

SUMMARY OF A LECTURE ENVIRONMENTAL LAW WITH SPECIAL REFERENCE TO INLAND WATERS

GIVEN BY
RUSSELL MACWILLIAM
TO THE FISHING DEVELOPMENT GROUP OF
THE CAPE PISCATORIAL SOCIETY

INTRODUCTION

Environmental Law is a relatively new branch of Law, as it is only since the Second World War that the protection of the environment has become a pressing issue.

GENERAL

There are four sources of Law, namely, Common Law, Custom, Precedent and Legislation. Due to the comparatively recent emergence of Environmental Law, the first three sources of Law have little bearing on the protection of the environment. Fortunately legislation, which either has as its primary function or as its secondary function the protection of the environment is becoming increasingly common.

DISTINCTION BETWEEN CRIMINAL AND CIVIL COURTS

It should be borne in mind that there is a very important distinction between the Civil Courts and the Criminal Courts. In the Criminal Courts the State brings a prosecution against the person who it is alleged has harmed the environment and in this instance it must be proved beyond a reasonable doubt that the environment has been criminally damaged (in other words that a legislative provision has been contravened). Fines are often paltry, for example some regulations provide for a maximum fine of R50.00. Of particular relevance is the fact that enforcement of those laws aimed at preventing water pollution is often woefully inadequate.

In a Civil case an individual brings an action in which he claims any monetary loss which he has suffered and which is caused by a person who is polluting the environment. He can also apply for an interdict to stop the person whose activities are causing pollution which is adversely affecting his rights. The major disadvantages of bringing a Civil action are:

1. A potential litigant must first show that he has *locus standi* to bring the action—in other words he must show that he personally has suffered some particular harm.
2. In the event of his being unsuccessful in his action for any reason he will be obliged to pay both his own legal costs and the legal costs of the polluter, which can and probably will be substantial.

PROOF

It is often difficult to prove that a party is guilty of causing pollution, for example although a water sample taken in the Vaal may show that certain pollutants are present, the fact that it can be proved that Factory A upstream produces similar pollutants would not be sufficient to establish criminal liability. Positive evidence to show that the effluent was indeed discharged into the river by the factory would also be required. Needless to say, this is not always easy to come by and, as mentioned above, if a conviction is obtained, the sentence will almost certainly bear little relation to the magnitude of the environmental damage caused.

DEFINITION OF ENVIRONMENTAL LAW

Environmental Law as such covers a very wide field. It may be defined as a body of rules which govern the conditions or influences which affect the lives or development of any person or thing. Fortunately I need only deal generally with inland waters.

INLAND WATERS

Unfortunately, because pollution can take so many varied forms, completely com-

prehensive legislation controlling all types of pollution is impossible to promulgate. By far and away the most important legislation affecting inland water is the Water Act of 1956. This Act provides a number of measures aimed at the protection of inland water against pollution. In the first instance permission to use public water for industrial purposes must be obtained from a Water Court and in many instances a permit has to be obtained from the Minister of Water Affairs. Thereafter, when the water is used for industrial purposes, the user must purify the water so as to conform with the requirements laid down by the Department of Water Affairs. It is here that the greatest measure of control is effected. In exceptional circumstances users may be exempted from purifying polluted water, an obviously unsatisfactory situation. Finally various specific offences are created by the Act.

The last line of defence is an umbrella provision which makes it an offence for any person to wilfully or negligently commit any act which *could* pollute any public or private water, including underground water or sea water in such a way as to render it less fit:—

- (i) for the purposes for which it is or could be ordinarily used by other persons;
- (ii) for the propagation of fish or other aquatic life;
- (iii) for recreational or other legitimate purposes.

To sum up, the Act prevents water pollution by debarring the uncontrolled use of inland water, thereafter once permission to use the water has been obtained, by endeavouring to minimise the amount of water pollution and finally by providing punitive measures in the event of any breach of the Act occurring. Although fines are provided for in the Act, these are generally of little importance. The Department of Water Affairs prefers in the majority of cases to rely on persuasion through the issue of permits to control water pollution.

It is all too easy to talk glibly about stopping water pollution but it should be remembered that the most difficult problem facing the control of water pollution is the fact that almost all economic development implies a certain degree of pollution. It will probably amount to economic suicide to insist that no water pollution whatsoever could take place in South Africa. Slimes dams present a typical example of the difficulties faced in balancing these two conflicting interests. Regulations have been promulgated which lay down certain requirements for the construction of slimes dams. These regulations provide that slimes dams must be constructed to withstand certain defined amounts of rainfall. In 1974 rainfall in excess of this defined amount descended upon certain slimes dams in Rustenburg with the result that their retaining walls collapsed. An environmental disaster occurred, and yet as far as I know no offence was committed.

OTHER ACTS

There are a number of other legislative provisions which help to control the pollution of inland water.

SOIL CONSERVATION

A large number of rather ineffective Soil Conservation Acts have been enacted which aim at preventing soil erosion.

PESTICIDES

Pesticides are a well-publicised form of water pollution. Unfortunately, while the manufacture of pesticides is in most instances strictly controlled, there is no enforcement of the method of application.

AIR POLLUTION

The control of air pollution is obviously important, as air pollution can often indirectly cause water pollution by, for example, the contamination of falling rain.

MINING

The outcry with regard to the mining of coking coal in the Kruger National Park is a reminder that nothing in South Africa is sacrosanct. It is likely that if coal is mined in the Kruger Park, the Levubu River will be polluted. Unfortunately where there is

a will there is a way, no matter what the legislation may say.

PLANNING

By far the best way to stop or control water pollution is in the planning stage. Various Planning Acts have been passed and the protection of inland water is in some instances affected by these.

CONCLUSION

It is unfortunately true that as most water pollution in the first instance does little more than adversely affect the inland waters habitat, pollution control is of little significance to the average person. In many instances, although individuals may feel greatly aggrieved by water pollution, the cost of transforming this grievance into positive action is prohibitive.

Our legal system and its application is in large measure a reflection of the society we live in. While our society does not consider water pollution to be a major crime, it is unlikely that water pollution will be adequately controlled.