

PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW AND LEGAL STATUS IN INDIA

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Abstract: *Widespread concern about the need for global action for the protection of the natural environment is a relatively recent phenomenon. Strengthening human resource capabilities for addressing the challenges of environment and development is a critical requirement for all countries. An integral component of such capacity building is the application of environmental law as an instrument for effectively controlling pollution, conserving natural resources, and promoting their sustainable use. Law is an effective means for translating environmental policies that incorporate global, regional and national priorities, concerns and practices into action. Agenda 21 emphasizes the need to promote the efficacy of international environmental law as well as the integration of environment and development policies through international agreements and institutions. To address environmental issues that India and other countries face, it is imperative and important to initiate action at all levels - global, regional, national, local, and at the community level. It is not enough to have international agreements and instruments on environmental issues; but implementation and enforcement of these policies and agreements to a large extent determine their impact and effectiveness. To bring about change at all levels, it is important to understand the global scenario and India's position in the global arena. Modern international environmental law received a major boost with the 1972 United Nations Conference on the Human Environment held in Stockholm, Sweden, which brought much broader attention to the issues.*

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Introduction

International law as a rule signifies the 'laws of nations that states feel themselves bound to observe. It is the structure of law which governs relations among states. It is the body of law, which comprises in greater part the principles and rules of conduct. At one time, states were the only entities enjoying international legal personality and having rights and duties, but today, international organizations, non-state groups and individuals are also seen as being international legal entities in certain situations. The scope of international law is still evolving. Since the Second World War, international law has further evolved under the auspices of the United Nations, to include international co-operation and human rights. In order to address the new environmental challenges which directly concern developmental issues, international environmental law is evolving intensely as a new branch of international law. The role of environmental law in fostering sustainable development is significant. It provides the foundation for governmental policies and actions for the conservation of the environment and for ensuring that the use of natural resources is both equitable and sustainable. However, even after over three decades since the introduction of a modern environmental law regime in India, the state of the environment continues to be a matter of great concern. Moreover, environmental legal literacy in India is still low and is often one of the greatest impediments to

public participation in environmental decision making. In addition, numerous 'soft law' instruments on the environment have been promulgated such as the 1982 World Charter for Nature, the 1992 Rio Declaration on Environment and Development, and the 2002 Johannesburg Declaration. The development of international law is a dynamic process, which requires continuous examination of not only current, but also future environmental trends and challenges. International environmental law is inspired by a number of innovative ideas, concepts and principles, facilitative and enabling mechanisms, and procedures. Among these are the concepts of sustainable development, the precautionary approach, polluter pays, common concern for humankind, and common but differentiated responsibilities of countries. These concepts and norms have been incorporated in major environmental conventions such as the biodiversity convention, desertification convention, climate change convention etc.

Development of International Environmental Law

By the year 1972, a body of international environmental rules at the regional and global levels, and international organizations addressing international environmental issues emerged. During this period, there was a lack of co-ordination to develop a coherent international environmental strategy. Moreover, no international organization had overall responsibility for coordinating international environmental policy and law. It was during this time that the United Nations took charge and convened the first global conference on environment at Stockholm known as the United Nations Conference on Human Environment. This conference was the outcome of an Intergovernmental Conference of Experts on the Scientific Basis for Rational Use and Conservation of the Resources of the Biosphere convened by UNESCO in 1968. The Convention considered the human impact on the biosphere, including the effects of air and water pollution, overgrazing, deforestation and the drainage of wetlands, and adopted 20 recommendations reflecting themes adopted at the 1972 Stockholm Conference.

Stockholm Declaration on Human Environment

The Stockholm Declaration is the product of the first major international conference on environment and its relationship with humans held under the auspices of the United Nations in 1972 at Stockholm. The Conference was attended by 114 States and a large number of international institutions and non-governmental observers. The Conference adopted a Declaration containing 26 Principles which are designed to 'inspire and guide the peoples of the world in the preservation and enhancement of the human environment.' The 26 Principles reflected a compromise between those states which believed it should stimulate public awareness of, and concern over, environmental issues, and those states who wanted the Declaration to provide specific guidelines for future governmental and intergovernmental action. Several different groups of principles are contained within the Declaration. Two Principles proclaim rights (Principle 1 and 21), four deal with conservation of resources (Principles 2-5), two deal with pollution (Principles 6 and 7), eight address development issues (Principles 8-15), nine address specific non-legal topics (Principles 16, 20, 23 and 26, etc.), and one considers state responsibility. The Stockholm Declaration is not a legally binding document but has an important impact on international environmental law. It has acted as a catalyst for the development of further measures in international law protecting the environment.

Sources of International Environmental Law

The traditional sources of International legal obligations which equally apply in the field of the environment comprise 'the body of rules which are legally binding on states in their intercourse with each other. These rules derive their authority, as per Article 38 (1) of the Statute of the ICJ, from four sources: treaties, International custom, general principle of law recognized by civilized nations, and subsidiary sources. The main "subsidiary sources" are the decisions of courts and tribunals and the writings of jurists. Apart from the ICJ the other international courts

dealing with environmental issues are the European Court of Justice, the European Court of Human Rights, GATT Dispute Settlement Panels and international arbitral tribunals. "National" courts and tribunals have often interpreted international obligations in environmental law field and jurisprudence of these courts is likely to become an important source in the development of international environmental law. According to Prof. J.G. Starke, "the decisions of state courts may, under the same principle as dictate the formations of customs, lead directly to the growth of customary rules of international law.

General Principles and Rules of International Environmental Law

General principles of international environmental law reflect in treaties, binding acts of international organizations, state practice, and soft law norms. They are general in the sense that they are applicable to all members of the international community in respect of the protection of the environment. According to Prof. Philippe Sands in environmental law context, the main general rules and principles which have broad support and are frequently endorsed in practice are:

1. "The obligation reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, namely that states have sovereignty over their natural resources and the responsibility not to cause environmental damage.
2. The principle of preventive action.
3. The principle of good neighborliness and international co-operation.
4. The principle of sustainable development.
5. The precautionary principle.
6. The polluter-pays principle.

Legal status of General International Environmental Principles

Prof. Philippe Sands has opined that in the absence of judicial authority and conflicting interpretations under state practice it is frequently difficult to establish the parameters or the precise international legal status of each general principle or rules. The legal consequences of each in relation to a particular activity or incident must be considered on the facts and circumstances of each case and take account of several factors. Some general principles or rules may reflect customary law, other may reflect emerging legal obligations, and yet others might have an even less developed legal status. Of these general principles and rules only aforesaid Principle 21 of Stockholm, Principle 2 of Rio and the good neighborliness are sufficiently substantive to be capable of establishing the basis of an international cause of action i.e. to give rise to an international customary legal obligation the violation of which would give rise to a legal remedy. The status and effect of the others remains inconclusive, although they may bind as treaty obligations or, in limited circumstances, as customary obligations. Whether they give rise to actionable obligations of a general nature is open to question. Prof. Sands is also of the view that the international community has not adopted a binding international instrument of global application which purports to set out the general rights and obligations of the international community on environmental matters.

International Law and Constitutional Duty

Though Part IV (Article 37 to 51) of the Indian Constitution, known as the Directive Principles of State Policy, is not enforceable by any court but principles contained therein are fundamental in the governance of the country and it "shall" be the duty of the State to apply these principles in making laws (Article 37). Article 51 specifically deals with international law and international relation, inter alia, provides that the 'state shall endeavor to foster respect for international law and treaty obligations.' In *Telephone Tapping Case* the Supreme Court by invoking Article 51 developed right to privacy as a fundamental right under Article 21. Here, the court took inspiration from the privacy provision of the Covenant on Civil and Political

Rights. However, in environmental matters, it appears, no such use of Article 51 has been done by the courts. Here, it may be recalled that the courts have invoked Article 48-A (duty of the state to protect environment) to develop a fundamental right to environment as part of the right to life under Article 21.

Statutes Enacted in India Pursuant to the International Environmental Law

In India many important environmental statutes have been enacted to ratify or to fulfill national obligations under the international environmental treaties, conventions and protocols etc. Hereinafter, an effort has been made to present a table which contains a list of international environmental laws and relevant Indian environmental statutes showing close linkages between the same.

Enforcement and Compliance of International Environmental Law by India

Over the years, together with a spreading of environmental consciousness, there has been a change in the traditionally-held perception that there is a trade-off between environmental quality and economic growth as people have come to believe that the two are necessarily complementary. The current focus on environment is not new; environmental considerations have been an integral part of the Indian culture. The need for conservation and sustainable use of natural resources has been expressed in Indian scriptures which are more than 3,000 years old and is reflected in the constitutional, legislative, and policy framework as also in the international commitments of the country. India has played a major role in the international fora relating to environmental protection. The major challenge for India in implementing the international commitments is to combat poverty and also development on sustainable basis. In June 1972, Mrs. Indira Gandhi, the then Prime Minister of India, emphasized at the first UN-sponsored Conference on Environment that poverty is the worst form of pollution and the most urgent issue facing the international community. Since then, India has been reminding the industrialized world that so long as poverty remains the main stumbling block in its road to development, its efforts to protect the environment and conserve resources would not bear the necessary fruits. For India, as well as for other nations of the South, removal of poverty and environmental protection are two sides of the same coin. A new authority for environmental protection known as National Council for Environmental Policy and Planning within the Department of Science and Technology was set up in 1972. This Council later evolved into a full-fledged Ministry of Environment and Forests (MoEF) in 1985, which today is the apex body of in the country for regulating and ensuring environmental protection.

Role and Status of the Indian legal system

The role of judiciary depends on the very nature of political system adopted by a particular country. This is the reason that role of judiciary varies in liberal democracy, communist system and countries having dictatorship. The role of judiciary has been important in liberal democracies like India. Constitution of India in fact took inspiration from US Constitution and therefore adopted similar concept of judicial review. In independent India, history of judiciary, judicial review and judicial activism has been a fertile area for legal researchers. It is now a well-established fact that, in India, in view of legislative and executive indifferences or failures, the role of judiciary has been crucial in shaping the environmental laws and policies. The role of the Indian Supreme Court may be explained quoting the views of Professor S.P. Sathe and Professor Upendra Baxi two leading academics who have extensively written on the role of judiciary in India. Professor Sathe has analyzed the transformation of the Indian Supreme Court "from a positivist court into an activist court". Professor Upendra Baxi, who has often supported the judicial activism in India, has also said that the "Supreme Court of India" has often become "Supreme Court for Indians". Many observers of the Indian Supreme Court including Professor Sathe and Baxi have rightly opined that the Indian Supreme Court is one of the strongest courts of the world.

Power and judicial activism of the Indian courts have resulted into a strong and ever expanding regime of fundamental rights. Stockholm Conference on Human Environment, 1972, has generated a strong global international awareness and in India it facilitated the enactment of the 42nd Constitutional Amendment, 1976. This amendment has introduced certain environmental duties both on the part of the citizens [Article 51A (g)] and on the state (Article 48-A). Under the constitutional scheme the legal status of Article 51(A)-(g) and 48-A is enabling in nature and not legally binding per se, however, such provisions have often been interpreted by the Indian courts as legally binding. Moreover, these provisions have been used by the courts to justify and develop a legally binding fundamental right to environment as part of right to life under Article 21. Hereinafter, an effort has been made to demonstrate that how both the 'soft' and 'hard' international environmental laws have been used by the Indian courts to develop a strong environmental jurisprudence in domestic law. The judicial adoption of international environmental law into domestic law in India has not been done overnight rather it has been gradual. In order to understand the judicial process of such adoption the present discussion can be divided into the following three periods:

- First period of Judicial Adoption (1950-1984)
- Second period of Judicial Adoption (1985-1995)
- Third period of Judicial Adoption (1996 onwards)

Before 1996 there were very few references to international environmental treaties though by 1990 India was party to more than 70 multilateral treaties of environment significance. In *Asbestos Industries Case* the Supreme Court extensively quoted many international laws namely ILO Asbestos Convention, 1986, Universal Declaration of Human Rights, 1948, and International Convention of Economic, Social and Cultural Rights, 1966. In this case the court dealt the issues relating to occupational health hazards of the workers working in asbestos industries. The court held that right to the health of such workers is a fundamental right under article 21 and issued detailed directions to the authorities. In *Calcutta Wetland Case* the Calcutta High Court stated that India being party to the Ramsar Convention on Wetland, 1971, is bound to promote conservation of wetlands.

Conclusion

The global environmental concerns have led the remarkable growth of international environmental law in post Stockholm Conference period. The environmental decision of the national/state courts and international environmental law has influenced each other. The influence of international law in general and international environmental law in particular is growing and there has been a close interaction between international environmental law and municipal law in India. It appears that growth of Indian environmental law has often been co-extensive to the growth of the environmental law under international law. India has made significant progress in its pursuit of environmental protection over the last decade. As an important first step, the government has officially accepted the coexistence of economic development and environmental protection. The environmental requirements however, may be used for protectionist purposes and may operate as a non-tariff barrier. In future, there is a likelihood of more trade embargoes in the name of environment, especially in cases where countries fail to comply with certain environmental standard requirements. Thus, the outcome of the various case studies has the potential for strengthening the hand of protectionist lobbies, in the name of conservation and protection of the environment. The threat of embargo can also be used to make countries adhere to certain environmental policies and regulations, which they would otherwise not adopt due to various socio-economic compulsions. Moreover, these environmental friendly policies demand the attention and cooperation of international institutions such as the World Bank as well as NGOs and other grassroots environmental groups. Protecting the environment is a luxury good, often only affordable by the wealthy countries. Therefore, these policies should be coupled with ones that encourage the transfer

and exchange of environment-friendly technologies and the building up of industries oriented to sustainable development.

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