

THE SCOPE AND LIMITS OF ENVIRONMENTAL LAWS AND INTERNATIONAL TREATIES IN INDIA.

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PROLOGUE

What is the purpose of International Environmental Law - is it a moral statement, a deterrence, or a socializing tool? If it is a moral statement, which many of the framework conventions seem to be, is it merely aspirational? If it is intended as deterrence, why are there not more international forums for dispute resolution, empowered to enforce agreements? If it is intended as a socialization technique, is it working?²

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 community. 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. In the last few decades, there has been an increasing concern and awareness about the need to protect the environment, nationally and internationally. Under the framework of the Constitution of India, a number of articles are enumerated in which environmental duties to preserve the natural resources of the country have been stated; Articles 48-A³ and 51-A(g)⁴. Moreover, the Constitution also provides procedures in Article 252⁵ and 253⁶ for adopting national legislations in regard to the needs of the states. The Union Government, in pursuance of the Stockholm Declaration of 1972 and acting under Article 253, adopted the Water (Prevention and Control of Pollution) Act, 1974⁷ and the Water (Prevention and Control of Pollution) Cess Act, 1977⁸.

1. SCOPE OF ENVIRONMENTAL LAWS AND INTERNATIONAL TREATIES IN INDIA-

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² See: Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Exploring issues of access, participation, equity, effectiveness and sustainability', 19 *Journal of Environmental Law* (2007) at p. 293-321

³ Kinkri Devi & Anr v State of Himachal Pradesh AIR 1988 HP 4; V. Lakshmi pathy v State of Karnataka AIR 1992 Kant 57

⁴ Nature Lovers Movement v State of Kerala AIR 2000 Ker 131; Indian Handicrafts Emporium v UOI AIR 2003 SC 3240

⁵ Bombay Dyeing and Mfg. Co. Ltd. v Bombay Environmental Action Group and Ors. AIR 2006 SC 1489; Narmada Bachao Andolan v Union of India and Others AIR 2000 SC 3751

⁶ : The State of West Bengal v Kesoram Industries Ltd. and Ors. (2004) 10 SCC 201; State of Punjab v Devans Modern Breweries Ltd. and Anr. (2004) 11 SCC 26

⁷ : Fishermen Co-operative Society v A.P. Pollution Control Board, Hyd. 2001 (6) ALT 162, Bombay Environmental Action Group v State of Maharashtra 1999 (1) Bom CR 455; A.P. Pollution Control Board v Prof. M.V. Nayadu (Retd.) & Others AIR 1999 SC 812, S. Jagannath v UO I AIR 1997 SC 811

⁸ Madireddy Padma Rambabu v District Forest Officer, Kakinada, E.G. District and Ors. AIR 2002 AP 256

The principles of Indian environmental law are resident in the judicial interpretation of laws and the Constitution, and encompass several internationally recognized principles, thereby providing some semblance of consistency between domestic and global environmental standards⁹.

The post-independence era saw a spate of legislation with the active intervention of the judiciary in the nineties. The Forty-Second Amendment to the Indian Constitution in 1976 introduced principles of environmental protection in an explicit manner into the Constitution through Articles 48A and 51A(g).¹⁰ The Stockholm conference is honored by references in the Air Act and the Environment Act – a result of effective applications of Article 253 of the Constitution, fulfilling India's international obligations, as well.¹¹

Some of the landmark acts are the Water (Prevention and Control of Pollution) Act of 1974, the Air Act and the Umbrella Act, or The Environment Protection Act (EPA), of 1986 & The Wildlife Protection Act in 1972. The Water (Prevention and Control of Pollution) Act of 1974 was brought about with the object to prevent, control, and abate water pollution. The Courts have interpreted Article 32 and Fundamental Right to Life and Personal Liberty of Article 21 to include the right to pollution-free air and water.¹²

In, *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*¹³, the Supreme Court based its five comprehensive interim orders on the judicial understanding that environmental rights were to be implied into the scope of Article 21.¹⁴

The relaxation of *locus standi*, in effect, created a new form of legal action, variously termed as public interest litigation and social action litigation.¹⁵ This is more efficient in dealing with environmental cases, for the reason that these cases are concerned with the rights of the community rather than the individual.¹⁶ The Supreme Court, in recent years, has been adopting a holistic approach towards environmental matters. This is usually done through detailed orders

⁹ *Mumbai Kamgar Sabha v. Abdulbhai*, AIR 1976 SC 1455

¹⁰ Article 48A: "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.";

Article 51A(g): "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;"

¹¹ *Intellectual Forum v. State of A.P.* AIR 2006 SC 1350.

¹² *Subhash Kumar v. State of Bihar* AIR 1991 SC 420, AIR 1987 Supreme Court 1086

¹³ AIR 1985 SC 652.

¹⁴ *T.Damodar Rao v Municipal Corporation, Hyderabad*, AIR 1987 AP 171; *L.K. Koolwal v State of Rajasthan*, AIR 1988 Raj 2.

¹⁵ See Upendra Baxi, "Taking suffering seriously: Social Action Litigation and the Supreme Court", 29 *International Commission of Jurists Review* 37-49 (1982).

¹⁶ *Sheela Barse v. Union of India*, AIR 1988 SC 2211.

that are issued from time to time, while Committees appointed by the Court monitor the ground situation. The origin of this tendency may be seen in cases such as *Ratlam*¹⁷ and *Olga Tellis*¹⁸.

International law as a rule signifies the 'laws of nations that states feel themselves bound to observe. In simple understanding, international environmental law comprises those substantive, procedural and institutional rules of international law which have as their primary objective the protection of the environment. Like the Precautionary and Polluter Pays Principle.

The current focus on environment is not new; the need for conservation and sustainable use of natural resources 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 forum relating to environmental protection. It was only after the UN Conference on the Human Environment at Stockholm in 1972 that a well-developed framework of environmental legislations came into existence; that the Constitution of India was amended to incorporate the provisions relating to environmental protection.¹⁹ 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 198. The Constitution of India calls upon the State 'to protect and improve the environment and to safeguard the forests and wildlife of the country'.²⁰ It also imposes a duty on every citizen 'to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures'.²¹

After the Rio Conference in 1992 the Environmental Action Programme (EAP) was formulated in 1993 with the objective of improving services and integrating environmental considerations with development programmes. Agenda 21 which is an outcome of the Rio Conference was implemented in India at a much larger scale. India has been very active in implementing all the objectives of Agenda 21 with the active involvement of all stakeholders like the government, international organizations, business, non-governmental organizations, and citizen groups. Since the Rio Conference, extensive efforts have been made by our government to integrate environmental, economic, and social objectives into decision-making through new

¹⁷ *Municipal Council, Ratlam v. Vardhichand*, AIR 1980 SC 1622.

¹⁸ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180

¹⁹ Vide 42nd Amendment.

²⁰ Article 48A; The Constitution of India.

²¹ Article 51A (g).

policies and strategies for sustainable development. As a nation deeply committed to enhancing the quality of life of its people and actively involved with the international coalition towards sustainable development, the Summit provided India an opportunity to recommit itself to the developmental principles that have long guided the nation. These principles are embedded in the planning process of the country and therefore the need for a distinct national strategy for sustainable development was not felt.²²

India also played a major role in implementing the Millennium Development Goals adopted at the WSSD in Johannesburg in 2002. Sustainability concerns have become an intrinsic component of the planning process. The Ninth Five-Year Plan²³ explicitly recognized the synergy between environment, health, and development. Even in the Tenth Five-Year Plan²⁴ the reconciliation of population growth and economic growth with environmental conservation is perceived as one of the main objectives.

Precautionary Principle

The precautionary principle provides the application of international environmental law where there is scientific uncertainty. The precautionary approach began to appear in international legal instruments in the mid-1980s. This principle got formal recognition in Principle 15 of the Rio Declaration, which provides that ‘where there are threats of serious or irreversible damage, lack of full scientific. Beginning with *Vellore Citizens’ Welfare Forum v. Union of India*²⁵, the Supreme Court has explicitly recognized the precautionary principle as a principle of Indian environmental law. More recently, in *A.P. Pollution Control Board v. M.V. Nayudu*²⁶, the Court discussed the development of the precautionary principle.²⁷

Polluter Pays Principle

The polluter-pays principle is the requirement that the costs of pollution should be borne by the person who is responsible for causing pollution and its consequential costs. The ‘polluter-pays principle’ in treaty law can be traced back to some of the first instruments establishing minimum rules on civil liability for damage resulting from hazardous activities.²⁸ According to Principle 16 of the 1992 Rio Declaration ‘National authorities should endeavor to promote the

²²Annual Report 2002–2003, MoEF.

²³Annual Report 1997–2002, MoEF

²⁴Annual Report 2002–2007, MoEF

²⁵ AIR 1996 SC 2715.

²⁶ AIR 1999 SC 812.

²⁷ *S. Jagannath v. Union of India (Shrimp Culture case)*, AIR 1997 SC 811

²⁸ *Indian Council for Enviro-Legal Action v. Union of India*, AIR 1996 SC 1446;

internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and environment.’ The Supreme Court has come to sustain a position where it calculates environmental damages not on the basis of a claim put forward by either party, but through an examination of the situation by the Court, keeping in mind factors such as the deterrent nature of the award.²⁹

2. LIMITS OF ENVIRONMENTAL LAWS AND INTERNATIONAL TREATIES IN INDIA

The current corpus of Environmental Law in India suffers from a multiple disability. It is myopic in vision, sectoral in approach and a knee jerk reaction to environmental problems. The Environment (Protection) Act, 1986, for instance, designed as an overarching umbrella legislation, to deal with every conceivable aspect of environment has, by and large remained a law regulating problems of pollution. Lack of vision, in foreseeing environmental problems, not evolving appropriate policies and plans besides non-dynamic, reactive (rather than being, proactive), legislative laws, in tackling the complex and ever challenging environmental issues and problems appear to be at the root of the activist stance of the courts of law.³⁰ It is not that the environment has never been an issue in India; it is just that the internalization of pro-environment and pro-ecological habits is absence in our environmental laws. Quite a few environmental legislations do not have the backing of a policy document. The wildlife (Protection) Act, 1972, The Forest (Conservation) Act, 1980; Water (Prevention and Control of Pollution) Act, 1974; The Water (Cess) Act, 1977 and Air (Prevention and Control of Pollution) Act, 1981, are only a few examples of such “stand alone” documents.³¹

The approach adopted by the pollution control bodies may be conveniently called “Command and Control” where laws exhibit a preventive rather than a proactive role. The “command” being the laying down of standards and pollution limits, while the “control” being

²⁹ *M.C. Mehta v. Union of India (Oleum Gas case)*, AIR 1987 SC 965; *Vellore Citizens' Welfare Forum v. Union of India*, AIR 1996 SC 2715

³⁰ *Evaluation of Environmental Laws and Proposals for Reforms - A Report*, prepared by the Centre for Environmental Law Education, Research, and Advocacy Research Team (Mumbai (1998).

³¹ The National Policy document concerning Pollution, unveiled in 1992, stands in independent, isolated splendor from the 1974 and 1981 Legislative efforts in combating Water & Air Pollution. The Biodiversity Act, 2000, tabled before the Parliament in May 2000 and under its “active” consideration, is one more of such recent efforts of our Lawmakers, the policy backing for which has to be discerned from the legal document itself.

the power to withdraw water or power supply of erring units, the imposition of penalties and fines, or even imprisonment.

The limitations leading to poor compliance of environmental laws in India are discussed below-

1. Lack of Elasticity in Legislations: The formulation of laws and standards is over-ambitious. In such a scenario the levels of compliance would be low. Absolute standards have to be adhered to. These standards are usually neither technology based nor performance based, nor are they related to the volume of pollution being generated. Thus even with strict enforcement, the environment quality may continue to deteriorate. Over-ambitious standards discourage firms from making investments in pollution abatement technologies.
2. Weak Enforcement: Enforcement is weak, and, environment management degenerates into crisis management. Therefore the impact of non-existent or merely formal inspection on enforcement draws a very weak response from firms towards compliance. In the case of *MC Mehta v UOI*, a closure of all mines within a 5 km radius of Badkal Lake and Surajkund (a tourist place) was ordered after a report submitted by NEERI on the pollution caused by mining. Mining activities had been going on without any consent stipulated under the Air Act. There was total violation of the Mines Act of 1952 and the Explosive Act. The judgment was delivered on a Public Interest Petition filed by M. C. Mehta alleging that the Haryana State PCB had failed to enforce norms and policies.³²
3. Poor Monitoring: Lack of technically skilled manpower leads to improper monitoring, as scientific assessment of the level of pollution generated by firms becomes difficult. According to the EPA, the State PCBs are required to have a technically competent Board of Members, in the case of the Andhra Pradesh PCB, out of 15 members, 9 were from the bureaucracy with no technical members. In Maharashtra, out of 13 members, 6 were from the bureaucracy with 2 technical. In contrast was the PCB of Goa that had 15 members, out of which 10 were technical and 3 from the bureaucracy. In the case mentioned above it was held that “Keeping Delhi clean is not an easy task, but then it is not an impossible one either. What is required is initiative, selfless zeal and dedication and professional pride, elements which are sadly lacking here.”³³

³² AIR 1996 SC 1977

³³ Ibid

4. Lack of Effective Punitive Measures: As mentioned before, there is lack of an effective punitive and deterrent mechanism in case of non-compliance. The penalties that are imposed on the firms in case of non-compliance are extremely low and irrespective of the extent of compliance and the quantity and quality of emissions. A defaulting firm, irrespective of the extent of pollution, faces a fine of only Rs. 10,000 or imprisonment up to three months, which is bailable. Also the problem of pendency of court cases compounds the problem. With justice delayed, justice is denied. At Mavoor in the southern state of Kerala, the villagers have been fighting a legal battle against the pollution of Chaliyar River by a rayon factory for 35 years.³⁴ In Rajasthan, only two convictions have been obtained despite nearly 7,000 cases filed in court against air and water polluters. Scarce inspectors, corrupt officials, and lenient courts aid the process of non-compliance.
5. Paucity of Funds: The fifth major constraint is the paucity of funds. A study found that low level of funding is one of the important factors behind poor monitoring. Due to paucity of funds, the PCBs lack adequate infrastructure facilities like laboratories and monitoring equipment, required for the execution of their responsibilities. Also, it was held that, the Municipal Corporation of India is wholly remiss in the discharge of their duties under law. They are authorities entrusted with the work of pollution control cannot be permitted to sit back with folded hands on the pretext that they have no financial or other means to control pollution and protect the environment.³⁵

3. WAY OUT: COURTS AND ENVIRONMENT

In the case of *A.P. Pollution Control Board vs. M.V. Nayudu*³⁶, the Court referred to the need for establishing Environmental Courts which would have the benefit of expert advice from environmental scientists/technically qualified persons, as part of the judicial process, after an elaborate discussion of the views of jurists in various countries. Also, in *M.C. Mehta vs. Union of India*³⁷ where the Supreme Court said that in as much as environment cases involve assessment of scientific data, it was desirable to set up environment courts on a regional basis with a

³⁴ The Member-Secretary, Kerala State Board for Prevention & Control of Water Pollution, Kawadiar, Trivandrum v The Gwalior Rayon Silk Manufacturing (Weaving) Company Ltd., Kozhikode and Ors. AIR 1986 Ker 256

³⁵ Supra fn 32

³⁶ 1999(2) SCC 718

³⁷ 1986(2) SCC 176

professional Judge and two experts, keeping in view the expertise required for such adjudication. Another judgment was *Indian Council for Enviro- Legal Action vs. Union of India*,³⁸ in which the Supreme Court observed that Environmental Courts having civil and criminal jurisdiction must be established to deal with the environmental issues in a speedy manner.

In *Kanpur Tanneries or Ganga Pollution case*³⁹ is among the most significant water pollution case. It discusses the various legal provisions and the legal duties of municipal bodies and pollution control boards. In the case, alarming details were about the extent of pollution in the river Ganga due to the inflow of sewage from Kanpur, the Court came down heavily on the Municipality. It emphasized that it is the Nagar Mahapalika of Kanpur that has to bear the major responsibility for the pollution of the river near Kanpur city.

In the case of *Attakoya Thangal Vs. Union of India*.⁴⁰ Lack of adequate ground water resources, potable water and large scale withdrawals with electric or mechanical pumps which can deplete the water sources, causing seepage or intrusion of saline water from the surrounding Arabian Sea was the reason for the Petitioner to approach the Court. The local administration had initiated a scheme to augment water supply, by digging wells and by drawing water from those existing wells to meet increasing needs. The Petitioners, sought restraint of the administration from implementing the scheme, by the issuance of appropriate writs or directions. The Court held that “The right to life is much more than the right to animal existence and its attributes are many fold, as life itself. A prioritization of human needs and a new value system has been recognized in these areas. The right to sweet water, and the right to free air, is attributes of the right to life, for, these are the basic elements which sustain life itself”.

A situation of total apathy of the Government in the city of Cuttack, which had led to a very acute water pollution problem, was dealt by the Court in the case of *M.C. Mehta Vs. State of Orissa*.⁴¹ The city of Cuttack was under the grip of a severe problem of water pollution ranging from sewage water clogging, direct inflow of sewage into the river to non-existence of a sewage treatment plant, thereby contaminating water and resulting in various types of water borne diseases. The Court held that the city of Cuttack, with its historic heritage, was in the centre a huge water pollution crisis on account of the inaction of the State in setting up of a waste

³⁸ 1996(3) SCC 212,

³⁹ *M.C. Mehta Vs. Union of India* AIR 1988 SC 1037

⁴⁰ 1990(1) KLT 580

⁴¹ AIR 1992 Ori 225

treatment plant causing serious health and sanitation problems. After going into the constitutional provisions, and the recommendations of the State Pollution Control Board which had made stark revelations about the conditions of drinking water and health in the city, the Court directed the State to immediately take necessary steps to prevent and control water

4. CONCLUSION

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.

During the past decade, India has ratified many of the international conventions related to environment protection and has taken a number of initiatives to implement them at the domestic level. Although India has been very active in all the international forums relating to environmental protection and has signed almost all the multilateral agreements relating to the environment except a very few, still a lot needs to be done at the domestic level for their implementation. The real challenge before India is how to preserve its environment, meet the basic needs of its growing population on an overburdened land, fulfill the necessary energy requirements of the people, and yet leave a legacy for future generations so that they may also enjoy the bounty of nature which the present generation is recklessly exploiting.