

Lord Carnwath gives the Garner Lecture 2013¹

The Common laws of the environment – at home and abroad

19 November 2013

The great Birmingham Corporation case of 1858² 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 those problems. The rights of the individual must prevail. In the words of Page Wood V-C it was

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“a matter of almost absolute indifference whether the decision will affect a population of 25,000 (in fact 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...”³

¹ This lecture was given on 19th November 2013 at Freshfields, hosted jointly by UKELA, PEBA and the Journal of Environmental Law. It is intended that an article based on the lecture will appear in the Journal in early 2014. Professor Jack Garner was a leading environmental lawyer and one of the founders of the UK Environmental Law Association.

² *AG v Birmingham Corporation* (1858) 4 K&J 528

³ P 539

In an illuminating article on the case and its sequel (newly incorporated into a book⁴), Ben Pontin⁵ has suggested that, given the atmosphere (literally) in which the case was argued, the result was never in doubt. The problem for counsel for the authority was not so much the lack of precedent, as 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”.

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.”

Reading that I found myself thinking of comparisons with the environment of Delhi at the time of the famous case in 1998 in which the 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

⁴ Pontin, B. (2013) *Nuisance Law and Environmental Protection : A study of nuisance injunctions in practice*. Lawtext Publishing Ltd. It was cited in the Supreme Court last week (unusually, before publication).

⁵ The secret achievements of nineteenth century nuisance law Ben Pontin (2007) 19 ELM 271

Natural Gas. There is no record of how those conditions were felt in the court room. But 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 and a responsive court. Both cases relied on the foundations of firm legal principles which have since become part of a common and enduring legacy. But in both, also, the working out of the judicial decisions showed principle and practicality as uneasy bedfellows. And in both justice took a very long time to achieve its objectives, and depended in the end on substantial involvement and commitment of resources by the executive.

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, whose 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 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"⁶ – words which have been echoed in many modern constitutions.⁷

⁶ HC Debates 25.7.1871 col 238

⁷ E.G. Constitution of Kenya art 42. Every person has the right to a clean and healthy environment, which includes the right— (a) to have the environment protected for the benefit of present

The VC's judgment in 1858 was as I have said a strong 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 the Vice Chancellor in 1858 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. 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 just 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 Addington had returned to the Chancery Division to enforce the original injunction, that the council devoted serious time and money to sewage treatment. 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" (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" (a precursor, he suggests, to the requirements of Waste Water Directive (91/271/EEC). It was not until 1895, 37 years

and future generations through legislative and other measures,..."

after the original decision, that the treatment was deemed adequate to enable the injunction to be discharged.

100 years on, the Delhi case also had a powerful champion in the form of the great environmental advocate, M C Mehta. His cases have, in the apt words of Wikipedia, “formed the foundation for the development of environmental jurisprudence in India and indeed South Asia today”. It was one of a remarkable series of Supreme Court cases beginning in about 1985⁸, in which the court used the guarantees of a right to life under article 21 of the constitution, interpreted as including the right to a wholesome environment, as the basis for developing a powerful set of principles for the protection of the environment.

One of those cases concerned air pollution caused by traffic in Delhi. The litigation began in 1985 on the basis that the government had an obligation under the constitution to take active steps to reduce pollution. As in England in the 19th C, things moved rather slowly. It was thirteen 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 (compressed natural gas) 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.

⁸ *Rural Litigation & Entitlement Kendra v State of Uttar Pradesh* 1985 SC 652

That account comes from an article written in 2003: “Can the Supreme Court manage the Environment?”⁹ 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”. As we will see, the tension between the courts and the executive as champions of the environment is a constant and unresolved theme of litigation in this field.

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 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”.¹⁰

Such worries do not seem to have troubled another remarkably activist court, the Philippines Supreme Court. In the famous *Oposa* case¹¹ the court memorably upheld a challenge to the state’s policies for granting consents to

⁹ Michael Jackson and Armin Rosencranz *The Delhi Pollution case: Can the Supreme Court Manage the Environment?* Environmental Policy and Law 33/2 (2003) p 88. Rosencranz is described as consulting professor at Stanford, and co-author of *Environmental Law and Policy in India* (Oxford 2001).

¹⁰ New Delhi Journal 26.12.12, reported on the New York Times website (<http://www.nytimes.com/2012/12/27>)

¹¹ *Oposa v Factoran* GR No 101083 (SC 30 July 1993)

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.

Before going on the bench, Ambassador Hilario Davide Jr. had 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 in the Supreme Court he was also instrumental in paving the way for the development of specialist environmental courts and for evolving the so-called writ of *Kalikasan*.¹²

"a remedy available ...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... involving environmental damage of such magnitude as to prejudice life, health, or property of inhabitants in two or more cities or provinces..."

¹² See Justice Hilario Davide *The Environment as Life Sources and the Writ of Kalikasan in the Philippines* in PACE Environmental \law Review (2012) Vol 29 No 2 p 592.

Such thinking was taken a stage further in Bolivia's Mother Earth law (Ley de derechos de la Madre Tierra)¹³. 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.

Although the language is perhaps more poetic, the thinking perhaps is not far from Lord Hope's reference (in a recent case in our own Supreme Court) to the rights of an osprey, threatened perhaps by windfarm development affecting its routes to a favourite fishing loch. As he said, to limit access to the courts to a person with property rights or interests, he said -

"would seem to be contrary to the purpose of environmental law, which 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

¹³ The law defines seven specific rights: to Life itself; to the Diversity of Life; to water; to clean air; to equilibrium (the maintenance of "the inter-relation, [and] interdependence, ability to complement and functionality of the components of Mother Earth, in a balanced manner..."); to restoration ("the effective and opportune restoration of life systems affected by direct or indirect human activities"); and to live free from contamination.

wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.”¹⁴

This world tour would of course be incomplete without a visit to New South Wales, where a leader in the development of general principles of environmental law has been the Land and Environment Court. Established in 1980 it has proved the model for a proliferation of specialist environmental courts or tribunals across the world. A succession of Chief Justices have drawn from national and international sources in moulding the common law to meet modern environmental challenges. I take one example, the remarkable judgment of Chief Justice Preston in 2006 *Telstra* case.¹⁵ 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 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”. He outlined six basic principles: in summary, (i) sustainable use, (ii) integration (the effective integration of economic and environmental considerations in the decision-making process; (iii) the precautionary principle (that “if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation”); (iv) the principle of equity, including inter-generational equity; (v) the conservation of biological diversity; (vi) the internalisation of environmental costs – the need for full account to be taken of the short-term and long-term costs of

¹⁴ *Walton v Scottish Ministers* [2012] UKSC 44 para 152

¹⁵ *Telstra Corporation v Hornsby Shire Council* (2006) 146 LGERA 10.

any major project. He went on to what is perhaps the fullest judicial discussion of the “precautionary principle” drawing on cases and other sources from across the world.

Finally, of course, to the USA, where in modern times the environmental justice movement has probably generated more litigation than anywhere else, and more academic literature. Two recent articles are of special interest to this assembly: Liz Fisher, JEL Editor, on Climate Change Litigation¹⁶; and Haydn Davies on a similar subject in the UKELA E-law newsletter for January 2013.¹⁷ 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*.¹⁸ The claim was brought by twelve states against the Environmental Protection Agency to compel them to regulate emissions of greenhouse gases. The Supreme Court divided on familiar lines. Indeed Liz Fisher notes that the differences between the respective approaches of Justices Scalia and Breyer can be traced back to legal questions that they addressed when they were both administrative law academics in the 1970s. On one view the case turned on relatively narrow issues about the construction of the word “pollutant”, But on another it went wider, the majority judgment appearing to give judicial recognition at the highest level to scientific theories linking the rise in global temperatures with man-made emissions of greenhouse gases.¹⁹ It had the effect in due course of leading the EPA to revise its view

¹⁶ Elizabeth Fisher *Climate Change Litigation, Obsession and Expertise: reflecting on the scholarly response to Massachusetts v EPA* Law & Policy Vol 35 no 3 July 2013 (University of Denver)

¹⁷ Haydn Davies Native *Villagers Plight is a Political Question* E-law Jan 2013

¹⁸ 549 US 497 (2007)

¹⁹ Fisher cites the endorsement of that interpretation in the NSW Land and Environment Court (*Walker v Minister for Planning* [2007] NSWLEC 741, and the opening words of Justice Stephens’ majority judgment: “a well-

and to identify six greenhouse gases which were potentially a danger to public health, and to resist a counter-challenge in the US Court of Appeals from another group of states, tellingly named the Coalition for Responsible Regulation.²⁰ Also important was the majority's affirmation of the standing of the States to bring such proceedings, citing Justice Holmes' reference in 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".²¹

Haydn Davies describes the more mixed fortunes of recent attempts to use the use the common law of public nuisance to bypass or supplement the more less flexible regimes imposed by statute. In *Kivalina Village v Exxonmobil* (2012) 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* (2011).²² He quotes Justice Ginsburg in *AEP* 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 adhoc case-by-case injunctions.²³ Davies is sceptical about the ability of the courts to do much to address environmental inequality, beyond some "prodding and pleading". As he says, it is an economic and political responsibility that can

documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere."

²⁰ *Coalition for Responsible Regulation v EPA* (DC Circ Jun 26 2012)

²¹ *Georgia v Tennessee Copper Co* 206 US 230, 237 (1907)

²² 131 S Ct 2527 (2011)

²³ *Ibid* 2539-40

only be undertaken by the legislature and the executive. Liz Fisher ends with the comforting thought that it is early days for this debate. She quotes one senior academic: “I am confident that my current students will be working on legal issues related to climate change until they retire some 50 years from now.”²⁴

These examples dating from the 19th C to the present show what a potent force the 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 UNEP Judicial Handbook on Environmental Law (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.”²⁵

Judge Weeramantry was the Sri Lankan judge of the ICJ who had been party to the ground-breaking judgment in the Hungarian Dams case²⁶. That case confirmed the role of common environmental principles as part of public international law, adopting the statements in an earlier case that

²⁴ Richard Pierce *Legal disputes related to climate change will continue for a century* (2012) Environmental Law 52: 1257-74

²⁵ Dinah Shelton and Alexander Kiss *Judicial Handbook on Environmental Law* (UNEP 2004) p xx
<http://www.unep.org/delc/Portals/119/publications/Judicial-Handbook-Environmental-Law.pdf>

²⁶ Case concerning the *Gabcikovo-Nagymaros* project (Hungary/Slovakia) 1997 General List No 92 (25.9.97)

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 part of the corpus of international law.²⁷

Any one who has read Justice Weeramantry’s concurring judgment will know that he is no ordinary judge. It is an astonishing 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”. 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 500BC. 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”.

I was privileged to act as co-chair with him of the judicial committee which oversaw the preparation of the UNEP manual. That Handbook was one of the initiatives which came out of the Global Judges Symposium on Sustainable Development and the Rule of Law, convened by UNEP in Johannesburg in August 2002. That was 10 years on from the adoption of Rio Declaration principle 10, which affirmed the right of all citizens to

²⁷ Legality of Nuclear Weapons Advisory Opinion ICJ Reports 1996 pp 241-2 para 29.

participate in decisions about their environment and to have effective access to judicial and administrative proceedings to enforce their rights. The Johannesburg Declaration 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.²⁸ 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.

A particularly memorable experience was a seminar for African common law judges in Nairobi, organised jointly by UNEP and the Commonwealth Magistrates and Judges Association. The judges there showed an impressive display both of understanding of environmental law principles and a wish to learn more from other countries.

The 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

²⁸ *History of Environmental Courts and UNEP's role* Lal Kurukulasuriya and Kristen Powell PACE *op cit* p 269. The regional planning meetings were held in Thailand, Argentina, Nairobi, Johannesburg, Auckland, Cairo, Jamaica, Rome and Lviv.

and apparently encyclopedic 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. At the same time UNEP produced a international digest of cases, edited by Professor Bob Reed, which showed how these principles have been applied in countries as varied as Argentina and Mauritius or Nepal and the Slovak Republic.

A UNEP congress of judges and law enforcers held in parallel with the 2012 Rio Summit²⁹ provided an opportunity to review the progress of this programme since 2002. Writing in 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.”³⁰

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 Thailand³¹; and the recognition of 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. It was described by Kofi Annan (Secretary-General of the United Nations 1997-2006) as “the

²⁹ A parallel event organised by UNEP, the World Congress on Justice, Governance and Law for Environmental Sustainability, brought together some 150 judges, prosecutors, and enforcement agencies from some 60 countries. In parallel with the A parallel

³⁰ <http://www.theguardian.com/law/2012/jun/22/judges-environment-lord-carnwath-rio>

³¹ George and Catherine Catherine Pring, *Greening Justice: Creating And Improving Environmental Courts And Tribunals* (The Access Initiative 2009): <http://www.accessinitiative.org/resource/greening-justice>

most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.”³²

The principles have since been endorsed in guidelines endorsed by UNEP’s governing council ³³

The congress was followed in November 2012 by the establishment by UNEP of an International Advisory Council on Environmental Justice, which in turn provided input in February 2013 to the meeting of UNEP’s Governing Council, the first with universal membership.

These peregrinations may all seem a long way from your day to day concerns. So let me finally come back to base. In a 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, but significant none the less.

One of our greatest challenges is that of complexity. This is especially so in our relations with European law and the European courts. 20 years ago I gave a talk *Environmental Law – a Way through the Maze?* We have not yet found the way. In her recent review of Twenty five years of domestic case law, Justine Thornton kindly includes in her list of top cases a judgment of my own: *OSS v Environment Agency*.³⁴ She refers to my “memorable quote that the search for logical coherence in the EU waste case law was probably

³² As cited at <http://www.unece.org/env/pp/>.

³³ *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters*, adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5, part A of 26 February 2010

³⁴ *OSS v Environment Agency* . The other was *Barr v Biffa* regarding the “clash between modern day statutory regulation and the 19th C principles of nuisance”

doomed to failure”. Grateful as I am, I am sorry that it should be so. I hope that in that judgment we were able to give some constructive guidance to those whose duty it was to give practical effect to the European directives and judgments.

Perhaps the most important role of the courts, in all countries including our own, is to deploy the power of objective and informed evaluation of the evidence, and the consequent ability to hold decision- and policy-makers to account for the consequences, good and bad, of their own decisions and policies. I take two examples.

The first is *Dimmock v Secretary of State* [2007] EWHC 2288. It concerned a challenge to the decision of the Education Department to distribute to every state secondary school a copy of Al Gore’s film *An Inconvenient Truth*. It was challenged under the provisions of the Education Act 1996 which outlawed the promotion of “partisan political views” and required “a balanced presentation of opposing views”. As Burton J pointed out in a marvellously dry but rigorous discussion of this highly charged subject, balance does not necessarily imply equality for all shades of opinion however far-fetched. As he put:

“There is nothing to prevent (to take an extreme case) there being a strong preference for a theory – if it were a political one – that the moon is not made out of green cheese, and hence a minimal, but dispassionate, reference to the alternative theory... the word “*balanced*” in s407 means nothing more than fair and dispassionate.”

(para 16)

The rest of his judgment is a model of just that – fair and dispassionate analysis. Counsel for Mr Dimmock had “produced a long schedule of

alleged errors and exaggerations and waxed lyrical in that regard”. The judge had looked at the film with this critique in hand, but found only nine “errors” to be “sufficiently persuasive to be relevant for the purposes of his argument.”(para 29). By the end of the hearing it was accepted that the film could be distributed but with an amended guidance note, addressing these points, and raising specific questions for discussion in class. The result I believe was not to detract from the power and relevance of the film, but if anything to confirm both the potency and accuracy of its central message and the great majority of the supporting evidence.

The second is a case of my own, the battle over the Third Heathrow Runway.³⁵ Although the actual decision was overtaken by a change of government policy following the General Election, it may remain significant as an illustration 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 the problem needed to be addressed. I had 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

³⁵ R(*Hillingdon LBC*) v *Transport Secretary* [2010] EWHC 626 (Admin)

objective standards of accuracy, relevance, and coherence. It is not for us to substitute our own views on policy for those of the policy-makers, but rather to give them full effect – in other words, it is for us to have the courage of their convictions.

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 C find a parallel in the inventiveness of the judges of the Indian and Philippines Supreme Courts in more recent times. The legal techniques may differ but the ultimate objects are the same.

When I proposed the subject of this talk, Liz Fisher showed some scepticism about the idea of an international “common law” of the environment, emerging from the case law of such different legal cultures. She was more impressed by the way in which the courts have been prompted by, in her words, bottom up forces (the need to resolve disputes) and top down processes (Rio, Agenda 21, Aarhus), and the way in which a single principle can be a catalyst for a range of different legal developments in a range of jurisdictions. 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 with our own legal system. Other judges in other countries may use different legal tools. But the objectives are the same and the underlying challenges are common to all.

In the light of recent tragic events in the Philippines it is apt that I should end there. 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....”

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.”³⁶

RC 19.11.13

³⁶ Reproduced as Davide *The environment as life sources*: in a special edition of PACE Environmental Law Review Vol 29 no 2 (Winter 2012) p592