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UPGRADING CITIZEN SUITS AS A TOOL FOR ENVIRONMENTAL ENFORCEMENT IN ISRAEL: A COMPARATIVE EVALUATION

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I. Introduction

Israel's environmental problems have grown increasingly severe over the past decade, bringing contamination of the air and water to crisis levels and scarring a landscape that has particular historic and religious value internationally.¹ A comprehensive report prepared by over 100 leading scientists and professionals about present environmental trends in the country was particularly discouraging.² Israel's former Minister of Environment Rafael Eitan also began an international report about the country's environment with an unusually frank appraisal of the situation: Damage to natural and landscape resources, deteriorating air and groundwater contamination have reached a level where it "threatens to rob us and our children of our right to quality of life and the environment."³

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1 *Towards Sustainable Development, Preliminary Documents* (Jerusalem, Israel Ministry of Environment, 1999).

2 See, generally, *National Environmental Priorities in the Area of Environmental Quality in Israel* (Haifa, Neeman Institute, 1999, 2001).

Environmental quality in Israel requires pressing actions and many emphases.

We find ourselves in a situation where the air we breathe in many cases is above the standard, illness and death caused by environmental pollution is commonplace, and we are speaking about thousands of cases. In a number of areas in Israel, illness among elementary school children is widespread. Clean water almost does not exist. Garbage is stacked in dumps, only few of which meet international standards.

3 Rafael Eitan, in Shoshana Gabbay, *The Environment in Israel* (Jerusalem, Israel Ministry of Environment, 1998) at xiii.

Much of the harm can be traced to pervasive lack of compliance among a range of polluters. One Technion study reports that over 30% of vehicles tested on the roads violate tail-pipe emission standards.⁴ A survey of petro-chemical industries along the Kishon River revealed that virtually no factory met the discharge standards imposed by Israel's Water Commissioner.⁵ While the Ministry of Environment declines to offer an official noncompliance level, managers at Israel's only hazardous waste disposal site estimate that as much as 50% of the country's toxic wastes are illegally disposed of and do not even reach the gates of the Ramat Hovav site.

These pollution phenomena have not gone unnoticed by the Israeli public, which is beginning to express its dissatisfaction. The environmental movement in Israel has emerged as a growing societal force locally, with dozens of grass-roots organizations sprouting up throughout the country.⁶ In the 1998 municipal elections, "Green Parties" ran for the first time and won seats in at least five cities, most notably taking five seats on Haifa's city council.⁷ In several public opinion surveys, a high percentage of Israelis pointed to environmental degradation as a major obstacle to quality of life.⁸

While Israel's citizens clearly are concerned about the continued deterioration of their environment, this increased consciousness has not been manifested in the legal realm. Despite a virtual revolution in the statutory standing of citizens to take legal action, the number of citizen enforcement actions did not increase noticeably during the 1990s. A string of amendments and new environmental legislation literally flung the doors of Israel's courts wide open to the public if it wished to challenge an environmental insult. And a freedom of information law has for the first time guaranteed the public access to critical environmental data.⁹ So why has the public, despite its

4 Alon Tal, *Air Pollution from Transportation*, *Tevah V'Aretz*, September, 1999.

5 Daniel Fisch, "Israel's Environmental Problems" (1998) 5 *Israel Palestine Journal* 20.

6 Orr Karassin, Shirli Bar-David and Alon Tal, *Harnessing Activism to Protect Israel's Environment, A Survey of Public Interest Activity and Potential* (Tel Aviv, *Adam Teva v'Din*, 1996).

7 Shmuel Chen, "Green Ballots in the Voting Booth" (1999) 23 *Green, Blue and White* 4.

8 While no formal academic surveys have explored the attitudes of the Israeli public, popular journalistic polls repeatedly reflect environmental concerns. See *Yediot Ahronot*, "Holiday Supplement", October 1, 1997.

9 Freedom of Information Law, *Sefer Chokim*, 1998.

growing awareness, largely abstained from utilizing the courts in its efforts to improve environmental quality?

The issue poses a quandary for legal scholars and environmental activists alike. The conundrum is particularly vexing in light of the American experience. The United States, which faced a similar environmental crisis in the late 1960s, has managed to achieve vast improvement in a number of areas. While centralized regulation by the federal and state environmental agencies may have been the main engine of progress, the role of citizen suits and public interest environmental law has also been an extremely significant factor. In what many consider the definitive environmental history of the United States by America's leading environmental journalist, Philip Shabekoff concurs that "Environmentalism has used litigation as no other social movement has before or since."¹⁰

In recent years, the number of citizen suits and public interest law organizations has increased dramatically not only in Europe but in many developing countries as well.¹¹ Yet Israel has seen little meaningful advancement in the area. With the exception of the establishment and work of public interest law organizations like Adam Teva v'Din (Israel Union for Environmental Defense), the past decade has been markedly devoid of legal battles by citizens to enforce environmental standards and to "hold polluters' feet to the fire." This phenomenon undoubtedly is due to numerous sociological and psychological explanations. A tradition of government socialism and paternalism, a citizenry that immigrated to Israel from Arab and East European countries which lacked a rigorous democratic culture, inadequate economic capabilities (or leisure time) to support privately initiated public interest litigation, ineffective characterization of Israeli

10 Philip Shabekoff, quoting David Sive, a leading public interest attorney, in *A Fierce Green Fire, The American Environmental Movement* (New York, Hill and Wang, 1993) 103.

11 See for example: Earnest Makawa, "Experience of Malawi: Public Role in Enforcement," *Fifth International Conference on Environmental Compliance and Enforcement, Conference Proceedings* (Washington, U.S. EPA, 1998) at 169. Narayab Belbase, "Environmental Compliance and Enforcement Through Public Litigation in the Godavari Area in Nepal", *idem* at 423; William Ringia, "Public Access to Environmental Information - Legal and Practical Problems: A Case Study of Tanzania", *idem* at 203; A. Oposa, "Intergenerational Responsibility in the Philippine Context as a Judicial Argument for Public Action on Deforestation", *Fourth International Conference on Environmental Compliance and Enforcement, Conference Proceedings* (Washington, U.S. EPA, 1996) at 521.

pollution and its actual health impacts, or distraction by other, seemingly more pressing societal and security issues, all probably played a part in the public's legal impassivity.¹² Many of these factors, however, have become less relevant over the last ten years as Israeli society as a whole has become more litigious. This article, therefore, seeks to explore the reasons for citizen inaction on this front that are associated with inadequacies in the law itself.

Before examining the specific legal situation, it would be well to define what is meant by citizen enforcement. When faced with a violation of environmental laws, the public in fact has three options for legal action:

- 1) A legal petition ("Bagatz") against a government agency, demanding that it exercise its powers as a secondary legislator or oversight body;
- 2) A petition against a government agency, calling upon it to undertake specific enforcement against an environmental violation; and
- 3) Legal action directly against the polluter.

This article avoids extensive examination of the first approach, an area which has been studied well in general administrative law.¹³ In essence, that approach has to do with matters about which the public has no power to promulgate regulations or issue permits on its own and can only realize environmental progress if the government takes action. Growing expressions of this type of public interest litigation are petitions that require the preparation or completion of environmental impact statements.¹⁴

This is not the case with the second approach, in which ad-

12 The contribution of an anonymous reviewer to this list of sociological factors is gratefully acknowledged.

13 See, generally, Zev Segel, "The Right of Standing in a Public Petition: Its Tests and Problems" (1992) 15 *Iyunei Mishpat* 391.

14 For example, in *Society for the Protection of Nature v. National Planning Commission*, Netanyahu, J., required the preparation of a two-year migration survey before an environmental impact statement would be acceptable for considering the effect of a giant transmitter to be built by the Voice of America in the Central Arava region. See A. DeShalit and M. Talias, "Green or Blue and White? Environmental Controversies in Israel" (Summer, 1994) 3 *Environmental Politics* 274. More recently, the Tel Aviv District Court held that an environmental impact statement had to be prepared before the submission of a plan in order to ensure the public's right to file objections. H.P. 210/96 *Adam Teva v'Din v. Tel Aviv Regional Planning Committee et al.* (unpublished).

ministrative petitions are somewhat unique to the environmental field.¹⁵ These petitions are designed to expedite administrative government activity against violators. In other words, citizens have the power to force the government to act as an enforcement agency.¹⁶ The theory for many environmentalists is that by forcing government to do its job, the public not only ensures that more efficient, qualified enforcement action (and oversight) occurs, but that it also creates a precedent that may enhance government enforcement in the future. In the area of sewage treatment, for example, this approach has proven a relatively effective way to push polluting municipalities toward upgrading their sanitary services.¹⁷ This is a fascinating subject for students of administrative and environmental law alike. As this particular area lacks a critical mass of case law, however, it cannot be the focus of this article. Rather, this article considers direct actions against polluters brought by citizens who seek to bring a halt to an

15 A survey of environmental litigation during the decade revealed only a handful of such actions relative to dozens of other administrative petitions. Orit Marom, "Public Enforcement of Environmental Law: Theories and Practice", Masters thesis (in preparation, 2000).

16 One interesting case of this type involved a petition to the High Court of Justice during the 1999 election campaign, in which the petitioner claimed the respondent Election Committee was not enforcing provisions of the Cleanliness Law, which prohibits the posting of campaign posters in inappropriate locations. A justice on the Supreme Court itself was the head of the Committee, making the case somewhat awkward if not controversial. Yet, given the time constraints of a three-month election campaign, it was considered a more efficient route than directly suing the many political parties that had blanketed the cities of Israel with election propaganda posters, in contravention of the law. Ultimately the Court rejected the appeal following the state's announcement that it would take the measures it was authorized to. Nonetheless, in the Court's decision, Or, J., chose to "once again direct the authorized bodies to the need to enforce the law in areas of their authority regarding prohibited election signs and to bring violators to justice." *Adam Teva v'Din v. Justice A. Matza, Chairman of the Election Committee et al.*, Bagatz 1996/99.

17 *Adam Teva v'Din v. Minister of Interior et al.*, Bagatz 1131/93 (lack of sewage treatment for Ramla and Lod); *Keren Herzl et al. v. Minister of Environment et al.*, Bagatz 3410/93 (sewage from Ra'anana, Even Yehudah and Tel Mond flowing into the Poleg River). On Israeli public interest litigation concerning untreated sewage waste and pollution, see, generally, A. Tal, "Civil Actions to Expedite Treatment of Municipal Effluents in the Poleg Spring, the Limitations and Potential of Legal Actions against Polluting Municipalities" (1995) 5 *Ecology and Environment* 151-55 (in Hebrew).

environmental violation, regardless of whether they or their property are affected.

After discussing the American experience with citizen suits, a brief review of international approaches toward citizen suits will be offered. Then, a description of Israeli institutional enforcement frameworks and existing local legislative underpinnings will be followed by a cursory description of objective obstacles to public access to court and the case law in the area. From this analysis, four fundamental substantive discrepancies between Israeli statutes and the American and European situation emerge that explain Israel's public interest experience:

- 1) the payment of full attorney's fees to public interest plaintiffs,
- 2) the civil versus criminal nature of environmental laws;
- 3) the availability of self-reporting and monitoring reports; and
- 4) the creativity of judicial sanctions.

The article argues that the road to changing Israel's poor public participation performance must involve a fundamental revision in the present statutory approach. While adopting an American paradigm cannot guarantee greater public involvement, given the state of maturation of Israel's environmental movement, it certainly offers considerable promise.

II. Environmental Citizen Suits in the United States – A Brief History

Citizen suits have become a sufficiently developed American specialty to justify the publication of at least two books and dozens of articles on the subject.¹⁸ In the United States hundreds of lawyers and public interest scientists make a living from citizen suits. Most importantly, communities across the nation have enjoyed enhanced environmental quality as a result of these legal actions.

This exasperated description from industry attorneys reflects the prevalence of the phenomenon:

There has been explosive growth in the number of citizen suits, so it is no exaggeration to call this "the era of the citizen suit."

18 Jeffrey G. Miller, *Citizen Suits: Private Enforcement of Federal Pollution Control Laws* (New York, Wiley and Sons, 1987); Michael Axline, *Environmental Citizen Suits 1-8*, looseleaf service, 3d ed. (Salem, NH, Butterworths, 1994).

Obviously, citizen suits have been around since the major environmental statutes were passed in the 1970s. The big trend today is the frequency and routine nature of many suits. In previous decades most suits were brought for one of three reasons: to set favorable precedents, to target highly visible sources, or to respond to local community concerns. Today, these suits are being prosecuted whenever there is evidence of a violation. Citizen attorneys are using law students and paralegals to cull through agency files and are filing notices without any prior knowledge of the facility.¹⁹

Perhaps the first chapter of this growing body of American public interest environmental law was written during the early 1960s. The electrical utility "Consolidated Edison" proposed a pumping station at Storm King Mountain in New York State's scenic Hudson Valley. Citizens banded together to form the Scenic Hudson Preservation Conference, and when the Federal Power Commission rejected their petition to stop the project, they filed suit. When the Court of Appeals for the Second Circuit granted standing to Scenic Hudson on the basis of "aesthetic, conservational and recreational interest in the area,"²⁰ it could not have envisioned the revolution its liberal approach would ultimately have on the American environmental experience.

Soon thereafter, U.S. Supreme Court Justice William O. Douglas would write his eloquent dissent in the case of *Sierra Club v. Morton*, in which he argued that the natural world had a right to be represented through citizen organizations in U.S. courts.²¹ While the American legislator seemed to share Douglas's romantic vision about citizens' role in representing environmental interests, the courts were less ardent. Today, years after the U.S. Congress recognized the public's right to enforce the gamut of environmental legislation in the

19 Ross Macfarlane and Lori Terry, "Citizen Suits: Impacts on Permitting and Agency Enforcement", *Natural Resources and Environment*, Spring 1997, at 20.

20 The court required that Consolidated Edison consider alternatives to a pumping station at the site, including the alternative of not building a facility at all.

21 "Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." *Sierra Club v. Morton*, 405 U.S. 727 (1972), at 741-2. Christopher Stone's essay, "Should Trees Have Standing" (1972) 45 So. Cal. L. Rev. 450, written during the same period, has also assumed "classic dimensions" in the field of environmental law.

court room, public interest litigators in America must still jump through a series of bothersome hoops before they can get down to the business of fighting pollution.

Establishing Standing for Environmental Citizen Suits

It is always easier for a professional organization to undertake a sustained legal effort than it is for a private individual. It is not surprising, therefore, that one of the most prominent and most often quoted environmental cases in American legal history, *Sierra Club v. Morton*, involved a non-governmental organization (NGO).²² Yet, American NGOs face substantial obstacles when they choose the legal route. Public interest groups must meet two series of procedural tests before they can establish standing to initiate an enforcement action.

The first series of tests involves standard constitutional criteria for establishing the plaintiff's standing. In the environmental context these rules were resolutely reconfirmed in the 1992 decision *Lujan v. Defenders of Wildlife*.²³ The substantive precedent set by *Lujan* remains highly controversial;²⁴ the Supreme Court refused to recognize the plaintiff's right to enforce the Endangered Species Act outside the borders of the United States. In narrowly construing the standing of a public-interest petitioner, the court relied on Article III of the U.S. Constitution to restate a three-part test having little regard for Congressional alacrity in favor of citizen enforcement. The court held that a public-interest plaintiff suing under environmental law

22 405 U.S. 727 (1972), at 741-42. A survey of eight American environmental law textbooks included extensive quotations from this landmark case, which ironically ended in the Sierra Club losing the case due to its failure to meet standing requirements.

23 504 U.S. 555 (1992). This decision came on the heels of the related *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), in which the Supreme Court case refused to recognize the plaintiff's right to challenge in court, as a violation of the National Environmental Policy Act, a decision by the U.S. Secretary of the Interior to make more than 160 million acres of federal lands available for commercial use.

24 See, e.g., critiques of the decision in Cass R. Sunstein, "What's Standing After *Lujan* of Citizen Suits, Injuries and Article III" (1992) 91 Mich. L. Rev. 163; Harold Feld, "Saving the Citizen Suit: The Effect of *Lujan v. Defenders of Wildlife* and the Role of Citizen Suits in Environmental Enforcement" (1994) 19 Colum. J. Env. L. 141; William Orr, "*Florida Audubon Society v. Bensten*, An Improper Application of *Lujan* to a Procedural Rights Plaintiff" (1997) 15 Pace Env. L. Rev. 373.

must show three things: (1) that it has been “injured in fact”; (2) that a causal connection exists between the injury and the defendant; and (3) that the injury is likely to be redressed by a favorable decision.²⁵

These generic requirements are supplemented by a second “associational” set of criteria that must be met before an organization can establish standing to sue violators. Here again, in *Hunt v. Washington State Apple Advertising Commission*,²⁶ the Court codified (fifteen years before Lujan) a three-part test which remains in force today:

An association has standing to bring suit on behalf of its members when (a) its members would otherwise have standing to sue in their own right (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested require the participation of the individual members of the lawsuit.

Lawyers at public interest organizations and citizen suit attorneys quickly learned how to document their clients’ involvement with polluted resources, representing joggers, hikers, bikers,²⁷ canoers, bird-watchers, swimmers,²⁸ and, of course, fishermen.²⁹

While the U.S. Supreme Court bolstered procedural barriers, the American Congress did everything it could to transform American environmental legal culture and encourage citizen involvement. The Clean Air Act passed in 1970 included a citizen suit provision that has grown into Section 304(a) empowering any person to “commence a civil action on his own behalf against any person, including the United

25 “First the plaintiff must have suffered an ‘injury in fact’, an invasion of a legally protected right which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical’. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be ‘fairly’ traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be ‘likely’ as opposed to merely ‘speculative’ that the injury will be redressed by a favorable decision.” *Lujan, supra* n. 23, at 560.

26 432 U.S. 333 (1977), at 343.

27 *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), cert. denied 498 U.S. 1109 (1991).

28 *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996).

29 *Friends of the Earth v. Crown Central Petroleum Corporation*, 95 F.3d 358 (5th Cir. 1996).

States, who is alleged to have violated or to be in violation of an emission standard or limitation or order issued by the Administrator of the United States Environmental Protection Agency (hereinafter, the EPA) or a State."³⁰ Under the Act, citizens can sue to require compliance with state implementation plans, to enforce new source performance standards, to prevent significant deterioration of scenic vistas from visual impairment, and even to enforce controls of motor vehicle fuels and fuel additives.³¹ Crucially, in filing their action, they need not prove that they have suffered actual injury.

Other citizen suit provisions soon appeared in legislation on subjects ranging from endangered species protection³² to hazardous waste disposal.³³ By 1976, the Second Circuit Federal Court could write of "a deliberate choice by Congress to widen citizen access to the courts, to ensure that the Act would be implemented and enforced."³⁴

Citizen Suits and the Clean Water Act

The initial wave of citizen suit legislation was especially manifested in the deluge of public interest litigation by Americans directed at illegal water pollution. The U.S. Congress drafted the Federal Water Pollution Control Act (hereinafter, "the Clean Water Act" or "CWA") with an ambitious objective: "to restore and maintain the physical, and biological integrity of the Nation's waters."³⁵ The implementation strategy of the law envisioned a central role for legal actions by citizens.

Ostensibly, section 505 of the CWA is more expansive than the citizen suit provision of the Clean Air Act. It empowers any citizen to commence a civil action on his own behalf against any person, including the government, who is alleged to be in violation of an effluent standard or of an order issued by the EPA administrator or a

30 Clean Air Act, 42 U.S.C. 1857h-7 et seq. (amended 1970), §304-7604, Citizen Suits.

31 See Scott M. DuBoff, "The 1990 Amendments and Section 304: The Specter of Increased Citizen Suit Enforcement", *Natural Resources and Environment*, Fall 1992, p. 34.

32 Endangered Species Act, 16 USCA 1540(g).

33 The Resource Recovery Act, 42 U.S.C. 6972; Emergency Planning and Community Right-to-Know Act 42 U.S.C. 11046.

34 *Fiends of the Earth v. Carey*, 535 F.2d 165 (2nd Cir. 1976) at 172.

35 Clean Water Act, 33 U.S.C. 1365, §101 (a).

State. The CWA also authorizes citizens to sue the EPA administrator for failing to perform any non-discretionary act or duty under the act.³⁶ Courts may order injunctive relief and/or impose civil penalties that are to be paid to the United States Treasury.³⁷ Several commentators have analyzed the public interest preference for litigation under the Clean Water Act as the citizen suit of choice.³⁸

Despite this hospitable climate for citizen enforcement, Congress did impose a few hurdles and constraints that public interest litigants must overcome. For instance, a plaintiff must notify the U.S. Environmental Protection Agency, the alleged polluter and the state where the violation is occurring of her intention to sue sixty days prior to commencing a citizen suit under most environmental statutes. In order to prevent harassment by public interest litigation, citizen suits are trumped by any formal enforcement activity by the federal government. The Clean Water Act, for example, holds that no citizen suit may be commenced "if the administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United State or a State to recompliance with standard, limitation or order."³⁹

Freedom of Information

The authority to file citizen suits is not enough to spur public action, or to win. Public interest litigation is absolutely dependent on access to the information typically held by the government which can document the alleged violations. It has been said that the American environmental revolution did not begin with modern environmental legislation *per se* (that is, the 1969 National Environmental Policy

36 *Ibid.*, §505(a)(1).

37 *Ibid.*

38 Courtney M. Price, "Private Enforcement of the Clean Water Act" (1986) 1 *Natural Resources & the Environment* 31; Sharon Elliot, "Citizen Suits under the Clean Water Act: Waiting for Godot in the Fifth Circuit" (1987) 62 *Tulane L. Rev.* 175; Steven Russo, "States, Citizens and the Clean Water Act: State Administrative Enforcement and the Diligent Prosecution Defense" (1996) 4 *N.Y.U. Env. L.J.* 211; John Dolegetta, "*Friends of the Earth v. Crown Central Petroleum: The Surrogate Enforcer must be Allowed to 'Stand Up' for the Clean Water Act*" (1998) 15 *Pace Env. L. Rev.* 707.

39 Clean Water Act, *supra* n. 35, §505(b)(1)(B).

Act),⁴⁰ but, rather two years earlier, with the passage of the Freedom of Information Act.⁴¹ Opening the vast government vaults containing raw and processed environmental data had the immediate effect of exposing environmental violations to the public. This not only served to increase public pressure on government agencies to demand compliance, but also strengthened the hands of the more zealous regulators within an agency. And, of course, it provided public interest litigators with the ammunition they would often need for the furious legal battles ahead.

Self-Monitoring

There is a variety of reasons why the Clean Water Act has been the most popular environmental law for filing citizen suits.⁴² Most notably was the form of the information that was so readily available to attorneys and public interest organizations. The CWA created a permitting system called the National Pollution Discharge Elimination System, or NPDES.⁴³ Anyone discharging pollutants into waterways had to operate according to an NPDES permit that limited the effluent levels they could release. Permit holders must, on a regular basis, sample their discharges, send them for testing with an approved laboratory and determine whether the pollution levels measured exceed their permit limits. This information, incriminating or not, must be submitted to the U.S. EPA or the state agency implementing the Act as "Discharge Monitoring Reports" – or, in the world of American acronyms, DMRs. DMRs, of course, have been available to the public since the inception of the Act and in a citizen suit are fair evidence to establish the existence of a violation of pollution levels or industry reporting requirements. Courts typically saw DMRs as an admission of liability by defendants and were willing to issue partial summary judgements to that effect. (In the present context, the courts also held consistently that a DMR exceeding a discharge limit combined with the presence of the pollutant in the waterway in

40 42 U.S.C. 4321.

41 5 U.S.C. 552 (1992). Not surprisingly, the Freedom of Information Act also contains citizen suit provisions to enable citizens who submit a request for information to determine in court whether they have been unjustifiably denied.

42 Axline, *Environmental Citizen Suits*, *supra* n. 18, at chapters 1-3.

43 Clean Water Act, 33 U.S.C. 1342, §482.

question established causation for purposes of general standing requirements).⁴⁴ An attorney in a leading environmental advocacy organization called the citizen suit enforcement process under the Clean Water Act “as easy as shooting fish in a barrel.”⁴⁵

The Clean Air Act Amendments of 1990

The relative advantages of the Clean Water Act did not go unnoticed by environmental advocates. In 1990, the Clean Air Act was amended, and among the central changes were provisions to expedite citizen suits.⁴⁶ Because many of the modifications are relevant to legislative reform in the Israeli context, it is highly instructive to detail the specific revisions in the 1990 amendments.

To begin with, the time horizon of the Act was expanded from the present tense to the past. Prior to the amendments, only ongoing offenses could be enjoined. Under the amendments, however, suits could be filed “against any person... who is alleged to have violated (if there is evidence that the alleged violation has been repeated).”⁴⁷ In doing so, Congress overruled the position of the Supreme Court that had disallowed Clean Water Act citizen suits against purely past violations.⁴⁸

The second area of reform was in reporting. Under the original Clean Air Act, air emissions monitoring and compliance records were not particularly helpful to the concerned public. When data were available, they were not presented in a form that was readily decipherable and which clearly indicated permit violations. Plaintiffs had to synthesize information from a variety of sources, such as the State Implementation Plan, construction permits and new source performance standards, to determine whether or not they had a case.⁴⁹

Title V of the amendments changed all that by requiring a single, integrated document that would clarify and make readily enforceable a source’s pollution control requirements. Under the regulations

44 *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64 (3d Cir. 1990), cert. denied 498 U.S. 1109 (1991).

45 DuBoff, “The Specter of Increased Citizen Suit Enforcement”, *supra* n. 31, at 34.

46 Clean Air Act, §304(a).

47 Clean Air Act, §304(a)(1).

48 *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987).

49 DuBoff, “The Specter of Increased Citizen Suit Enforcement”, *supra* n. 31, at 34.

promulgated by the EPA, air quality monitoring reports were to be filed at least every six months, "certified by a responsible official as true, accurate and complete with each deviation from permit requirements identified."⁵⁰ Monitoring data is now submitted in a format consistent with the underlying standard, such as delineating the amount of pollutant emitted per hour. This avoided the complicated conversion and calculations of raw monitoring data that previously had discouraged plaintiffs.

In addition, the Act required the EPA to establish enhanced monitoring and compliance certification.⁵¹ With the exception of trade secrets, all of the new information was, of course, readily accessible by the public. The legislative history indicates that Congress specifically sought a system that, like the NPDES program in water, would "enable the state, the EPA and the public to better determine the requirement to which a source is subject and whether the source is meeting those requirements."

No less important, the 1990 statutes expanded the remedies available to plaintiffs under the citizen suit provisions. While in the past, only injunctive relief could be sought, now civil penalties were made available, with penalty payments deposited into a special fund for use by the EPA in its air compliance and enforcement work. Punitive monetary sanctions and the award of attorneys fees to "the party who prevails or substantially prevails on the merits of the suit" changed the equation for public interest attorneys and put the Clean Air Act on an equal footing with the Clean Water Act.⁵² The availability of industry reports constituting admissions of liability ensured that plaintiffs would meet the "substantially prevails" test and suddenly made public interest litigation a low-risk proposition.

Why the American Citizen Suit Provisions Work

Before moving to other jurisdictions, it will be instructive to consider a few reasons why public interest legal enforcement of anti-pollution laws has been so popular in the United States. In addition to the

50 40 CFR §70.6(a)(3)(iii).

51 Clean Air Act, §114 (a)(1).

52 DuBoff, "The Specter of Increased Citizen Suit Enforcement", *supra* n. 31, at 35.

liberal laws themselves, much of the credit goes to the sympathetic interpretation of the statutes by the federal courts.

First, strict liability assessed against defendants, evidentiary burdens on plaintiffs are eased considerably. Because of the convoluted, often perplexing nature of American environmental regulations, and the transparency of the regulatory process under the U.S. Freedom of Information Act, it is often quite easy to uncover a procedural error or breach of the conditions of an environmental permit. Whether or not the polluter actually knew or could reasonably have expected to know about the violation is irrelevant for establishing liability.

Second, courts typically have been unwilling to accept the magnitude of the infraction as a defense, that is, to absolve a polluter because the violation was statistically insignificant.⁵³ This position, a *de facto* rejection of an objective cost-benefit line of defense for polluters in public interest litigation, goes a long way to balancing the proverbial uneven playing field that cash-starved public interest organizations face when confronting the seemingly unlimited resources of a monolithic, polluting corporation.

Third, once liability is established, penalties are mandatory.⁵⁴ This provides considerable leverage in the pre-trial negotiation stages. As the only thing in question remains the magnitude of the penalties, a polluter can save the exorbitant cost of conducting a trial by reaching a settlement with the plaintiff and presenting the consent accord to the court for its blessing. This too heightens the incentives for public interest litigators.

Fourth, while civil penalties assessed due to public interest litigation are deposited in the federal treasury, the attorneys fees stipulated under the statutes have been interpreted quite liberally by the courts. Even more important, courts have viewed these fees as asymmetrical in nature. If a plaintiff succeeds even partially⁵⁵ in proving a violation of an environmental law, he can be richly rewarded for providing this

53 *Sierra Club v. Union Oil Co.*, 716 F. Supp. 429 (N.D. Cal. 1988) at 433. See also *Connecticut Fund for the Environment v. Stewart Warner*, 631 F. Supp. 1286 (D. Conn. 1986) at 1288.

54 *Leslie Salt Co. v. United States*, 55 F.3d 1388 (9th Cir. 1995) at 1397.

55 *In Ruchelshaus v. Sierra*, 463 U.S. 680 (1983), the Supreme Court essentially put an end to awards for unsuccessful petitioners but did not disallow attorneys' fees for partially successful petitioners.

public service and promoting enforcement against a polluter.⁵⁶ If he fails, the defendant receives no compensation for her trouble unless she can prove that the citizen suit was clearly frivolous.⁵⁷ This means that for all intents and purposes, public interest litigators operate with financial impunity.⁵⁸ This situation is a departure from the "American rule" on attorney's fees, to the effect that each party typically must bear its own litigation expenses. However, such asymmetry also exists in other social legislation such as the Civil Rights Act⁵⁹ and the Securities Act.⁶⁰ It is worth noting that attorney fees are granted only for direct citizen suits, not for litigation involving nonjudicial review.⁶¹

Finally, courts have received considerable praise for their creativity in wielding "supplementary environmental projects" as part of the punishment for polluters. This means that a public interest environmental group can circumvent the limitations involved in suing for damages under federal statutes stipulating that penalties for polluting go exclusively into the U.S. treasury. Supplementary environmental projects, of course, include a rich menu of environmental initiatives and donations to environmental organizations that often indirectly reach the pockets of public interest organizations and the attorneys that represent them.⁶²

III. *Other International Approaches to Citizen Suits*

While the American experience probably offers the most expansive model of citizen suit enforcement, many other nations have begun to

56 A U.S. 5th Circuit opinion, *Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714 (1974), set forth the criteria on which attorneys' fees are based. They are the time and labor required, the novelty and difficulty of the issues involved, the skill needed in order to provide proper representation; the extent to which one is precluded from other employment, the nature of the professional relationship with the client, and awards in similar cases.

57 In fact, after almost twenty years of environmental citizen suits, in only one reported case was a public interest action found sufficiently "frivolous" to justify an award to the defendants. Miller, *Citizen Suits*, *supra* n. 18, at 108.

58 *National Wildlife Federation v. Consumers Power Co.*, 729 F. Supp. 62 (W.D. Mich. 1989).

59 42 USC §2000-a-3(b), 2000e-5(k)-1964.

60 15 USC 77k(e) 1933.

61 Miller, *Citizen Suits*, *supra* n. 18, at 108.

62 Ross Macfarlane and Lori Terry, "Citizen Suits: Impacts on Permitting and Agency Enforcement", *Natural Resources and Environment*, Spring, 1997, at 21.

empower citizens to sue polluters as well. One can distinguish between two types of approaches. In European countries, a conventional centralized approach continues to characterize national policy; little has been done to change the underlying statutory underpinnings and incentives that might foster greater public involvement. In a growing number of developing countries, however, citizens themselves have seized standing in environmental cases as an extension of general civil rights litigation. In short, what environmentalists lack in formal authority they make up for with creativity and a sympathetic judiciary. The following section will offer a cursory examination of both approaches.

Developing Countries and Citizen Involvement

South America has a growing environmental community, and lawyers there have been at the forefront of ecological campaigns. In Columbia, for example, "popular actions" have been promoted as the best "collective procedural remedy for public injury and damage." These are based on old Roman law that stipulated that "the citizen was nothing more than an integral element of the populace, (who) defended the interest of the latter and his own interests, through popular actions."⁶³ These actions have been incorporated in the country's civil code since its inception⁶⁴ but only recently have they been recognized as a potential launching ground for environmental advocacy. A recent reform in the rules of civil procedure states that in the defense of natural resources and rural environmental elements, "the Judge may impose on the defendant in the decision the compensation of damages caused to the Community and all measures which are appropriate."

Federal law in Mexico creates a system whereby citizens can file informal complaints or petitions to draw the attention of the government to incidents or acts that "produce an ecological imbalance or environmental damage or which violate any environmental law provisions." Under the system the government is required to receive, investigate and respond to these complaints within specific time

63 German Sarmiento, "Popular Actions and the Defense of the Environment in Columbia", in *Proceedings of the Third International Conference on Environmental Enforcement* (Washington, D.C., U.S. EPA, 1994) at 262.

64 Articles 1005 and 2359.

constraints. Complainants are entitled to receive a full report of the results of the verification check and the intended government response.⁶⁵

On the other side of the planet, public interest attorneys in Bangladesh have begun to file legal actions against a range of ecological ills, including industrial pollution, vehicular pollution, unlawful construction, illegal felling of public forests, razing of hills, land use, and unlawful development schemes.⁶⁶ Even after a Bangladesh lower court disqualified a public interest enforcement petition in 1994 on the basis of standing, the setback was short-lived and overturned by the Appellate Court only two years later.⁶⁷ Here, case law has created an extremely broad window of opportunity for public interest enforcers.⁶⁸ Similar examples can be found in Australia,⁶⁹ Russia⁷⁰ and the Philippines, where public interest attorneys combine community organizing with legal counsel in what they call "meta-legal" strategies.⁷¹

65 International Network for Environmental Compliance and Enforcement, *Citizen Enforcement: Tools for Effective Participation* (Washington, D.C., 1998) at 10.

66 Ehsanul Habib, "Public Interest Environmental Litigation: A Tool to Ensure Compliance and Enforcement", in *Proceedings of the Fifth International Conference on Environmental Enforcement* (Washington, D.C., U.S. EPA, 1998), at 445.

67 *Farooque v. Bangladesh et al.* (Writ Petition No. 990 of 1994), as reported in Habib, "Public Interest Environmental Litigation", *supra* n. 66.

68 "Insofar as it concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion of fundamental rights of an indeterminate number of people, in common with others, or any citizen or an indigenous association, as distinguished from a local component of a foreign organization espousing that particular cause, is a person aggrieved and has the right to invoke the jurisdiction under Article 102."

69 James Johnson, "Civil Enforcement of Environmental Laws in Australia", in *Proceedings of the Fifth International Conference on Environmental Enforcement* (Washington, D.C., U.S. EPA, 1998) at 436.

70 Vera Mischenko and Erika Rosenthal, "Successful Environmental Enforcement in Russia: The First Successful Nation-Wide Case", in *Proceedings of the Fifth International Conference on Environmental Enforcement* (Washington, D.C., U.S. EPA, 1998) at 419.

71 Maria Paz G. Luna, "Enforcing Environmental Laws in a Developing Country: An Alternative Law Approach" (1998) 15 TAU Stud. in L. 177.

The European Experience with Citizen Suits

While European nations have emerged as both innovative and effective enforcers of environmental laws, policy on the Continent typically leaves enforcement in the hands of government officials. Beyond its Directive requiring free access to environmental information,⁷² European Union law does not push member countries in this respect. Unlike other regional consortiums, the EU, for example, offers no forum to individual or organizational litigants to enforce domestic environmental laws.⁷³ Most countries recognize the right of individuals to sue for their own financial losses, but access to the courts is limited to private actions in which a plaintiff can establish personal damage as a result of environmental insult.

Some countries, like Denmark, have passed legislation to expand polluters' liability into new areas such as soil contamination, thereby broadening the scope of actionable claims by the public.⁷⁴ Presumably, homeowners could sue if they could trace pollutants to a given plant. In Germany the civil code even contains an "environmental" provision focusing on damages from neighbors. The provision establishes the rights of real estate owners with regard to pollution caused by "gasses,

72 "Save as provided in this Article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest." Article 3(1) Council Directive 90/313 EEC on Freedom of Access to Information on the Environment.

73 While the EC has yet to create a formal international legal format for filing citizen complaints, the rudiments of such a system were created under the North American Free Trade Agreement. Since 1995 any citizen or nongovernmental organization in Canada, the U.S. or Mexico is entitled to file a submission with the Secretariat of the Commission for Environmental Cooperation charging a NAFTA country with failure to enforce its environmental laws. The Commission must investigate the complaint and issue a factual record. As the ministers of environment in these countries are parties to the matter, a two-thirds vote of the participants leads to the publication of the factual record which has great declarative influence. To date, eighteen submissions have been filed, the most successful involving the Mexican government's failure to enforce domestic law while conducting an environmental impact assessment in Cozumel. See generally: International Network for Environmental Compliance and Enforcement, *Citizen Enforcement: Tools for Effective Participation* (Washington, D.C., 1998) at 18.

74 Environmental Liability Act, Act No. 225, April, 1994. .

steam, offensive smells, smoke, soot, heat, noise, vibrations and similar effects from properties."⁷⁵

Sweden passed a special Environmental Damages Act that imposed strict liability on a range of environmental violations, with an eye to easing litigation by the public. Nevertheless, citizen involvement there has been defined as not "playing a meaningful role in the national enforcement picture."⁷⁶ And consider, for example, Austria, where under the civil code a landowner may "forbid" a neighbor from releasing emissions that are higher than customary; the provision does not apply, however, when the neighbor is a licensed industrial facility. Nor does the law introduce clear financial repercussions in the event the prohibition is violated.⁷⁷ In short, in all the above legal systems, compensation to environmental plaintiffs remains limited to tort remedies or monetary damages that can be proven.

A few nations are experimenting with new formulas that may expand public involvement in environmental enforcement. Italian law, for example, does not recognize a right of individual citizens to file suit for damages to the environment, but limited standing is granted to environmental organizations that have been approved by the Ministry of the Environment⁷⁸ to file compensation claims for damage to the environment. Accordingly, if the State has already initiated an action a recognized environmental group can intervene, but it is not authorized to commence the action. These organizations are also granted special status to "denounce" violations they have identified. But this is largely a symbolic act and serves only to pressure the government to file a legal action.⁷⁹

Interestingly, the criminal law arena in Italy is more accessible to the public. A recent amendment to the Italian Criminal Procedure

75 Sec. 906 of the BGB.

76 Stefand Wusterland, "Public Environmental Law in Sweden", in R. Seerden and M. Heldeweg, eds., *Comparative Environmental Law in Europe, An Introduction to Public Environmental Law in EU Member States* (Antwerp, Malkin, 1996) 391.

77 K. Weber, "Public Environmental Law in Austria", in Seerden and Heldeweg, eds., *Comparative Environmental Law in Europe, supra* n. 76, at 30.

78 Article 13 of Law 349/86. The criteria for selection are: the national character of the organization; its presence in at least five regions; its declared purpose of environmental protection and democratic statutes; the continuity of the activity undertaken; and the external relevance of the activity.

79 Francisco Francioni and Massimiliano Montini, "Public Environmental Law in Italy", in Seerden and Heldeweg, eds., *Comparative Environmental Law in Europe, supra* n. 76, at 262.

Code recognizes the rights of a registered association in general to intervene in criminal proceedings. Presumably, intervening organizations enjoy the same rights as victims of crimes.⁸⁰ While the law technically requires the consent of the injured party in environmental cases, this is clearly not realistic, so implied agreement has become the presumption. A recent court decision explained that as long as an interest is "ascertained as characteristic and exclusive to the injured organization the organization can sue for damages." A mere "ideological relationship," however, is not enough to establish standing in a criminal enforcement intervention.⁸¹

Holland, a perennial leader in environmental policy, has recently begun to take a more liberal view towards public involvement. This trend began with a 1986 Supreme Court decision⁸² and solidified in two subsequent cases that recognized standing for relevant environmental organizations.⁸³ The Court held that an organization can bring a civil action in pollution cases when it is a "legal person, represents the violated interests in accordance with the articles of the association or foundation and the interests can more or less be bundled together."⁸⁴ This position was modified somewhat by a amendment to the BW civil code. While the general view toward standing afforded by the court was adopted, financial compensation to public interest plaintiffs was disallowed. Two leading Dutch legal experts have argued that the court's liberal approach will lead to the statutory provision being interpreted to allow organizations to appear on behalf of "general interests" (e.g., birds, fish, natural areas, etc.). In such cases, however, the remedies they seek will still be limited to injunctions or a declaratory judgment concerning the unlawfulness of violations to environmental values.⁸⁵

80 Sec. 91, Italian Code of Criminal Procedure.

81 Court of Causation, § III. Judgment no. 1584, October 13, 1993 (unreported).

82 HR 17 June 1986 AB 1987 (*Nieuwe Meer*).

83 HR 18 December 1992 M en R 1993/4, 24 (*Kuunders*), and Rechtbank Rotterdam, 15 March 1991 TMA 1991-2 p. 27 (*Borcea*).

84 *Nieuwe Meer*, *supra* n. 82, at 173.

85 René Seerden and Michiel Heldeweg, "Public Environmental Law in the Netherlands", in *Comparative Environmental Law in Europe*, *supra* n. 76, pp. 262, 306.

IV. *Enforcement of Environmental Statutes in Israel: An Institutional Review*

Before exploring the role of the public in environmental enforcement in Israel, it is worthwhile sketching the broader institutional context in which private citizens and NGOs operate. In particular, a cursory description of the authorities of the three conventional branches of government and their function in Israel is instructive.

The Executive Branch

One might expect that the central player would be Israel's Ministry of Environment. Established in 1988 as a coalition compromise after the deadlock in the Knesset elections between the Likud and the Labor party, among its initial institutional missions was to consolidate a critical mass of authorities from the sundry agencies that oversaw environmental policy in practice.⁸⁶ These included the Ministry of Interior, the Ministry of Health, the Ministry of Agriculture, the Ministry of Transportation, and several independent bodies located in the Prime Minister's office. For purposes of historical accuracy, it is worth noting that an Environmental Protection Service operating as a department within the Ministry of Interior had begun to take on many enforcement functions. Initially designed as an advisory committee, during its fifteen-year history it embraced its enforcer role, albeit at a

86 Until then, the chief environmental player was the Environmental Protection Service, originally set up as an advisory department in the Prime Minister's office and moved in 1976 to the Ministry of Interior. The Service's primary function was to advise on planning policy, and it only took on an enforcement role in 1980 when it assumed responsibility from the Ministry of Transportation for the newly retrofitted Oil Pollution Ordinance. Another important landmark was the 1982 government decision to merge the Health and Interior Ministers' authority under Israel's Abatement of Nuisances Law (*Yalkut Pirsumim*, 1982, p. 1736), for the control of noise, air quality and odors. During this time, a variety of proposals were put forward to upgrade the Service, although this only became possible due to the unique political circumstances and Likud MK Ronni Milo's personal interest in the position. See A. Tal, *Pollution in a Promised Land, An Environmental History of Israel* (Berkeley, Univ. of California Press, 2002), chapter 9.

modest level. This was most notable in the areas of preventing marine pollution, protecting air quality⁸⁷ and enjoining littering.⁸⁸

Today the Ministry of the Environment operates at two levels, national and regional, and subsidizes several dozen local environmental units that operate out of municipal governments. The Ministry relies on some twelve major environmental laws for its authority as well as several more tangential statutes.⁸⁹ The Ministry is divided into departments and branches, according to conventional environmental media and activities. While the Ministry's legal department focuses primarily on legislation and ongoing legal counsel, ultimately its seven attorneys oversee and operate alongside an enforcement branch. The Ministry's enforcement team includes a team of over 30 inspectors, which serves as a specialized environmental "green police" force, visiting the sites of reported violations in the field.

At any given time, the legal department is involved in 200 environmental prosecution cases simultaneously. For instance, in 1998 the Ministry counted 253 open, active prosecution files.⁹⁰ Yet, this number is deceptive and, in fact, does not reflect a powerful enforcement presence. Most of these cases involved litter violations (144 files), with a few dozen water quality violations, and a handful of cases in the areas of licensing, hazardous materials and marine pollution violations. Typically, most of these are settled before a final court decision. The Ministry of Environment's poor enforcement" record has been discussed elsewhere; among the explanations for the phenomenon are the seemingly arbitrary and paltry allocation of statutory authority, insufficient funding for technical personnel and

87 The Environmental Protection Service initiated the first major prosecution concerning air quality against Haifa's Oil Refineries. It was soon resolved after a plea-bargain in which the indictment of the company chairman, Zvi Zamir, was expunged in return for a guilty plea by the corporation. *State of Israel v. Haifa Oil Refineries*, T.P. 2004/87, Haifa Magistrate Court, 1987. See also Tal, *supra*, note 86.

88 For instance, in 1987, before the Ministry was established, the Environmental Protection Service proudly reported thousands of prosecutions against Israeli litterers.

89 Abatement of Nuisances Law, the Water Law, Protection of Cleanliness Law, Hazardous Substances Law, Oil Pollution Prevention Ordinance, Collection of Garbage for Recycling Law, Deposit Law, Marine Pollution Prevention Law (Dumping of Garbage), Marine Pollution Prevention Law (Land Based Sources), Cruelty to Animals Law.

90 "Report regarding the Handling of Investigation Files", internal Ministry of Environment memo, on file with authors, 1999.

measurements, lack of continuous monitoring and oversight, and, on occasion, inadequate political will.⁹¹ This situation highlights the importance of the present study that seeks a legal explanation for the public's reticence in filling the vacuum.

The Judicial Branch

Israel's courts have a reputation for jealousy guarding their independence, by both meticulously refraining from intervening in strictly political affairs and at the same time not allowing politicians to influence their work. While ostensibly this might seem to bode well for environmental interests, in only a few cases has Israel's Supreme Court adopted clearly pro-environmental positions, zealously interpreting environmental statutes and showing little regard for the political forces that support development and industry. Recently, J. Englard offered a rare and refreshing expression of judicial commitment to environmental protection. For instance, the Supreme Court did not blink in delaying the construction of the Voice of America transmitter, despite the heavy pressure applied by two U.S. presidents to expedite its construction.⁹² Nor did it think twice about enjoining the operation of a factory that employed hundreds of workers.⁹³

Yet a retrospective look at Israel's case law invariably leaves the observer with the unmistakable impression that its Supreme Court's judges are decidedly not pro-environmental, even though they have had numerous opportunities and all the tools to adopt such a position. One glaring but representative example was the Supreme Court decision in the matter of the Trans-Israel highway.⁹⁴

As the court itself acknowledged, the Trans-Israel Highway is

91 Alon Tal, "Six Reasons For a Severe Crisis" (1993) 47 *Politica*, at 48-51.

92 *Society for Preservation of Nature in Israel et al. v. National Planning Board et al.*, Bagatz 3476/90 (unpublished) 1990. Here the court ruled that a "serious impact statement must be prepared before any decision is made about the location of the transmitter" (at p. 2).

93 C.A. 44/76 *Ata v. Schwartz* (1976) 30(iii) P.D. 785.

94 Bagatz 2920/94 *Adam Teva v'Din et al. v. National Planning Commission et al.* (2001) 50(iii) P.D. 446. The Trans-Israel Highway was challenged once again in 1999 on the basis of changes in the tender, but here, too, the Supreme Court was decidedly pro-development and anti-environmental in its interpretation of the relevant statutes. *Adam Teva v'Din v. Minister of Treasury et al.*, Bagatz 4119/99 Tk-AL 99(3), p. 793.

perhaps the largest construction project in the country's history, costing billions of shekels and paving over thousands of dunams of land. Its environmental impacts may be unprecedented in terms of open space decimation, the boost in the number of motor vehicles on Israel's roads, creation of noise nuisances, etc. Yet, rather than engage in an even moderately creative interpretation of Israel's regulations regarding environmental impact statements, Cheshin, J., took a formalistic approach, rejecting all the petitioner's arguments. The narrow "snapshots" of individual highway segments presented in a series of minor impact statements were deemed sufficient to meet the relevant legal requirements. The result was that the public and the decision-makers were never informed about the full, comprehensive environmental impacts of Israel's largest public works project ever. This clearly flew in the face of legislative intent.

The Supreme Court of Israel has almost systematically chosen not to grant priority to environmental cases. Dragging out proceedings for years, frequently the environmental damage feared has already occurred by the time a decision is reached.⁹⁵ Often cases are dismissed on the basis of a promise by a public entity to do better in the future without grounding the agency's position in a binding court ruling.⁹⁶

It is encouraging to note a recent wave of cases involving environmental planning infractions in which district courts have actually assented to public interest petitions to apply the law to protect environmental interests.⁹⁷ For example, district courts have prevented the construction of a park adjacent to the site of a former asbestos plant⁹⁸ and have enjoined luxury housing projects that were planned for protected shoreline regions.⁹⁹ And, in a remarkable decision by the

95 See, e.g., *Adam Teva v'Din et al. v. Safed Municipality*, Bagatz 1582/95, on the city's effluents flowing into the Ahmud Stream and from there to Lake Kinneret, a case which awaited a final decision for five years.

96 *Adam Teva v'Din v. Minister of Interior et al.*, Bagatz 1131/93. The petitioner's request for a formal court declaration detailing a municipality's responsibility to treat its sewage was rejected due to the assertion by the cities of Ramlah and Lod of their intention to improve treatment in the future.

97 It is conceivable that District Courts are truly indifferent to or unaware of political pressures, thus allowing for more aggressive interpretation of environmental laws.

98 *Association for Quality of Life and the Environment in Nahariah et al. v. City of Nahariyah et al.* (1998) A.M. 166/98 Haifa District Court, 1998.

99 *Aliman v. National Planning Board*, H.P. 2073/95 Tel Aviv District Court (unpublished) 1995.

Tel Aviv District Court, Judge Sarota prohibited the City of Tel Aviv from filing a marina plan for the mouth of the Yarkon River, ruling that the lack of an environmental impact statement abrogated the public's right to know.¹⁰⁰

Technically, to date only one court in Israel might be categorized as a special environmental court. Under Israel's Water Law, the Haifa District Court is empowered to sit as the Water Court hearing petitions against the Water Commissioner.¹⁰¹ In practice, this tribunal has been used most sparingly within the environmental context, primarily serving as an arbiter of water allocation rights for farmers who feel that their full allotment has been usurped unjustly. Environmentally, the court has largely been irrelevant.¹⁰² There are no signs that administrative actions against the Water Commissioner will gain in prominence, given the openness of alternative civil and criminal procedures.

Judicial predisposition notwithstanding, the number of environmental cases that actually reach judges remains quite small and has not grown commensurate with the overall expansion of litigation in Israel. For example, Israel's marine pollution enforcement program is undoubtedly the oldest and most extensive in the country. According to a recent study, between 1990 and 1999 courts ruled on roughly 200 cases.¹⁰³ Like the situation in most Western nations, the vast majority of non-compliance files were, in fact, resolved outside the legal system.

The combined result of the above is that, unlike in the U.S., Israel's case law has contributed little to encouraging public involvement in environmental enforcement. Relatively few precedents have been set over the course of the country's first fifty years, and many of these were not necessarily favorable to environmental interests.

100 H.P. 210/96 *Adam Teva v'Din v. Regional Planning Committee of Tel Aviv-Jaffa et al.* (unpublished).

101 Israel Water Law, 1959, *Sefer HaChokim*, 1959, p. 169, §§140-147.

102 *Citizens for the Western Galilee Environment and Adam Teva v'Din v. Water Commissioner et al.*, Water Appeal 11/93, Haifa District Court (unpublished). The case formally filed against the Water Commissioner was actually directed against the Miluot food production plants. When the parties reached an agreement on a timetable for construction of a treatment facility, the case was discontinued.

103 D. Talitman, "On Marine Pollution Enforcement", *Blue Green and White* (January, 2000).

The Legislature

Israel's Knesset has never been an environmentally aggressive body. Historically, its environmental concerns have rarely gone beyond the lip service of politicians, who pass tough criminal legislation in the field but have little interest in following actual implementation.¹⁰⁴ The Knesset Interior and Environment Committee has only occasionally provided meaningful oversight of policies initiated by the executive branch, playing a watchdog role similar to that of several parliamentary committees in the U.S. and Europe.¹⁰⁵ It is interesting to note the lack of any clear tendencies of these "green" parliamentarians relative to the conventional Israeli "left/right" continuum. About the only thing that seems common to these legislative efforts is just how anomalous they are.

To a large extent, this is a function of the political priorities of Knesset members. For most of its history, the environment was considered a non-issue among the Israeli electorate. The creation of the Ministry itself, international trends and perhaps the dramatic increase in urban pollution levels appears to have had a profound influence on the environmental awareness of the Israeli public during the 1990s.¹⁰⁶ Educational programs from elementary schools to universities reflect both public interest and market demand for expertise in the field.¹⁰⁷

The likelihood of Knesset involvement in environmental oversight is enhanced by the growing role played by lobbyists of Israel's NGO

104 There is an "honor list" of exceptions to this rule. During the 1960s, Shimon Kanovich pioneered air and noise legislation and Yizhar Sminlansky shepherded through the Knesset the crucial statutory infrastructure for nature preservation. During the 1970s, MK Yosef Tamir was responsible for several green legislative initiatives and more recently, Knesset members like Dedi Tzucker, Beni Temkin, and Uzi Landau were environmental sparkplugs. See generally Tal, *Pollution in a Promised Land*, *supra* n. 86, chapters seven and nine.

105 Yosef Tamir, *Knesset Member* (Jerusalem, Ahiabar, 1987).

106 Abraham Bloom, "Thirty Years of Education for the Environment – in the World and in Israel" in Proceedings of *Environmental Education in the Educational System, Scientific and Educational Aspects*, March 23-24, 1999, Beit Berl, Kfar Saba, 13-14.

107 Eilon Schwartz et al., *From Nature Protection to Environmental Practices, A Report on Developments in Environmental Education in Israel* (Tel Aviv, The Heschel Center, 1997).

community.¹⁰⁸ As will be discussed, these organizations have the potential to play an increasingly crucial role in Israeli environmental enforcement efforts. Moreover, the emergence of environmental political parties at both the local and national levels will undoubtedly begin to affect the Israeli legislatures and municipal governments. While in the 1999 elections Green parties did not receive sufficient votes to cross the threshold into the 15th Knesset, in both the Haifa and Tel Aviv City Councils their representatives already have an influential role. Presumably, this area of environmental activity will only grow with time as security issues are resolved.

V. The Evolution of Israel's Environmental Citizen Suits – The Early Years

Common Law

Like most countries with a common law heritage, from the country's inception, nuisance law was the primary tool available to the Israeli public for addressing environmental problems. Thus, environmental law in Israel actually began with an assumption of citizen involvement. Israeli tort law in general and nuisance law in particular largely preserve the country's English heritage. After a few attempts, in 1944 the British Mandate promulgated the "Civil Wrongs Ordinance" which closely copied a Cypriot codification of English court precedents in the area of tort law.¹⁰⁹ Private nuisances were loosely defined as "activities that caused considerable violation of the reasonable use of another individual's property."¹¹⁰ The violation of

108 While precise numbers are impossible due to the ephemeral nature of many organizations or the issue that sparked their creation, today there are well over a hundred NGOs working in all parts of Israel. Typically they can be divided into two groups: large, professional organizations like the Society for the Protection of Nature in Israel (SPNI) with its 50,000 members, and *Adam Teva v'Din* – Israel Union for Environmental Defense, a public interest law organization; and small, voluntary groups active at the local level. See S. Bar-David and A. Tal, "Harnessing Environmental Activism", Report prepared for CRB Foundation, 1996.

109 *The Palestine Gazette*, 1944, Appendix 1, Number 1389, p. 93, later codified in *Sefer HaChokim* 1960, p. 340.

110 Civil Wrongs Ordinance, §44.

the personal space of individuals by unacceptable odors, noises, or air emissions not infrequently resulted in private nuisance actions between neighbors. Some of these cases eventually reached the Israeli Supreme Court, creating a modest, local case law to balance the predominant reliance on old English precedent.¹¹¹

The Civil Wrongs Ordinance contained a public nuisance tort that theoretically had broad potential application as a tool to combat the growing pollution burden in the country.¹¹² Predictably, with ambiguous financial incentives for plaintiffs, public nuisance as an environmental defense mechanism remained almost completely dormant.¹¹³ This was exacerbated by a court decision which took a narrow interpretation of standing, holding that the Attorney General of Israel himself (not local municipalities) had to file any such public nuisance case or authorize civil litigation involving a public nuisance.¹¹⁴

In addition, environmental law (if one is willing to stretch the definition) during the period of the British Mandate and the nascent years of the state included planning laws, hunting ordinances, a forestry ordinance, some dormant provisions in the Penal Code, and a broad array of local by-laws. Given the explosive demographic growth of Israel's first decade, during which the country's population essentially quadrupled, local environmental resources began to show the first signs of distress.

Class Action Suits

An old but under-utilized tool for public enforcement is the class action suit. Class action suits involve legal actions in situations of a general, frequently nebulous interest for a large number of individuals, in which circumstances make individual litigation inefficient. Generally the costs of filing suit are simply prohibitive for an individual plaintiff given her actual personal share of the

111 *Eden Hotel Jerusalem et al. v. Garzon et al.* (1955) 8 P.D. 1121; *Reiss v. Kofef* (1966) 18 (iii) P.D. 309; *Meir Ezri et al. v. Klein et al.* (1966) 17(ii) P.D. 767.

112 Civil Wrongs Ordinance, §42.

113 For an excellent review of case law in the area of private and public nuisances during Israel's first thirty years see David Kretzmer, *Nuisances* (Jerusalem, Sacher Institute, 1980).

114 *Local Council Tamra v. Tsvi Chaimovich et al.* Civil Appeal 317/67 P.D. 21(2) 320.

environmental damage. Class action suits that seek the damages due to an entire injured group in the aggregate provide real financial incentives for the group's representative to initiate legislation and, of course, potentially a handsome return for the attorneys.

Israel's civil procedure has allowed class action suits since 1963,¹¹⁵ with the present provision appearing in regulation 29 of the 1984 Civil Procedure Code.¹¹⁶ In practice, however, the regulation has been little used, primarily because of the judicial position that identical damage to each plaintiff must be proven. Thus, this provision has been useful primarily in seeking declarative judgements.¹¹⁷

In 1992, a special environmental class action suit was created as part of the Prevention of Environmental Nuisances Law (Citizen Suits).¹¹⁸ Unfortunately, the provision created an environmental class action suit that is more difficult to utilize than the conventional class action suit. The new law certainly did nothing to modify existing judicial policies regarding the need to show identical damage to plaintiffs and, in fact, limits the remedy in environmental class action suits to injunctive relief. Moreover, unlike the general provision, the environmental citizen suit requires that all citizens who wish to be represented under the action so write affirmatively. (In the original class action suit, the presumption is reversed, and citizens who want no part in the action must opt out).

To date, two class action suits have been filed for purposes of abating an environmental hazard. The first was filed in the Tel Aviv Magistrate Court against the real estate project *Sea and Sun*, arguing that the construction was illegal as it violated zoning restrictions and the national prohibition against residential apartments along the sea.¹¹⁹ The request was filed under regulation 29 of the Civil Procedure Regulations, based on the precedent allowing a large group of plaintiffs who are damaged by the acts of same defendant to receive a common remedy.¹²⁰ In this pending case, the shared damage was lost access to the coast.

115 Civil Procedure Code, 1963.

116 Civil Procedure Code, 1984.

117 *Moses v. Musaf - State Tender* BARA 5615/98.

118 Sec. 10, *Sefer HaChokim* 1622 p. 132.

119 *Adam Teva v'Din v. Aviv and Associates, Holiday Apartments Ltd et al.*, T.A. 127150/98 (pending); The National Master Plan Number 13 (Coasts).

120 BASHA 198/88, *State of Israel v. Keren Hoffer*, (1993) 42(iii) P.D. 32; see also BARA 4363/91 *Shteppler v. Directors of Gush Gadol* (1994) 46(iii) P.D. 466.

The second case, filed in the Beer Sheva Magistrate Court, concerned the operation of the Ramat Hovav hazardous waste disposal facility.¹²¹ In this case, section 10 of the Prevention of Environmental Nuisances Law (Citizen Suits)¹²² was the basis for the claim. In August 1999, the court recognized the validity of the group to file a class action.¹²³ While this represents a positive development, there is a need for substantial legislative reform to transform the class action suit in Israel into a formidable tool in the public interest arsenal.

The Kanovich Law

This was the situation that troubled Shimon Kanovich, a German-born pediatrician turned politician in 1960 when he joined the Knesset as a representative of the Progressive Party. Kanovich, an expert in child psychology, suffered greatly from the lawlessness and squalor of his new Levantine home and was representative of a group of immigrants who missed the European sense of public order.¹²⁴ Although he himself was a smoker, he was perhaps the first parliamentarian in Israel to make a connection between exposures to noise or air pollution and public health.¹²⁵ In the explanatory text to the Abatement of Nuisances Law, he identified legislative *lacunae* as responsible for much of the deterioration in the country's urban environmental conditions. He explained that while municipal by-laws are often intended to solve pollution and nuisance problems, "their common denominator is that no one enforces them."¹²⁶

Kanovich's original bill was draconian in nature, reflecting an absence of any legal orientation. For instance, air pollution was called "damaging smoke" and unreasonable noise was defined as any sound

121 *Southern Scientists Association v. Environmental Quality Services Company*, BASHA 2422/9. (unpublished).

122 Sec. 10, *Sefer HaChokim* 1622, 132.

123 The court ruled that the three prohibitive conditions specified in §11 of the law did not exist (that the suit was filed in bad faith, the size of the group was too small to justify a class action, and the suit did not truly represent the interests of the entire group).

124 Tom Segev, *The Seventh Million* (New York, Free Press, 1992).

125 *Divrei ha Knesset*, 1960, p. 580.

126 Proposed Prevention of Nuisances Law, 1961, *Proposed Laws*, 1961, p. 66.

that disturbs three people or more.¹²⁷ The proposed law was tough; a second violation of the prohibition of noise or air pollution could result in a three-year sentence.¹²⁸ The law that eventually passed the Knesset in 1961 was sanitized by parliamentary staff. It prohibited the causing of unreasonable odors,¹²⁹ and air¹³⁰ and noise pollution,¹³¹ and authorized the Ministers of Health and Interior to promulgate regulations to control emissions¹³² and define allowable ambient levels as national standards.¹³³

The law also was the first (and only) Israeli environmental statute designed to have both criminal and civil status.¹³⁴ Most important for this discussion, it was specifically designed with the notion of empowering the public to enforce its provisions and contained extremely liberal standing requirements.¹³⁵ On the one hand, the law empowered members of the public who identified a violation of the law to file legal actions as civil plaintiffs in accordance with the Civil Wrong Ordinance.¹³⁶ Subsequent court decisions interpreted this to mean that rather than adding procedural requirements, the law simplified civil suits against polluters.¹³⁷ In other words, violations of the Abatement of Nuisance Law or its regulations were a sufficient basis for filing a tort suit, and there was no need to prove any harm to the reasonable use of plaintiff's property, as was required under the nuisance statute.

Simultaneously, the law was also registered in Israel's Criminal Procedure Code as one of the few laws empowering the Israeli public to file criminal actions against violators.¹³⁸ Unlike later laws, there

127 *Ibid.*, § 6(2), p. 67.

128 *Ibid.*, §10.

129 Prevention of Nuisances Law, *Sefer HaChokim*, 32, 1961, p. 58 (§3).

130 *Ibid.*, §2.

131 *Ibid.*, §4.

132 *Ibid.*, §8.

133 Sec. 5.

134 While several areas of activity can be addressed in both contexts, this is the only law that gives the public the choice.

135 The general requirements of private prosecutions under §68 of the Criminal Proceedings Law (Integrated Version) 1982, do not have many of the constraints specified in later environmental laws.

136 The Abatement of Nuisance Law, §13 specifically creates a "pipeline" to the Civil Wrongs Ordinance, thus facilitating civil litigation in an otherwise criminal law.

137 C.A. 190/69 *Israel Electric Company v. Avisar* (1969) 23(ii) P.D. 315-21.

138 Criminal Proceedings Law (Integrated Version) 1982, *supra* note 115.

was no threshold requirement for such "private attorney generals" to prove damages to the environment or to the prosecuting party.

The "Kanovich Law", as it came to be known, was not an immediate success. Enforcement efforts were initially aggressive, particularly against the black fumes emitted by diesel trucks and busses. However, the Ministry of Transportation supported a general strike by drivers, and the police were told to back off.¹³⁹ Indeed, the first regulation promulgated under the Abatement of Nuisances Law provided a loop-hole for polluting vehicles, whose operators were not liable under the law if they could get their vehicle to pass a Hartridge test and show reasonable tailpipe emissions within 24 hours of detection.¹⁴⁰ Indeed, the law was so poorly implemented that the term "Kanovich Law" soon became synonymous with idealistic but unrealistic legislation.¹⁴¹

A Dormant Environmental Movement

Subsequent to the Abatement of Nuisance Law, several environmental statutes were passed by Israel's Knesset, but from a citizen-enforcement perspective Kanovich's law remained anomalous. For the next twenty-seven years, no additional law directly empowered the public to file legal action to combat environmental violations.

The sole exception to this legislative reliance on government enforcement of environmental norms was Israel's Planning and Building Law.¹⁴² This restatement of the Mandate law authorized the Israeli public to file objections against building plans that affected them. A later amendment empowered the Minister of Interior to appoint select organizations, presumably with a proven record in public interest work, as bodies empowered to file "public interest" legal objections against development plans. Unlike the general public, appointed organizations could file objections without having to show a direct interest to the land or plan in question.¹⁴³ A list of ten

139 Tal, *Pollution in a Promised Land*, *supra* n. 86, chapter 7.

140 Abatement of Nuisances Regulations (Air Pollution from Motor Vehicles) 1963, KT 1425.

141 Ernest Katin and Mordechai Virshubski, "Environmental Law and Administration in Israel" (1975) 1 TAU Stud. in L. 210.

142 Planning and Building Law, 1965, §100 LSI.

143 *Ibid.*, §100.

organizations, both private and public institutions, was soon promulgated.¹⁴⁴

But, even though Israel's citizens had the power to utilize the courts to address a growing environmental crisis, from a legal perspective they remained largely passive. During Israel's first forty years the public at large was generally quiescent in urban environmental matters. While the country developed a robust environmental movement and the Society for Protection of Nature became the nation's largest organization of any type,¹⁴⁵ the focus was conservation rather than preventing pollution.

There were a few notable exceptions. "MALRAZ", the Israel Council for Prevention of Noise and Air Pollution, began to offer free legal aid and filed numerous actions against a variety of nuisances.¹⁴⁶ At its peak, several thousand citizens joined MALRAZ, and Yedidya Be'eri, its chairman, even served a term in the Knesset as a member of the Liberal party.¹⁴⁷

At the national level, two notable initiatives involved successful Supreme Court challenges to the sluggish pace of secondary legislation by the Ministers of Interior and Health in implementing the Kanovich Law.¹⁴⁸ The court ruled that under the Act the Ministers were not granted discretion as to whether or not to promulgate regulations defining unreasonable air or noise levels. Yet, when a series of air and noise regulations were finally promulgated by the Minister of Interior, rarely did the public utilize these as a basis for more aggressive public interest legislation against increasingly severe pollution problems in Israel.

During the 1970s and 1980s, when pollution of Israel's water, sea and land emerged clearly as serious environmental problems, citizen suits for direct legal action in these areas were not forthcoming.

144 The list was most recently amended in the Planning and Building Order (Determination of Public and Professional Bodies for Purposes of Sec. 100(3)) 1993, K.T. 1993 at 431.

145 Ofer Regev, *Forty Years of Flowering, the Society for Protection of Nature, 1953-1993* (Tel Aviv, SPNI, 1994).

146 Two MALRAZ cases that reached the Supreme Court were: C.A. 151/84 *Israel Electric Company v. Farsht* (1985) 39(iii) P.D. 1; *Israel Electric Company v. Avisar*, *supra* n. 137.

147 See "MALRAZ, 1973" in *The Biosphera*, No. 9, 1974, p. 3.

148 Bagatz 295/65 *Oppenheimer v. Minister of Interior and Health* (1966) 20(i) P.D. 309; Bagatz 371/71 *Eng. A. Feranio v. Minister of Health et al.* (1972) 26(i) P.D. 809.

Nonetheless, laws were in place that assigned responsibility to different governmental ministries to protect these resources, and omissions by these agencies were subject to judicial review. Yet, the Israeli environmental public did not take advantage of the increasingly liberal approach toward standing being forged by the Supreme Court with regard to public interest petitions in administrative law cases.

The court's basic axiom came to be that an honest, serious petitioner in a matter of clear, public-character importance to the rule of law was entitled to judicial review of administrative actions.¹⁴⁹ Accordingly, standing could be granted on the basis of the individual rights of members of a public interest organization.¹⁵⁰ Yet, during the 1970s and 1980s, when they went beyond nature preservation Israel's environmental groups seemed more comfortable with campaigns, demonstrations and non-legal tactics than public interest litigation.¹⁵¹

The New Wave of Public Interest Legislation

From a strictly legal perspective, it can be argued that Israel's signature on the Barcelona Convention to Protect the Mediterranean Sea heralded its "modern" age of environmental legislation. The resulting marine pollution laws departed from the old-style nuisance statutes, with their impractical requirements for demonstration of harm. The new laws relied heavily on administrative permits along with design and performance standards. The marine legislation brought with it another crucial change. Section 8 of the Marine Pollution Prevention Law (Land Based Sources), 1988,¹⁵² for the first time created a citizen suit provision within the body of the law to supplement government enforcement capabilities.¹⁵³ The law

149 E.g., Bagatz 1/81 *Shiran v. Public Broadcasting Co.* (1985) 35(iii) P.D. 365; C.A. 2901/97 *Ofer Brothers v. Glickman et al.* (not yet published).

150 *Adam Teva v'Din v. Local Planning Committee of Nahariyah*, 30012/96 T.M. volume 99 (1) 530.

151 Tal, *Pollution in a Promised Land*, *supra* n. 86.

152 *Sefer Hachokim*, 1988 p. 118. Even though the law technically involved ratification of the Barcelona Convention by the Israeli government, in fact, the law was the result of a private bill sponsored by MK Dedi Tzucker, a member of the leftist Meretz party and long-time advocate of expanding public participation in government.

153 Kanovich's Law was simply added to the list of laws for which it was possible to file a private criminal enforcement action.

prohibited dumping of sewage and other materials into the Mediterranean and Red Seas without a permit that was to be granted by an inter-ministerial committee.¹⁵⁴ Standing to file a criminal action against violators was granted to three types of parties:

- Any person regarding a violation committed within his personal property or that caused damage to his property;
- A Municipal government regarding a violation committed within its jurisdiction; and
- Any of the professional and public organizations specified according to par. 100(3) of the Planning and Building Law- 1965.¹⁵⁵

In adopting a list of recognized public interest organizations for private criminal enforcement, the law began a trend, which during the next decade would extend to six other laws. This has emerged as a uniquely Israeli approach to the issue, although Germany is presently considering a similar measure.¹⁵⁶

The private criminal action section also established another precedent that was soon adopted in subsequent legislation. Similar to the American requirements, a citizen prosecutor had to notify the Minister of Interior (and once the Ministry of Environment was established, the Minister of Environment) of his intent to file a legal action 60 days prior to formally filing an indictment. The private criminal suit could proceed as long as no prosecution was initiated by Israel's Attorney General in the interim.¹⁵⁷ Other laws would require the 60-day notification period for the polluting party as well.

It would take until July 1990 for the Marine Pollution "Land Based Source" regulations to come into the force. No sooner had they done so, however, than *Adam Teva v'Din* – Israel Union for Environmental Defense began the process of notification sixty days prior to filing suit against the city of Eilat for illegal discharges of the city's sewage effluent into the Red Sea.¹⁵⁸ In this case, the Ministry of Environment decided to initiate legal action in lieu of the fledgling environmental

154 *Supra* n. 101, § 2.

155 *Ibid.*, §8(1)a-c.

156 The draft of a new comprehensive law to be launched in Germany gives recognized NGOs the right to sue within rather strict limits, without the need to allege personal injury. Monica Neuman, Rechtsawaltin (Attorney), Bonn, Germany, personal communication, September 1, 1999.

157 *Supra* n. 101, §8(2).

158 Alon Tal, Proceedings of the Third Conference for Protection of the Gulf of Aqaba, Eilat, Inter-University Institute, 1996.

group.¹⁵⁹ While the case was never prosecuted to completion, Eilat eventually expanded its sewage system to pump its effluents north, away from the Red Sea for irrigation use by the neighboring desert kibbutzim.

Soon thereafter, as part of an omnibus revision to Israel's water law, the legal department of the Ministry of Environment included a provision empowering citizens to file criminal actions against violators. At this stage, standing was only granted to citizens who were able to prove they had actually incurred damage.¹⁶⁰ In practice, this procedural hurdle was sufficiently significant to stymie almost all litigation pursuant to it, until the law was eventually amended five years later.

The next landmark in public enforcement came in the form of a new law passed in the final days of the 12th Knesset. The Abatement of Nuisances Law (Civil Actions)¹⁶¹ was submitted in 1990 as private environmental litigation by MK Dedi Tzucker.¹⁶² The original bill stated in its explanatory notes that without clear financial incentives, private attorneys could not be expected to take an active role in citizen enforcement. The proposed law in many ways attempted to emulate the American citizen-suit model, and was therefore categorized as a civil law, empowering the public to file legal actions against a variety of environmental hazards: air pollution, noise pollution, solid waste, hazardous materials, marine pollution.¹⁶³ The bill's initial draft granted plaintiffs punitive damages in the event that they prevailed in a suit against a polluter. It was this provision which most invoked the ire of the Ministry of Justice, who feared a flooding of the courts and a deluge of baseless litigation due to the opportunistic tendencies of the Israeli public and the legal profession.

The final version of the law, which remains basically unchanged to date, was but a pale reflection of the original vision. Gone were the incentives of private attorney's fees. Indeed, after the Interior and Environment Committee got through with the bill and submitted it for a final reading, although it was still a civil law, plaintiffs were not entitled to sue for damages at all. Comparable to the aforementioned Dutch legislation, organizations and individuals were only empowered

159 Criminal File 538/92, Eilat Magistrate Court, 1992.

160 Water Law, §20(25) *Sefer HaChokim* 5751, p. 180.

161 *Sefer HaChokim* 5752, p. 184.

162 Proposed Laws, 2106, 1992 p. 179.

163 *Supra* n. 101, §1.

to request injunctions against present and future polluting activities or clean-up of past violations.¹⁶⁴ Moreover, the law allowed judges to balance the economic merits of the defendant in deciding whether or not to grant the injunction.¹⁶⁵ This constituted a marked departure from many years of Israeli case law that tended to view environmental penalties automatically within the context of citizens' rights.¹⁶⁶

Here, too, while the legislation ostensibly recognized the right of any non-profit organization whose primary goals were "environmental" to file suit, in fact, utilizing the law was difficult. An organization's standing was only granted if it could prove that one of its members was entitled to sue as an individual.¹⁶⁷ Taken together, the new Citizen's Suit law did little to further environmental interests. Although written thirty years earlier, the Kanovich Law and the suits filed under it against air, noise and odor pollution provided a much more favorable basis for initiating litigation.

Two amendments to the Water Law and to the Prevention of Nuisances (Citizen Suits) Law changed this dynamic, at least from the perspective of standing.¹⁶⁸ After these amendments, each statute now includes list of organizations authorized to file suit, largely based on that compiled by the Minister of Interior under the Planning and Building Law.¹⁶⁹ These organizations were empowered to file criminal actions against Water Law violators or civil suits under the new citizen suit law without having to prove direct damages to their members. In effect, these organizations enjoyed the same authority as Israel's Attorney General, the one *caveat* being that they had to give notice 60 days before filing suit and might be supplanted by government activity.

The most recent legislation to expand citizen suit rights is the

164 *Ibid.*, § 2.

165 *Ibid.*, § 3.

166 See Shamgar, J., in *Ata v. Schwartz* (1976) 30(iii) P.D. 785; D. Kretchmer "Judicial Conservatism v. Economic Liberalism: Anatomy of a Nuisance Case" (1978) 13 *Israel Law Review* 298.

167 Abatement of Nuisances Law (Civil Actions), *Sefer HaChokim* 1622, p. 132, 109, §6.

168 *Supra* n. 108. Benny Temkin, a political science professor turned politician, proposed changes to each law.

169 This list includes the Council for National Parks, Nature Reserves and National Sites, the National Parks Authority, the Nature Reserve Authority, the Society for Protection of Nature in Israel, the Council for a Beautiful Israel, the Public Council for Noise and Pollution Prevention in Israel, and *Adam Teva v'Din* – Israel Union for Environmental Defense.

Environmental Quality Law (Methods of Punishment) 1997.¹⁷⁰ The primary purpose of this law was to increase the actual monetary penalties that could be levied after conviction of environmental offenses. Yet the law also contained substantial provisions regarding citizen suits, primarily directed at creating a uniform standard. This led some laws, such as the Cleanliness Law and the Hazardous Substances Law, to be upgraded¹⁷¹ and to the relative advantage that had existed under the 1961 Kanovich Law being downgraded.¹⁷² The law adopted the list of “recognized organizations” across the board, and recognized the individual citizen plaintiff in cases where “the violation transpired in [his] individual property or caused him damage.”

In summary, Israeli law today ostensibly offers an unprecedented menu of legal options for public interest organizations and individuals who wish to enforce the law through the courts. Beyond the general access to the Supreme and District Courts to force administrative vigilance, both criminal and civil proceedings can be taken in cases involving noise pollution, air pollution, water pollution, marine pollution, hazardous waste abuses, solid waste contamination, and littering. The ostensibly impressive and empowering new legislation has not yet found expression in expanded litigation, however, a phenomenon which demands explanation. Or, as the old Yiddish expression goes: “If everything is so good – then why is everything so bad?”

The Local Climate for Public Interest Litigation

This cursory review of the development of environmental laws with citizen suit provisions reveals a gradual process of expanded public access to the courts for purposes of citizen enforcement. Yet, “*plus ça change, plus c’est la même chose.*” (The more things change, the more they stay the same.) A survey of some 250 environmental cases

170 *Sefer HaChokim* 1622 (1997), p. 132.

171 Sec. 21 (a) of the Protection of Cleanliness Law, 1984 (*Sefer HaChokim* 1984, p. 142) now contains a citizen suit provision as does §15b of the Hazardous Substances Law 1993 (*Sefer HaChokim* 1993, p. 28).

172 For example, the law granted standing to plaintiffs or private criminal enforcers comparable to those required under the Water Law amendments: private individuals had to show damages and public organizations were entitled to file suit. A sixty-day notification period was also required.

involving the public in Israel¹⁷³ confirms that the vast majority of citizen suits still involve litigation between private citizens and their neighbors, where basic property rights violations are alleged. Israel's common law legacy still casts a powerful shadow over the thinking of the public and lawyers alike, especially because it enables plaintiffs to not only enjoin the nuisance but also receive payment of financial damages.

The reliance on property-based cases may also reflect an incorrect perception among the legal community regarding the prevailing attitude of the Israeli Court toward standing. Historically, it was hard to find a judge who might recognize an individual's standing simply because she decided to "take on" pollution of the Mediterranean Sea, initiate a request to rehabilitate a river, or tackle Tel Aviv's air pollution without proving that her property was injured.¹⁷⁴ And so it was that direct enforcement against polluters in Israel began in a sporadic way during the 1950s and '60s within the context of conventional tort and nuisance law. The most famous of these cases involved a legal action by a local apartment owner against the Ata textile plant in Qiriyat Ata.¹⁷⁵ The appellant factory was one of the major employers in the Haifa region. The case preceded the extensive noise regulations that have been promulgated within Israel during the past twenty years and relied largely on the impressions of the Magistrate Judge who reached her subjective impression after visiting

173 Orit Marom, "Public Enforcement of Environmental Law: Theories and Practice", Masters thesis, in preparation (2000).

174 In the case of *Avisar v. Israel Electric Company*, Magistrate Judge Yosef Harish (later to become Israel's Attorney General) refused to hear an appeal from individuals alleging damage from a general increase in air pollution concentrations from the Reading D power plant. While the decision was formally overturned by Beisky, J., in the Tel Aviv District Court and confirmed by the Supreme Court C.A. 190/69, *Israel Electric Company v. Avisar* (1969) 23(ii) P.D. 315-21, the attitude ascribed to by Judge Harish was also deeply rooted in the thinking of other judges who were raised with a conservative view towards standing. Historically, an important case in planning law was Bagatz 394/72 *French Hill Hotel Ltd v. Jerusalem Planning Committee et al.* (1973) 27(ii) P.D. 325, where the Supreme Court ruled that the Hebrew University Student Committee lacked sufficient interest in the land (just meters from the University campus) to justify its legal objections to the planning process.

175 See David Kretchmer, *Nuisances in the Law of Civil Wrongs – The Different Torts*, G. Tedesky (ed.) (Jerusalem, Sacher Institute, Hebrew University, 1982).

the apartment.¹⁷⁶ Nonetheless, her decision did not hesitate to impose limitations on the factory's production schedule until it could comply with a general "reasonable" standard for noise. After two appeals to the Supreme Court, Shamgar, J., supported a narrow construction of the court's discretion to deviate from injunction remedies once a nuisance had been established.¹⁷⁷ Economic considerations were considered irrelevant within the judicial discretion to be applied in the specific context of tort law.

A more recent case of this type was the civil action filed by a Bedouin neighborhood in Shfaram against a concrete plant located only a few meters from the local residents' homes.¹⁷⁸ Beyond the noise nuisance from the plant, the plaintiffs argued that the incidence of asthma was extremely high due to the excessive dust concentration. After years of protracted litigation and unsuccessful compromises in the form of temporary injunctions, the Haifa Magistrate court ultimately issued an extremely harsh judgment calling for the plant to be closed.

But while impressive as individual achievements, these cases ultimately are the exceptions that prove the rule. Clearly, objective legal obstacles remain that can explain the relatively poor record of Israel's public in utilizing its legal rights to directly enforce environmental laws. Regardless of jurisdiction, historically, there have been two inter-related categories of barriers to environmental public interest litigation. The first is the legal requirements for standing in environmentally related cases, and the second is the high costs and corresponding lack of financial incentives for the petitioners.¹⁷⁹

A threshold theoretical issue associated with any non-governmental enforcement of environmental laws goes to the question "Who is the most appropriate party to represent an environmental interest?"¹⁸⁰

176 The Prevention of Nuisances Regulations (Unreasonable Noise) 1990, (The Prevention of Nuisances Regulations (Noise) 1992, which replaced simpler regulations from 1966 and 1976, respectively.

177 C.A. 44/76 *Ata Textiles Corporation v. Zev Schwartz* (1976) 30(iii) P.D. 785.

178 C.A. 20186/92 Haifa District Court, *Mahmud Ka'abiah v. Joseph Abu Alula* (1996) 98(i) *Piskei Mechozom* 48, 208.

179 Bagatz 1681/90 *Action Committee Regarding Expansion of Highway, the Accadia-Sea View Segment and 90 others v. Minister of Construction and Housing et al.* (1992) 46(i) P.D. 509.

180 In Israel the question of an animal's legal standing arose in 1978 in the matter of *Israel Society to Prevent Cruelty to Animals Association et al. v. Tel Aviv-Jaffa and Five Others* (1978) 32(ii) P.D. 404. The petitioners petitioned the court with the goal

The traditional, common-law answer has usually been "the party whose legal rights have actually been violated." Yet, the paradox of environmental issues has also been that in many cases, the party with the most direct, specific environmental interest is incapable of defending these rights. Courts have viewed standing as self-evident in legal actions where damage was inflicted as a result of a direct violation of a specific environmental right. The standard example here would be cases of severe noise nuisances caused by a neighbor's air conditioner¹⁸¹ or a nearby factory.¹⁸² Indeed, who else is a more appropriate plaintiff than the citizen who has suffered from direct exposures? But empirically, it is now clear that it also takes a very rare citizen who has the time, temerity and tenacity (not to mention the money) to take on such cases. Usually, Israelis either learn to either live with the nuisance or move.

Moreover, conventional nuisance theory is of little or no help when environmental damage is diffused, impacting a broad, frequently ill-defined community. Examples of these environmental problems include exhaust from motor vehicles, damage caused by discharge of

of preventing animal performances, arguing that they constituted "cruelty to animals." As to the matter of standing, the petitioners argued that they were in court in order to defend their own interests as well as those of the animals that were protected by law. The Supreme Court chose not to delve into the issue of standing and went straight to the substantive issue at hand.

Twenty years later, however, the Supreme Court opted to address the issue, in *Let the Animals Live Association v. Hamat Gader Recreational Enterprise and Five Others* (1997) P.D. 51(3)832. In this case, the animal rights organization sought to enjoin the defendant from continuing "human versus alligator battles" as a tourist gimmick because it constituted "torture" to the animals. The court chose to conduct an in-depth discussion of the independent rights of animals. It held that while it was true that the school of thought granting rights to animals essentially was not recognized in legislation and court precedent, nonetheless, humans in their activities need to consider the interests of animals. Through this circuitous formula, the courts essentially recognized the legal "interests" of animals, without actually making a decision regarding animal standing. This was justified by the newly enacted Cruelty to Animals Law (Protection of Animals) 1994, which resolves the issue by creating a right of standing to "a pro-animal organization." In so doing, animal rights joined the expanding Israeli approach to environmental standards through the recognition of specific organizations which are empowered to litigate on behalf of broader public interests.

181 *Shapira v. Ari et al.*, C.A. 109/89, Jerusalem District Court, 1992 (unpublished).

182 *C.A. 44/76 Ata Textiles Corporation v. Schwartz* (1976) 30 (iii) P.D. 785.

effluents into the sea, contamination of ground water, or the refusal of a municipal government to expedite waste reduction programs. Ultimately, all members of the general public face environmental exposures which negatively affect their right to breath air or drink water that have only "reasonable" concentrations of pollutants; many believe that their right of access to Israel's seashore has been compromised by development projects. Taking on such battles as an individual is positively quixotic.

The legislative intent behind Israel's environmental laws is obvious; it encourages citizens to band together as either a collection of individuals or a single body, such as a non-profit organization (an *amutah*) or *ad hoc* neighborhood action committee,¹⁸³ in order to file suit against a polluter. The new addition of public interest rosters provides statutory reinforcement of an already vigorous non-profit, organizational culture. Yet, even in such cases, the objective hurdles facing public interest organizations are considerable.

These impediments, of course, are a far more profound factor for ordinary citizens who are not among the select organizations empowered to file suit and for whom litigation to enforce the law is not a trivial matter. Not many citizens can show that effluents discharged into the sea passed through their personal property or affected their bank accounts. Moreover, in most pollution cases, proving damage remains difficult, given the number of alternative sources of contamination that can truncate a purported chain of causality. Indeed, on two subsequent occasions, criminal actions filed by *Adam Teva v'Din* against the city of Ra'anana¹⁸⁴ and Haifa Chemicals were challenged *prima facie* due to purported lack of evidence regarding causation of harm.¹⁸⁵

The problem of standing for individuals should not be considered a monolithic issue. Of late there have been meaningful improvements within the planning realm, and Israeli courts have begun to send a different message to citizens. A recent legal action to enjoin

183 *Ka'abiah v. Abu Alula*, C.A. 20186/92, Haifa District Court, 1996 (unpublished)

184 A. Tal, "Civil Actions to Expedite Treatment of Municipal Effluents in the Poleg Spring, The Limitations and Potential of Legal Actions against Polluting Municipalities" (1995) 5 *Ecology and Environment* 151-55 (in Hebrew).

185 Daniel Fisch, "Israel's Environmental Problems" (1998) 5 *Israel Palestine Journal* 20.

construction of the Tel Aviv "Sea and Sun" luxury apartments recognized a local public's right to challenge the development. Here the court confirmed a broad interpretation of the statutory definition of the public as being entitled to object to development plans ("[o]ne who has an interest in a detail of the plan or sees himself injured by a submitted plan").¹⁸⁶ In litigation a few kilometers to the north, Herzliyah Pituach residents, living in the vicinity of the city's marina, saw this as a sufficient basis for challenging the legitimacy of luxury apartments that were planned behind the new wave-breakers.

It has been argued on several occasions that the present legal situation is desirable, lest the courts be overwhelmed by a plethora of public interest litigation. But given the condition of Israel's environment, this hardly seems an undesirable outcome. A more compelling position supporting the *status quo* involves the present barriers to suits that abuse the public's right to file criminal actions against individuals and companies. The potential stigma associated with indictment, and the attendant publicity, certainly justify a modicum of precaution from a public policy perspective.

Private Criminal Actions concerning the environment are, in fact, a fairly unique Israeli phenomenon. Many countries have begun to allow government prosecutors to treat environmental excesses as criminal infractions.¹⁸⁷ Yet, since the 1961 Kanovich legislation, Israeli law goes even further, allowing the public to file private criminal actions against polluters. These actions (known locally as "kuvlanah") are grounded in the Criminal Procedure Law.¹⁸⁸ Section 64 refers to the

186 *Organization of Property Owners in Section 8 Block 6621 et al. v. Planning Committee of Tel Aviv-Jaffa*, D.A. 2053/99, Tel Aviv District Court, 1999.

187 See, e.g., G.A. Biezeveld and J.W. Wabeke, "Strategy on Enforcing Environmental Law through Law by the Public Prosecutions Department in the Netherlands," in *Fifth International Conference on Environmental Compliance and Enforcement* (Washington, D.C., U.S. EPA, 1998), 353-71. See also Andreas Gallas and Julia Werner, "Transboundary Environmental Crimes: German Experience and Approaches," *idem*; J. Libber "Making the Polluter Pay, EPA's Experience in Recapturing A Violator's Benefit from Non-Compliance," *idem*, at 365-83. In the U.S., a Florida court handed out the "longest jail term ever in an environmental case" – 13 years for knowingly pouring toxic waste into the Tampa sewage plant. "Florida Man Gets Longest Term in Environmental Case", *Yahoo News* (<http://dailynews.yahoo.com>), Monday, August 16, 1999.

188 Sec. 64.

law's second appendix which lists the criminal provisions private citizens can prosecute. While "slander" may be the most commonly used provision, environmental violations most certainly are disproportionately represented on the list. The number of private criminal actions filed during the past forty years, however, has been minimal – this, despite the relatively open orientation of the Kanovich Law to private criminal actions.

It would seem, therefore, that rather than standing *per se*, it is the inherent difficulty of meeting the standard of "beyond a reasonable doubt," foregoing disclosure procedures and other procedural disadvantages that discourage private criminal litigation to protect the environment. In most respects, criminal decisions are much more difficult to prosecute than civil actions.¹⁸⁹ Not only is it harder for the public interest prosecutor to reach a positive verdict in the criminal realm, often she faces a judge who simply does not perceive a factory owner or mayor as a legitimate "criminal defendant." Lack of judicial enthusiasm for a criminal case may ultimately be the reason why the Ministry of Environment agreed to delay proceedings in the Eilat sewage prosecution or why a private criminal action filed by *Adam Teva v'Din* against the Neshet Har Tuv Cement plant in Beit Shemesh fizzled.¹⁹⁰

At the same time, public interest criminal prosecutions can offer great leverage in negotiations. No one wants to be a convicted criminal! In 1995, in one of the more ambitious private criminal efforts, *Adam Teva v'Din* along with a group of local fishermen sued both the Haifa Chemicals Factory and the near-by Dshanim Ltd. plant, major producers of chemical fertilizers and other chemicals.¹⁹¹ The factories were the most conspicuous of a complex of petrochemical plants that had been dumping their highly acidic effluent into the Kishon river for decades without the necessary pretreatment.¹⁹² The

189 Alon Tal, "The Economic Benefit from Noncompliance with Environmental Laws, The Role of Economic Analysis in Penalties for Polluters in Israel", *Ecology and Environment*, January-February 2000.

190 *Vanunu and Others v. Neshet Cement Corp.*, K.P. 2883/91, Jerusalem Magistrate Court (1991).

191 *Adam Teva v'Din v. Haifa Chemicals et al.*, K.P. 5790/94 (unpublished).

192 Daniel Fisch, "Israel's Environmental Problems" (1998) 5 *Israel Palestine Journal* 20.

Kishon River, generally considered Israel's most polluted, is perhaps the single greatest contributor to the pollution in the Haifa Bay. This criminal action was based on both Israel's Water Law and the Prevention of Marine Pollution Law (Land Based Sources). The case concluded in a court decision that ratified a consent agreement in which the sides prescribed the necessary steps and discharge standards that the factory had to meet. In addition, the decision established a publicly run fund, to be paid for by the first defendant, for environmental quality research in the Haifa region. Finally, Haifa Chemicals agreed to pay the full losses of the fishermen¹⁹³ plaintiffs as well as legal fees of the public interest organization, which after two years of intense litigation had reached close to half a million dollars.

It is important to emphasize that the payment of full attorneys fees constituted a concession that was reached during the parties' final settlement negotiations, not as a result of a court decision or new judicial policy. Rather than creating a precedent and inspiring a new climate for public interest litigation, four years after the case's conclusion the award of attorneys' fees against Haifa Chemical remains anomalous.

VI. *Making Citizen Suits a Meaningful Tool for Environmental Enforcement in Israel*

Before moving to the prescriptive section of this article, it would be well to summarize the state of Israeli law with regard to citizen enforcement of environmental violations. Clearly a basic infrastructure of environmental laws exists beyond conventional tort law. Yet, over the past forty years this infrastructure has been utilized only sporadically at best by the Israeli public.

The Israeli experience would not be so discouraging if there were no alternative models suggesting the potential of citizen enforcement. While Europe is hardly a model for emulation, the U.S. serves as a valuable benchmark. One can make a compelling argument that the greater success in the U.S. is the result of societal factors (affluence, the general litigiousness of American society, greater environmental commitment by the public). Nonetheless, meaningful substantive differences between the two legal approaches to citizen environmental

193 Kishon River Authority Annual Report, Haifa, 2001.

suits emerge from a systematic comparison. Table 1 accordingly offers a summary of the two systems:

Comparison of Israeli and American Citizen Suit Laws

	<u>ISRAEL</u>	<u>U.S.</u>
Type of citizen suits	Criminal/Civil	Civil
Attorneys' fees	No	Yes
Past violations	Yes	Yes
Monitoring reports available	No	Yes
Strict liability	Sometimes	Yes
Creative sanctions	No	Yes
Sticklers for standing	No	Yes
Highest Fines	\$15,000/day	\$25,000/day

The table indicates that in some areas Israel law is every bit as "liberal" as the U.S. citizen suit statutes, and in some respects even more encouraging of public legal involvement. For instance, for a major environmental organization establishing standing in court would seem to constitute a significantly more difficult obstacle under the American system than it does in Israel. Indeed, once recognized under law, environmental organizations in Israel face only procedural hoops of notification prior to their ability to file suit (unless the government decides to file action in their stead).

Yet the comparison also confirms that there are several other areas in which the U.S. system is fundamentally different and, at an intuitive level, more favorable for public interest litigation. A closer look at these differences offers a reasonable explanation for Israel's lackluster citizen suit performance.

Attorneys' Fees

There is little doubt that the U.S. approach to attorneys' fees has been the single greatest factor in the country's citizen environmental enforcement boom. The American criteria (see note 56, *supra*) generate prodigious awards, instantly turning the environmental law field into a potentially lucrative one. Not only has the Israeli rule with regard to

attorneys' fees always been "loser pays," in fact, the actual amounts granted to winning plaintiff attorneys are usually symbolic and a mere fraction of market rates. Presumably, this judicial policy involves an attempt to discourage excessive litigiousness in society. Environmentally, at least, it works.

Moreover, in Israeli environmental cases it is not uncommon for courts not to grant successful citizens or NGOs awards at all, especially when they reach a consent agreement with the defendant. Thus, for example, when after four years of heated litigation, a complex of food factories in the Western Galilee essentially admitted its violation of the Water Law and agreed to install a waste water treatment system, Israel's Water Court refused to grant the petitioners, two NGOs (Citizens for the Western Galilee Environment and *Adam Teva v'Din*) attorneys' fees at all.¹⁹⁴ In the one Israeli case in which an environmental public interest group received the market rate for their litigation due to a settlement agreement, the fees came to \$500,000.¹⁹⁵ Arguably, this is greater than all the other court-ordered attorneys' fees in the history of Israel combined!

Self-Monitoring and Access to Information

The second reason that citizens have been such an effective enforcement partner in the U.S. is because putting together a suit is relatively simple. The plethora of information provided by polluters themselves, primarily about emissions, is frequently so incriminating that little additional evidence is necessary to successfully conduct a trial.¹⁹⁶ Reaching an out-of-court agreement with a polluter when such data is available is even easier.

Israel has begun to require many plants to monitor their emissions and discharges through their business licenses. Factories handling serious quantities of hazardous materials are required to submit "risk assessments" as part of a fairly voluminous "factory file".¹⁹⁷ Yet, the amount of data required of Israeli factories is far less than that

194 *Citizens for the Western Galilee Environment and Adam Teva v'Din v. Water Commissioner et al.*, Water Appeal 11/93, Haifa District Court (unpublished).

195 *Adam Teva v'Din v. Haifa Chemicals*, *supra* n. 191.

196 R.M. Klein, "The Continuing Nature of Notification Violations under Environmental Statutes" (1996) 26 *Environmental Law* 565.

197 Hazardous Substances Law 1993 (*Sefer HaChokim* 1993, p. 28).

expected of American facilities. This is true of both the frequency and the level of detail designated. For example, relatively few smokestacks in Israel have continuous monitors. Moreover, frequently the crucial data needed to characterize non-compliance are buried in volumes of information forwarded by a factory. But self-monitoring is expanding locally and, theoretically, there is no reason why this information should not be readily available to the public. In practice, the relevant government ministries have not yet translated the Freedom of Information Law into the intended transparency. For example, the website of the Haifa Union of Cities Environmental Protection Unit, which contains real-time results of air quality monitoring, remains an anomaly. But, in theory, there is no reason why citizens should not be able to access a site on the internet which tells them not only the emission and performance standards of local factories but what they report is actually coming out of their smokestacks and sewage pipes.

Finally, it is crucial that for the next five to ten years the Ministry of Environment provide a strong oversight presence, to overcome a "dismissive" approach to environmental standards among many Israeli industries. In a word, there is a substantial amount of inaccurate reporting or outright fraud. For example, the case of *Adam Teva v'Din v. Haifa Chemicals* was based on a monitoring report by a public-interest analytical chemist who showed that every factory discharging effluents into the Kishon river was understating the actual concentrations of pollutants in its waste stream.¹⁹⁸

Civil Penalties

There are compelling ethical reasons to retain the present system of criminal law in environmental matters, especially when a polluter knowingly imposes significant environmental risk on an unwittingly exposed population.¹⁹⁹ Here, environmental offenses are no different than other acts of assault. There are also a variety of tactical reasons why it might pay to file a criminal action. These include increased attention from the media, the relative simplicity of filing criminal

198 *Adam Teva v'Din* – Israel Union for Environmental Defense, *Annual Report*, 1995.

199 A. Tal, "On Protected Values and Environmental Violations" (1992) 40 *HaPraklit*, *Journal of the Israel Bar Association* 321-413 (in *Hebrew*).

actions, the relative speed of criminal actions versus civil ones and, of course, the deterrent impact of a criminal conviction.

But from a purely pragmatic vantage point, citizen suits will become infinitely more attractive if the system is expanded to include civil penalties. Recently, Professor Marsha Gelpel has emerged as a key advocate of civil penalties within Israel: "The major innovation I would suggest is to provide Israeli courts with statutory authorization to issue civil penalties. These penalties would be distinguished from criminal penalties by their civil nature. They would be larger in amount than administrative penalties. Civil penalties have the potential to become a major enforcement tool. As compared to criminal fines, they are easier to impose and therefore should be imposed on a greater number of violators."²⁰⁰

Creative Penalties

Fines, injunctions and jail sentences are the only real tools that judges have in ruling on environmental cases. These can require remedial action, as in the "Cleaning Orders" under Israel's newly amended Protection of Cleanliness Law.²⁰¹ But in certain cases a broader array of penalties may be more effective. During the past decade, the Indian Supreme Court has become extremely interventionist in environmental matters.²⁰² In one of its decisions, it ruled in favor of mandatory anti-pollution promotional commercials to be prepared for movie theaters. American courts have begun to require polluters to fund a variety of community projects and environmental initiatives.²⁰³ A variety of clean-up measures could be imposed. And, to a recalcitrant factory owner who had affected the community's health negatively, community service would seem a fair sanction. At

200 M. Gelpel, "The Goals of Enforcement and the Range of Enforcement Methods in Israel and the United States" (1998) 14 TAU Stud. in L. 135-77.

201 Cleanliness Law, 1984, *Sefer HaChokim* (1984) p. 142.

202 "It is the Courts and most important the Judges who man these Courts who are required to give body and soul to these vibrant concepts of environmental rights." M. F. Saladna J., High Court of Karnataka, Bangalore, India, August 1998, quoted in International Network for Environmental Compliance and Enforcement *Citizen Enforcement: Tools for Effective Participation* (Washington, D.C., 1998) at 7.

203 U.S. EPA, *Principles of Enforcement* (Washington, D.C., 1992).

the very least, creative penalties would enjoy much greater publicity, presumably enhancing their deterrent potency.

The Level of Fines

Fines in Israel are pitifully low. By the Ministry of Environment's own figures, few fines during the past three years exceeded New Israel Shekel 10,000 (\$2,500 US).²⁰⁴ The highest fine during the 1990s, issued against the Daliat HaCarmel Municipality, was only NIS 180,000 (less than \$50,000). An Israeli citizen who wants to "make a difference" can hardly expect even a favorable verdict on these terms to affect a polluter's bottom line considerations. By way of comparison, while most of the actual enforcement of American environmental laws is done by the states, federal enforcers alone issue fines to environmental violators in excess of \$100 million each year.²⁰⁵

Conclusion

Israeli law has embraced citizen suits as an important component of the national enforcement strategy. Unfortunately, the number of legal actions by the public and NGOs is still far too small to make a real difference in environmental quality nationally. The U.S. experience suggests that a few fundamental changes should be adopted in order to allow citizens to play the role the legislature expects of them:

- Building in a clear fee structure to reward attorneys who successfully represent environmental interests;
- Making self-monitoring a compulsory component of business licenses for plants that emit pollutants;
- Creating the frameworks (e.g., web-based data bases and environmental catalogues that summarize the environmental conditions for business licenses, etc.) for simple transfer of this environmental

204 Ministry of Environment, "Prosecution Files", internal memo, 1999, on file with author. See also, A. Sharon and S. Motes, "Statistical Data - Legal Prosecutions", seminar paper submitted to Dr. Alon Tal, Tel Aviv University, 1997.

205 J. Libber, "Making the Polluter Pay, EPA's Experience in Recapturing a Violator's Benefit from Non-Compliance" in *Fifth International Conference on Environmental Compliance and Enforcement* (Washington, U.S. EPA, 1998) at 468.

data to the public to facilitate public interest litigation when violations are clear;

- Returning civil penalty provisions to the Abatement of Environmental Nuisances Award (Citizen Suits) Law and expanding the remedies available to the courts in confronting pollution cases;
- Removing the procedural barriers to class action suits that make them such a ponderous legal proceeding; and
- Establishing minimum fines for environmental violations, especially for second-time offenders.

There is, of course, no guarantee that statutory revisions will produce an overnight revolution in public interest litigation trends. As mentioned, substantial sociological factors are present which can also explain the public's reticence to sue polluters in Israel. Yet, with Israeli environmental consciousness growing every year and the proliferation of environmental NGOs at the local and national level, there is no reason why citizen suits should not play a central role in improving the nation's environment. However, this will not happen until some fundamental legislative changes take place, completing the process begun in 1961 to allow the public's commitment to public health and Israel's natural resources to be expressed in the legal realm.