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LAW AS A SOCIAL INSTRUMENT TO SUSTAINABLE DEVELOPMENT

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If the common conception that environmental issues can be solved by law were true, Sri Lanka would rank among those countries with a very high environmental rating. Sri Lanka counts well over 100 statutes directly or indirectly dealing with environmental matters.[1] Most of these statutes were first enacted during British colonial times. Major statutes such as the Forest Ordinance, the Municipal Councils Ordinance, the Crown Lands Ordinance, the Land Development Ordinance and the Irrigation Ordinance have been repeatedly amended before and after independence.

Yet, Sri Lanka's environmental problems have not gone away, rather they have in many instances, consolidated themselves and become chronic. The Forest Ordinance was first enacted in 1907 and has been amended a dozen times since then. Over the last eight decades the law has been made more drastic by ever increasing penalties and other substantive and procedural legal changes.[2] The burden of proof in respect of offenses under the Forest Ordinance, which is usually on the prosecution, has been made lighter by shifting the burden of proof in many instances to the accused.[3] Penalties for illegal felling and transport of timber has consistently increased and now include minimum penalties.[4] Additionally, the Ordinance now provides for automatic forfeiture upon conviction of vehicles and other property which has been used in the commission of offenses under the Ordinance.[5]

Notwithstanding, the increasing severity of the Forest Ordinance, Sri Lanka's forest cover has continued to decline and has now reached a critically low level.[6] The upshot is that the enactment and increasing severity of the Forest Ordinance has not prevented or mitigated deforestation and loss of forest cover. One conclusion might be that the Ordinance has failed to achieve the purpose for which it was enacted. It is manifest that complex environmental issues cannot be solved by law but rather through the law. Whatever the answers, the phenomenon described raises several questions.

Firstly, has the law addressed the real causes of deforestation and loss of forest cover? Secondly, what were the real objectives for which the Ordinance was originally enacted (and since retained) by the British colonial government and are those objectives consistent with current needs? Thirdly, how effective have the solutions contained in the Ordinance been?

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1. A comprehensive list of these statutes is given in the appendix to a paper entitled "Environmental Law in Sri Lanka" presented by this author to the National Law Conference in 1991.
2. Withanage Sumudu, (1991). *Towards Legal Protection of Tropical Forests,* pp. 7 *et seq.*
3. *Vide* Sections 2,23 and 52 of the Forest Ordinance.
4. e.g. S 25 of the Forest Ordinance.
5. Section 40 of the Forest Ordinance.
6. Natural Resources, Energy and Science Authority, (1991). *Natural Resources of Sri Lanka, Conditions and Trends,* pp. 193-201.

Sri Lankan lawyers posed with such questions would analyse the law, the judgements and juristic opinions and come to findings. The traditional way in which law has been taught in Sri Lanka tends to narrow the perspective of lawyers to evaluating legal issues within the four corners of the statute. Entrenched in the Austinian module, legal reform tends to become a matter of degrees within a command and control module. All too often the social, economic and anthropological dimensions of the law are ignored or inadequately addressed in legal reforms. This paper seeks to demonstrate that more effective laws will only emerge if reform is hinged to a deeper appreciation and analysis of the social, ecological, economic and anthropological dimensions of the issues addressed.

Legal anthropologists have evolved several models through which these dimensions can be brought into legal analysis. This paper will use two such theories to highlight some issues that environmental law reform appears to have consistently missed.

Methodology

The methodology for this paper follows two themes. Firstly, a sample of laws will be analysed for the purpose of identifying the socioeconomic forces that shaped them. Secondly, the interpretive and constitutive elements of these laws will be evaluated.

The two methods described above have been used with success in several comparative socio-legal studies. Tigar and Levy, used the first of the two methodologies in their study on the law and the rise of capitalism.[7] Their focus was on the manner in which law and legal institutions reflect the interests of the dominant class and how they are changed as a new social class gradually replaces its predecessor. They concluded that legal ideology was not the sole property of the dominant group within society; on the contrary, groups that aspire to state power have formulated their attack in terms of systems of legal rules and principles. The study they made was able to demonstrate how new classes aspiring to state power used, among others, the Roman law to change legal ideology in their favour.

Tigar and Levy argued that "legal change is the product of conflict between social classes seeking to turn the institutions of social control to their purposes, and to impose and maintain a specific system of social relations".[8] A study of jurisprudence in history, requires an understanding of the content of competing legal ideologies and the interests from which they spring. It also requires the identification of groups whose conflict in ideology foreshadows revolutionary change, and a description of how such conflict works out in the daily life of men and women.

The second method employed is to identify the constitutive and interpretive aspects of the law. Following Geertz[9] and White,[10] Mary Ann Glendon adopted this approach

7. Tigar, Michael E. & Madeleine R. Levy, (1977). *Law and the Rise of Capitalism.*
8. *Op. cit.* p. xii.
9. Geertz, Clifford (1983). *Local Knowledge: Further Essays in Interpretive Anthropology.*

in her comparative study of abortion and divorce in western law.[11] Glendon says that the law is interpretive "when it is engaged in converting social facts into legal data and systematically summarizing them in legal language".[12] "The law is constitutive", says Glendon, "when legal language and legal concepts begin to affect ordinary language and to influence the manner in which we perceive reality".[13]

The Tragedy of the "*Kele*"

If the Forest Ordinance is analysed by using the methodology adopted by Tigar and Levy,[14] interesting insights begin to emerge. Prior to the advent of the colonial powers (in particular the British), Sri Lanka's forests vested in the King as "bhupathy" (Lord of the Earth). The vast tracts of forest then available were never treated as the personal domain of the King but rather as property held by the King for the People. Within this context, individuals and communities (i.e. often villages) had usufructuary rights in these forests.

This was the case with most land including forest. In pre-colonial times, a land ownership map of Sri Lanka would have been a mosaic of lands held communally, by royalty, by Temples and by individuals. In 1840, the British colonial government enacted the Waste Lands Ordinance which by a single stroke of the legislative pen vested all "forest, waste, unoccupied, or uncultivated land or chena..."[15] in the British crown. The Ordinance established a procedure for the making and settlement of claims to such lands. Yet, the Ordinance was enacted at a time when the Colonial writ did not quite run throughout the country as effectively as it did in the following century. The 1818 rebellion was just over and the 1848 rebellion was yet to come.

In effect the Waste Lands Ordinance of 1840 vested communally and royally held lands in the British crown without due process and without compensation. The land ownership mosaic changed over-night to one of lands held by the British crown, by temples and by individuals. communal and common lands were wiped off the face of the map vesting the majority of Sri Lankan lands in the British crown. Colonial forest protection has its roots in this context. To the British colonial government, forests were a resource waiting to be harvested as timber and other produce. Forests were waiting to be cleared and sold to British enterprises for plantations (coffee and later tea). The interests that drove the colonial government to enact both the Waste Lands Ordinance and the Forest Ordinance of 1907 were closely tied with the colonial economy.

10. White, James B. (1985). Law as Rhetoric, Rhetoric as Law: The Art of Cultural and Community Life, 52 *University of Chicago Law Review*, p. 684, 1985. See also James B. White, (1985) *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law.*
11. Glendon, Mary Ann, (1987). *Abortion and Divorce in Western Law.*
12. *Ibid.* p. 9.
13. *Ibid.*
14. *Supra*
15. Section 2, Waste Lands Ordinance of 1840. Later amended by Ordinance No. 1 of 1897 and by the Land Settlement Ordinance 1931 (Cap. 299) of the Legislative Enactments of Sri Lanka, (1980)

As Tigar and Levy[16] point out, law is an instrument of social control wherein the interests of the dominant social classes are entrenched, safeguarded and maintained. The Forest Ordinance likewise entrenched, safeguarded and maintained British colonial interests in Sri Lanka's forests. It did not safeguard or entrench the public or community interests or rights in those forests and more often than not, eroded them.

The Forest Ordinance has since its enactment at the turn of this century been amended a dozen times, although its original scheme and institutional structure has remained unchanged. The Scheme of the Forest Ordinance as it now stands envisages the establishment of Forest Reserves and Village Forests by Ministerial order and the affording of protection to fauna and flora within these areas.[17] The Ordinance also provides for protection for listed tree species[18] and regulates the acquisition, sale and transportation of forest produce and timber.[19] Although the Ordinance provides for the creation of village forests, none actually exist today.

The creation of forest reserves during colonial times was motivated by several factors, including environmental factors such as watershed preservation. The control of transportation was largely motivated by revenue collection. Village forests were a redeeming feature and was an attempt on the part of the colonial government to recognise some communal usufructuary rights yet these were few and far between. The Forest Ordinance as it stands today, still embodies these original interests. None of the amendments to the Ordinance, even during the post independence era, has ever attempted to introduce the new social thinking on people and community management of forests, or the establishment of buffer zones or the re-creation of economic stakes and tenures for communities in public forests.

The colonial institutional structure continues to be entrenched and perpetuated through the Ordinance. The Forest Department under a Conservator of Forests has only now begun to change from its revenue collecting mentality to a conservation oriented government agency.

As Glendon points out, the law has both a constitutive and an interpretive role in society. With the enactment of the Waste Lands Ordinance and the Forest Ordinance, the colonial law began to recite its own "story". Public and communal lands were no more, they would no longer be recognized and such lands vested in the crown to be dealt with at the discretion of the crown. Communities and competing interests no longer could formulate their disputes and grievances within the communal and traditional tenure system but had to do so within the new language of the colonial law. In turn, colonial law would influence the manner in which these resources were perceived.

16. *Supra*
17. Section 3 and 12 of the Ordinance.
18. Chapter IV of the Ordinance.
19. Chapter V of the Ordinance.

Thus under the Forest Ordinance, it was no longer valid for a villager to plead that he collected medicine in a forest as part of an ancient hereditary right derived from his ancestors; he was now required to produce a permit from a forest officer. In turn, as time passed, a villager would seek to justify the collection of firewood under a permit and not under a traditional usufructuary rights tenure system. Whenever, the dispute was articulated in the traditional system, British colonial judges would counter by re-interpreting the dispute within the new paradigm.

The forests which once was communally owned was now rendered "crown forest". The right and duty to protect that forest was now on the crown and not with the community. In fact the community suddenly became trespassers within these forests. The forests began to be felled by the crown for plantations. The communities that had derived benefits from the forest saw it taken away with no compensation. Individual economic motivations then drove some to take from the commons what they could. This compounded deforestation. The way in which forests were perceived by village communities had begun to change irreversibly.[20]

The law is then made more stringent but the institutional capacity to police and enforce remain unchanged. Thus the cycle of deforestation continued, unabated. What was once perceived as a place for veneration and a place from whence sprang the great civilisations of the South Indian sub-continent (Aranya Samskriti) was gradually perceived as an economic asset to be tamed and harvested. The colonial law had a devastating constitutive effect on Sri Lanka's forests.

This social phenomenon is apparent not only in the area of public lands and forests but also in the area of artisenal fisheries. Sri Lanka's coastal fishing communities had evolved an ancient system of communal tenure in respect of artisenal fishing grounds. These were tenures that established limited access regimes with complex rules of internal distribution. The colonial legal system introduced the concept of the "open seas" and through legal decisions gradually eroded the traditional tenure of near shore fisheries resources.[21]

Legal Responses to Environmental Issues

In this context it is no longer possible to ignore the socio-legal and anthropological input so necessary to an adequate understanding of natural resource law and its reform. Today, Emergency Regulations have been enacted to control access and illegal felling in forest reserves with consequent heavy penalties. The emergency regulations even provide that trespassers may be shot on sight. Perhaps these regulations seek to emulate the JVP's example of posting death threats against persons reputed to be involved in

20. Throughout the Indian subcontinent, forests were perceived as a source of life. It gave cover to the earth, water for irrigation, fruits, medicines and a place of refuge. The forest was always equated to a goddess - the source of pro-creation and life support. See *Vandana Shiva, Ecology and the Politics of Survival, 1991.* The Forest was the "Aranyani" the forest goddess as in the Vedas.

21. For an analysis of this phenmenon in the artisenal fisheries of Sri Lanka see this author's "A comparative study of the public trust in Sri Lanka and America", University of Washington, Unpublished, June 1990.

illegal felling in public forests! Yet felling goes unchecked. The thesis of this paper is to demonstrate that the law can be made a more effective instrument for natural resource management, provided its formulation and implementation is supported by socio-legal, ecological, economic and anthropological inquiry.

In many cases, such inquiry would demonstrate that the command and control mechanism is only good in some situations and certainly more effective when adopted in conjunction with other mechanisms. The law has responded to environmental and natural resource issues in four identifiable ways:-

1. Command and control response;
2. Mandated rational planning response;
3. Common law response; and
4. Incentives response.

In most Sri Lankan statutes dealing with natural resources, the command and control response predominates.[22] Mandated rational planning is manifest in more recent statutes such as the Coast Conservation Act (1981) and the National Environmental Act (NEA) (1980 amended in 1988). In this response the law establishes an institutional, timing and procedural framework for pre-planning the management of the resource. Often, such statutes provide a supporting command control mechanism for enforcing the management plan that evolves from the decision-making process.

The Coast Conservation Act 1981, mandates the Director of Coast Conservation to prepare a Coastal Zone Management Plan (CZMP) covering various aspects of the coastal resources, its use and conservation.[23] The plan is then referred to the Coast Conservation Advisory Council and to the Public for inspection and comment. The draft is then amended and placed before the Cabinet of Ministers for approval.Once approval is granted, the draft become final and is Gazetted for public notice. The Act then provides that future development activity in the coastal zone should be consistent with the CZMP. Such activity is controlled through a permit system which is supported by penal sanction.

The NEA likewise mandated the use of environmental impact assessment (EIA) procedures for specified development projects.[24] The mandate directs that the developer should prepare an EIA for the project for evaluation by the deciding government agency after consultation with the public and other relevant government agencies. An EIA is a mechanism that allows decision makers to pre-assess the environmental consequences of a project and to consider alternatives that could be less harmful to the environment. Public inspection and participation ensures a greater degree of accountability and transparency in the decision making process.

22. e.g. The Forest Ordinance, the Fauna and Flowra Protection Ordinance, the State Lands Ordinance, the Pesticide Control Act 1981.
23. Section 12 of the Act.
24. Chapter IVC.

The common law has responded to environmental issues by evolving rights that enable victims of environmental aggression to recover damages and seek injunctive relief. The law of nuisance and negligence and principles of strict liability are illustrative of this response.

Finally, the incentive response is gaining in popularity throughout the world. This response is perhaps the converse of the command and control response. Incentives are offered through the law for right environmental behaviour. The incentives response is usually coupled with one of the other responses.

Where a pollution control regime is established, it should be possible to legislate incentives for those industries that do better than the minimum pollution standards fixed. Tax incentives can be offered for the use of re-cyclable containers for packaging thus reducing the burden of disposal from the tax payer and encouraging sound resource management.

The Wise Choice

In given resource management issues it may be necessary to adopt some or all of these responses and to experiment in a search for the most effective response. But such creativity would be misplaced if it is not based upon socio-legal, anthropological and ecological inputs and analysis.

In the case of forest protection, it is becoming increasingly clear that traditional communities have closer ties to the forest and care more for it than "alien" managers brought in by the state. Often the solution might lie in returning some forests to the community for management. Such management is only meaningful where economic and legally enforceable stakes can be created for the managing community. The success of the management might very well depend upon the value and legal enforceability of the stakes. Stakes could range from usufructuary rights to full ownership.

Such an innovative legal strategy can only be developed if anthropological, socio-logical and ecological evaluations and data is available. In the absence of such data and analysis the law will simply follow traditional patterns based on the command control responses and on executive territoriality. The Coast Conservation Act 1981 illustrates how such insensitivity can create anomalies unimaginable in rational legislation. The Act defines the coastal zone as a 300 meter strip of land from the high water mark of the sea and a two kilometer strip of sea from the low water mark of the sea. This thin strip of land and sea surrounds the island and forms the area of jurisdiction under the Act. The Act also extends this jurisdiction to a "body of water" connected to the sea upto two kilometers from the point of connection.

Basic ecology teaches that water bodies and ecosystems do not have such precisely drawn boundaries. Rather these boundaries fluctuate with the seasons and with other

factors. If the coastal zone was treated a collection of ecosystems, a legal formulation that gave jurisdiction over these could have been formulated, making the Act more efficacious. Ecology also teaches that any impact on one part of an ecosystem could have repercussions on another part. Ideally, the Coast Conservation Act should have developed a jurisdiction that encompassed the whole ecosystem rather than parts only. In the result, many development projects that are constituted over a large area falls partly within and partly outside the coastal zone. Additionally, activities carried out outside the coastal zone but within the same ecosystem, adversely impacts the coastal zone, yet the Act is ineffectual against such intrusions.

"Sustainable Development" has been defined in several ways before and after the Report of the World Commission on Environment and Development (1984). Time has shown that the two words together constitutes an oxymoron which means all things to all persons. "Sustainability" is a concept that come from the ecological context implying the continued existence of resources within the bounds of renewability set by nature. "Development" on the other hand comes from the context of post industrial revolution economics which predicates unlimited economic growth, inter-alia, by harnessing natural resources. The two concepts come from widely differing contexts and attempts to define the composite word usually ends up with endless debates, often pedantic and semantic.

At a practical level, "sustainable development" simply seeks to convey the concept that there are limits which nature places upon the use, re-use and renewal of resources and that there cannot be unlimited economic growth at the expense of transcending those limits. Technology can help by changing the natural limits one way or the other, thus extending or diminishing the capacity to utilise that resource without endangering its renewal. On the other hand, transcending those limits would undermine economic growth by reducing the availability and adaptability of the resource.

Sustainable development is therefore achievable only through a series of compromises - compromises in resource use, re-use, allocation, and renewal - compromises in economic growth and distribution. These compromises have to be guided by a set of values, which perhaps each society and community may have to determine for itself. There may also be values or principles which each society or community may decide should not be compromised. Two values however receive primacy - firstly that of survival and secondly that of inter-generational equity.

For the most part, law in this context is either the embodiment of those compromises or must be the vehicle for facilitating the making of those compromises. The law might embody a compromise in the form of one or more of the above type responses or in the form of a combination of several of them. Such compromises may come about through long range pro-active planning or more often through crisis reaction. On the other hand, where society recognizes the need to make these compromises, the law can and should

provided adequate mechanisms for the facilitation and implementation of these compromises.

The rational planning response identified above is one way in which the law can facilitate compromises. Transparency, participatory decision-making processes, and arbitration and mediation are some of the ways in which the law seeks to facilitate such compromises.

In this context, many natural resource and environmental laws in Sri Lanka are out dated, and far removed from the current social, environmental, anthropological, and economic context and cry for reform. That reform will not come until the dominant classes of society begin to see resource conservation as essential for the protection and preservation of their interests. Alternatively, other classes in our society must begin to use the legal system in a creative way, articulating the resource conflict and expanding the legal frontiers. The Indian Supreme Court's attempts to enlarge the scope of the fundamental right to life as including the right to a wholesome environment is one such case.[25] With such change the law will begin to constitute a different perception of the reality of the state of our environment.

25. Mehta v. The Union of India, AIR 1987 Supreme Court, 965.