Board (with Judge Weeramantry, former judge of the ICJ) to oversee the preparation of the judicial handbook. See DINAH SHELTON & ALEXANDRE KISS, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW (U.N. Env’t Programme 2005), available at http://www.unep.org/law/PDF/JUDICIAL_HBOOK_ENV_LAW.pdf.

environment. Of course, the nature of that role differs depending on the legal and administrative system of the country concerned. For example, the United Kingdom has had elaborate administrative arrangements for control of potentially polluting operations since the industrial revolution of the nineteenth century. The court's role has principally been that of enforcement and judicial review, rather than creation of new substantive protections.

By contrast, in countries where administrative systems for environmental regulation are relatively undeveloped, courts have had to fill the gap by imaginative interpretation of constitutional guarantees. India is a prime example.⁴ The Indian Supreme Court interpreted their constitutional right to life as granting each individual the right to a healthy and pollution-free environment, and to effective remedies enforceable in the courts.⁵ By abandoning strict principles of standing, the Court has recognized the rights of citizens to raise issues of public importance and has thus paved the way for public interest litigation as an important tool in promoting environmental protection.⁶ Equally important is the Court's willingness to devise new remedies, such as establishing expert committees to supervise environmental measures and monitor their performance.⁷ A famous example is the *Vellore Citizens Welfare* case,⁸ in which the Indian Supreme Court, by creative interpretation of the Constitution, held that principles of sustainable development, including the precautionary principle and the polluter pays principle, were part of Indian law.⁹ In response to a petition complaining of pollution of the water supply in the claimants' area by untreated effluent from tanneries, it ordered the central government to set up an

4. See generally Bharat H. Desai & Balraj Sidhu, *On the Quest for Green Courts in India*, 3 J. CT. INNOVATION 79 (2010).

5. *Id.* at 81.

6. *Id.* at 92.

7. *Id.* at 95.

8. *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 S.C.R. 241 (India).

9. *Id.* ¶ 14.

authority with the powers necessary to remedy the situation and compensate families who had suffered.¹⁰

Whatever the national context, it is important that judges should observe the limitations of their role. They are servants of the law. They are not politicians, lawmakers, nor policymakers. In his 2001 lecture, Lord Woolf, then Lord Chief Justice of England and Wales, explained his view of the three roles of the law in relation to the environment:

First, law should ensure that the standards set down by policy makers are enforced fairly and efficiently.

Second, law needs to ensure the policy maker's decision-making process itself is of the highest standard The decision-making process should be as open and accountable as possible, particularly where local interests are involved: it should allow relevant representations to be considered.

Finally, the law has a responsibility to protect the fundamental rights of the individual even when they conflict with the policy choices of the democratic majority. Measures aimed at the protection of the environment, as well as those that threaten it, may impact on people's right to life, property, privacy, conscience and their right to a fair hearing. Here the law has the difficult job of balancing rights of the individual against the will of the majority as expressed through Parliament.¹¹

In other words, the task of the law is to ensure informed and transparent decision-making, fair and efficient enforcement of environmental laws, and a fair balance between public objectives and private rights.

IV. AARHUS CONVENTION PRINCIPLES

The Aarhus Convention,¹² which has now been adopted by most European countries and the European Union itself, offers a

10. *Id.* ¶ 27.

11. Lord Chief Justice Woolf, *Environmental Risk: The Responsibilities of the Law and Science*, 13 ENVTL. L. & MGMT. 131, 132 (2001) (transcript of The Environmental Law Foundation Professor David Hall Lecture).

12. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447, 38 I.L.M. 517 [hereinafter Aarhus Convention].

powerful model for the involvement of the public in environmental decision-making. It stands on three “pillars”:

1. *Access to information* — Citizens have the right to ready access to environmental information, and public authorities have a duty to collect and provide it.
2. *Right to participate in environmental decision-making* — The public must be informed of relevant projects and have the opportunity to participate in the decision-making process.
3. *Access to justice* — The public has the right of access to effective judicial or administrative procedures to challenge the legality of environmental decisions.¹³

The simplicity of this tripartite model is important to its success. Article 9 is concerned with access to justice.¹⁴ Under article 9.3, members of the public must have access to “administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national” environmental law.¹⁵ Particularly important is article 9.4, which provides that the procedures for rights of access to justice “shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.”¹⁶

In determining standing in matters of public concern, the Convention defers to national law, but emphasis is given to “the objective of giving the public concerned wide access to justice.”¹⁷ Furthermore, the Convention’s definition of “the public concern” provides that “non-governmental organizations promoting environmental protection and meeting any requirements under national law” are explicitly deemed to have an interest in environmental decision-making.¹⁸

The *Handbook on Access to Justice under the Aarhus Convention* was published in 2002 by the Regional Environmental

13. *See id.* art. 1.

14. *Id.* art. 9.

15. *Id.* art. 9, ¶ 3.

16. *Id.* art. 9, ¶ 4.

17. *Id.* art. 9, ¶ 2.

18. *Id.* art. 2, ¶ 5.

Centre for Central and Eastern Europe (“REC”), with support from a number of governments including the United Kingdom.¹⁹ A series of case studies from nineteen countries was used to illustrate the practical problems arising for access to justice under article 9.²⁰ The issues included the role of non-governmental organizations (“NGOs”), rules as to standing, financial guarantees for interim relief, delay, and costs.

For example, while most of the cases show a broad approach to standing, the Hungarian court restricted the contribution of environmental NGOs by refusing them standing in cases not directly concerning “environmental” law, as defined by the Hungarian Environmental Protection Act.²¹ In the United Kingdom, by contrast, as in most common law countries, standing has ceased to be a live issue, at least where cases are brought by responsible environmental organizations. On the contrary, the court generally welcomes the expertise that environmental groups can bring to difficult cases raising technical issues.

A much more difficult issue in the United Kingdom has been the problem of costs.²² The ordinary cost-shifting rules applied in civil proceedings combined with the expense of civil litigation mean that those bringing public law challenges to environmental decisions risk very substantial cost penalties if they lose. In May 2008, a working group under Justice Sullivan commented on the operation of the current rules and concluded:

Our overall view is that the key issue limiting access to environmental justice and inhibiting compliance with Article 9(4) of Aarhus is that of costs and the potential exposure to costs. What is notable about the problem is that, by and large, it flows from the application of ordinary costs principles of private law to judicial review and, within that, of ordinary principles of judicial review to environmental judicial review. We consider that the first of those does not take proper account of the particular

19. REG’L ENVTL. CTR. FOR CENT. AND E. EUR. (REC), HANDBOOK ON ACCESS TO JUSTICE UNDER THE AARHUS CONVENTION (Stephen Stec ed., 2003), *available at* <http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/handbook.final.pdf>.

20. *See id.* at 18.

21. *Id.* at 148.

22. *See, e.g., id.* at 211-12.

features of public law. And that the latter is only acceptable in so far as it maintains compliance with Aarhus.²³

In July 2009, the European Court of Justice gave judgment in *Commission v. Ireland*,²⁴ in which the equivalent cost-shifting rules in Ireland were held to be inconsistent with Aarhus requirements.²⁵ The United Kingdom government is currently consulting on changes to the rules.

Another serious problem is that of interim relief — how to secure environmental protection while the case goes through the court, without causing disproportionate financial loss to other interests. In October 2010, the United Nations Economic Commission for Europe Compliance Committee drew attention to the financial risks involved in cross-undertakings in damages, leading to the situation where injunctive relief was not pursued, although the claimant was legitimately pursuing environmental concerns that involve the public interest. Such effects, it was held, would amount to prohibitively expensive procedures not in compliance with article 9(4). Again the government is currently consulting on measures to address the position.

These examples show how an international instrument such as the Aarhus Convention can force governments to address the practical workings of their traditional legal systems so as to ensure effective access to justice.

Kofi Annan, Secretary-General of the United Nations from 1997 to 2006, has said of the Convention:

Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of

23. WORKING GRP. ON ACCESS TO ENVTL. JUSTICE, ENSURING ACCESS TO ENVIRONMENTAL JUSTICE IN ENGLAND AND WALES 15 (May 2008), available at http://www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf.

24. Case C-427/07, *Comm'n v. Ir.*, 2009 E.C.R. I-06277.

25. *Id.* ¶¶ 92-94.

“environmental democracy” so far undertaken under the auspices of the United Nations.²⁶

In February 2009, the Governing Council of UNEP proposed the extension of similar principles on an international basis, in the spirit of Principle 10 of the Rio Declaration. In the following year, the Governing Council adopted its *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*.²⁷ Aarhus principles should therefore become increasingly important in providing a strong legal platform for the assertion of individual environmental rights.

V. DEVELOPMENT OF ENVIRONMENTAL COURTS AND TRIBUNALS

One of the most striking developments of recent years has been the growth of specialist tribunals. Over 360 national or sub-national specialist environmental courts and tribunals currently exist in some forty-two countries, with half of them created in the last five years.²⁸ Bolivia, Belgium, China, Paraguay, Philippines, South Africa, and Thailand are among the most recent additions to this list.²⁹ The main factors contributing to this growth have been the increasing public awareness of the seriousness of the threats to domestic and global environment, and the perceived inadequacy of the traditional courts to deal with them. In an article in the *Journal of Court Innovation*, the authors commented:

26. U.N. Econ. Comm'n for Eur., *The Aarhus Convention: An Implementation Guide*, at v, U.N. Doc. ECE/CEP/72, U.N. Sales No. E.00.II.E.3 (2000).

27. Proceedings of the Governing Council/Global Ministerial Environment Forum, 11th Special Sess., Feb. 24-26, 2010, Annex I at 11, U.N. Doc. SS.XI/5 (Mar. 10, 2010).

28. George Pring & Catherine Pring, *Increase in Environmental Courts and Tribunals Prompts New Global Institute*, 3 J. CT. INNOVATION 11, 12 (2010) [hereinafter Pring & Pring, *Increase in Environmental Courts*]; see also GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, THE ACCESS INITIATIVE, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS 19-21 (2009), available at <http://moef.nic.in/downloads/public-information/Greening%20Justice.pdf>.

29. See Pring & Pring, *Increase in Environmental Courts*, *supra* note 28.

Many nations have responded to these environmental pressures by adopting complex environmental laws – from constitutional “rights to a healthful environment,” to substantive environmental quality laws, to procedural rights of access to information, public participation, and access to justice. International environmental treaties and agreements also create new rights and duties – principles such as sustainability, polluter-pays, precautionary, prevention, inter-generational equity – that increase expectations and the pressure on countries to adopt strong laws protecting the environment. But in many countries (a cynic might say “all”), the laws on the books are not adequately enforced, and so environmental problems and public outrage continue. . . . Barriers to existing court effectiveness in resolving environmental conflicts are many and various – the most significant being long delays, huge case backlogs, poor case management, decision-makers lacking in environmental expertise, narrow definitions of plaintiff standing, the high cost and economic risks of litigation, lack of consistent decisions, intimidation, and corruption.³⁰

Specialist tribunals also provide opportunities for innovation, and for development of flexible procedures and remedies.

The same article provides many illustrations of such innovation. For example, the Land and Environment Court of New South Wales has been at the forefront in creating a “model ‘multi-door courthouse,’ utilizing different adjudication pathways, ADR, and social services.”³¹ Another example comes from Brazil:

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

30. *Id.* at 13-14.

31. *Id.* at 20 [‘ADR’ stands for Alternative Dispute Resolution].

environmental comic books he has personally authored and illustrated and which are paid for by offenders in lieu of fines.³²

The Supreme Court of the Philippines has also been particularly active:

Before going on the bench, Ambassador Hilario Davide Jr. personally authored the provision in the Philippines' 1987 Constitution creating a "right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." When he was appointed to the Supreme Court of the Philippines, he wrote the landmark opinion in *Oposa v. Factoran* and subsequently became Chief Justice. That groundbreaking 1993 case was brought by award-winning environmental advocate Antonio (Tony) Oposa against the national government for failing to protect hundreds of thousands of acres of virgin Philippine forests from clear-cutting.³³

More recently, a network of 117 environmental courts has been created, and the Philippines Supreme Court has adopted new rules of procedure for environmental cases, including a so-called "writ of *kalikasan*," also known as a writ of nature:³⁴

The writ is a remedy available to a natural or juridical person, entity authorized by law, people's organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice life, health, or property of inhabitants in two or more cities or provinces.³⁵

32. *Id.* at 19-20.

33. *Id.* at 16 (*citing* *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.)).

34. Hon. Hilario G. Davide Jr. & Sara Vinson, *Green Courts Initiative in the Philippines*, 3 J. CT. INNOVATION 121, 128 (2010).

35. *Id.* (*citing* RULES OF PROCEDURE FOR ENVIRONMENTAL CASES R. 7, A.M. No. 09-6-8-SC (Phil.)).

VI. CONCLUSION

As we approach the tenth anniversary of the Johannesburg Symposium, there is much progress to report. Fundamental to the declaration, challenges of environmental protection have to be addressed at all levels – national, regional and global – and laws are not enough without judges and courts able to understand the issues. Also essential is the ability to provide accessible justice to individuals and representative agencies. A large body of experience has now been created by judges in many parts of the world. What is needed is to coordinate that work and to learn from each other's experiences. Pace Law School's proposal for a new International Judicial Institute for Environmental Adjudication could provide a useful platform for cooperation between judges and judicial institutes, as well as partnerships with environmental law academics and experts.³⁶ More importantly, UNEP should renew its commitment to the principles stated in 2002, and develop a new program of cooperation with judges and administrators to build on the successes of the last ten years.

36. Sheila Abed de Zavala et al., *An Institute for Enhancing Effective Environmental Adjudication*, 3 J. CT. INNOVATION 1, 8 (2010).