

Environmental Law Scholarship in a Developing Country – An Alternative Discourse

CAMENA GUNERATNE

Introduction

Legal scholars have been engaged in a critical examination as to the nature, role and objectives of environmental law scholarship, questioning its relevance as an academic discipline. Much of this discourse is located in common law jurisdictions of developed countries that share common perspectives about the nature of environmental law and its role in environmental regulation and management.

In this chapter, I use a developing country's experience of environment and development to argue for an alternative discourse in both environmental law and the scholarship that informs it. I contend that there cannot be a uniform definition of what constitutes environmental law scholarship, and it must inevitably adapt to differing jurisdictions, needs and social realities, wherever they are located. In this chapter, I consider the ambit of this sub-discipline of law, and its relevance and impacts in a developing country that is confronting issues of environmental degradation, poverty and development. In doing so, I will offer suggestions as to how scholarship in this field can positively contribute to this process in terms of wider impact, research methodologies and responding to current challenges.

1 The Discourse on Legal Scholarship and Environmental Law

Legal scholarship has been the subject of much debate within the field and legal scholars themselves have questioned its role, purpose and objective. They have asked what legal scholars contribute to the academic pursuit of knowledge and to the pursuit of justice. It has been alleged that legal scholarship is normative and its aim is not to create new knowledge

but merely to analyse the current status of the law to consider what it should be. At its best, it seeks to develop a more just world rather than a more knowledgeable one. For that reason, legal scholarship is not true scholarship, the defining goal of which is to uncover subtle and interesting truths in the pursuit of knowledge within the discipline of a recognized academic field. The comment has been made that '[i]t is too professional or too normative to be true "scholarship" for some critics and too academic for others. It is too disorganized, undisciplined, or disperse: no one can articulate widely shared standards of quality, or even a widely shared method that defines the discipline.'¹

The questions raised as to the purpose of legal scholarship have been asked with even greater intensity and self-doubt in regard to environmental law. Environmental law scholarship has been defined as scholarship predicated on ideals common to all legal scholarship but which addresses 'the special kind of problems that are discovered in the study of laws and legal systems that relate to the environment'.² Writers from the United Kingdom are pessimistic about the nature and state of environmental law as a legal discipline and perceive it as one that has yet to come of age, and which is immature, incoherent and marginal to mainstream legal scholarship.³ US scholars take a more positive view and contend that since the birth of modern environmental law forty years ago the subject has matured considerably and reached a level of stability.⁴ However, they too agree that the area is highly fragmented and unduly complicated and needs an overall vision or descriptive framework to make it coherent.⁵ Interestingly, the literature does not appear to indicate that a similar debate has arisen among scholars in developing countries. This is possibly because environmental law scholarship in many of these countries has a strong element of

¹ Robin West, 'The Contested Value of Normative Legal Scholarship' (2016) 66 *Journal of Legal Education* 6; Robin West & Danielle Citron, 'On Legal Scholarship' available at www.aals.org/wp-content/uploads/2014/08/OnLegalScholarship-West-Citron.pdf; Gavin Little, 'Developing Environmental Law Scholarship: Going Beyond the Legal Space' (2016) 36(1) *Legal Studies* 48.

² Elizabeth Fisher, Bettina Lange, Eloise Scotford & Cinnamon Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21(2) *Journal of Environmental Law* 213.

³ *Ibid.*, 213; Ole W. Pedersen, 'Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law' (2013) 33(1) *Oxford Journal of Legal Studies* 103 at 105.

⁴ Todd S. Aagaard, 'Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy' (2010) 95(2) *Cornell Law Review* 221 at 223.

⁵ Aagaard, 'Environmental Law as a Legal Field'.

activism with academics contributing to the development of the law within and outside a legal setting.

The uncertainty as to the nature and status of environmental law as an academic discipline has largely to do with the uncertainty as to what the speciality encompasses. Macrory notes that one of the challenges of environmental law is to define its boundaries.⁶ Several writers have attempted to define these boundaries, the scope of which ranges from all laws that affect or have to do with the natural environment,⁷ to those whose primary purpose is to protect the natural environment, to the most restrictive – that is, those laws which are based on an environmental ethic.⁸ A narrow definition encompassing such issues as pollution and nature conservation law may bring some certainty to the field but does not address all environmental challenges. Conversely, as Aagaard argues, an over-inclusive definition that encompasses all laws which impact on the environment but which were enacted without any consideration of environmental interests would lead to confusion. Aagaard appears to take the middle ground – environmental law encompasses laws that deal with human impacts on the natural environment, and he notes that such a definition ‘will allow us to study the various approaches that law making institutions take to environmental management’.⁹

The attempts to define the boundaries of environmental law reflect the perhaps unresolvable debate as to the nature of the discipline – is it simply a collection of any laws relating to the environment which may be used to resolve environmental problems, or is it based on a fundamental set of principles that give it credence as an identifiable legal discipline?¹⁰ The first question also gives rise to another that would precede it – namely, how does one define ‘environment’ and identify ‘environmental’ problems?

⁶ Richard Macrory, ‘Maturity and Methodology’: A Personal Reflection’ (2009) 21(2) *Journal of Environmental Law* 251.

⁷ Pedersen, ‘Modest Pragmatic Lessons’, 105.

⁸ Aagaard, ‘Environmental Law as a Legal Field’, 261.

⁹ *Ibid.*, 263. Dernbach carries the role of environmental law a step further, citing its role in ensuring sustainability. He defines sustainable development as environmentally sustainable human development and notes that environmental law and natural resources law are essential foundations to achieve this objective and are reasonably well developed in the United States and many other countries. See John C. Dernbach, ‘The Essential and Growing Role of Legal Education in Achieving Sustainability’ (2011) 60(3) *Journal of Legal Education* 489 at 490.

¹⁰ Macrory, ‘Maturity and Methodology’, 252; Pedersen, ‘Modest Pragmatic Lessons’.

In this chapter, I argue that the accepted width and breath of environmental law as a legal field and as an academic discipline and its acceptance as such has diverged between scholars of developed and developing countries. Environmental law in developed common law jurisdictions has a relatively narrow definition as a response to the global ecological crisis, generally covering remedies for environmental harms under areas such as tort law, public nuisance, planning law and others.¹¹ While it expanded to address issues such as pollution, waste, and species protection and then transitioned to those such as transport, resource use, climate change and biodiversity, it remains focused on the role of law in regulating the human impacts on the natural environment.¹²

In this chapter I reflect on the experience of a developing country, Sri Lanka, and argue that environmental law, though a much more recent academic discipline, has evolved in response to the very different environmental challenges faced by such a country in grappling with issues of poverty, development and good governance. I will examine how environmental law scholarship has been both informed and driven by these factors; in the context of the Sri Lankan experience, I will argue that a new discourse in environmental law is needed to make a meaningful contribution to issues of environment and development.

2 A Developing Country Perspective on Sustainable Development and the Environment

To deconstruct the nature, scope and objectives of environmental law in countries such as Sri Lanka, it is necessary to consider the principle of sustainable development as it evolved in the international sphere and was defined within these countries. By the late 1960s, understandings of development, economic growth and progress started pointing towards sustainable development. The many reasons for this include the realization of the impacts of human population growth, unchecked industrialization together with pollution and resource depletion on the global

¹¹ An expansive definition of environmental law research has been defined as research which analyses any legal issues focused on pollution, species or habitat conservation, land use, natural resource management, or climate change. Robert L. Fishman & Lydia Barbash-Riley, 'Empirical Environmental Law Scholarship', 44 *Ecology Law Quarterly* (2018) 101 at 106.

¹² Macrory, 'Maturity and Methodology', 254.

environment and the Earth's carrying capacity.¹³ While the theory and practice of sustainability and concerns about the impacts of human activity on the planet have historical roots going back centuries,¹⁴ the succinct conceptualization contained in the Brundtland Commission report of 1986, 'Our Common Future,' gave it a renewed impetus in the latter half of the twentieth century. The earlier conceptualization of sustainability as protecting ecosystems and natural resources evolved into an acknowledgement that development must maintain an equilibrium between environmental protection, economic growth and social justice.

The convergence of issues of environment and development progressed relatively slowly, and the process reflected the divergent viewpoints of developed and developing countries. Affluent developed countries conceptualized environmental issues primarily as conservation and pollution control and on questions as to how economic growth, particularly in the Global South, would impact the natural environment. This standpoint was often at odds with the position of developing countries whose over-riding priorities of human development and poverty alleviation took precedence over environmental protection.

Concurrently with the Brundtland Commission report, a parallel development agenda emerged with the Declaration on the Right to Development. The declaration sought to infuse a human rights-based approach to development with particular emphasis on social and economic rights.¹⁵ Developing countries were grappling with issues that were generally omitted from the sustainable development discourse, including problems of extreme poverty, vertical and horizontal inequity, conflict over the possession and use of natural resources and a disadvantageous international economic order. The emphasis on human development enunciated in the declaration coalesced with the agenda of developing countries, which sought to ensure distributive justice, equity and inclusiveness in development, including in resource allocation and use. The two conceptualizations of development advanced

¹³ Jacobus A. Du Pisani, Sustainable Development – Historical Roots of the Concept (2006) 3(2) *Environmental Sciences* 83, 89.

¹⁴ Ibid.; Ulrich Grober, 'Deep Roots – A Conceptual History of "Sustainable Development"' (Nachhaltigkeit) available at <https://bibliothek.wzb.eu/pdf/2007/p07-002.pdf>.

¹⁵ 'Development is a Human Right', United Nations Human Rights Office of the High Commissioner, www.ohchr.org/EN/Issues/Development/Pages/Backgroundtrtd.aspx; 'The Right to Development at a Glance', United Nations Human Rights Office of the High Commissioner, www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf.

by the Brundtland Commission and the Declaration on the Right to Development in effect forced a meeting point of environment and development.

Since the Rio Conference, the confluence of sustainable development and human development has evolved in the international sphere. The process was facilitated by a series of world conferences addressing issues of environment, social development, population, gender and human rights, which shifted the focus from the human environment to environment and development, to sustainable development and to the human right to development.¹⁶ The human right to development was rooted in the human rights discourse rather than in the environment-based sustainable development discourse. The right to development introduced what are now called the third generation of human rights merging the first two generations of civil and political with economic, social and cultural rights. The third generation of human rights includes both the right to development and the right to environment.¹⁷ It also reflected the universality and indivisibility of human rights expressed in the Preamble to the two International Covenants on Human Rights which both stressed that one category could not be fulfilled without the other.¹⁸ This meeting of the two agendas paved the way for a greater parity among the three pillars of sustainability – environmental, economic and social.

In developing countries, there was an initial resistance to environmental protection, which was perceived as an obstruction to development and poverty alleviation. However, policy shifts and attitudinal change eased the tensions between issues of environment and development as these countries acknowledged that economic growth and development without environmental protection and conservation was essentially self-destructive. The shift to a new paradigm of sustainable development in states' laws and policies also marked the development of a new environmental law in these countries.¹⁹ The consistent articulation

¹⁶ 'Sustainable Development Timeline', International Institute for Sustainable Development, www.iisd.org/pdf/2012/sd_timeline_2012.pdf.

¹⁷ Alexandre Kiss, 'An Introductory Note on a Human Right to Environment' in Edith Brown Weiss (ed.), *Environmental Change and International Law* (New York: United Nations University Press, 1992), 199.

¹⁸ See the Preambles to the International Covenant on Civil and Political Rights, 999 UNTS, 171; 6 *ILM* 368 (1967) and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3; 6 *ILM* 368 (1967).

¹⁹ Kilaparti Ramakrishna, 'The Emergence of Environmental Law in the Developing Countries: A Case Study of India' (1985) 12(4) *Ecology Law Quarterly* 907.

of the countries of the Global South of their development agenda has now found expression in the 2030 Sustainable Development Goals (SDGs).²⁰

The Millennium Development Goals (MDGs), which had preceded the SDGs, had focused almost entirely on eradicating extreme poverty and on the provision of basic human needs for the peoples of the Global South. They included only one goal addressing environmental sustainability²¹ and did not make an explicit link between environmental protection and human development. The SDGs on the other hand offer a renewed paradigm of development, integrating the three pillars of sustainable development into an overarching objective rather than conceptualizing them as competing priorities. Human development, progress and welfare are addressed in all their dimensions predicated on the efficient use of a declining natural resource base. While the MDGs were designed as targets to be achieved by developing countries with the assistance of the developed nations, the SDGs require equal commitment and action from all nations. Most importantly, the SDGs are ‘universally anchored in human rights’ and grounded in a human rights agenda, directly tackling inequalities within peaceful, just and inclusive societies and ensuring human rights and dignity.²²

In this context of the renewed paradigm of sustainable development, I will explore the nature and scope of environmental law in Sri Lanka and the way in which it has evolved to meet the challenges of development and sustainability. I will examine environmental law scholarship and the role of scholars and researchers in informing, responding to and guiding the legal process on human rights, development and environmental protection.

3 Environmental Law Scholarship – The Sri Lankan Experience

In the context of the current developmental paradigm, I argue that the role of the environmental law scholar in Sri Lanka must necessarily be to

²⁰ ‘Sustainable Development’, United Nations, <https://sustainabledevelopment.un.org/?menu=1300>.

²¹ ‘Millennium Development Goals’, United Nations, Goal 7 – Ensure Environmental Sustainability.

²² Yesudas Choondassery, ‘Rights-based Approach: The Hub of Sustainable Development’ (2017) 8(2) *Discourse and Communication for Sustainable Education* 17; ‘Transforming Our World: Human Rights in the 2030 Agenda for Sustainable Development’, United Nations Human Rights Office of the High Commissioner, www.ohchr.org/Documents/Issues/MDGs/Post2015/TransformingOurWorld.pdf; John H. Knox, ‘Human Rights, Environmental Protection, and the Sustainable Development Goals’ (2015) 24(3) *Washington International Law Journal* 517.

impact on, and contribute to, the development process. Environment law in Sri Lanka, both as an academic discipline and as the practice of law and policy, has moved beyond conservation and management of the natural environment and into the realm of human rights and development founded on the sustainable use of natural resources. Although it has not been redesignated in these terms, the conceptualization of environmental law scholarship has moved in parallel into the field of sustainable development law.

The redefining of environmental law as sustainable development law was driven initially by legal practitioners rather than by scholars. The 1980s and 1990s could be described as the formative years of environmental law in Sri Lanka in terms of both legislation and case law. The introduction of environmental law teaching into Sri Lankan universities in the mid-1990s was preceded by a body of statutory law, which formed a regulatory and management framework on protection of natural resources from the impacts of human development. This body of law was consistent with the narrower definition of environmental law discussed earlier and followed the direction of sustainability in the international sphere.

Concurrent with the statutory process, public interest lawyers often working for environmental non-governmental organizations began initiating litigation in courts challenging the state on matters of environment and development. A considerable number of these cases were filed questioning state action, including on development projects that adversely impacted the natural environment and, increasingly, communities. Litigation sought enforcement of statutory duties by state agencies through writs²³ and on several occasions petitioned for judicial review of legislation impacting environment and development.²⁴ Others filed on behalf of peoples and communities drew heavily on constitutional provisions on fundamental rights.²⁵ The lawyers initiating this case law had not received training in environmental law as a specific discipline but

²³ For example, *Center for Eco-Cultural Studies and Others v. Director General Department of Wildlife Conservation and Others* (2016) CA/WRIT/370/2015 (unreported); *Fernando and Others v. Urban Council Kesbewa and Others* (2014) CA/177/2010 (Writ) (unreported).

²⁴ For example, *Supreme Court Special Determination No 24/2003 and 25/2003 on the Water Services Reform Bill* (unreported) (2003); *Supreme Court Special Determination 26/2003 on the Land Ownership Bill* (2003)(unreported).

²⁵ Camena Guneratne, 'Using Constitutional Provisions to Advance Environmental Justice – Some Reflections on Sri Lanka' (2015) 11(2) *Law, Environment and Development Journal* available at www.lead-journal.org.

were well versed in constitutional rights, and therefore resorted to constitutional remedies to achieve justice for their clients, and for environmental regulation. Much of this case law was founded on inequality in benefits from the development process and from the adverse impacts of environmental degradation. Consequently, environmental law transitioned, almost inadvertently, into the area of human rights and social justice.²⁶

As mentioned earlier, environmental law scholars initially played a subsidiary role to the practitioners in this process. Their function was limited to doctrinal scholarship, documenting, commenting on and analysing the law that was being produced in the courts, as well as critically reviewing the legislation enacted by Parliament. However, over time this role evolved into a more proactive one, and as teaching and research developed in the law schools, scholars began to redefine the field. Environmental law scholarship soon encompassed comparative jurisprudence, particularly in the South Asian region, which drew heavily on human rights standards. The deconstruction of the rights to life and environment by South Asian judges, particularly in India, opened up new areas of social and economic rights and issues of social justice in sustainable development. Exploring the case law that had drawn heavily on human rights, academics also began explicating the area of environment and human rights, the right to development and social and economic rights.

Both curricula and research in environmental law began to expand to encompass any field that might impact the development process or natural resources. Areas of law that were distinctive in the law school curricula, such as international trade, intellectual property rights and human rights, were embraced within environmental law to the extent that they impacted development or the environment, and these subjects too were often redefined. This trend reflected the ethos that fine distinctions could not be made between economic development, social justice and environmental conservation which were all intrinsically intertwined, and issues of environment, trade and commerce and foreign investment, among others, were conceptualized as issues of development.

²⁶ Ibid.

4 Future Directions

4.1 *Linking Environment and Human Rights*

The 2030 SDGs have given renewed impetus to the study of a human rights-based approach to sustainable development. The notion that development is a complex process that must be founded on human rights and environmental sustainability is now widely accepted and validated by the SDGs which offer new opportunities for Southern perspectives on development.²⁷ While some goals more directly confront environmental protection and sustainability,²⁸ all the goals and their targets link human rights and environment.

In the light of the SDGs, it is pertinent to assess future directions of environmental law scholarship in Sri Lanka. A writer has noted that 'Rather than reducing itself to a reactive, ponderous and disciplinary-confined position, environmental law is ethically obliged to assume a much more active role in what is currently happening on the planet.'²⁹ This exhortation carries even greater force in developing countries where the launch of the SDGs has made it necessary for environmental law scholars to reassess their role and functions in implementing them, and to consider whether in order to make a positive impact on development, it has become necessary to once again re-conceptualize the field, questioning its purpose, methodology and beneficiaries. Universities globally have a unique role in accelerating implementation of the goals, and higher education institutions particularly in developing countries have a crucial role to play in national development.³⁰ The role of the environmental law scholar in this scenario will be discussed below.

²⁷ Oluf Langhelle, 'Sustainable Development and Social Justice: Expanding the Rawlsian Framework of Global Justice' (2000) 9 *Environmental Values* 295; Karin Arts, 'Inclusive Sustainable Development: A Human Rights Perspective' (2017) 24 *Current Opinion in Environmental Sustainability* 24.

²⁸ 'Sustainable Development Goals', United Nations, Goals 6, 7, 11, 13, 14 and 15.

²⁹ Andreas Philippopoulos-Mihalopoulos, 'Critical Environmental Law as Method in the Anthropocene' in Andreas Philippopoulos-Mihalopoulos (ed.) *Research Methods in Environmental Law: A Handbook* (Cheltenham, UK: Edward Elgar, 2017), chap. 6.

³⁰ It has also been noted that the goals cover a range of specific areas in which higher-education institutions can make a positive contribution in teaching, research, community engagement and advisory services; Goolam Mohamedbhai, 'SDGs - A Unique Opportunity for Universities', University World News, Issue 392, 27 November 2015, - www.universityworldnews.com/article.php?story=2015112512342677.

4.2 *The Contribution and Impact of Environmental Law Scholarship*

To assess the impact of environmental law scholarship, at the outset we must determine for whom the environmental law scholar writes or should write. The answer in short must be for everyone. Assuming that the primary objective of environmental law scholarship is action-oriented research, it follows that to have the widest possible impact, such scholarship should not be confined to academia alone. Therefore, the targets of environmental law scholarship, both research and teaching, must include students (both law and non-law), lawyers, judges, policy-makers, developmental specialists and the community, among others. Since the primary function of an academic is teaching, scholarship in environmental law must inform this process. Teaching is not confined to students alone and must include the wider legal community of both judges and lawyers as well as those outside it.

A related question to the previous one, which has been often posed, is whether environmental law scholarship can and does have an impact beyond the community of legal scholars. The answer to this question is that this is a necessity if the objective of scholars is to contribute to development. As discussed earlier, while lawyers and judges initiated the practice of environmental law, it has been supplemented by the scholarship of academics who have engaged in legal and judicial training. Similarly, scholars have contributed to law and policy, interacting with technocrats and policymakers, thus ensuring the links between research and application of the law to respond to social and political realities. Extending environmental law scholarship into the public space will extend its reach to those outside the academy and will have a greater impact and influence on policymaking. Importantly, it will also help to ensure the accountability of the state for good governance, environmental regulation and protection of human rights.

A challenge that must be overcome in writing and teaching for those beyond the academy is that research must necessarily be comprehensible to those without a legal background. For many legal scholars, this poses particular challenges which are, however, not insurmountable. Writing for those within the legal field including judges and lawyers will not pose much difficulty, but writing for non-lawyers will be a more arduous task. Writers from the UK take the view that teaching and writing for non-lawyers further marginalizes the field,³¹ but it is argued that

³¹ Fisher et al., 'Maturity and Methodology', 221.

environmental law should not be perceived as an esoteric discipline, and in fact doing so would test the skills of the scholars.

4.3 *Interdisciplinary Approaches and Legal Scholarship*

In making this wider impact, environmental law scholarship must necessarily move beyond the traditional methodologies of legal scholarship. Environmental law scholars cannot and should not operate in a vacuum or in silos. In practice, lawyers have crossed the boundaries from a narrow perception of environmental law as regulating and managing natural resources into areas of constitutional law, administrative law and human rights. Scholars, teaching and researching environmental law, have found themselves functioning in areas of intellectual property, consumer protection, international trade and investment, and corporate law to name a few. The pressing need for climate change mitigation and adaptation has also carried researchers into fields such as agriculture, energy and construction law.

Taking environmental law scholarship forward in the context of the human rights-based approach to development as explicated in the SDGs will require a radical rethinking of the field. To impact development and inform litigation, policy and legal reform, environmental law scholarship must take an instrumental approach, described as a conception of 'law as a tool for sustaining changing aspects of social life'.³² Research on human rights and sustainable development must be carried out, not as a purely academic exercise, but for achieving the targets of the SDGs and harmonizing with human rights commitments. A question that needs to be addressed is whether the predominantly doctrinal research which legal scholars engage in will be sufficient for this purpose.

As noted, environmental law scholars have crossed the boundaries between the various subsets of law. This will not pose much difficulty, and legal research within these subsets can be conducted within the familiar methodology of doctrinal studies. However, to produce action-oriented research that responds to social realities and development, and which proactively impacts both litigation and policy, I argue that to make a practical contribution outside the legal community, environmental law scholars must be receptive to the contribution of other disciplines. This

³² Austin Sarat & Thomas R Kearny (eds), *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1995), 23.

inevitably poses greater challenges including venturing into alternative methodologies.

Macrory cites three methodologies that should guide environmental law scholarship. These are 'black letter law', requiring intense and critical analysis of legislation and case law, and an activity whose importance should not be underestimated; sociolegal studies, designed to illuminate how law actually works in practice; and what one might describe as policy-orientated scholarship, which explores the contribution that law and legal techniques might make to the resolution of challenging policy issues.³³

While doctrinal research or black letter law forms the foundation of legal scholarship, engaging in the other two forms of research advocated by Macrory would require an interdisciplinary approach. The call for interdisciplinarity in the study of law is a long-standing one and³⁴ although the question is still heavily debated, there seems to be some agreement that legal research would be enhanced by drawing upon the social sciences. It is argued that environmental law scholarship is a subject where interdisciplinarity, and adopting a range of alternative research methodologies, is not only desirable but also necessary to further the instrumentality of the field. Writers engaged in critiquing environmental law scholarship acknowledge that '[t]he most important development in legal scholarship over the past quarter century has been the rise of empirical research', while also noting that '[e]nvironmental law, while not immune from the trend of increasing contributions from empirical research, nonetheless seldom incorporates insights from empirical investigations. An empirical agenda could facilitate reforms to improve environmental law's effectiveness.³⁵ Owen and Noblet point out that environmental law in practice is highly interdisciplinary, noting that environmental lawyers work closely with environmental scientists, and environmental law is a response to the findings of scientific research.³⁶ They argue that a similar level of interdisciplinary engagement in academia would be useful. Given that these comments have been

³³ Macrory, 'Maturity and Methodology', 252.

³⁴ Dave Owen & Caroline Noblet, 'Interdisciplinary Research and Environmental Law' (2015) 41 *Ecology Law Quarterly* 887; William Boyd, Douglas A. Kysar & Jeffrey J. Rachlinski 'Law, Environment, and the "Nondismal" Social Sciences' (2012) 8 *Annual Review Law and Social Sciences* 183.

³⁵ Fishman & Barbash-Riley, 'Empirical Environmental Law Scholarship'; see also Fisher et al., 'Maturity and Methodology'.

³⁶ Owen & Noblet, 'Interdisciplinary Research', 887.

made with reference to a relatively narrow view of what environmental law encompasses, it would be even more applicable to a redefined field that includes all aspects of sustainable development founded on human rights. Further, development is a field that is in itself interdisciplinary and requires the input of social sciences, natural sciences and the hard sciences, and law must be included in the discourse.

There is general agreement that legal research on human rights and sustainable development would be greatly enriched by the contribution of social sciences disciplines. De Feyter points out that the process of legalization of human rights established law as the dominant discipline in the field. Lawyers perceived legalization as the final phase in the development of human rights and took the view that only legal rights could qualify as human rights, thus diminishing the relevance of other disciplines to the topic. However, there are limitations to the legal enforcement of human rights, including problems of compliance, the limited impacts of litigation on society and legalization as the ultimate definition of human rights, and such issues could be explained by other disciplines.³⁷ Social sciences disciplines could also assist the legal scholar in interpretation of texts (which is a primary function of a lawyer) and help to determine whether the protection afforded to individuals operates in reality.³⁸

Integrating law with social sciences in human rights research will not be an easy endeavour. Since lawyers by and large have little or no grounding in social sciences research methodologies, collaboration with scholars who do would become necessary, and this carries its own challenges. Further questions include what exactly the collaboration would entail and how it would benefit instrumental legal research on development and rights.

One of the objectives of sociolegal studies, as observed by Macrory, is to illuminate how law works in practice. In a specific context, the SDGs include targets and indicators, which have to be met within the given time frame. Human rights researchers have pointed to the need for statistical data to measure developmental outcomes and determine whether the indicators have been met.³⁹ Since law is a discipline that is

³⁷ Koen De Feyter, 'Law Meets Sociology in Human Rights' (2011) 40(1) *Development and Society* 45 at 49.

³⁸ De Feyter, 'Law Meets Sociology', 63.

³⁹ 'A Human Rights Based Approach to Data: Leaving No One Behind in the 2030 Agenda for Sustainable Development', United Nations Human Rights Office of the High Commissioner, 2015, available at www.ohchr.org/Documents/Issues/HRIndicators/

essentially data deficient, social scientists who work on evidence-based research are better able to develop tools for such data collection. However, writers have noted that there is a tension between law and the social sciences particularly in regards to conceptualization.⁴⁰ While lawyers do not generally examine the impacts of laws and legal systems in reality, social scientists who do so may overlook or misinterpret the applicable legal standards, thus affecting both data collection and analysis.⁴¹ The literature also points to the omissions in human rights research, among both legal and social science scholars, and these potential pitfalls will have to be given consideration.⁴²

The meeting point of legal scholars and social scientists is obviously not confined to data collection alone. Macrory's third objective of legal research is policy-oriented scholarship. This is another endeavour in which collaboration between lawyers and social scientists would be beneficial, as the law must respond to the social context within which it is located. Here too the potential obstacles to such collaboration would be the diverse ways in which different disciplines understand and prioritize development and rights, and barriers of conceptualization, norms and methodologies would need to be overcome.

Examples of interdisciplinary efforts in law and policymaking in non-environmental fields in Sri Lanka include criminal law and children's rights, where multidisciplinary teams of legal and medical personnel and sociologists brainstormed to reach agreement on the law relating to the age of consent and statutory rape, and the minimum age of marriage. It is clear that the policy on such issues required the contribution of all three areas of expertise, since the ages of consent and marriage have social and health implications which form the rationale for the law. Similarly, in the fields of environment and development and in the context of the SDGs, the input of a range of disciplines becomes necessary to guide law and

GuidanceNoteonApproachtoData.pdf; 'Human Rights and Data, Tools and Resources for Sustainable Development', The Danish Institute for Human Rights, 2017, available at www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelsesr/sdg/data_report_2016.pdf.

⁴⁰ Paola Cesarini & Shareen Hertel, 'Interdisciplinary Approaches to Human Rights Scholarship in Latin America' (2005) 37 *Journal of Latin American Studies* 793 at 795.

⁴¹ Fons Coomans, Fred Grünfeld & Menno T. Kamminga, 'Methods of Human Rights Research: A Primer' (2010) 32(1) *Human Rights Quarterly* 179 at 181.

⁴² Ibid. 181; Russel Lawrence Barsh, 'Measuring Human Rights: Problems of Methodology and Purpose' (1993) 15(1) *Human Rights Quarterly* 87.

policy in context. Those needed include historians and anthropologists who can decipher concepts of sustainability which are intrinsic in countries such as Sri Lanka so that they can be adapted and applied to present-day scenarios. Justice C. G. Weeramantry drew upon 'some wisdom from the past relating to sustainable development' and 'principles of traditional legal systems' in elucidating the principle of sustainable development in the present day, citing the works of novelists, historians and engineers to support his thesis.⁴³ Legal scholars and practitioners conversant with disciplines beyond their own can potentially contribute a diversity of 'worldviews, biases and heuristics'⁴⁴ to the development of current paradigms of development and equity.

5 Conclusion

Environmental law in Sri Lanka has moved beyond regulation and management of the environment and into the realm of sustainable development and human rights. This direction has been underscored by the international framework on development founded on human rights, as explicated in the SDGs. This chapter has argued that to maintain its relevance, environmental law scholarship in Sri Lanka must keep pace with these developments and must positively influence law and policy reform for national development and social change. In doing so, such scholarship should not be confined by a narrow definition of what environmental law entails but should proactively contribute to the continuous redefining of the subject to meet current realities of environmental sustainability, human development and rights. To ensure that environmental law scholarship has the widest possible impact, both within and outside the legal community, scholars must also move beyond the familiar methodologies of legal research and engage not only with other relevant areas of law but also with non-law disciplines including the social sciences. It is by doing so that environmental law scholarship, far from being marginal, will acquire a distinctive relevance.

⁴³ Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Separate Opinion of Vice President Weeramantry) [1997] ICJ Rep 7, at 94. This trend was also followed in a seminal case in Sri Lanka where the court laid down guidelines for the state in managing natural resources; *Bulankulame v. The Secretary, Ministry of Industrial Development and Others* [2000] 3 Sri Lanka Law Reports 243.

⁴⁴ Note the comments of Pedersen, 'Modest Pragmatic Lessons', 119.

Bibliography

- Aagaard, Todd S., 'Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy' (2010) 95(2) *Cornell Law Review* 221.
- Cesarini, Paola & Hertel, Shareen, 'Interdisciplinary Approaches to Human Rights Scholarship in Latin America' (2005) 37 *Journal of Latin American Studies* 793.
- De Feyter, Koen, 'Law Meets Sociology in Human Rights' (2011) 40(1) *Development and Society* 45.
- Dernbach, John C., 'The Essential and Growing Role of Legal Education in Achieving Sustainability' (2011) 60 (3) *Journal of Legal Education* 489.
- Du Pisani, Jacobus A., 'Sustainable Development – Historical Roots of the Concept' (2006) 3(2) *Environmental Sciences* 83.
- Fisher, Elizabeth, Lange, Bettina, Scotford, Eloise & Carlarne, Cinnamon, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21(2) *Journal of Environmental Law* 213.
- Fishman, Robert L. & Barbash-Riley, Lydia, 'Empirical Environmental Law Scholarship' (2018) 44 *Ecology Law Quarterly* 101.
- Guneratne, Camena, 'Using Constitutional Provisions to Advance Environmental Justice – Some Reflections on Sri Lanka' (2015) 11(2) *Law, Environment and Development Journal*, available at www.lead-journal.org.
- Knox, John H., 'Human Rights, Environmental Protection, and the Sustainable Development Goals' (2015) 24(3) *Washington International Law Journal* 517.
- Macrory, Richard, 'Maturity and Methodology': A Personal Reflection' (2009) 21 (2) *Journal of Environmental Law* 251.
- Owen, Dave & Noblet, Caroline, Interdisciplinary Research and Environmental Law, (2015) 41 *Ecology Law Quarterly* 887, available at <http://scholarship.law.berkeley.edu/elq/vol41/iss4/2>.
- Pedersen, Ole W., 'Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law' (2013) 33 (1) *Oxford Journal of Legal Studies* 103.
- Sarat, Austin & Kearny, Thomas R. (eds) *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1995).