

The Environment and its Influence on the Law

by

The Hon. Justice Brian J Preston
Chief Judge
Land and Environment Court of NSW

Keynote address to:

**Legal Aid New South Wales
Civil Law Conference
September 2007**

**26 September 2007
Mercure Hotel, Broadway
Sydney**

Introduction

The environment has been said to include “all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings”.¹ This is a reference to the physical elements of the environment, both the abiotic or non-living elements such as the climatic, physiographic and edaphic elements as well as the biotic or living elements (other living things). From an ecological viewpoint, however, humans themselves are also part of the environment. We interact with our surroundings; the surroundings sustain, feed, clothe and inspire us but we also shape our surroundings. Desertification, loss of biological diversity and climate change stand testament to humans’ ability to shape the environment.

The environment also interacts with the law. The law is employed to regulate humans’ dealings with the environment. Fowler has suggested that environmental statutes can be seen to have both a positive or protective component and a negative or exploitative component.² The positive component is divided into first, rules for the protection of the environment from undue degradation by human activity, and secondly, rules for the conservation of natural, built or cultural items within the environment. The negative component is divided into, first, rules as to the disposition of natural resources and, secondly, rules which promote or facilitate development activity. The common law also has both positive and negative components. The law of torts, for example, has a positive component in that it protects certain classes of persons from unreasonable interference with their rights of person or property caused by other persons but such regulation is done in the recognition of the right of the other persons to exploit their land and its resources in a manner and to an extent that does not cause such unreasonable interference.

The interaction of law and the environment is, however, not unidirectional, that is to say, limited to the law shaping the environment. The environment has also shaped the law. The laws of today, to varying degrees, are a product of the environment.

This conference focuses on civil law. Let me illustrate ways in which the environment and disputes about it have influenced, and continue to influence, the development of civil law. I will focus on property law, the law of torts, administrative law, constitutional law and human rights and contract law.

Property law

Property law quintessentially involves the environment. Both statutory law and common law have as their central concern the regulation of humans’ interaction with the environment. As Sax notes, our traditional legal system is organised to permit the expropriation to certain persons of the resources of the earth:

“The resources of the earth are largely organised to encourage decentralised, atomistic, self-interested decision making. Indeed the very essence of the legal structure of resource ownership is the division of the earth into segments created by the drawing of arbitrary lines, to isolate these segments one from another (the fence being the dominant symbol of our system) and then leave it to each owner within his own fenced enclave to exploit the resource to his maximum benefit.”³

Under the traditional concept of real property rights, the land (including waters other than communal waters (*res communes*)) is divided by arbitrary lines to create

¹ s 4(1) of the *Environmental Planning and Assessment Act 1979* (NSW).

² R J Fowler, “Environmental law and its administration in Australia”, (1984) 1 *EPLJ* 10 at 18.

³ J L Sax, “The law of a liveable planet”, in R J Fowler (ed), *National Environmental Law Association of Australia (NELA) and the Law Association for Asia and the Pacific (LAWASIA) Proceedings of the International Conference on Environmental Law, Sydney, 14-18 June 1989*, p 8

allotments. Each allotment is composed of the land and things so attached thereto as to be part of the land. This includes the minerals in the soil, the rocks and the plants growing on the land. Ownership of the allotment of land carries with it the right to use the land and exploit its resources. Ownership of land also provides an opportunity to graze tame animals on the land and to expropriate to the owner wild animals that enter the land.

This notion of real property rights derives from Roman law and was embraced by the early English common law.⁴ Over time, however, this traditional notion has been altered.

Perhaps the first alteration was the exclusion of game animals from the category of wild animals. Wild animals traditionally were *res nullius* until such time as they were captured or tamed and reduced to somebody's possession thereby becoming *res alicuius*. However, game was seen to be of particular value as a source of food and sport. The nobility wished to exclude others from expropriating to themselves game animals. According to Blackstone, to avoid disturbances and quarrels amongst individuals contending about the acquisition of this species of property by first occupancy, ownership of game was vested in the sovereign of the state or its authorised representatives, usually lords of manors.⁵

This device of vesting property in animals in the sovereign was employed in Australia. In a number of States, fauna or certain classes of fauna, were declared by statute to be the property of the Crown in right of the State unless and until the fauna was lawfully taken. A current illustration is in s 97(2) of the *National Parks and Wildlife Act 1974* (NSW).

Bonyhady notes that legislation in New South Wales and Western Australia creating Crown title to wild animals was uncontroversial. In Western Australia it was considered necessary in order to enable the Crown to declare a royalty on the taking of all native game.⁶ In New South Wales, Crown ownership was the government's response to a decision in the District Court, that when someone captured a wild animal or bird in the closed season, he became the legal owner of it (following the common law position) and hence could not be prosecuted for wrongful possession of protected birds and animals. To overcome this decision, Parliament enacted the *Birds and Animals Protection (Amendment) Act 1922* (NSW) so that all protected birds and animals were the property of the Crown until taken or killed in accordance with the *Birds and Animals Protection Act*. In Queensland, amendments to the *Animals and Birds Act* in 1924 were intended "less to protect native fauna than to enhance State revenue from the fur trade and to free trappers from the indignity of having to 'bow and scrape' before station holders to get permission to enter their land".⁷

More recently, the concern to protect endangered species of fauna, has resulted in endangered species legislation which prohibits the harming of endangered fauna and their habitat.⁸

⁴ See B J Preston, "From commodity to community: the emancipation of wildlife" in S Thomas (ed), *Conference papers of the National Environmental Law Association of Australia (NELA) and the Law Association for Asia and the Pacific (LAWASIA) Second International Conference, 4-7 August 1991*, Bangkok, Thailand, pp 95-98. As to the classification of things under Roman Law, see *Justinian's Institutes*, Book II, s 2.1 (at pp 55-61 in the translation by P Birks and G McLeod, Duckworth, London, 1987)

⁵ Blackstone, *Commentaries on the Law of England*, Book II, 1829, pp 14-15

⁶ See s 6 of the *Game Act Amendment Act 1913* (WA)

⁷ T Bonyhady, "Property rights" in T Bonyhady (ed), *Environmental Protection and Legal Change*, Federation Press, 1992, pp 61-62

⁸ See for example ss 118A – 118D of the *National Parks and Wildlife Act 1974* (NSW) and the *Threatened Species Conservation Act 1997* (NSW) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

In Australia, another alteration to the traditional concept of real property rights occurred by vesting in the Crown certain components of the land that at common law would have attached to and been part of the land and hence the property of the land owner. One example is that the bundle of rights that a property owner acquired, from the original Crown grants and subsequently, had reserved from it many mineral resources. Beginning with New South Wales in 1884, all jurisdictions adopted a general severance policy, separating the mineral rights from the rest of the land, by providing that future land grants should contain a reservation of all minerals.⁹ A second example, although perhaps not of concern to non-aboriginal owners of land, but of significant concern to Aboriginal persons, is that Aboriginal objects in, on or under land were deemed by statute to be the property of the Crown.¹⁰

Collectively, these shifts in ownership of wild animals, mineral resources and Aboriginal objects in Australia had the effect of reducing land ownership almost to a surface ownership, with all other rights being vested in the Crown.

Statutory law has effected an even greater alteration to the traditional concept of real property rights by constraining significantly a land owner's right to use the land and its natural resources as he or she thinks fit¹¹. The common regulatory technique employed is for a statute to prohibit the doing of some act but to establish a regulatory mechanism whereby that prohibition can be relaxed by the owner of the land applying for and obtaining a form of statutory approval to do the act, often on terms or conditions. This is the regulatory approach for the subdivision and development of land,¹² the exploitation of mineral resources,¹³ the use of water resources,¹⁴ the exploitation of timber and plant resources,¹⁵ and affecting threatened species, populations and ecological communities and their habitats.¹⁶ Such regulatory restrictions do not, as a usual rule, create a right of compensation for the land owner affected.¹⁷

The consequence is that there is, in practice, little a land owner can undertake on the land without being subject to some form of statutory regulation, including obtaining some form of statutory approval.

Let me turn to another way in which the environment and disputes about it are affecting property law.

The common law and statutory law of relevance to real property mostly impose duties of a negative nature, that is to say, duties that a land owner not do certain acts. However, affirmative duties on land owners do exist and they may become more common. Land owners may be under positive obligations to conserve land and

⁹ T Bonyhady, note 7, p 74. See also C W O'Hare, "A history of mining law in Australia", (1971) 45 ALJ 281 at 285-287 and A J Bradbook, S V MacCallum and A P Moore, *Australian Real Property Law*, 4th ed, Lawbook Co, 2007, pp 654-658

¹⁰ s 83(1) of the *National Parks and Wildlife Act 1974* (NSW)

¹¹ R J Lazarus, "Changing conceptions of property and sovereignty in natural resources: Questioning the public trust doctrine" (1986) 71 Iowa L Rev 631 at 693-698 and A J Bradbook et al, note 9, pp 29-31

¹² See Part IV of the *Environmental Planning and Assessment Act 1979* (NSW) and *Lloyd v Robinson* (1962) 107 CLR 142 and *Western Australian Planning Commission v Temwood Holdings Pty Limited* (2004) 221 CLR 30

¹³ *Mining Act 1992* (NSW)

¹⁴ *Water Management Act 2000* (NSW). See generally as to statutory regulation of water resources, D E Fisher, *Water Law*, LBC Information Services, 2000

¹⁵ *Native Vegetation Act 2003* (NSW), *Environmental Planning and Assessment Act 1979* and the environmental planning instruments and tree preservation orders made there under, and the *National Parks and Wildlife Act 1974* (NSW)

¹⁶ *National Parks and Wildlife Act 1974* (NSW), *Threatened Species Conservation Act 1997* (NSW) and the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)

¹⁷ T Bonyhady, note 7, pp 49-56 and K Gray, "Can environmental regulation amount to taking of common law property rights?", a paper presented to the Beyond Environmental Law Conference, Sydney, 16 & 17 February 2007

things attached to it. A land owner may be required, in relation to a heritage item on the land, to undertake a minimum standard of maintenance and repair to avoid demolition of the heritage item by neglect.¹⁸ A land owner may enter into a private property agreement, whereby the land owner undertakes to conserve the land and things attached to it. Examples are heritage agreements in relation to heritage items on land,¹⁹ conservation agreements in relation to native flora and fauna²⁰ and property vegetation plans.²¹ An owner of land may also be under an affirmative duty to control noxious weeds or prescribed alien species of fauna.²²

Affirmative duties will also arise where the land is the subject of a carbon credit or a biodiversity credit.²³ The owner of the land sells a credit for the growing vegetation on the land either to an emitter of greenhouse gas (such as a coal-fired power station) for the benefit the vegetation affords as a sink for the sequestration of carbon or to a person who causes the loss of biological diversity in the course of development of other land. The owner, having sold the credit, will be obliged to maintain the vegetation on the land.

Finally, affirmative duties may arise by consent authorities, in granting development consent, imposing conditions requiring the preservation or improvement of the environment on the land the subject of the development or, indeed, the carrying out of works on adjoining land.²⁴

An increasing recognition of the first law of ecology – that everything is connected to everything else²⁵ - and that the earth's ecosystem is, in a sense, a spaceship,²⁶ may necessitate the imposition of more sweeping affirmative duties on land owners. Professor Sax argues that “property owners must bear affirmative obligations to use their property in the service of a habitable planet”.²⁷ Sax argues that there needs to be a fundamental reorientation of the role of land and our use of it:

“We increasingly will have to employ land and other natural resources to maintain and restore the natural functioning of natural systems.

More forest land will have to be left as forest, both to play a role in climate and as habitat. More water will have to be left instream to maintain marine ecosystems. More coastal wetland will have to be left as zones of biological productivity. We already recognise that there is no right to use air and water as waste sinks, and no right to contaminate the underground with toxic residue. In short there will be - there is being - imposed a servitude on our resources, a first call on them to play a role in maintaining a habitable and congenial planet. Though fundamental changes are called for, this is not a grim warning of tribulations to come. The innovativeness that has been used so boldly over the last two centuries to subdue natural systems should be equally available to utilise those systems more efficiently and less

¹⁸ See s 118 of the *Heritage Act 1977* (NSW) and Part 3 of the *Heritage Regulations 2005*

¹⁹ Part 3B of the *Heritage Act 1977* (NSW)

²⁰ Division 12 of Part 4 of the *National Parks and Wildlife Act 1974* and s 126A of the *Threatened Species Conservation Act 1995* (NSW)

²¹ Part 4 of the *Native Vegetation Act 2003* (NSW) and see also heritage agreements under ss 23 and 23A of the *Native Vegetation Act 1991* (SA)

²² s 12 of the *Noxious Weeds Act 1993* (NSW) and s 182 of the *Natural Resources Management Act 2004* (SA)

²³ See for example Part 7A of the *Threatened Species Conservation Act 1995* (NSW) which provides for biodiversity credits

²⁴ See s 80 and s 80A(1)(f) of the *Environmental Planning and Assessment Act 1979* (NSW)

²⁵ See B Commoner, *The Closing Circle – Confronting the Environmental Crisis*, Jonathan Cape, 1972, p 33

²⁶ K E Boulding, “The Economics of the Coming Spaceship Earth” in *Environmental Equality in a Growing Economy*, reproduced in G de Bell (ed), *The Environmental Handbook*, Ballantine Books, 1970, p 96

²⁷ J Sax in R J Fowler (ed), note 3, p 11

disruptively. We already know from pioneering work done in energy conservation that there is no necessary correlation between productivity and energy resources expended. We know how to use far less water, and to reuse what we have. There is no reason to doubt that much can be done with far less demand on resources, and with less disruption of resource systems.

We shall have to move that way, for only when the demands of the abovementioned public servitude of habitability has been met will resources be available for private benefits. To fulfil the demands of that servitude, each owner will have to bear an affirmative responsibility, to act as a trustee insofar as the fate of the earth is entrusted to him. Each inhabitant will effectively have a right in all such property sufficient to ensure servitude is enforced. Every opportunity for private gain will have to yield to the exigencies of a life-sustaining planet".²⁸

Sax's call for private gain to yield to the exigencies of a life-sustaining planet is encapsulated in the concept of ecologically sustainable development. The Australian National Strategy of Ecologically Sustainable Development defines the concept as "development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends". The call for ecologically sustainable development is today universal. It has been made at international and national levels. Australia is committed to it.²⁹ The implementation of ecologically sustainable development will, no doubt, increase the affirmative duties on land owners and continue to alter the traditional theory of real property.

Another development in the law of real property, stemming from environmental concerns, has been the revival of the doctrine of the public trust. The concept of the public trust has its roots in Roman law and is based on the idea that certain resources such as the air and waterways are held in trust by the government for the benefit and use of the general public. The essence of the public trust is that the government, as trustee, is under a fiduciary duty to deal with the trust property, being the common natural resources, in a manner that is in the interest of the general public. Hence, the government cannot alienate the trust property unless the public benefit that would result outweighs the loss of the public use or "social wealth" derived from the land.³⁰

The trust doctrine has been interpreted by the courts so as to strike a balance between the maintenance of the most beneficial use of natural resources by the public and the essential development of those resources.³¹

The public trust doctrine has, to differing extents, become part of the law of all countries with a common law heritage.³² While traditionally applied primarily to waterways and rivers, the doctrine has been extended to protect other natural resources from private use and harm. Courts have invoked the doctrine in, to name a few countries with a common law heritage, the United States³³, India,³⁴ Pakistan,³⁵ Sri Lanka,³⁶ and Kenya.³⁷ It has also been referred to in Australia.³⁸

²⁸ In R Fowler (ed), note 3, pp 13-14

²⁹ See for a comprehensive analysis of the concept of ecologically sustainable development, B J Preston, "The role of the judiciary in promoting sustainable development: the experience of Asia and the Pacific" (2005), 9 (2&3) APJEL 109

³⁰ J L Sax, "The public trust doctrine in natural resource law: effective judicial intervention" (1970) 68 Mich L Rev 471; J L Sax, *Defending the Environment*, Vintage Books, 1970, p 60 and J L Sax, "Liberating the Public Trust Doctrine from its Historical Shackles" (1980) 14 U C Davis L Review 185

³¹ G Bates, *Environmental Law in Australia*, 6th ed, LexisNexis Butterworths, 2006, p 48

³² For a discussion of the public trust concept in a number of common law countries including Australia see B J Preston, note 29 at 203-210

³³ See for example *National Audubon Society v Department of Water and Power of the City of Los Angeles* (1983) 658 P 2d 709 and *State v Public Service Commission* 275 Wis 112, 81 NW 2d 71

³⁴ *M C Mehta v Kamal Nath* (1997) 1 SCC 388 and *TN Godavarman Thirumulpad v Union of India* CDJ 2005 SC 713 (Supreme Court of India, Y K Sabarwal J)

Acceptance of the public trust doctrine means that any individual would have standing as a beneficiary to enforce the trust against the government as trustee and would result in greater accountability of government action affecting the subject of the trust.³⁹ Professor Rodgers suggests that “Public trust law is perhaps the strongest contemporary expression of the idea that the legal rights of nature and of future generations are enforceable against contemporary users”.⁴⁰

Law of Torts

Many of the causes of action in tort developed to protect the rights of property owners from unreasonable interference such as by pollution of the air, water and land. Trespass and private nuisance are ready examples. The doctrine of strict liability in *Rylands v Fletcher*⁴¹ is another example. The doctrine was not to be abandoned in Australia until the High Court’s decision in *Burnie Port Authority v General Jones Pty Limited*.⁴² The doctrine held that a person who uses his land in a non-natural way, such as where he, for his own purposes, brings on his land and collected and kept there anything likely to do mischief if it escaped, must keep it in at his peril. The person was *prima facie* answerable for all the damage which was the natural consequence of its escape unless he excused himself by showing that the escape was due to the aggrieved person’s fault, or was the consequence of *vis major* or act of God.

The law of negligence today is perhaps the most frequently invoked cause of action in tort. The tort of negligence involves failing, in particular circumstances, to exercise the care which a reasonable person should have exercised in the circumstances and thereby causing harm to another person or property. Fundamental to negligence is that the wrongdoer owe to the aggrieved person a duty of care to prevent causing damage to that person or their property. How does one determine whether there is such a duty? In *Donoghue v Stevenson*,⁴³ Lord Atkin provided the following test to assist in resolving the problem:

“Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.”⁴⁴

³⁵ *In Re: Human Rights Case (Environmental Pollution in Balochistan)*, PLD 1994 SC 102 (Supreme Court of Pakistan, Saleem Akhtar J)

³⁶ *Bulankulanma v Secretary, Ministry of Industrial Development* (Eppawela case) SC Application No 884/99, Supreme Court of Sri Lanka (Amerasinghe J with whom Wadugodapitya J and Gunasekera J agreed) (2 June 2000) reproduced in *UNEP Compendium of Judicial Decisions on Matters Related to Environment*, Vol II, National Decisions, July 2001, p 54 at pp 57-59

³⁷ *Waweru v Republic of Kenya*, (2006) 1 KLR (E&L) 677 at 689-690, 692 (High Court of Kenya)

³⁸ *Re Sydney Harbour Collieries Co* (1895) Land Appeal Court Reports 243 at 251-252 and *Willoughby City Council v Minister Administering the National Parks and Wildlife Act* (1992) 78 LGERA 19. See also T Bonyhady, “A Usable Past – The Public Trust in Australia” (1995) 12 EPLJ 329 and G D Meyers, “Divining Common Law Standards for Environmental Protection: Application of the Public Trust Doctrine in the Context of Reforming NEPA and the Commonwealth Environmental Protection Act” (1994) 11 EPLJ 289

³⁹ Justice J Toohey and A D’Arcy, “Environmental Law – its place in the system” in R J Fowler (ed), note 3, p 83

⁴⁰ W H Rodgers, “Bringing people back: Toward a comprehensive theory of taking in natural resource law” (1982) 10 Ecology L Q 205 at 239-240

⁴¹ (1868) LR 3 HL 330

⁴² (1994) 179 CLR 520

⁴³ [1932] AC 562

⁴⁴ [1932] AC 562 at 580

What will be required to satisfy the neighbour test will vary over time with an expansion in knowledge. For example, where once a particular action might not have been understood to have a cause and effect relationship with a particular harm, increased knowledge may now establish that such a cause and effect relationship exists. The last half century is replete with illustrations of pollutants which once were not thought to have adverse health or environmental effects but which later were found to have such effects. Examples are the bio-accumulative effects of pollutants such as methyl-mercury (which caused such devastating effects in Minamata Bay in Japan)⁴⁵ and DDT (about which Rachel Carson wrote in *Silent Spring*).⁴⁶

A current and topical illustration is global climate change. Increasingly, a causal relationship is being found between actions which result in the emission of green house gases and global climate change. Recent cases where a causal relationship has been found are *Gray v The Minister for Planning*,⁴⁷ and *Massachusetts v Environment Protection Agency*.⁴⁸

The expansion of knowledge has also resulted in an expansion in the horizon of harm and the size of membership of the classes of persons affected. Cashman summarises these effects in the context of toxic tort litigation:

“More recently, increasing concern has risen out of the possible effects of exposure to various toxic chemicals in food, air, water, cosmetics and pharmaceuticals and the discovery that activities such as chemical manufacturing, waste disposal, production of nuclear power and the transport of hazardous materials are extremely hazardous and potentially injurious to the health of a significant number of people. In many instances, toxic time bombs began to explode or at least tick louder. As Huber notes, the moment came ‘for personal injury law in its restless and unending expansion to invade the formerly sleepy kingdom of nuisance law’. On Huber’s analysis, this has led to three generations of cases over a relatively short period.

The first generation of cases were product liability actions arising out of exposure to therapeutic drugs and devices, such as thalidomide, diethylstilbestrol (DES), and high doses of x-ray therapy. The second generation of cases arose in the workplace where occupational exposures to substances such as asbestos were often at a high level over a long period of time. The third generation of cases has arisen out of familiar substances such as asbestos, dioxin and radiation which have spread over huge territories including school buildings (asbestos insulation), towns (dioxin road spraying) and entire states or regions (fallout from nuclear tests).

As traditional notions of bilateral litigation have been transformed into complex, large scale group or class action litigation, there has been an exponential growth in the number and size of cases arising out of exposure to radiation, hazardous chemicals and waste, asbestos and dioxins. For example, the *Love Canal* case in the United States which was ‘only’ a \$20,000,000 action led to a state of emergency being declared by President Carter and the introduction of new Federal (Superfund) legislation. The *Agent Orange* case, which included Australian Vietnam Veterans amongst the potential claimants, was commenced in January 1979 against seven chemical companies and the United States government. It was eventually settled by the chemical companies for \$180 million”.⁴⁹

⁴⁵ See B J Preston, “Environmental law 1927-2007: Retrospect and Prospect”, (2007) 81 ALJ 616 at 623

⁴⁶ B J Preston, note 45, p 624

⁴⁷ (2006) 152 LGERA 258.

⁴⁸ (2007) 127 S Ct 1438; 167 L Ed 2d 248

⁴⁹ P Cashman, “Torts” in T Bonyhady (ed), note 7, pp 130-131

The environment could influence tort law in another, more innovative way. Professor Stone has proposed that the concept of “neighbour” could be extended to include not merely persons, but also nature. Stone notes that currently natural objects do not count in their own right. Damages awarded as a result of the pollution of a river are not necessarily applied to reinstate the river to its former unpolluted state. There is nothing to stop a riparian owner from “selling out” the river by agreeing not to enforce rights in exchange for monetary compensation. The river, of course, cannot protect itself. Stone’s solution is that legal rights should be extended to inanimate natural objects such as rivers, forests and trees. Stone points out that natural objects should not be denied standing merely because they are unable to vocalise their claims since corporations, states, infants, persons of unsound mind and so on are in a similar position. The answer is simply to appoint a legal spokesperson.⁵⁰

Such a spokesperson could include the Attorney-General but there are obviously limitations to the degree of dedication to the championing of issues, particularly controversial issues, due to the political nature of his or her office. Another solution would be to appoint a body such as the Environmental Defender’s Office to act for the natural objects. The Environmental Defender’s Office is an independent, public interest legal aid centre operating in New South Wales and elsewhere in Australia specialising in matters of public interest in the environmental and planning law field.

Stone’s proposal has aroused some academic interest⁵¹ and limited judicial acknowledgment in Australia and the United States of America.⁵² However, it is yet to be implemented.

A synergy can also be seen to exist between tort law and ecologically sustainable development. Tort law enables the addressing of environmental damage. Tort law requires the wrongdoer to make payment for environmentally degrading activities, thereby incorporating the negative externalities directly into the costs of conducting the polluting or degrading activity.⁵³ Ecologically sustainable development has the same effect. One principle of ecologically sustainable development is the internalisation of external environmental costs. One way of achieving the internalisation of external environmental costs is by application of the polluter pays principle. The polluter pays principle requires that the polluter take responsibility for the external costs arising from his or her pollution. Internalisation is complete when the polluter takes responsibility for all of the costs arising from pollution but is incomplete when part of the costs is shifted to the community as a whole. The polluter pays principle has received statutory recognition.⁵⁴ It is also being employed by courts in common law countries in tort law. Examples are to be found particularly in India⁵⁵ and in Kenya.⁵⁶

⁵⁰ C Stone, “Should trees have standing: Toward legal rights for natural objects”, (1972) 45 S Cal L Rev 450; See also C Stone, “Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective” (1985) 59 S Cal L Rev 1; C Stone, *Earth and Other Ethics – The Case For Moral Pluralism*, Harper & Row Publishers, New York, 1987; R Nash, *The Rights of Nature – A History of Environmental Ethics*, Primavera Press, 1990, pp 128-136

⁵¹ See for example, L H Tribe, “Ways Not to Think About Plastic Trees: New Foundations for Environmental Law” (1974) 83 Yale L J 1315 at 1343, 1345; D S Favre, “Wildlife Rights: The Ever-Widening Circle” (1979) 9 *Environmental Law* 279; D S Favre “Judicial Recognition of the Interests of Animals – A New Tort” (2005) Mich St L Rev 333. For a contrary view, see M Sagoff “On Preserving the Natural Environment” (1974) 84 Yale L J 205 and P S Elder “Legal Rights for Nature: The Wrong Answer to the Right(s) Question” (1984) 22 Osgoode Hall L J 285

⁵² See in Australia, Justice J Toohey and A D’Arcy, “Environmental Law – its place in the system” in R J Fowler (ed), note 3, p 76 and in USA, Justice William Douglas in *Sierra Club v Morton, Secretary of the Interior* (1972) 405 US 727 at 741-752

⁵³ M Anderson, “Transnational corporations and environmental damage: is tort law the answer?”, (2002) 41 Washburn L J 399 at 408

⁵⁴ See for example s 6(2)(d)(i) of the *Protection of the Environment Administration Act 1991* (NSW)

⁵⁵ *Indian Council for Enviro-Legal Action v Union of India* AIR 1996 SC 1446, (1996) 2 SCC 212, *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715, (1996) 5 SCC647, *M C Mehta v Union of India* (1997) 2 SCC 411, Supreme Court of India (Kuldip Singh J), WP 3727/1985 (19 December 1996) (known as the Calcutta Tanneries Case), *M C Mehta v Union of India* AIR 1997 SC 734 WP 13381/1984

Administrative law

Administrative law has its origins in the common law but also increasingly nowadays is to be found in statutory law (the *Administrative Decisions (Judicial Review) Act* (Cth) is the best known example). Environmental cases have been at the forefront of development of administrative law⁵⁷. Examples are in relation to standing,⁵⁸ consideration of relevant matters⁵⁹ and jurisdictional fact.⁶⁰ The pervasive effects of climate change are also having an effect on administrative law. Climate change litigation against government decision making is becoming more common⁶¹. Examples are to be found in Victoria, *Australian Conservation Foundation v Latrobe City Council*,⁶² in New South Wales, *Gray v Minister for Planning*⁶³ and *Drake-Brockman v Minister for Planning*,⁶⁴ in New Zealand, *Greenpeace New Zealand v North Land Regional Council and Mighty River Power*,⁶⁵ and in the United States, *Massachusetts v Environment Protection Agency*.⁶⁶

Environmental disputes have also prompted the courts to re-evaluate procedural law governing administrative law challenges. The Land and Environment Court has been at the forefront of reforming procedural law to enable access to justice in public interest environmental cases.⁶⁷ The Court has, in public interest environmental litigation, liberally construed standing requirements and not automatically required an undertaking for damages for interlocutory injunctions, or required security for costs, or ordered costs against an unsuccessful public interest plaintiff.

The twin needs for the environment to have a champion – a defender – and for access to environmental justice spurred the establishment of a specialist environmental, public interest legal centre, the Environmental Defender's Office. The Office was initially established in 1984 in New South Wales and subsequently similar offices have been established in all States and Territories of Australia. The

(13 December 1996) (known as the Taj Trapezium case) and *Research Foundation for Science Technology and Natural Resources Policy v Union of India* Supreme Court of India (Y K Sabharwal J and S H Kapadia) WP 657/1995 (5 January 2005)

⁵⁶ *Waweru v Republic of Kenya*, (2006) 1 KLR (E&L) 677 at 688, 689 (High Court of Kenya)

⁵⁷ For a discussion of administrative law in an environmental context, see B J Preston, "Judicial Review in environmental cases", (1993) 10 Aust Bar Rev 147, B J Preston, "Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia", (2006) 28 Aust Bar Rev 17 and B J Preston, "Administrative Law in an Environmental Context", (2007) 15 A J Admin L (forthcoming)

⁵⁸ *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, *Fraser Island Defenders Organisation Ltd v Hervey Bay Town Council* [1983] 2 QdR 72, (1982) 51 LGRA 94, *Australian Conservation Foundation v Forestry Commission of Tasmania* (1988) 19 FCR 127, 76 LGRA 369, *Australian Conservation Foundation v Minister for Resources* (1989) 76 LGRA 200, *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492, 85 LGRA 270, *Tasmania Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516, 85 LGRA 296, *North Coast Conservation Council v Executive Director, Queensland Parks and Wildlife Service* [2000] QSC 172 (14 June 2000)

⁵⁹ *Parramatta City Council v Hale* (1982) 47 LGRA 319, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

⁶⁰ *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, *Timbarra Protection Coalition v Ross Mining NL* (1999) 46 NSWLR 55 and *Woolworths Ltd v Pallas Newco Pty Limited* (2004) 61 NSWLR 707

⁶¹ See R Lyster, "Chasing down the climate change footprint of the private and public sectors: Forces converge", (2007) 24 EPLJ 281 at 300-309; J Peel, "The role of climate change litigation in Australia's response to global warming", (2007) 24 EPLJ 90 at 96-100; Marcus Priest, "Jury Still Out on Climate Change Liability", *Australian Financial Review*, Legal Affairs, Friday, 5 October 2007

⁶² (2004) 140 LGRA 100; [2004] VCAT 2029

⁶³ (2006) 152 LGRA 258

⁶⁴ [2007] NSWLEC 490

⁶⁵ High Court of New Zealand, Auckland, HK AK Civ 2006 – 404-004617 12 October 2006, (Williams J)

⁶⁶ (2007) 127 S Ct. 1438; 167 L. Ed. 2d 248 and see cases discussed in R Lyster, note 61, pp 301-303

⁶⁷ See B J Preston (1993), note 57 at 165-175, Justice P L Stein, "The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law", (1996) 13 EPLJ 179 at 179-183 and B J Preston, "The role of public interest in environmental litigation", (2006) 23 EPLJ 337

Environmental Defender's Office in New South Wales pioneered the concept of legal aid in environmental disputes.⁶⁸

Constitutional law and human rights

Environmental disputes have been the catalyst for constitutional litigation. Litigation concerning world heritage areas is a prime illustration. The trifecta of the *Tasmanian Dam case*,⁶⁹ *Tasmanian Forests case*,⁷⁰ and the *Daintree Rainforest case*⁷¹ were influential in the extension of Commonwealth power in relation to the environment. The legitimate concern to regulate trade in protected fauna led to constitutional decisions concerning s 92 of the Constitution.⁷² Environmental laws influenced decisions on the extent of inconsistency between Commonwealth and State laws.⁷³

I will now deal with human rights and in particular the right to life.

In Australia, human rights can have as their source the common law,⁷⁴ the Constitution⁷⁵ or federal, state and territorial legislation,⁷⁶ which together constitute the law of this country and form one system of jurisprudence.⁷⁷ One fundamental human right is the right to life. Such a right, together with the right to liberty, property and citizenship, were declared in the Magna Carta. Chapter 29 of the 1297 version of the Magna Carta⁷⁸ provides:

“No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or in any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right”.⁷⁹

Chapter 29 of the 1297 version has been adopted as a received Imperial statute into the law of New South Wales,⁸⁰ Victoria,⁸¹ Queensland⁸² and

⁶⁸ See B Boer, “Legal Aid in Environmental Disputes”, (1986) 3 EPLJ 22 and B J Preston, *Environmental Litigation*, LawBook Co, Sydney, 1989, pp 74-80

⁶⁹ *Commonwealth v Tasmania* (1983) 158 CLR 1

⁷⁰ *Richardson v Forestry Commission* (1988) 164 CLR 261

⁷¹ *Queensland v Commonwealth* (1989) 167 CLR 232

⁷² See *Ackroyd v McKechnie* (1986) 161 CLR 60, *Cole v Whitfield* (1988) 165 CLR 360 and *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436

⁷³ *Botany Municipal Council v Federal Airports Corporation* (1992) 175 CLR 453 and *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47

⁷⁴ The common law had anterior operation to and was assumed by the constitutional instruments: see Sir Owen Dixon, *Jesting Pilate*, 1965, pp 174, 198-202, 203-214 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-564

⁷⁵ In *Street v Queensland Bar Association* (1989) 168 CLR 461 at 521-522, Deane J noted “The Constitution contains a significant number of express or implied guarantees of rights and immunities”. See also MH McHugh, “Does Australia Need a Bill of Rights?” a paper presented to the New South Wales Bar Association, Charter of Rights Forum No 1, Sydney, 8 August 2007, pp. 5-8. For example, freedom of communication on matters of government and politics has been held to be an indispensable incident of the system of representative government which the Australian Constitution creates: see *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, *Coleman v Power* (2004) 220 CLR 1 and *APLA Ltd v Legal Services Commissioner* (2005) 224 CLR 322

⁷⁶ For example, freedom from racial discrimination and rights to equality before the law under the *Racial Discrimination Act 1975* (Cth) and various human rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic), including the right to life (s 9). See also MH McHugh, “Does Australia Need a Bill of Rights?”, note 75, pp 10-11

⁷⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 564

⁷⁸ 25 Edward 1 c 29 (1297)

⁷⁹ Translation in *Report of the NSW Law Reform Commission on the Application of Imperial Acts* (LRC4), November 1967, Government Printer NSW, p 62

⁸⁰ *Imperial Acts Application Act 1969* (NSW), s 6 and Part 1 of Second Schedule

⁸¹ *Imperial Acts Application Act 1980* (Vic), s 8 Div 3

Australian Capital Territory.⁸³ In the other states of Western Australia, South Australia and Tasmania and in the Northern Territory the version of the Magna Carta in force at the time of the reception legislation, was received as an Imperial statute.⁸⁴ This would include Chapter 29. The Magna Carta may also have been declaratory of common law principles⁸⁵ and hence received as part of the common law in Australia with the arrival of the British settlers.⁸⁶

The Magna Carta recognised three basic principles which are, as summarised by Issacs J in *ex parte Walsh and Johnson; Re Yates*,⁸⁷: “(1) primarily every free man has an inherent right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at the will of the State; (3) the law of the land is the only mode by which the State can so declare its will”.

As this summary makes clear, the State may abrogate or curtail a citizen’s human rights, but only through the law of the land. This is true whether the juridical source of the right is the common law or a received Imperial statute. There does not seem to be support in Australia for the view taken by Lord Cooke in New Zealand that there can be no abrogation of fundamental rights because “some common law rights presumably lie so deep that even Parliament could not override them”.⁸⁸ Justice Brennan summarised the widespread view in Australia as follows:

“A court will interpret laws of Parliament in the light of a presumption that the Parliament does not intend to abrogate human rights and fundamental freedoms but the Court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the court’s opinion, should be preserved”.⁸⁹

⁸² *Imperial Acts Application Act* 1984 (Qld), s 5 and Sch 1

⁸³ *Imperial Acts Application Ordinance* 1986 (ACT), Sch 3, Pt 2

⁸⁴ See D Clark, “The Icon of Liberty: The Status and Role of the Magna Carta in Australian and New Zealand Law” (2000) 24 MULR 866

⁸⁵ Sir Edward Coke asserted that the Magna Carta “was for the most part declaratory of the principal grounds of the fundamental law of England”: *The Second Part of the Institutes of the Laws of England* (first published 1642, 1979 ed) quoted by D Clark, note 84, p 872. See also *Herron v McGregor* (1986) 6 NSWLR 246 at 252 where McHugh J A stated: “In Vol 1 of his *First Institute* Coke declared (at 22) that Magna Carta was ‘but a confirmation or restitution of the common law’”. (McHugh JA’s view that there was a specific, existing common law right to a speedy trial that was recognised by the Magna Carta has not been accepted in Australia: see *Jago v District Court of New South Wales* (1989) 168 CLR 23. However this does not affect the more general proposition that the Magna Carta is declaratory of the common law principles that did exist). See also Lord Irvine of Lairg, “The Spirit of Magna Carta Continues to Resonate in Modern Law”, a paper based on the Inaugural Magna Carta Lecture, presented in the Great Hall of Parliament House, Canberra on 14 October 2002, pp. 143-144, available at <http://www.aph.gov.au/Senate/pubs/pops/pop39/c07.pdf>

⁸⁶ See *Mabo v Queensland [No. 2]* (1992) 175 CLR 1 at 34-38 and 79-80 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567. See also A C Castles, “Australian mediations on Magna Carta” (1989) 63 ALJ 122. In *Calder v British Columbia (Attorney-General)* (1973) 34 DLR (3d) 145 at 203, the Canadian Supreme Court stated that the “Magna Carta...has always been considered to be the law throughout the Empire. It was a law which followed the flag as England assumed jurisdiction over newly-discovered lands or territories”. See also *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 at 1095 [36]

⁸⁷ (1925) 37 CLR 36 at 79

⁸⁸ *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398. See also *New Zealand Drivers Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390; *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121. In the United Kingdom, see *Oppenheimer v Cattermole* [1976] AC 249 at 278 that a pre-war German decree depriving Jews of German citizenship was “so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all”. For comment, see I D Killey, “Peace, Order and Good Government: A Limitation on Legislative Competence” (1989) 17 Melb U L Rev 24

⁸⁹ *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1 at 43, 48 per Brennan J. See also Justice G Brennan, “Courts Democracy and the Law”, (1991) 65 ALJ 32 at 38; *Building Construction Employees and Builders’ Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 387, 405; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 at 152; N O’Neill, “Blue-eyed Babies May be Murdered: Dicey’s First Principle Upheld in the Court of

However, before the courts will find that the legislature has intended to abrogate or curtail a citizen's fundamental law rights or immunities the intention must be clearly expressed:

"The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights".⁹⁰

So much for the existence of a fundamental right to life and the need for express authorisation by law to abrogate or curtail the right. But what is the content of the right? In particular, in an environmental context, does the right to life involve, not merely a bare right of animal existence, but also a right to live in an environment of such a quality as is consistent with a life of dignity and wellbeing – that is, a right to a clean and healthy environment? This question has not been determined in Australia⁹¹ but it is increasingly being addressed internationally and in other countries.

International treaties on human rights⁹² do not expressly state that a person has a right to a clean and healthy environment.⁹³ Any right with such a content would need to be derived by implication from the more general human rights in the instruments, such as, the right to life in the Universal Declaration of Human Rights,⁹⁴ International Covenant on Civil and Political Rights⁹⁵ and the Convention on the Rights of the Child;⁹⁶ the right to health in the International Covenant of Economic,

Appeal", (1987) 12 *Legal Service Bulletin* 2; G Winterton, "Extra-Constitutional Notions in Australian Constitutional Law", (1986) 16 *F L Rev* 223 at 231-235. Note, however, that in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10, the High Court did leave open the question "[w]hether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system and the common law"

⁹⁰ *Coco v The Queen* (1994) 179 CLR 427 at 437. See also *Potter v Minaghan* (1908) 7 CLR 277 at 304; *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337 at 381 [89]; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11], 582 [106]-[108]; *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 492 [30]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]-[20]; *Thomas v Mowbray* (2007) 237 ALR 194 at 249 [208], 300 [380] and Hon JJ Spigelman "Principle of Legality and the Clear Statement Principle" (2005) 79 ALJ 769 at 774-776

⁹¹ There have been calls for Australia to establish environmental rights: see Justice P L Stein, "An Antipodean Perspective on Environmental Rights", (1995) 12 *EPLJ* 50 at 52 and T Simpson and V Jackson, "Human Rights and the Environment", (1997) 14 *EPLJ* 268 at 277. See also Justice M Kirby, "Human Rights: An Agenda for the Future" in B Galligan and C Sampford (eds), *Rethinking Human Rights*, Federation Press, 1997, p 2 at pp 4 and 8

⁹² An international treaty or convention to which Australia accedes does not have force as municipal law (of the Commonwealth or the States): *Kioa v West* (1985) 159 CLR 550 at 570 *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287. Nevertheless, an Australian statute will be interpreted and applied, as far as its language admits, so as not to be inconsistent with established rules of international law: *Polites v Commonwealth of Australia* (1945) 70 CLR 60 at 68-69, 77, 80-81; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Kartinyer v Commonwealth of Australia* (1998) 195 CLR 337 at 384 [97]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 [63], 591 [65]; *Thomas v Mowbray* (2007) 237 ALR 194 at 300 [380]

⁹³ See T Stephens, "Multiple International Courts and the 'Fragmentation' of International Environment Law", 25 *The Australian Year Book of International Law* 227 at 242-243

⁹⁴ Article 3

⁹⁵ Article 6

⁹⁶ Article 6

Cultural and Social Rights,⁹⁷ and the Convention of the Rights of the Child;⁹⁸ and the right to an adequate standard of living in the Universal Declaration of Human Rights⁹⁹ and in the International Covenant on Economic, Cultural and Social Rights¹⁰⁰.

There are, however, a number of soft law, international declarations expressly recognising a right to a clean and healthy environment. The first such soft law declaration was the Stockholm Declaration in 1972 which provided that:

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and being, and he bears a solemn responsibility to protect and improve the environment for present and future generations”.¹⁰¹

The link between human rights and environmental protection was also established in the preamble to the Stockholm Declaration:

“Both aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights, even the right to life itself”.

This link was described by the Vice President of the International Court of Justice, Judge C G Weeramantry, as follows:

“The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments”.¹⁰²

The Rio Declaration made at the UNCED Conference on Environment and Development (or Earth Summit) in Rio de Janeiro in 1992 put the issue of a human right to a clean and healthy environment within the context of sustainable development. Principle 1 of the Rio Declaration provides that:

“Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”.

At national level, an increasing number of countries have constitutional provisions recognising a duty owed by the national government to its citizens to prevent harm to the environment or recognising the importance of a healthy environment either as a duty of the state or as a right.¹⁰³ An example is the Constitution of the Republic of South Africa which states in s 24 that:

“Everyone has the right (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable and other legislative measures that (i) prevent pollution and degradation; (ii) promote conservation;

⁹⁷ Article 12

⁹⁸ Article 24

⁹⁹ Article 25

¹⁰⁰ Article 11

¹⁰¹ Principle 1 of the Declaration of the UN Conference on the Human Environment, 16 June 1972, Stockholm

¹⁰² C G Weeramantry J in his separate opinion in the International Court of Justice’s decision in *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ 97 at 110; 37 ILM 162 at 206 (1998)

¹⁰³ B E Hill, S Wolfson, N Targ, “Human rights and the environment: A synopsis and some predictions” (2004) 16 Geo. Int’l Envtl L Rev 359 at 381

and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.¹⁰⁴

Another example is the Constitution of the Ukraine, which states in Article 50:

“Every person has the right to a safe and healthy environment and to compensation for damages resulting in the violation of this right”.

Other national constitutions refer to a decent, healthy (Hungary, Nicaragua, Korea, Turkey), pleasant (Korea), natural, clean, ecologically balanced (Peru, Philippines, Portugal) or safe environment or one free from contamination (Chile).¹⁰⁵

National courts have also interpreted constitutional provisions recognising the human right to life as including a right to a clean and healthy environment. India is a lead example, interpreting Article 21 of the Constitution of India which provides simply “No person shall be deprived of his life or personal liberty except according to procedures established by law” as including the right of enjoyment of pollution-free water and air for full enjoyment of life and as providing a basis for sustainable development and intergenerational equity.¹⁰⁶

In the Philippines, the Supreme Court of Philippines has held that “the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature” in Article II, s 16 of the Constitution is a mere deduction from, if not a reiteration of, the right to life provision in Article III, s 1 which states “No person shall be deprived of life, liberty, or property without due process of law”.¹⁰⁷

In Pakistan, the Supreme Court of Pakistan has given a wide interpretation to Article 9 of the Constitution which provides that “No person shall be deprived of life or liberty save in accordance with law” so as to include a right to have a clean atmosphere and unpolluted environment.¹⁰⁸ In Nigeria, the Federal High Court of Nigeria has held that the fundamental rights to life and dignity of a human in ss 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria 1999 “inevitably includes the right to clean, poison-free, pollution-free and healthy environment”.¹⁰⁹

¹⁰⁴ Section 24 of Chapter 2 of the Constitution which is a Bill of Rights. See J Glazewski, “The Environment, Human Rights and a New South African Constitution”, (1991) 7 SAJHR 167, J Glazewski, “The Environment and the New Interim Constitution” (1994) 1 SAJELP 1, T Winstanley “Entrenching Environmental Protection in the New Constitution”, (1995) 2 SAJELP 85

¹⁰⁵ UNEP, *Judicial Handbook on Environmental Law*, UNEP, 2005, p 30. See generally, E Brandl and H Bungert, “Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad”, (1992) 16 Harv Entl L Rev 1 and J Thornton and S Tromans, “Human Rights and Environmental Wrongs. Incorporating the European Convention on Human Rights: Some Thoughts on the Consequences for UK Environmental Law”, (1999) 11 J Evtl L 35

¹⁰⁶ See *M C Mehta v Union of India* AIR 1988 SC 1037 at 1038-1039 [4]; *Subhash Kumar v State of Bihar* AIR 1991 SC 420 at 424[7]; *Virendra Gaur v State of Haryana* 1995 (2) SCC 577; *Vellore Citizens Welfare Forum v Union of India* AIR 1996 SC 2715, (1996) 5 SCC 647 at [12]-[15]; *AP Pollution Control Board v Prof MV Nayudu (ret'd)* [1999] 1 LRI 185 at [59]; *M C Mehta v Kamal Nath* AIR 2000 SC 1997 at [8]-[10]; A Rosencranz and S Rustomjee, “Citizen’s Right to a Healthful Environment” (1995) 25 (6) *Environmental Policy and Law* 324 at 325-327, 7; B E Hill, S Wolfson, N Targ, “Human rights and the environment: A synopsis and some predictions” (2004) 16 *Geo. Int’l Evtl L Rev* 359 at 383-384 and A B Divan, “The Supreme Court of India – Access to Courts and Public Interest Litigation” in R J Fowler (ed), note 3, pp 48-59

¹⁰⁷ *Minors Oposa v Factoran, Secretary of the Department of Environment and Natural Resources* 33 ILM 173 (1994); 224 SCRA 792 (1994). See also *Environmental Law Training Manual*, Philippine Judicial Academy, Manila, 2006, p 27

¹⁰⁸ *Shehla, Zia v WAPDA* PLD 1994 SC 693 at [12]-[15]; *General Secretary, West Pakistan Salt Miners Labour Union, Khewral, Jhelum v Director of Industries and Mineral Development, Punjab* 1994 SCMR 2061 at [4]

¹⁰⁹ *Gbemre v Shell Petroleum Development Company Nigeria Ltd and others*, Suit No FHC/B/CS/53/05, Federal High Court of Nigeria (C V Nwokorie Presiding Judge), 14 November 2005 (orders made 15 November 2005)

In Kenya, the High Court of Kenya has held in relation to s 71(1) of the Constitution of Kenya which provides “No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted”, that “whereas the literal meaning of life under s 71 means absence of physical elimination, the dictionary covers the activity of living. That activity takes place in some environment and therefore the denial of wholesome environment is a deprivation of life...Thus a development that threatens life is not sustainable and ought to be halted. In environmental law life must have this expanded meaning as a matter of necessity”.¹¹⁰

Contract law

The environment can influence the law of contract in at least two ways. First, conservation of the environment or components of it may be able to be achieved by a private agreement between the owner of the land on which the environment occurs and a relevant government authority. Various statutes provide for the making of these voluntary environmental agreements.¹¹¹ The use of voluntary environmental agreements can be a useful tool in ensuring the conservation of biological diversity in situ.¹¹²

Secondly, certain contracts relating to pollution and environmentally harmful products and processes may be invalid or unenforceable as being contrary to public policy. The underlying principle is that expressed by Isaacs J in *Wilkinson v Osborne*:¹¹³

“In my opinion the ‘public policy’ which a Court is entitled to apply as a test of the validity to a contract is in relation to some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the Courts of the country can therefore recognise and enforce. The Court is not a legislator: it cannot initiate the principle; it can only state or formulate it if it already exists.

The rule of law as to contracts against public policy is constant – namely that every bargain contrary to social governing principle is regarded as prejudicial to the State, or, in other words, contrary to ‘public policy’ or as is sometimes called, ‘policy of the law’, and the State by its tribunals refuses to enforce it.

...

The Courts refuse to give effect to such a bargain, not for the sake of the defendant, not to protect any interest of his – indeed they do not fail to notice that his failure to abide by his agreement sometimes adds dishonesty to illegality – but they refuse to enforce the bargain for the sake of the community, it would be prejudiced if such a bargain were countenanced”.¹¹⁴

¹¹⁰ *Waweru v Republic* (2006) 1 KLR (E&L) 677 at 690-691. See also at 687

¹¹¹ See for example, conservation agreements under Division 12 Part 4 of the *National Parks and Wildlife Act* 1974 (NSW) and s 126A of the *Threatened Species Conservation Act* 1995 (NSW), property vegetation plans under Part 4 of the *Native Vegetation Act* 2003 (NSW), heritage agreements under ss 23 and 23A of the *Native Vegetation Act* 1991 (SA) and heritage agreements under Part 3B of the *Heritage Act* 1977 (NSW)

¹¹² See generally D Curran, “The conservation of biological diversity on private property in NSW” (2000) 17 EPLJ 34, A P Danne, “Voluntary environmental agreements in Australia: an analysis of statutory and non-statutory frameworks for the implementation of voluntary environmental agreements in Australia”, (2003) 20 EPLJ 287, S Shearing, “Taxation incentives for conservation covenants”, (2006) 11 LGLJ 139, J A Fitzsimmons, “Private Protected Areas? Assessing the suitability through incorporating conservation agreements over private land into the national reserve system: the case study of Victoria” (2006) 23 EPLJ 365 and E Peden, “Conservation Agreements – contracts or not?”, a paper presented to the Beyond Environmental Law Conference, Sydney, 16-17 February 2007

¹¹³ (1915) 21 CLR 89 at 97

¹¹⁴ (1915) 21 CLR 89 at 97-98

The statement has been cited with approval on numerous occasions.¹¹⁵

As I have noted earlier, society's views change and with respect to environmental matters, this change is towards imposing stricter standards in environmental responsibility. As stated in *Re Jacob v Morris (dec'd)*,¹¹⁶ "Public policy is not...fixed and stable. From generation to generation ideas change as to what is necessary or injurious, so that 'public policy is a variable thing. It must fluctuate with the circumstances of the time'".¹¹⁷ The courts are bound to adapt to these changing circumstances.

Byers has predicted that the time has come where courts will strike down a contract which is designed to pollute or has as an inevitable consequence to the pollution of the environment as being contrary to public policy.¹¹⁸

One way in which a contract relating to environmental harm could be seen to be contrary to public policy is if it involves statutory illegality. In *Yango Pastoral Company Pty Limited v First Chicago Australia Ltd*,¹¹⁹ Gibbs ACJ identified four ways in which the enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful:

"(1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful, or (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits."¹²⁰

In the first class of case, a statute might prohibit pollution or prohibit the manufacture, marketing, sale or distribution of an environmentally harmful product. Such a statute may affect the enforceability of a contract in which one or both of the parties have undertaken to do the very act of pollution, manufacture, marketing, sales or distribution which is prohibited. An illustration would be a contract by one person to collect the waste of another person and to dispose of it by dumping it in a particular river where that act would contravene clean waters legislation.¹²¹ A court is unlikely to enforce such a contract either by an order of specific performance or by enabling a party to recover damages for breach or wrongful repudiation of such a contract.¹²²

In the second class of case, the statute may be directed to the very making of the contract. In such a case, it can be expected that the legislature would provide expressly in relation to the enforceability of the contract. An illustration is a statute which makes it unlawful for any person to subdivide land into allotments or to offer for sale or to sell such allotments except in accordance with the statutory provisions. A contract entered into for the sale of certain allotments without first complying with the statutory provisions would be illegal and invalid.¹²³

¹¹⁵ See for example, *Re Jacob v Morris (dec'd)* (1943) 43 SR (NSW) 352 at 355-356 and *A v Hayden* (1984) 156 CLR 532 at 558 and 571

¹¹⁶ (1943) 43 SR (NSW) 352

¹¹⁷ (1943) 43 SR (NSW) 352 at 356. See also *Shaw v Groom* [1970] 2 QB 504 at 523, *Seidler v Schallhofer* [1982] 2 NSWLR 80 at 87-89 and *A v Hayden* (1984) 156 CLR 532 at 558

¹¹⁸ Sir Maurice Byers QC, "Concluding remarks" in R J Fowler (ed), note 3, p 178

¹¹⁹ (1978) 139 CLR 410

¹²⁰ (1978) 139 CLR 410 at 413

¹²¹ Such as s 120 of the *Protection of the Environment Operations Act* (NSW)

¹²² K Lindgren, "Public policy and the enforcement of contracts relating to pollution and environmentally harmful products and processes" in S Thomas, (ed), note 4, p 256

¹²³ *George v Greater Adelaide Development Co Ltd* (1929) 43 CLR 91. See further K Lindgren, note 122, p 258

The third class of case focuses attention on the intention of the parties at the time of entering into a contract. It identifies whether such contracts are accompanied by illegal intent. A contract which is entered into with the object of committing an illegal act is unenforceable.¹²⁴ Lindgren gives the example of “Company A contracts to dispose of Company B’s waste intending, unbeknown to Company B, to dump the waste in a stream in contravention of legislation. Once Company B becomes aware that Company A is illegally polluting the stream, Company B ceases to make its waste available to Company A. Company A sues Company B for damages for breach of contract”.¹²⁵ In such a case, the contract would not be enforceable by Company A.¹²⁶ Company B, however, would be entitled to enforce it, not having been aware at the time of contracting of Company A’s intention, and Company B would be entitled to discontinue performing the contract upon becoming aware of Company A’s illegal intention.¹²⁷

The fourth class of case contemplates a contract, lawful on its face, which has the potential to be performed lawfully or unlawfully and which neither party, when contracting, intends to perform unlawfully, but which in fact is performed, in one respect or another, unlawfully by one party or both parties and if by one party only, with or without the other’s prior knowledge of the illegality. In an environmental context, there might be many contracts, in the performance of which contraventions of environmental protection legislation might occur. Lindgren’s example is that, in the course of carriage of goods by land, sea or even air, acts of pollution might be committed by the carrier. On the assumption that there was not an initial or supervening intention to break the law, the enforcement of the contract is, *prima facie*, not affected. If there was such an intention to break the law, the contract would not be enforceable by the party having that intention from the time that he or she develops it or even by the other party who knowingly acquiesces in that intention, from the time that he or she knowingly acquiesces. A party who in fact performs illegally will not be entitled to recover in respect of the prohibited acts of performance, at least if it would be necessary to plead the illegal acts in the proceedings for recovery, since to allow such recovery would be to allow such a person to take advantage of his or her wrong.¹²⁸

Conclusion

The above examples illustrate the responsiveness of the law to the ever-changing environment and environmental issues. The responsiveness of the law to changing needs ensures the continuing relevance of the law and the attainment of environmental justice.

The concept of ecologically sustainable development involves the integration of three components - economic development, social development and environmental protection - as interdependent and mutually reinforcing pillars. It involves not only intergenerational equity or equity between the present and the future generations but also intragenerational equity which involves ensuring equality within the present generation, such that each member has an equal right to benefit from access the earth’s natural and cultural resources and to benefit from a clean and healthy environment. Environmental harm, however, commonly discriminates against the economically and socially disadvantaged of society. Ensuring access to environmental justice for all people is fundamental if intragenerational equity is to be achieved.

¹²⁴ *St Johns Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 at 283

¹²⁵ K Lindgren, note 122, p 259

¹²⁶ K Lindgren, note 122, p 261

¹²⁷ K Lindgren, note 122, p 261

¹²⁸ K Lindgren, note 122, pp 261-262

Achieving access to environmental justice for everyone will require constant and continuing analysis of the law and our system of justice. As the former Chief Justice of India, the Hon P N Bhagwati, has said:

“If our judicial process is to be responsive to our society’s needs, if it is to fulfil its true purpose and advance the cause it is intended to serve, it must be subjected to a constant and continuing analysis. Our judicial systems must continually be renovated and improved so they become a fit and adequate instrument of justice as we conceive it to be, not only for the fortunate few, but also for the masses”.¹²⁹

Justice Cardozo in his address on the topic of “Faith in a Doubting World” to the New York County Lawyers Association, said this:

“Where shall we find a more stirring message than the great speech delivered by Lord Brougham a century ago in the English House of Commons when he spoke in support of a motion that an address be presented to the King petitioning a Commission be established to enquire into the defects occasioned by time and otherwise in the laws of this realm of England as administered in the Courts of Common Law, and the remedies which may be expedient for the same.

He then proceeded to quote from a book written by Claude Mullins with a provocative title, *In Quest of Justice*:

‘It was the boast of Augustus that he found Rome of brick and left it of marble. But how much nobler would be our sovereign’s boast, when he shall have to say that he found law dear and left it cheap; found a sealed book, left it a living letter; found the patrimony of the rich, left it the inheritance of the poor; found it the double-edged sword of craft and oppression, left it the stuff of honesty and the shield of innocence.’¹³⁰

Can I conclude by adapting Bhagwati’s words. Let all who are privileged to serve in our system of justice – both judges and lawyers - exercise their respective functions in a manner that brings environmental justice to everyone in the country. I am sure that Legal Aid New South Wales and the dedicated lawyers, both public and private, who work in the legal aid system, in times to come, will help to make environmental justice a ready instrument in the hands of all people.

¹²⁹ P N Bhagwati, “The Courtroom as Temple of Justice”, in WH Malik and C E L Ochaita (eds), *Furthering Judicial Education: Proceedings of the Conference of Judicial Schools in Latin America*, World Bank Technical Paper No 528, World Bank, p 29

¹³⁰ As cited in PN Bhagwati, note 129, p 29