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## **THE BANARAS LAW SCHOOL : DEAN'S REPORT**

**T**he Banaras Law School since its establishment has been playing significant role in reforming legal education and making it socially relevant. The institution has been pioneer in introducing three year LL.B. full time course of studies and two year full time program of LL.M. studies. During 1998-99, the Law School introduced Two Years full time LL.M. Course in "Human Rights, Duties and Education" and in 2001-2002 a new paper on Animal law has been introduced. At the LL.B. level of studies, the major thrust of Law School has been to provide to the students, a career oriented training in law in order to equip them to face the challenges of legal education and increasing demands of Law graduates in elimination of social civil. The Law School has also started some community-oriented courses in Law which include Law in relation to Society, environment, Poverty, Population, Consumer, Religion, Women, Children, Medicine and many more. The Law School also provides legal education on the rural problems which includes Rural Development and Planning, Local Self Government, Rural Indebtedness, Agricultural Land Laws and Reforms. It has also been rendering legal aid and services to the poor and down-trodden persons of the society since 1978 and has included practical training and legal aid as a part of LL.B. curriculum.

During the financial year under report a Vertical Interaction Course for IPS officers, 2001 was organized under the auspices of B.P.R.D. in which senior IPS Officers participated. A Regional Workshop on the Reforms suggested by the NCRWCO was organised on August 4-5, 2001 with the financial support of the National Commission on Review of the Working of The Constitution. Under the Environmental Law Management Capacity Building Project, a TEACHERS' MEET of the teachers teaching environmental law in the 20 partner institutions was organised on 6th August, 2001 with a view to develop and train the teachers in Environmental Law. In this meet, teachers from twenty institutions participated and also discussed curriculum of environmental law and also strategies for teaching the subject. Various seminars were organized in the Faculty on the topics like Consumer Protection and Environmental Law. The Faculty members attended and participated in various seminars/conferences and presented papers. The articles of the faculty members were published in reputed journals. It requires special mention that for the last three years, the Law School of Banaras Hindu University has been rated amongst the top ten institutions imparting legal education and this year (during 2001-2002) it has been rated at FOURTH position. In fact, Law School is on the top of the list amongst the institutions imparting 3-year LL.B. degree course. Due to lack of

adequate publicity and financial resources, it has been rated 4th at perception level.

#### **Academic Activities During The Session 2001-2002 :**

- (i) A Seven days Vertical Interaction Course for IPS Officers was organized from July 16 to 21, 2001 under the auspices of the Bureau of Police Research and Development, Ministry of Home, Government of India, New Delhi.
- (ii) The activities regarding Environmental law Management were launched under the Environmental Law Management Capacity Building Project under the auspices of the Ministry of Environment, and Forests, Government of India, New Delhi and following activities were undertaken :
  - (a) National Workshop on Biodiversity Regime : Traditional Knowledge *vis a vis* Intellectual Property Rights.
  - (b) National Workshop on Hazardous Waste Management.
  - (c) Research Projects on Regional environmental problems.
  - (d) Preparation of case material on environmental law.
  - (e) Preparation of case material on environmental law in Hindi.
  - (f) Establishment of Animal Law Centre.
- (iii) One day workshop was organized on Consumer Protection Amendment Bill, 2001.
- (iv) Two-days National Seminar on the Review of the Working of the Indian Constitution was organised in August 2001.
- (v) One-day Training Program of Environmental Law Teachers was organised on August 6, 2001.
- (vi) Honorary LL.D. was awarded to Dr. Owada, Japanese scholar on International Law.
- (vii) Honorary LL.D. was awarded to Mr. Justice M.N. Venkat Chaliah Former Chief Justice of India, Former Chairman National Human Rights Commission and Chairman, National Commission for the Review of the Working of the Constitution.
- (viii) Honorary LL.D. was awarded to Mr. Justice R.S. Pathak, Former Chief Justice of India and Former Judge, International Court of Justice, The Hague
- (ix) Many eminent academicians, judges delivered lectures under the auspices of Current Law Forum. The details are as follows

Sl.No.	Name of Speaker	Topic
1.	Sri Achal Bihari Srivastava, Former Judge, Allahabad High Court	Consumer Protection
2.	Sri A.K. Gupta, Chief Justice, Jharkhand High Court	Judicial Activism
3.	Sri M.N. Venkatchaliah, Former Chief Justice of India and Chairman Constitution Review Committee	Legal Education in India
4.	Prof. D.N. Jauhar, Department of Law, Punjab University, Chandigarh	Child and Law

- (x) Various teachers of the Faculty got training and orientation in the emerging disciplines inside and outside the University and thus the Faculty was enriched.
- (xi) Books of Rs. 3,00,166/- were added in the Law School Library.
- (xii) A large number of LL.M. Students qualified NET and were appointed as Lecturers in various Universities and Colleges.
- (xiii) Ms. Maneka Gandhi, Hon'ble Union Minister for Social Justice and Empowerment visited the Faculty and inaugurated the Animal Law Centre and addressed the IPS Officers and the august audience.
- (xiv) The Law School is the first institution in the country which developed an independent curriculum on Animal Laws and it has been introduced as an optional paper in LL.B. III year.
- (xv) Human Rights and Juvenile Justice project was granted by the British Council under its HUMAN RIGHTS OUTREACH PROJECT ad the students and teachers were involved in the project.

**LIST OF LL.M. DISSERTATIONS SUBMITTED DURING THE SESSION 2000-2001**

Name of the Student	Name of the Supervisor	Topic
Saroj Kumar	Prof. M.N.P. Srivastava	Legal Aid as An Instrument of Access To Justice (With Special Reference to Civil Disputes)
Satyendra Kr. Singh	Prof. D.P. Verma	Right of Asylum In International Law : A Comprehensive Approach To Refugee Debate
Anand Prakash Tiwari	Dr. B.N. Pandey	Punishment As An Instrument of Public Justice

Jag Prasad Mishra	Km. Abha Trivedi	Tortious Liability of The Government In India
Dharmendra Kumar	Shri Sukh Pal Singh	Contract of Guarantee : A Critical Evaluation (With Special Reference to The Indian Contract Act, 1872)
Pankaj Kr. Chaturvedi	Dr. B.C. Nirmal	Legal Regulation of Closure of Industrial Undertakings In India
Miss. Kavita Jalan	Shri Akhilendra Kr. Pandey	Legal Control of Cruelty to Animals
Vivekanand Vishwakarma	Shri Akhilendra Kr. Pandey	Protection of Cultural Heritage and Penal Policy
Shiv Bahadur Tiwari	Shri Akhilendra Kr. Pandey	Intention : Meaning Under the Indian Penal Code (With Reference To Offences Against Body and Property)
Om Sharma	Shri Ajai Kumar	Stable Marriage Versus Easy Divorce : A Socio Legal Study
Ajay Bhupendra Jaiswal	Shri Sanjay Gupta	Doctors' Accountability and Judiciary
Ashok Kumar Rai	Dr. Md. Nasimul Haque	Taxation and Freedom of Trade and Commerce
Rakesh Kumar	Prof. D.P. Verma	Weapons of Mass Destruction : A Challenge for International Humanitarian Law
Hiralal Gautam	Dr. Siddha Nath	Kampani Adhiniyam, 1956 Ke Antargat Nirikshan, Lekha Samparikshan Avam Anveshan Sambandhit Vidhi Ka Vinidhankarta Ke Sarankshana ke Dristikon Se Parikshana.
Daya Nand Dwivedi	Shri R. K. Murali	Patent Law in India : Problems and Prospects (A Study with Special Reference to Biotechnological Inventions)
Kashi Prasad Singh Yadav	Shri V.S. Mishra Shri Sanjay Gupta	Writ of Certiorari : Trends and Issues
Rananjay Singh	Shri Shailendra Kr. Gupta	Right to Privacy : Emerging Dimensions
Dharmendra Kumar	Shri Sanjay Gupta Shri Ajay Kumar	Contract of Adoption for Religious to Secular : A Socio-Legal Study

Raj Kumar Singh	Shri R. Krishnamurali	Judicial Interpretation of Definition of Industry (Retrospect and Prospect )
Ashok Kumar	Shri Shailendra Kr. Gupta	The Role of Public Participation in Protection of Environment : Indian Environmental Law Perspective
Alok Kumar Srivastava	Dr. D.K. Srivastava	Uses and Abuses of Doctrine of Ultra-Vires Under Company Law
Narendra Kumar Singh	Shri Ram Jee	Development of the "Doctrine of Indoor Management" Under the Indian Companies Law
Shiv Prakash Singh	Dr. D.K. Srivastava	Anetik Vyapar (Nivaran) Adhiniyam 1956 Ek Vishleshnatmak Adhyayan

**LIST OF LL.M. (H.R.D.E.) DISSERTATIONS SUBMITTED  
DURING THE SESSION 2000-2001**

Name of the Student	Name of the Supervisor	Topic
Prem Prakash Singh	Prof. R.A. Malviya	International Legal Control of Transboundary Air Pollution : An Evaluation of the LRTAP Convention (1979)
Navin Prakash Verma	Shri Akhilendra Kr. Pandey	Offences Against Environment and Penal Policy
Anjum Parvez	Shri Vinod Shanker Mishra	Ganga Action Plan : A Case Study of Varanasi
Jai Shanker Pd. Srivastava	Prof. G.P. Verma	Environment Protection : The Judicial Approach in India
Hari Shanker Sharma	Dr. B.C. Nirmal	UNHCR : Role and Activities
Awanish Kr. Tiwari	Dr. B.N. Pandey	Jal Pradushan (Nivaran avam Niyantana) Aur Manavadhikar : Varanasi Ke Vishesh Sandarbh Main

**LIST OF Ph.D. THESIS SUBMITTED**

Name of the Student/ Year	Name of the Supervisor	Topic
S.P. Singh ( Sept. 93)	Prof. G.P. Verma	Pollution and Law : Legal Control of Air Pollution by Industries in India
Smt. Shashi Srivastava, (Sept. 93)	Prof. G.P. Verma	भारतीय संविधान के अनुच्छेद-२१ के अन्तर्गत आपराधिक न्याय के नवोदित आयाम
V.N. Tripathi (March 95)	Dr. B.N. Pandey	The Role of General Insurance in Transport Matter : Problems of Perspectives
Dharmendra Kumar Mishra (March 95)	Dr. B.C. Nirmal	भारत में आत्म हत्या : एक मनोसामाजिक एवं विधिक अध्ययन
G.N. Mishra (March 96)	Prof. S. Nath	नयी पंचायत राज व्यवस्था के माध्यम से मॉप्रो की अनु० जाति/जनजाति के सामाजिक विधिक अधिकारों का संरक्षण (सतना जिला मॉप्रो का अनुभूतिमूलक अध्ययन)



**ROLE OF LAW IN A CHANGING SOCIETY\***Justice M.N. Venkata Chaliah<sup>++</sup>

I am beholden to the Banaras Hindu University and to its esteemed Vice Chancellor Prof. (Dr.) Y.C. Simhadri for the honor conferred upon me today. This honor coming as it goes from this great portal of education and research is of particular value to me. I shall cherish this event and count it amongst the more important attainments in life. I once again express my deepest gratitude to the University and to its Senate and the Academic Council and to Vice Chancellor Dr. Simhadri.

The discipline of law is today a profound intellectual, academic and professional pursuit. An eminent American judge cautioned that a lawyer who does not know economics and sociology is apt to be a public enemy. Possner called law a minor branch of economics. Another author said that 'law is politics by other means'. Benjamin Cardozo emphasized a point when he said figuratively:

"Our lady of the common law - I say it with the humility that is due from and old and faithful servant - has become insatiable in her demands. Not law alone, but almost every branch of human knowledge, has been brought within her ken, and so within the range of sacrifice exacted of her votaries. Those who would earn her best rewards must make their knowledge as deep as the science and as broad and universal as the culture of their day. She will not be satisfied with less".

There were many judges of the American Supreme Court who had the distinction to adorn the bench for over four decades each. The great Chief Justice Marshal was Chief Justice of that court for nearly 34 years. Benjamin Cardozo was in that sense a mere bird of passage: he was a judge in that court for just six years (1932-1938). The esteem and admiration for the judicial contribution of the judge emphasized an important aspect of the times. United States of America after the great depression of the early thirties was emerging into a new phase of economic recovery. Justice Cardozo's work demonstrated the potential of the common law to manage the forces of this transformation. The inheritance of common law lay in its inherent capacity to keep pace with social, economic change and progress, and to adapt itself and meet the needs of the times. Justice Cardozo's judicial thinking and contribution

\* Based on Convocation Address delivered by Mr. Justice M.N. Venkata Chaliah on Third Convocation of the Faculty of Law as a part of the Eighty -Third Convocation of the Banaras Hindu University 8th October, 2001 Swatantrata Bhawan on the occasion of conferment of LLD (Honoris causa) by Banaras Hindu University.

++ Former Chief Justice, Supreme Court of India & Chairperson, National Commission to Review the Working of the Constitution

symbolized this ability and potential of the common law. The contribution of a judge in the common law tradition is not anonymous. Even the appointment of a judge to a superior court in the common law tradition is said to be the announcement of an emerging judicial personality. Unlike in the civil law system of the continent, where judges are career judges and where the number of judges at the apex level can often exceed over a 100, the highest courts in the common law hierarchy have a compact, manageable court strength.

The doctrine of precedent is one of the corner stones in the development of the common law. Indeed one of the lesser known but more important attributes of the common law system is the doctrine of inherent power of the courts, an aspect which has not perhaps received adequate attention in teaching. There is again an inadequacy in our law teaching programme which does not provide enough attention to the history of our system of law reporting in the common law tradition.

The forces of change that the legal system faced in the United States in the 1930s is, perhaps, currently repeated in the developing countries in a more acute and accentuated form. Breath taking advances in science and technology , break-throughs in genetic research, in the assisted reproductive technology, in micro-robotics, in tele-communication, tele-medicine, transportation , information and Bio-Technology will usher in unprecedented pace of change . The effects of this change are intensified by the accompaniment of the great iconoclastic winds sweeping over the globe challenging all established social and political institutions. These sweeping global winds challenge every institution, both public and private, for their social relevance and professional utility. Very few institutions can survive these challenges of reassessment.

This is verily an age of challenge, change, conflict and irreverence. This is an age of conflict between established social institutions and the intense forces of social change; between the rationality of modern science on the one hand and religious – faith on the other; between the malignant evils and superstitions of older civilizations and the aspirations of a brave new world; and in science between the teleological and the mechanistic.

Thought and action of men are influenced by a set of general ideas about the nature of the world and man's place in it . This general set of ideas may be called the 'world picture' which conditions contemporary thinking and influences scientific temper of the times.

It is said that the 'Modern Mind ' is the product of 17<sup>th</sup> century science . That era saw the birth of modern science as it is understood today and was exposed to the thoughts of Kepler , Galileo and Newton . Several theories of creation and cosmology were put forward . There was the expected and inevitable confrontation between the " teleological " and 'mechanical' theories of evolution : whether there was ' purpose ' or 'consciousness' in evolution or whether it was merely a causative factor.

Science is generally associated with 'mechanism' and religion with 'Teleology'. The discerning of a purpose in evolution was considered unscientific. This scientific temper militated against the religious concept of the world as a moral order and the declaration implicit in it that moral values were objective. Newton was unaware that the 'celestial-calculus' of his science and his devout Christian faith did not square with each other, though however, the assumption implicit in his faith was that the laws of science presupposed and evidenced a transcendental intellect and a superior power. But today a new philosophy of science is emerging. The 'Theory of everything' contemplates and postulates a fundamental, higher unity of all branches of knowledge.

We are in an era of continuous and seemingly unending spin of change. Our life styles, our mind sets, our world-picture will change and so will the standards and the quality of our lives. It is said that English wheat took 1000 years to quadruple: from 0.5 ton per hectare to 2 tones per hectare. But in our own generation we have achieved this in just 40 years after the Green Revolution. The world's population, it is said, was one billion in 1800; it took 130 years to add the second billion but the sixth billion was added in just 11 years. The great advances in science and technology have widened the chasm between the rich and the poor of the world, between the North and the South, the West and the rest. World is increasingly becoming knowledge driven and knowledge based. Ponder these figures: the richest 1/5<sup>th</sup> of the world command 86% of the worlds' incomes and wealth but the poorest 5<sup>th</sup> have just 1%. Even in India, the richest top quintile has 85% of nation's income, the low quintile just 1.6%. Great accomplishments have been made since independence of the country. Our life expectancy at birth in 1950 was just 32 years- it is now 75 years for women in Kerala. However, if the unborn woman chooses Madhya Pradesh instead of Kerala for her birth, she instantly loses 18 years of her life span. The life expectancy for women in Madhya Pradesh is 57 years while it is 75 years in Kerala. In Kishanganj district the rate of infant mortality is higher than that of Burkina Faso: but in Kerala it is just 12. The per capita income in Orissa is 1/4<sup>th</sup> of that in Punjab. These regional, intra-societal disparities emphasize the loss of social equilibrium of justice.

Developing countries will face increasing obsolescence of their industrial technologies and become increasingly uncompetitive globally. The post Marrakesh International intellectual property regime will accentuate the problems of the Third World. Out of 3, 47,000 patents administered in 1998, 91% went to OECD countries which represent just 19 per cent of the world's population. Out of 70 billion dollars spent on global health research, just about half per cent was devoted to tropical diseases. Between 1975-96 some 1223 new drugs were introduced, only 13 of them were relevant to the problems of the developing world.

The proportion of low birth babies in India is 33 per cent while it is 9 per cent in China and South Korea and 6 per cent in Thailand. Only

42% of our children between the ages of 12-23 months are fully immunized. The coverage is shockingly low in Bihar, at 11%. Some 53% (almost 60 million) children under five remain malnourished which is below the level reported even in many parts of sub-Saharan Africa. Majority of pregnant women are anemic; maternal anemia and low birth weight are major causes of neurological deficiencies of the children which are incurable after birth.

Though the base of democracy in the country has widened, the vision of an inclusive democracy which is the foundation of a conflict free and just and caring society has eluded us. It is perhaps time really to re-examine the glib assumption that a stable democracy depends on a homogenous society. Experiments of other countries have shown that a stable democracy is an inclusive democracy, not a mere majoritarian democracy which is 'a crude statistical view of democracy'. Only an inclusive democracy can be conflict free. The words of Benjamin Barber are worth recalling:

"Strong Democracy rests on the idea of a self-governing community of citizens who are united less by homogeneous interests than by civic education and who are made capable of common purpose and mutual action by virtue of their civic attitudes and participatory institutions rather than their altruism or their good nature. Strong democracy is consonant with—indeed it depends upon—the politics of conflict, the sociology of pluralism, and the separation of private and public realms of action."<sup>1</sup>

This brings us to the role of law in a changing society. Many of these great changes that science and technology have ushered in, have their indirect unintended and undesired fall-outs that need to be regulated. Law is a notorious laggard. It does not reach out as science does. It merely follows social consensus and social consensus is notoriously behind the needs of the times. This traditional process of evolution of legal regulation of the social fall out of the ills of modernism are wholly inadequate. The requirements of the older generation though that is necessary.

There is an intense need for insightful and deep thinking on the emerging issues. It is, therefore, not merely a constant upgrading or revision of the legal curriculum of law schools but of newer concepts, and constructs of law that need to be fashioned. The problems of the future will not correspond to the preconceived and existing mental models of solutions. Newer concepts of property will emerge, so will newer kinds of poverty and deprivations. New norms for international relations, and international economic order and for resolution of human conflicts both internal and international need to be evolved with a broad inter-

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1 Benjamin Barber, *Strong Democracy*, p. 117

disciplinary framework in which law and legal institutions play a major part.

Constitution, if bereft of constitutionalism, might mean lofty but empty sounds. Building up a constitutional culture takes its own time. But at a particular stage the concept of a reform- process building up incrementally towards a rights oriented constitution becomes self-defeating as, in the meanwhile, the cynicism which disenchantment with constitutional institutions might generate would be inimical to the success of such a process. The situation needs one sharp thrust in the direction of the desired political goals. As Zander put it '(t)he vested interest of all governments is to preserve the normal ways of doing things and to resist pressure for change. Government, of whatever political compulsions, is usually moved to change things only when the pressure to do so becomes greater than the convenience of leaving things as they are."

Achievement of socio-economic goals by entrenched constitutional guarantees is much debated, as such entrenchment and justiciability would tend to enlarge the judicial role. The key role, would then, be of the judiciary. The corner-stone of objections, based on democratic theory, is that an entrenched Bill of Right places power in the hands of an unelected, unaccountable, unrepresentative and elite judges who will, by implication, also decide questions of resources. Policy choices will be dressed up to look as legal choices and those meant to apply the law will also be the ones who will reform the law. Then again, the outcomes may, it is argued, be regressive with known conservatism of the judiciary. But then this objection based on democratic theory proceeds on a 'crude statistical view of democracy'. Any objection based on democratic theory against making minimal economic such as access to life- sustaining water, adequate housing just enough to enable life to survive, primary-education, bare medical services, food sufficient to make life bearable can hardly be tenable. Indeed in theory civil, political, economic, social and cultural rights are all indivisible. As to the fear of expansive judicial role suffice it to say that it should be a part of the principles of Judicial review to limit such intervention into merely directing the executive to prepare concrete and affordable measures which would address the problem.

To capture these shifts, legal systems and institutions must develop a new vision, insight and new competence. They include not only the formal systems but the legal practices as well. That would be law's finest hour. Will it enable a peaceful social-revolution possible without which violent one becomes inevitable? I leave the answer to those whose opinions are yet uncommitted.

I take this opportunity to congratulate the scholars graduating from the University to-day and wish them God-speed and every happiness and fulfillment in life.



## **JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000**

Maneka Gandhi\*

**W**illiam Wordsworth said that "the child is the father of the man". In this sentence the poet was able to capture the reality that in our children lie our hopes for the future and it is for this reason that it is essential to invest our resources and to ensure their proper care. This is especially so for those children who are most vulnerable and are in need for care and protection. These are children who have for whatever reasons come into conflict with the judicial system or who have been neglected and abandoned by those who should have taken care of them.

To achieve this objective, it is essential that the country has a sound judicial framework that will protect the interests of the child. It should provide a structure for setting up of institutions and systems that will ensure that the child can be looked after and which will encourage action for their care and rehabilitation in society. The lawmakers and implementers of the law have to be sensitive to the needs of children, to recognize their aspirations and desires so that they are able to assist in achieving them.

India was the first country to evolve a law relating to delinquent children in 1986 through the Juvenile Justice Act. However, the Act had many drawbacks and was unable to address the problems being faced by the very children, which it was supposed to be protecting. The Act was also not in consonance with the International Convention on the Rights of the Child, which India signed in 1992. It was felt that the Act should be made more children friendly and provide for various mechanisms for the proper integration and rehabilitation of the concerned children in society. There was a need for a clear distinction between the children in conflict with the law and those children who are neglected and abandoned. It was with this background that the Government enacted the Juvenile Justice (Care & Protection of Children) Act, 2000. The Act has become effective from the 1st of April 2000 and Model Rules have been circulated to the States. However, the effectiveness of any legislation depends on its implementation and unless the police, who are the main protectors of the law, take an active role, we will not be able to achieve what we have set out to do.

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\* Minister of State, Social Justice and Empowerment, Government of India, Guest Lecture delivered in the Vertical Interaction Course for IPS Officers on Juvenile Justice at Law College, Banaras Hindu University, 20th July 2001.

I am sure that you will be going into the details of the Act but I would just like to touch on a few features, which must be kept in mind by all police personnel. Firstly, all offences committed against children are now cognizable and the police should take action accordingly. The Act also provides that all cases concerning children should be disposed off within a period of four months. The police will thus have to ensure that they take prompt action so that the relevant information, investigation is provided quickly so that the cases can be finalized.

It is important to create sensitivity amongst the police that they are not dealing with criminals or grown-ups but with children. In many cases the child would have reacted impulsively and without a proper understanding of the circumstances in which he/she perhaps acted in a manner, which was in contravention to the law. The police will have to act as child psychologists and develop a complete understanding of the child rather than sticking to the letter of the law. An extent of flexibility and compassion will have to be developed in the attitude of the police.

Recognizing the importance of the role of the police, the new Act has provided for the setting up a Special Juvenile Police Unit in every district and city to coordinate and improve the treatment of juveniles by the police. It will be necessary to train at least one officer in every police station to function as a juvenile and child welfare officer. These special units may also require the assistance of trained social workers and they will have to form linkages with local voluntary organizations so that they can perform their functions effectively.

The police personnel who will be assigned to this unit will have to be chosen with care. They should be persons who are sensitive, dedicated and be able to appreciate the concerns of the group that they are working with. As the children are young and impressionable any wrong move at this stage would affect their future and would vitiate the efforts being made for the child.

Regular training of police personnel would be required at various levels including at induction, in service and refresher levels. The process will require selection and training of at least 15000 police officers, down to the level of police stations, to ensure that there is at least one such police officer in each of the police stations all over the country.

I would like to commend the role of the police for their assistance to the child-line units all over the country. For those who do not know Child-line, it is a free 24-hour emergency phone service where a child or a person wishing to address the problem of child in crisis can ring up 10-9-8 for assistance. The project has been extremely successful and from a small unit in Mumbai in June 1998, it has now spread to 30 cities and towns and by March 2002 at least another 20 will be covered. This would not have been possible without the help and support that the police have provided to these units. To grow on our successes that we have achieved so far, we will be further looking towards the police for their assistance. I

would like to take this opportunity to add that the unit in Varanasi has done extremely good work and has even worked to rehabilitate bonded children. I am sure they will continue their good work.

However, it is not only the police and the NGOs who will be able to ensure that the Act is implemented properly. It is necessary that a multi-sectoral approach be followed and links have to be created with the other sectors involved with child welfare including the judiciary, local governments, NGOs, doctors, etc., and to set up proper systems to ensure the protection of the child.

The Act therefore recognizes the importance of the establishment of various institutions such as observation homes, special homes, children homes, shelter and after-care homes for children. The minimum standards for functioning of these institutions and for monitoring their working have also been specified. The originality of the Act also lies in the fact that for the first time it recognizes the role of the voluntary organizations and the local authorities including involvement of the community to address the problems of out target group. The police department can also play an important role in monitoring the functioning of these institutions and to report any instances of lapse and default.

The Act for the first time also recognizes the importance of the processes of adoption and foster care for the rehabilitation of children. The nuances and importance of these provisions in the law have to be understood by everyone carefully so that they can be effectively implemented.

With this background, I am happy that the Law School of Banaras Hindu University has taken a lead in organizing this Vertical Interaction Course for IPS Officers on Juvenile Justice which is probably the first such course being organized for police officers after the new Act has come into effect. It is important that police personnel understand their critical role in implementation of the Act and I am sure that this interaction will be meaningful.

I would also like to mention that I am personally committed to the implementation of this Act and I welcome any feed back on the practical situation on the ground and any suggestions in this regard.



version of 'social engineering', to tilt the balance a little towards the 'common social good' as a core goal value of law and policy.<sup>1</sup>

In the meantime, however, the imported legal systems and categories unfortunately replaced lock, stock and barrel the age-old South Asian 'native' customary law institutions and concepts which recognized the close interrelationships between the individual and the society, and between humans and their environment, i.e., other living beings, and even the non-living matter on which the origin of life is itself based. The recent introduction of a community-centric environmental law in these countries owes itself largely to the evolution of international environmental norms and policies, often coupled with the terrible experiences of domestic environmental disasters, whether man made or natural.

The present essay reflects an attempt to draw up an overview of the state of the environmental law currently obtaining in South Asia, largely in the SAARC region. It first seeks to identify some broad international environmental obligations and then identify as far as possible the major legal problems confronted by the countries of the region against the backdrop of this existing legal framework for the protection of the environment.

## II. INTERNATIONAL OBLIGATIONS FOR PROTECTION OF THE ENVIRONMENT

### A. Environmental Obligations :

States have undertaken a range of international obligations in respect of protection of the environment under both general customary international law as well as treaty law.

The Stockholm Declaration on the Human Environment 1972 recognizes that "The protection and improvement of the human environment...is the urgent desire of the peoples of the whole world and the duty of all Governments".<sup>2</sup> It specifically underscores "a solemn responsibility [of every individual] to protect and improve the environment for the present and future generations".<sup>3</sup> It imposes an obligation on all to safeguard the natural resources of the earth including the air, water, land, flora and fauna and diverse natural ecosystems "for the benefit of present and future generations through careful planning or management as

1. Emanuel Kant, and Jean Jacques Rousseau did indeed make immense contribution to the European political and legal thought of their time, but not necessarily on the forms of government and the principles of governance on the ground, where Metternich's theory of legitimacy still held the sway, despite the shock treatment it received from the eruption of French Revolution and the Napoleonic wars. For a neat summary of Roscoe Pound's legal thought, see his *An Introduction to the Philosophy of Law* (Yale University Press, 1922-1954, Indian Reprint 1995).

2. Paragraph 2 of the Declaration

3. Principle 1 of the Declaration

appropriate".<sup>4</sup> While it readily recognizes "the sovereign right [of states] to exploit their own resources pursuant to their own environmental policies", it also reminds them of their "responsibility to ensure that activities within their jurisdiction or control do no cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".<sup>5</sup>

The World Charter for Nature, adopted by the UN General Assembly in 1982 stresses the obligations of states and individuals to respect the nature's processes and the genetic viability of all life forms, to conserve and protect the environment and the optimum sustainable productivity of ecosystems and organism as well as the land, marine and atmospheric resources.<sup>6</sup>

These and other general obligations to protect and preserve the environment are now part of international customary law of environment, being based on or recognized by consensual international declarations.

Since the 1970's there has emerged a considerable range and quantity of treaty law which increasingly provides for more and more specific obligations on the part of states on a wide spectrum of subjects many of which have traditionally been regarded as essentially part of the domestic jurisdiction of states - marine pollution<sup>7</sup>, long range transboundary air pollution,<sup>8</sup> protection of the Ozone layer<sup>9</sup>, climate change,<sup>10</sup> biodiversity,<sup>11</sup> desertification,<sup>12</sup> trade in endangered species of wild fauna and flora<sup>13</sup>, transboundary movement of hazardous wastes and their disposal<sup>14</sup>, industrial accidents<sup>15</sup>, wetlands<sup>16</sup>, and so on.<sup>17</sup>

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4. Principle 2 of the Declaration.
  5. Principle 21 of the Stockholm Declaration, reaffirmed by Article 2 of the Rio Declaration Environment and Development 1992.
  6. General Principles 1 to 4 of the World Charter of Nature 1982.
  7. The London Dumping Convention 1972; IMO conventions on marine pollution by oil.
  8. The Convention on Long-Range Transboundary Air Pollution 1979 and Protocols of 1988, 1991 and 1994.
  9. The Vienna Convention for the protection of the Ozone Layer, 1985 and Montreal Protocol 1987.
  10. The UN Framework Convention on Climate Change, 1992.
  11. The Convention on Biological Diversity, 1992.
  12. UN Convention to Combat Desertification, 1994.
  13. The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973.
  14. Basel Convention on Control of Transboundary Movement of Hazardous Wastes and Their Disposal, 1989.
  15. The Convention on the Transboundary Effects of Industrial Accidents 1992. The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar), 1971.
  16. The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar), 1971.
  17. For an overview of many of these obligations, see Centre for Environmental Law, WWF-India, New Delhi, *Strengthening Environmental Legislation in*

### B. Obligation to Implement International Obligations in Good Faith :

The principle of good faith, a peremptory norm of international law, requires them to fulfil these obligations to the fullest extent.<sup>18</sup> No State is permitted to justify its deviant conduct by invoking the general provisions of its national law.<sup>19</sup> While international law does not prescribe any particular method of compliance by states of their international obligations, it must be assumed that where an obligation requires for its fulfillment action by a state within its territorial jurisdiction, it is expected to facilitate such implementation, if necessary by taking any appropriate legislative or administrative action. This is indeed the reason why some of the international environmental instruments routinely impose on states additional obligations to establish policies, institutions and legislation to give effect to the undertakings made in each such instrument.<sup>20</sup> In strict legal terms, such provisions are tautological, but they reflect the deep concern of the international community for the national implementation of the obligations undertaken by states parties.

### III. NATIONAL ENVIRONMENTAL LAWS IN SOUTH ASIA

#### A. Factors Conditioning National Environmental Laws in South Asia

*India : Final Report on the Asian Development Bank Project*, 7 September 1999 (New Delhi, 1999), pp. 114-117. The present writer was one of the Project Implementers for this project.

18. The Friendly Relations Declaration 1970 (UN General Assembly resolution 2625 (XXV) formulating the seventh 'basic principle of international law" states :
 

"Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

"Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law".
19. Unless the provisions are of such "fundamental importance" as to have acquired general notoriety - see Article 27 of the Vienna Convention on the Law of Treaties, 1969.
20. See e.g., Article 14 of the World Charter for Nature, 1982; Principles 11, 13 and 17 of the Rio Declaration on Environment and Development, 1992; Geneva Convention on Long Range Transboundary Air Pollution 1979, (read with Article 7 of the 1988 Protocol on Nitrogen Oxides, Article 7 of the 1991 Protocol on Volatile Organic Compounds; and Article 4 of the 1994 protocol on Sulphur Emissions); Article 2(2) (b) of the Vienna Convention for the Protection of the Ozone Layer, 1985; Article 4(2)(a) of the UN Framework Convention on Climate Change, 1992; Articles 6(a) and 8(k) of the Convention on Bio-Diversity 1992; Article 10 of the UN Convention to Combat Desertification, 1994; Article VIII of the Convention on International trade in Endangered Species of Wild Fauna and Flora, 1973; Articles 4,5 and 9(5) of the Basel Convention on the Control of transboundary Movements of Hazardous Wastes and Their Disposal, 1989; Article 3(4) of the Convention

A few points may be made at the outset of portrayal of the environmental legal scenario obtaining in South Asia. First, is the issue of a South Asian perspective of development priorities. The economic development of Europe began when South Asian nations were its colonies and they readily supplied it with the necessary resources to begin and nurture the process. The European enterprise and technology simply exploited these resources with no constraints whatever, physical, legal or any other. Hence the remark by a former Minister in the Government of Nepal :

"Europe exploited the environment of the world to be miles ahead of us in modernization, we find we cannot even pollute our own backyard to attain rapid development or even to alleviate poverty".

There is a fundamental unfairness in this situation. South Asia has suffered from some of the worst depredation of colonization. She has a rapidly growing population and the world's largest mass of poverty. Yet, she "faces enormous environmental handicaps in her development".<sup>21</sup>

With poverty, overpopulation and illiteracy forming a vicious circle of challenges to development, the South Asian countries tend to prioritize the use of their scarce resources most immediately towards tackling these fundamental problems that afflict their societies, than on improvement of the quality of environment. What is perceived, as an immediate necessity for the developed economies, is often a luxury for the developing economies. This is not to say that the South Asian nations can ignore environment altogether. A region-sensitive perspective would favor a regional strategy for protection of the environment "which should be complimentary to the strategy for development, rather being only treated as a subsidiary. Wherever possible, development itself should be environment-friendly or sustainable. Where such a mutually complementary strategy is not feasible, there the development is....an objective and environment its constraint".<sup>22</sup> Very clearly, this perception of sustainable development inhibits, nay determines, the attitudes of the

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21. Pashupati Rana, "Interface between Environment and Development; Regional Strategy for Environment Protection in South Asia", in L.L. Mehrotra, H.S. Chopra and Gert W. Kueck, eds., *SSRC 2000 and Beyond* (New Delhi, 1996), pp. 200-216, at p. 200. Rana notes further : "SAARC States bear the burden of 20% of the World's population and have only 3.5% of the total land area on the planet, and generate only 2% of the global GNP. This population of around 11 billion is growing at a rapid rate, whereas GNP is just beginning to outstrip population growth rates. As a result, two-third of the world's malnourished live in this region". *Id.*

22. See Rana, *ibid.*, at p. 201.

nations of the region towards putting in place their national environmental laws and institutions.<sup>23</sup>

Second, South Asian countries, as noted already, have largely been left with a high dose of European legal traditions that supplanted the ancient customary laws of the region. Thus, our laws now think and see things and speak of them in western legal idioms and pigeonholes. They still do not adequately relate to the ground realities of the locale in question. Thus, like their western counterparts, the South Asian national laws specifically addressing environmental issues are of recent origin. Environmental issues were only incidentally dealt with by the pre-1970 laws, either as a part of the law of torts (seeking to protect the rights of one individual vis-a-vis those of another), or as a part of the law relating to occupational safety (factory laws, for instance; which itself are a 20th century development thanks mainly to ILO). This situation has changed only recently, that too to a limited extent, with the onset of the post-1970 international emphasis on environmental protection. Third, the diversity and enormity of environmental problems confronted by the individual states of the region coupled with the diversity in the levels of economic development in these countries pose a formidable challenge to evolving a uniform regional legal response to them.<sup>24</sup> The diversity and enormity of environmental problems operate in two ways. One, while issues like eco-tourism is commonly shared among the South Asian countries (even if some of them, like Maldives, feel their heat more than others), some other issues like coastal management and desertification are of special concern to some, but not to others (Coastal management is of special concern for the Maldives, Sri Lanka, India Pakistan and Bangladesh, whereas desertification is a problem of concern more for Pakistan and

23. This is why Article 10 of the 1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change (whose fate hangs precariously in balance after the recent Bush administration's threat to stage a walk out) imposes implementing obligations on all parties to the protocol, "taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances".

See also the second para of Article 11(2) of the same Protocol : "The implementation of these existing commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among developed country parties".

24. For some of the writings on this, see C. Suriya Kumaran, "Nature of the Environmental Problem in South Asia", *South Asia Journal*, Vol. 3 (1989), Nos. 1&2, pp. 1-15, Parvez Hassan, "Regional Responses to Environmental Degradation in South Asia", *ibid.*, pp. 43-52; ESCAP, *State of the Environment in Asia and the Pacific* (Bangkok, 2000); Shaukat Hassan, *Environmental Issues and Security in South Asia : Adelphi Papers*, 262 (International Institute of Strategic Studies, London, Autumn 1991); Pashupati Rana, "Interface between Environment and Development: Regional Strategy for Environment Protection in South Asia," in L.L. Mehrotra, H.S. Chopra, and Gert W. Kueck, *SAARC 2000 and Beyond* (New

India than for others). Ecological implications of industrialization and urbanization are more acutely felt in the larger countries of India, Pakistan and Bangladesh, whereas global warming and the consequent sea level rise is a special problem for the Maldives. Deforestation is a generally shared problem in South Asia, save perhaps for the Maldives, but the impact of *terrorism* on forest protection is more felt in Nepal, India, Sri Lanka and perhaps Pakistan. Natural disasters have seriously affected most countries of the region, except perhaps Nepal and Bhutan. Some of these disasters like cyclones and floods almost regularly befall upon India and Bangladesh. The magnitude of the same environmental problems may also vary from country to country, sometimes in relation to the size of the country, and sometimes without any such relationship.

Two, there may also be an interrelationship, often cause-effect relationship, among some of the environmental problems faced by the countries of the region. Thus deforestation in the upper reaches of the mighty Ganga may result in silting and flooding in Bangladesh. The urbanization and industrialization in northern parts of India may also contribute to deforestation in the northern reaches of the river, and pollution of its waters that flow into the Bay of Bengal.<sup>25</sup>

Fourth, some of the South Asian countries - India, Pakistan, Bangladesh and Sri-Lanka-share the British colonial experience, and carry with them the common law perceptions and institutions of law.<sup>26</sup> There is therefore considerable scope for exchange of ideas concerning legal and institutional mechanisms to be evolved and for sharing of the limited available regional expertise to meet common environmental problems, political will permitting. SAARC, for instance, can, but does not as yet, play a useful role more effectively than the far away situated ESCAP in this area.

### **1. Bangladesh :**

Bangladesh promulgated the Environment Pollution Control Ordinance in 1977 "to provide for the control, prevention and abatement of pollution of the environment of Bangladesh".<sup>27</sup> The Ordinance set up an Environment Pollution Control Board comprising a member of the

25. Such ecological interrelationships will hopefully, and eventually, persuade the co-riparian states to think in terms of protection of the eco-system of the whole river basin and discard the current practice of bilateralism, which perpetuates inter-state disputes concerning equitable sharing of the benefits of the river basin.

26. The impact of the British system of law on the South Asian region is well known. "Because the colonial power was the same, the laws each country inherited had a striking similarity. Thus, the Factories Acts and the Forest Acts of India and Pakistan were the same. On the creation of Bangladesh, it inherited the same from Pakistan". See Parvez Hassan, "Regional Responses to Environmental Degradation in South Asia", *South Asia Journal*, vol. 3 (1989), nos. 1&2, pp. 43-52.

27. The preamble to the Ordinance.

National Planning Commission, the Secretaries of Local and Rural Government, Agriculture, Industries, Home, Power-Water Resources-Flood Control, and Forests-Fisheries-Livestock, the Chief of Flood Control and Water Resources of the Planning Commission, an administrative Deputy Secretary (to administer the ordinance), Directors of Health and fisheries, Chief Engineer (Public Health Engineering), Chief Engineer (Inland Water Transport), a representative from Meteorological Department to be nominated by the defence Ministry, and the Director for Environment Pollution Control. The Board was mandated to formulate policies for the control, prevention and abatement of pollution and suggest measures for their implementation. It was also empowered to call for information from any person, and report from the Director for the Environment Pollution Control on the state of the Bangladesh environment, and appoint expert committees, as it might deem necessary.<sup>28</sup> The Director had powers to require any person to adopt measures as he might direct for the prevention, control and abatement of existing or potential pollution of the environment; require any person to furnish information relating to wastes, sewerage system or treatment works; and authorise any officer to enter upon, inspect and search any place.<sup>29</sup> The orders of the Director must be complied with, subject however to a right of appeal to the Board. Penalties for non-compliance included a sentence of one year, and/or a fine of 5000 taka.

It was soon realized that this statute mainly dealt with only air and water pollution, and that too inadequately. It did not provide for land use planning, zoning, production controls, registration, transportation, storage and disposal of potential pollutants, control of marine pollution, improvement of water or air quality. Nor did it provide for a framework of administrative mechanism (it only earmarked a "cell" under section 6), powers and standards, means of restrict or control of effluents and discharges. The penalties were too inadequate to be a deterrent.<sup>30</sup>

A survey made by the Bangladesh Department of Environment in July 1991 identified as many as 45 pieces of Bangladesh legislation on environment and categorized them into three groups, namely, laws relating to control of pollution, those relating to conservation of "natural and cultural resources", and those relating to protection of environmental health.<sup>31</sup> It reported that there was no legislation on environmental impact

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28. Section 5(1) of the Ordinance.

29. Section 7 of the Ordinance.

30. See Bangladesh Department of Environment, Bangladesh National - An Overview (a paper produced to 'identify the status of environmental provisions of legislation, their adequacy and other aspects, Dhaka, July 1991), p. 4.

31. *Ibid.* The Department of Environment of Bangladesh also produced a paper on Environmental Quality Standards (EQS) for Bangladesh in July 1991. These standards related to water pollution, air pollution, noise pollution, sewage pollution, industrial pollution, and soil pollution.

assessment and radiation control, that many of the statutes were inadequate, some of them, including the 1977 Ordinance, were rarely used for pollution control. It also highlighted the problem of administrative co-ordination, as it noted the laws required action by as many as 33 government agencies.

The Environment Protection Act was finally enacted in 1995 to replace the 1977 ordinance. The Act provides for a comprehensive framework "for the conservation, improvement of environmental standard and control and mitigate the pollution of the environment".<sup>32</sup> It defines, *inter alia*, terms like pollution, occupier, environment, environmental pollution, environment conservation, eco-system, person, handling dangerous substance and waste.<sup>33</sup> The Director-General of the Department of Environment has been authorized to take all actions "as may be deemed reasonable and necessary for the conservation of environment, improvement of environmental standard and control and mitigation of pollution of environment".<sup>34</sup> Taking into account the need for balancing the command-control approach and co-operative-participatory approach in environmental administration, the Act also mandates the Director-General to "advise" any person on "environment friendly handling storage, transportation, import and export of hazardous substances or its components".<sup>35</sup> The Act embodies a provision for declaration of ecologically critical areas by the Government, regulation (including prohibition).<sup>36</sup> It prohibits "the driving of vehicles which emit smoke injurious to health or detrimental to environment" and empowers the Director-General to enforce this prohibition.<sup>37</sup> The Director-General is also empowered to take action in respect of any activity causing damage to the eco-system whether directly or indirectly.<sup>38</sup> Any person "affected or likely to be affected from the pollution or degradation of environment" ,may apply to him" for remedying the damage or apprehended damage".<sup>39</sup> Director-General is also empowered to deal with discharge or threatened discharge of pollutants due to accidents<sup>40</sup>, to enter or inspect any place or activity or examine any equipment, industrial plant or to conduct search and seizure<sup>41</sup>, or to collect samples of air, water, soil or other substance from any place.<sup>42</sup> There are also provisions requiring environmental clearance, as a prerequisite for setting up of any industrial

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- 32. The preamble to the Act (unofficial English translation of the Act, by the Bangladesh Environmental Lawyers Association, Dhaka).
  - 33. Section 2 of the Act.
  - 34. Section 4(1) of the Act.
  - 35. Section 4(2) (c) of the Act.
  - 36. Section 5 of the Act.
  - 37. Section 6 of the Act.
  - 38. Section 7 of the Act.
  - 39. Section 8 of the Act.
  - 40. Section 9 of the Act.
  - 41. Section 10 of the Act.
  - 42. Section 11 of the Act.

unit which does not fall within the exempted categories.<sup>43</sup> The government is mandated to formulate environmental guidelines from time to time.<sup>44</sup> The Act provides a general right of appeal to any person aggrieved of any order or direction under it.<sup>45</sup> It also provides for offences, including those by companies, and penalties.

The 1995 Act has in short established a sufficiently comprehensive framework for environmental action. It contains elements generally common for the legal framework obtaining in India, Pakistan and Sri Lanka.

## 2. Bhutan :

The Kingdom of Bhutan has the advantage of having a relatively low density of population, leaving the land area largely in its natural state. Over 60% of its land area of 40,250 square Kilometers is covered with forests. forests are used for the forest products and for grazing. The mountainous terrain of the country does not allow any large-scale cultivation of crops. Use of wood for household needs of heating and cooking, some industrial supplies and export. Some 20% of the total land area has been declared as a protected area, and this whole reserved area is forested.<sup>46</sup>

Environmental problems such as deforestation and degradation of forest areas, degradation of pastoral land, decline of productivity of cultivable slope lands (the setting in of wasteland phenomenon), soil erosion and land slides, drying up of traditional sources of water, and increasing evidence adverse impact of floods have begun to appear on the horizon. Environmental degradation is now visible in the vicinity of areas of higher population concentration.<sup>47</sup> Also some mining activities and emergence of industries in urban areas have highlighted the need for putting in place special environmental laws and institutions.

Until recently, however, the environmental law of Bhutan was essentially based on the Buddhist principles, which were considered good enough to govern all human activity.<sup>48</sup>

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43. Section 12 of the Act.

44. Section 13 of the Act.

45. Section 14 of the Act.

46. See generally, Dorji Tenzin, "State of Environment in Bhutan with Special Reference to Forests". *South Asia Journal*, vol. 3 (1989), Nos. 1 & 2, pp. 185-201.

47. *Ibid.* at pp. 193-194.

48. Statements by the Bhutanese delegation at a Workshop on Environment Protection Legislation, 15-16 February 2001, organized for the National Environment Commission of Bhutan, under the auspices of the Jawaharlal Nehru Chair in International Environmental Law, School of International Studies, Jawaharlal Nehru University, New Delhi.

According to the cosmology of the Buddhist approach to the environment, "the appearance and disappearance of all phenomena of the universe does

Currently, awareness has dawned on the Bhutanese Government of the need to enact an environment-specific law to set up the necessary legal and institutional framework to tackle the problems that have begun to pose a threat to the fragile environment of Bhutan. A specific Environmental Assessment law is awaiting adoption since 2000.<sup>49</sup>

### 3. India :

India has come to establish probably the most comprehensive framework of legal and institutional mechanisms in the region to respond to the tremendous challenges to the environment it is facing, owing to population explosion, poverty and illiteracy augmented by urbanization, industrial development. India faces most of the environmental problems that each of the other South Asian countries face, some of them at a more formidable scale, both quantitatively as well as qualitatively. The federal structure of the country and the regional variations, disparities and peculiarities within the country also pose considerable difficulties in finding solutions to the environmental problems of the country as a whole. India is indeed a subcontinent in this regard.

India is probably the first developing country which has incorporated into its Constitution specific provisions for environmental protection<sup>50</sup>, although the Constitution of India as it came into force in 1950 did not address the environmental issues as such. As the aftermath of the Stockholm Conference, the constitution was amended in 1977, to incorporate Articles 48-A and 51-(g).<sup>51</sup> Article 48-A directs the State (both the Central and State Governments) to "endeavor to protect and improve the environment and safeguard the forests and wild life of the country". Article 51-A (g) imposes on every citizen of India "to protect and improve the natural environment including forests, lakes, rivers, and wild life, and to have compassion for living creatures". While the wording of Article 48-A does not as such confer upon any Indian citizen to claim a right to clean environment, it was left to an active judiciary to invent such

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not occur by chance but is ruled by the law of Interdependent Origination (*pratitysamudpada*) of the five Aggregates (*skandha*). All elements and phenomena of the universe are linked and interdependent in the following way : 'This being, that is : from the arising of this, that arises; from the destruction of this, that is destroyed'. Seen in this light, it is in the final analysis, our attitude [and action] which is the cause for the appearance and disappearance of any problem of the 'environment'. - Rigzin Dorji, "Protection of the Environment in South Asia", *South Asian Journal*, Vol. 3 (1989), Nos. 1 & 2, pp. 35-41, at p. 39.

- 49. See ESCAP, State of the Environment in Asia and the Pacific 2000, Chapter 11 "Institutions and Legislation", at p. 255.
- 50. See Centre for Environmental Law, WWF - India, note 17, p. 13.
- 51. Inserted by the Constitution (Forty - Second Amendment) Act, 1976 (w.e.f. 3 January 1977), vide Sections 10 & 11 respectively.

a right, albeit by extending the right of an individual to life and personal liberty under Article 21.<sup>52</sup>

Even in the absence of such provisions in the Constitution, the common law of the country has been held to embody some basic principles of law, which the State is not at liberty to ignore. As the Supreme Court of India stressed in *M.C. Mehta v. Kamal Nath*,

"Our legal system - based on English Common Law - includes the public trust doctrine as part of its jurisprudence. The state is the trustee of all natural resources, which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, air, forests and ecologically fragile lands. The state as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership".<sup>53</sup>

It is not difficult to read into the customary law of any country the doctrine of public trust for the benefit of protection of the environment.

The numerous pre-independence laws relating to use of resources, property laws, commercial laws and criminal laws dealt with issues of environmental protection only incidentally. The Indian Fisheries Act 1897, for instance, prohibits use of dynamite or other explosive substance, and use of "any poison, lime or noxious material into any water with intent thereby to catch or destroy any fish".<sup>54</sup> Very clearly, the focus of the Act has never been prevention of water pollution, let alone conservation of the aquatic environment. Similarly, the Indian Forest Act, 1927 has had the singular distinction of so blatantly contributing to the wanton destruction of forests in India, by promoting a contract system for exploitation of all forest produce without any legal inhibition or constraint. Some semblance of order and environment orientation set in only upon the enactment of the Forest (Conservation) Act in 1980.

Many post-independence statutes, at least until the 1970's, generally stayed clear of any discernible environment orientation. One of the few exceptions has, perhaps, been the Factories Act, 1948, which in its concern for labor welfare and safety at workplace made provisions while serving the cause of environmental protection rather incidentally.<sup>55</sup> On the contrary, the focus of many of the statutes of this period,

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52. See, *Subhash v. State Bihar*, All India Reporter (A.I.R.) 1991 Supreme Court 420; *Satish v. State of UP*. 1992 Supp. (2) Supreme Court Cases 94; *M.C. Mehta v. Union of India*, 1992 Supp. (2) SCC 85; *Rural Litigation and Entitlement Kendra v. State of U.P.*, A.I.R. 1985 S.C. 652 & 1259; 1985 (2)SCALE 906; A.I.R. 1987 S.C. 359 & 2426; A.I.R. 1988 S.C. 2187; J.T. 1988 (4) S.C. 710; J.T. 1990 (2) S.C. 391.
53. (1997) 1 Supreme Court Cases 388, at p. 413.
54. See Sections 4 and 5 of the Act.
55. The 1987 amendment to the Factories Act has given it a specific environment orientation.

probably beginning with the Industries (Development and Regulation) Act 1951, was on rapid industrial development.

The Stockholm Conference 1972 contributed to at least three developments in India. *First*, it 'instigated' evolution even if in fits and starts, of a broad legislative and institutional framework for the protection of the environment. *Second*, it also gave a fillip to the germination and maturing of popular movements committed to the environmental protection, gradually spreading environmental awareness among the masses. *Third*, it also gave an opportunity to the Indian judiciary to be pro-active in environmental matters as part of its concern for protection of human rights.

The Water (Prevention and Control of Pollution) Act was enacted in 1974, strangely not by virtue of Article 253 of the Constitution, but with concurrence of constituent States<sup>56</sup>. The Air (Prevention and Control of Pollution) Act, 1981, on the other hand, expressly states that it is inspired by the Stockholm Conference, and has therefore been enacted by Parliament implicitly by virtue of Article 253 of the Constitution.<sup>57</sup> But why this piece of legislation was not enacted simultaneously with the Water Act of 1974 has not satisfactorily been explained. One of course had to await a shocking human catastrophe in the form of the Bhopal Gas Disaster in December 1984 to move the Government of the day and the lawmakers to enact a comprehensive framework statute in 1986 - the Environment (Protection) Act 1986.<sup>58</sup>

Admittedly, the Environment (Protection) Act is inspired by the Stockholm Conference of 1972, fourteen years after the event.<sup>59</sup> The Act

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56. Article 253 empowers Parliament (the Central Legislature) to supersede the legislative power of the constituent States and enact law to give effect to the treaties to which India is a party or decisions of international organizations or international conferences. More on this see V.S. Mani, "Effectuation of International Law in the Municipal legal Order : The Law and Practice of India", *Asian Yearbook of International Law* (Dordrecht : Kluwer, 1997), vol. 5 pp. 145-174; P. Chandrasekhara Rao, *The Indian Constitution and International Law* (New Delhi : Taxman, 1993).
57. See the second preambular para of the Act : "Whereas decisions were taken at the United Nations Conference on the Human Environment held in Stockholm in June, 1972, in which India participated, to take appropriate steps for the preservation of the natural resources of the earth which, among other things, include the preservation of the quality of air and control of air pollution".
58. For an optimistic assessment of the Act, see Upendra Baxi, *Environment Protection Act : An Agenda for Implementation* (Bombay : N.M. Tripathi, 1987).
59. The second and third preambles of the Act read as follows : "whereas the decisions were taken at the United Nations Conference on the Human Environment held at Stockholm in June, 1972, in which India participated to take appropriate steps for the protection and improvement of human

is in four chapters - (1) Preliminary; (2) General Powers of the Central Government; (3) Prevention, Control and Abatement of Environment Pollution; and (4) Miscellaneous. The first Chapter, among other things, defines environment, environmental pollutants, environmental pollution, handling, hazardous substance and occupier. Section 3 of the Act confers upon the Central Government, the comprehensive "power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution". This power encompasses, among other things, power to take action for the purpose of co-ordination of actions by State Governments, "planning and execution of a nation-wide program for the prevention, control and abatement of environmental pollution", laying down standards for the quality of environments in its various aspects; laying down standards for emission or discharge of pollutants, restrictions as to siting of industries, laying down procedures and safeguards for prevention accidents and remedial measures, examination of manufacturing processes, materials and substances likely to cause environmental pollution, investigations and research into problems of pollution, inspection of any place, environmental laboratories, information on pollution, and preparation of manuals, codes or guides relating to pollution. The Government is also empowered to establish any authorities and officers to exercise its powers and perform its functions. It has an equally broad power to make rules in respect of all matters covered by Section 3.

Chapter III of the Act identifies two categories of acts as offences by any person committing them, namely (1) in respect of discharges or emissions in violation of prescribed standards,<sup>60</sup> and (2) in respect of handling of any hazardous substance in violation of the prescribed procedure or safeguards.<sup>61</sup> It also provides for powers of entry into and inspection of any place to determine compliance of the Act or any rules or orders made thereunder. Willful non-co-operation with the authority in this regard is an offence under the Act. The Central Government has also the power to take samples for analysis.

Contravention of the Act or the rules or orders made thereunder, is punishable with imprisonment for a term of up to five years with a fine of up to one lakh of rupees, and a failure to rectify contravention would invite an additional fine of up to five thousand rupees per day of such continued contravention.<sup>62</sup> If the contravention continues beyond a period of one year after conviction, the offender is liable to be punished with

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"And whereas it is considered necessary further to implement the decisions aforesaid in so far as they relate to the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property".

60. Section 7 of the Act.  
61. Section 8 of the Act.

imprisonment up to seven years.<sup>63</sup> The Act further provides for offences by companies<sup>64</sup> and officers of Government departments as well.<sup>65</sup> The Central government has the power to require any person, officer, State Government or other authority to furnish any information on matters within the Act.

In respect of its relationship with other laws, the 1986 Act contains the following remarkable provision :

"24(1) Subject to the provision of sub-section (2), the provisions of this Act and the rules or orders made therein shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act.

"(2) Where any act or omission constitutes an offence punishable under this Act and also under any other Act then the offender found guilty of such offence shall be liable to punished under the other At and not under this Act".

While Section 24(1) gives the impression that this Act supersedes all other laws in respect of matters it deals with, sub-section (2) takes away the sting by subordinating the offences provisions of the Act to those of other laws, most of which provide for far lesser punishments than provided for in the Act. In fact, one would have proposed that the monetary penalty should be either increased at least ten times or kept open-ended leaving it for the court to determine its quantum in the context of each case to make it sufficient deterrent.

Acting under the 1986 Act, the Central Government has promulgated a wide range of subordinate legislation, order and notifications.

The Indian judiciary has done a yeoman's service in pushing further the environmental agenda, even at times in conflict with other human rights such as the right to employment, right to food etc., and has largely helped in implementation of the post-1970 environmental legislation.<sup>66</sup> To facilitate implementation of the 1986 Act and associated statutes, Public Liability Insurance Act, 1991, National Environment Tribunal Act 1995 and National Environmental Appellate Authority Act

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63. Section 15(2) of the Act.

64. Section 16 of the Act.

65. Section 17 of the Act.

66. On this, see generally, Centre for Environmental Law, WWF-India, note 17, pp. 147-179, Bharat Desai, "Enforcement of rights to Environment Protection through Public Interest Litigation in India", *Indian Journal of International Law*, vol. 33 (1993), pp. 27-40; Rajkumar Deepak Singh, "Response of Indian Judiciary to Environmental Protection: Some Reflections", *IJIL*, vol. 39 (1999), pp. 55-63; P. Leelakrishnan, *Environmental Law in India*, New Delhi : Butterworths, 1999).

1997 have also been enacted.<sup>67</sup> There is, however, a growing criticism that these 'implementing' statutes cover too small a ground to be of any significance for the cause of protection of the environment.<sup>68</sup>

The crucial problem of legal framework for environmental protection in India, however, is that the 1986 Act has not been able to bring about a holistic approach defining the interrelationship of the multitude of statutes, old and new, with the Act, identifying central institutions to co-ordinate the implementation of policies and norms nation-wide, and harmonizing of overlapping laws and jurisdictions of diverse authorities at diverse levels of governance. Urgent action is called for to respond to this and make the Act the hub of an intrinsically coherent framework.

#### 4. Maldives :

Maldives is a small island country comprising some 2000 islands most of which are uninhabited. Given its small population, Maldives has probably the highest per capita income in the South Asian region. Its chief environmental problems relate to adverse effects of global warming, eco-tourism, and threats to the fragile marine environment.

Maldives enacted its Environmental Protection and Preservation Act in 1993. The Act recognizes that "The protection and preservation of the country's land and water resources, flora and fauna as well as the breaches, reefs, lagoons and all natural habitats are important for the sustainable development of the country".<sup>69</sup> It empowers the Government to provide necessary environmental guidelines,<sup>70</sup> and empowers the Ministry of Planning and Environment to formulate policies, as well as rules and regulations regarding the environment in areas not already covered by any government authority.<sup>71</sup> The Ministry has the responsibility to identify protected areas and natural reserves and to issue the necessary rules and regulations for the purpose. The Act also encourages "anyone" desirous of establishing any such areas, to register with the Ministry.<sup>72</sup>

The Act requires submission of an environmental impact assessment study to the Ministry before implementing any development project likely to impact the environment.<sup>73</sup> The Ministry is of course

67. For a list other enactments bearing on environment, after 1971, see Centre for Environmental Law, WWF-India, note 17, p. 188.

68. For some of the criticism of the 1991 and 1995 Acts, see Centre for Environmental Law, WWF-India, note 17, pp. 34-38. One of the important criticisms is that these statutes confine to pollution issues arising from hazardous activities.

69. Section 1 of the Act.

70. Section 2 of the Act.

71. Section 3 of the Act.

72. Section 4 of the Act.

empowered to formulate Environmental Impact Assessment Guidelines and determine what projects would require such assessment.<sup>74</sup> The Ministry is empowered to terminate any project for its 'undesirable impact on the environment" without any payment of compensation.<sup>75</sup>

The Act prohibits disposal, within the territory of Maldives, of "any type of wastes, oil, poisonous gases or any substances that may have harmful effects on the environment", unless it is "absolutely necessary" (in which case they shall only be disposed within the areas designated for the purpose by the government, and that too, with "appropriate precautions....to avoid any harm to the health of the population".<sup>76</sup> The prohibition is absolute in respect of "hazardous/toxic or nuclear wastes that is harmful to human health and the environment" Transboundary movement of such wastes through the territory of Maldives requires three months advance permission from the Ministry of Transport and Shipping.<sup>77</sup>

The Act categorizes offences against the Act or any regulations made thereunder, into two classes, in terms of "the actual gravity of the offence" - "minor offences" for which a levy of fine ranging from five to five hundred Rufiyas, and "major offences" to carry a fine of up to one hundred million Rufiyas. The fine is levied by the Ministry of Planning and Environment.<sup>78</sup>

One remarkable feature of the Act is that it embodies a declaration that "the Government of the Maldives reserves the right to claim compensation for all damages that are caused by activities that are detrimental to the environment".<sup>79</sup>

The Maldivian law as outlined above seems to display considerable flexibility in implementation - decidedly a virtue, given the small size of the country and limited range of environmental problems it faces. One hopes, however, that the judiciary will have some role in ensuring impartial determination of rights of individual vis-a-vis those of the community. The role for impartial environmental administration must find a place in the institutional set-up.

##### 5. Nepal :

Although Nepal does not seem to have any framework legislation, it has brought into force in 1993 its National Environmental Impact Assessment Guidelines.<sup>80</sup> These guidelines confer upon the

74. Section 5(2) of the Act.

75. Section 6 of the Act.

76. Section 7 of the Act.

77. Section 8 of the Act.

78. Section 9 of the Act.

79. Section 10 of the Act.

80. See its original version in the Nepalese Language, published in the *Nepal Official Gazette*, part 4, Section 43. No. 5, dated 4th Jeth 2050 (i.e. 1993).

National Planning Commission a central role in administering the guidelines. All environmental policies, programs and projects in the public sector are subject to review and approval by the Commission. The Environment Protection Division of the Commission is responsible for overseeing all activities relating to planning, program budgeting and monitoring of environment related actions.<sup>81</sup> The guidelines provide for setting down of various standards for environmental assessment, inspection and examination, pollution abatement standards, environmental auditing.

#### **6. Pakistan :**

Like India, Pakistan has inherited the whole colonial legislation that had applied to the erstwhile British Indian Empire.<sup>82</sup> The Constitution of 1973 recognizes "Environmental pollution and ecology" as a concurrent legislative subject for enactment of laws by both Parliament and the Provincial Legislatures. Problems of federalism are thus common for both India and Pakistan.

Pakistan adopted its Environment Protection Ordinance in 1983. It extended to "the whole of Pakistan and its territorial waters, Exclusive Economic Zone and historic waters".<sup>83</sup> The Ordinance established the Pakistan Environment Protection Council comprising the President of Pakistan, the federal minister of environment, provincial ministers of environment, persons nominated by the federal government, and the secretary of environment in the federal government. The Council was empowered to establish a comprehensive national environment policy, give appropriate directions to conserve resources, ensure the national development plans and policies to take into account environmental considerations, to exercise general powers of oversight. The Ordinance established the Pakistan Environment Protection Agency with a Director-General at its head. The Agency was mandated to administer the ordinance, and the rules and regulations thereunder, assist the Council in its work, prepare an annual report on the state of environment, establish National Environmental quality standards with the approval of the Council, co-ordinate environmental policies and programs, establish systems for surveys, surveillance, monitoring, measurement, examinations and inspection to combat pollution, and take measures to promote environmental science and technology, training and environmental education. The Agency had power to seek information from any government agency, establish and maintain laboratories, and initiate action for legislation in the field of environment.

81. ESCAP, note 48, pp. 244-245.

82. For a useful collection of environment related legislation of Pakistan, see, Environment and Urban Affairs Division, Government of Pakistan, *Environmental Legislation in Pakistan* (Islamabad 1993).

The 1983 Ordinance contained broad provisions concerning the requirements of environmental impact assessment and the Agency's powers in respect of it, and its duty to assist the local councils and authorities, and persons to implement schemes for proper waste disposal.

A draft comprehensive environmental legislation to replace the Ordinance of 1983 was pending since 1993, and finally the current Environment Protection Ordinance was adopted in 1997. While the new legislation retains the 1983 institutional set up and most provisions relating to environment administration, it has been made more comprehensive in the light of the post-1983 developments and experiences. Its provisions relating to waste management and control of discharges or emissions are more rigorous. It has sought to make penalties heavier and more deterrent than under the 1983 law. It also provides for an environmental tribunal with jurisdiction encompassing all matters under the Ordinance.

#### 7. Sri Lanka :

Unlike India and Pakistan, Sri Lanka is a unitary state like Bangladesh. But being part of the former British Indian Empire, Sri Lanka too carries along the colonial legal legacy of uniform civil and criminal laws in force in the empire.

Sri Lanka enacted its framework legislation, namely, the National Environmental Act, in 1980 and amended it rather extensively in 1988. The Act does six things - (1) it establishes a Central Environmental Authority; (2) it establishes an Environmental Council to assist the Authority; (3) it provides for environmental resource management; (4) it provides for control of emissions and discharges; (5) it provides for environmental quality and control of pollution; and (6) it empowers the Authority to set down various standards and guidelines and sets up a procedure for project approvals. Additionally, it also contains general provisions such as those relating to furnishing of information, inspection, establishment of protected areas, and so on.

The Central Environment Authority comprises three members appointed by the President in consultation with the Minister in charge of environment, two of whom should have expertise in environmental matters and the third, in administration. The Authority has the overall responsibility to administer the provisions of the Act and regulations made thereunder, advise the Minister on policy and criteria for the protection of any part of the environment, undertake surveys and investigations, promote research, co-ordinate action, regulate waste management and disposal, oversee project proposals, require local authorities to take necessary action; publish reports and information on environment, set standards for taking of samples and conduct of tests,

and disseminate information and promote environmental education.<sup>84</sup> The Act underscores the power of the Authority to issue, with the approval of the Minister, directions to local authorities and the duty of the latter to comply with them.<sup>85</sup> It also empowers the Authority to appoint a District Environmental Agency for each district and delegate to it such powers and functions, as it may deem necessary.<sup>86</sup>

The Environmental Council established by the Act is a broad-based body with members drawn from the Ministries in charge of Local Government, Finance, Plan Implementation, Lands, health, Industries, Transport, Power and Energy, Highways, Agriculture, Fisheries, Tourism, Labor, Textile Industry, Plantation Industry, Foreign Affairs, Education, Trade and Shipping, Defence and Greater Colombo Economic Commission, the Director-General of the Authority, seven members from NGO's and two persons with expertise or experience in environmental matters. The Council is mandated to advise the Authority on all matters relating to its responsibilities and on matters referred to it by the Authority.<sup>87</sup>

The role of the Authority in respect of resource management is manifold. It has the responsibility to formulate and recommend to the Minister a sustainable land use management scheme, the basic policy for natural resource management, a management policy for the management of fisheries and other aquatic resources and measures for rational exploitation of fisheries, a system of rational management of forestry promoting reforestation, soil conservation programs, and promotion of environmental research.<sup>88</sup>

The Act empowers the Authority to regulate and control of discharges, emissions and other waste disposal methods through a system of licences<sup>89</sup>, with a provision for a right of appeal for the aggrieved party.<sup>90</sup>

The Act prohibits pollution of the internal waters of Sri Lanka, if such pollution proves "detrimental to the health, welfare, safety or property of human beings, poisonous or harmful to animals, birds, wildlife, fish, plants or other forms of life or detrimental to any beneficial use made of those waters".<sup>91</sup> Any violation of this prohibition may invite a penalty fine of up to one hundred thousand rupees, and also for a continuing offence a fine of five hundred rupees per day of such

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84. Section 10 of the Act.

85. Section 12 of the Act.

86. Section 9 of the Act.

87. Section 7(3) of the Act.

88. Sections 15 to 23 of the Act.

89. Sections 23-A to 23-D of the Act.

90. Section 23-E of the Act.

91. Section 23-H(1) of the Act.

continuance.<sup>92</sup> Similar provisions are also made in respect of pollution of atmosphere<sup>93</sup>, pollution of soil<sup>94</sup>, noise pollution<sup>95</sup> and oil pollution.<sup>96</sup> The Act also addresses the problem of litter removal.<sup>97</sup>

The Act embodies basic provisions for project approvals and environmental impact assessment reports and guidelines, with a right of appeal to the secretary of Environment Ministry.<sup>98</sup>

The Act supersedes any planning scheme or project in a protection area under any other law.<sup>99</sup> it specifically further provides that it shall prevail over any "other written law".<sup>100</sup> Does the reference to "any other written law" seeks to save customary law, such as customary land rights and rights of user? This raises the question whether a statute law can defer to unwritten law at all. One certainly wishes that the Act clarified this issue in favor of the traditional land rights of tribal communities. Offences under the Act confer upon ordinary courts jurisdiction to deal with them according to the ordinary procedural law.

#### IV. ENVIRONMENTAL LAWS IN SOUTH ASIA IN RETROSPECT

There are four principal reasons why a critical assessment of the environmental laws in South Asian countries could be flawed in this paper. *One*, this paper has chiefly portrayed the framework environmental legislation obtaining in the region, and not other legislation bearing on environment, whether directly or indirectly. Most of the South Asian countries are still engaged in evolving environmental laws in areas of their respective national priorities and for that reason it would be rather premature to pass judgment over the state of the law in the region as a whole. *Two*, framework legislation is no panacea for all environmental ills. what is important is the efficacy and social acceptability of the implementation mechanism proffered by the law. This calls for an in depth study of both customary law and socio-cultural moorings of each of the countries of the region, and this paper does not pretend even to attempt that task. *Three*, the impact of the framework legislation can be properly evaluated only in terms of the relationship of other laws which operate side by side with the environmental legislation, as the preservation of the environment is a function that transcends all human activities and interests, and thus all societal activities and institutions. *Four*, there is a clear dearth of diverse data basic to the performance evaluation of environmental laws. Without such data, no honest and

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92. Section 23-I(3) (a) of the Act.  
93. Section 23-K of the Act.  
94. Sections 23-M and 23-N of the Act.  
95. Sections 23-P, 23-Q and 23-R of the Act.  
96. Section 23-V of the Act.  
97. Sections 23-S, 23-T and 23-U of the Act.  
98. Sections 23-Y to 23-FF of the Act.  
99. Section 24-D of the Act.  
100. Section 29 of the Act.

critical assessment of the laws is possible. Indeed, even the regional inter-governmental organization, such as SAARC, ESCAP, and ADB, have not succeeded in filling up of this gap. Whether this state of affairs also reflects the lack of commitment on the part of the regional states in imparting information concerning environment, is anybody's guess.<sup>101</sup>

The above caveat notwithstanding, the present writer may be permitted to hazard a few general comments, even if dictated by the limited nature of data surveyed and largely inveighed by his study of Indian laws and institutions.<sup>102</sup>

First, to the extent that environmental legislation in the region is largely a post-1972 phenomenon, it has been superimposed on the already existing laws, and most countries of the region have ignored the problem of harmonizing these laws and institutions based on them with the environmental legislation and institutional mechanism set up by it. On this point, however, the Sri Lankan statute stands out, as it has made sure, at least normatively, that its environmental legislation prevails over any other inconsistent statute of the country.

The Indian legal framework is flawed in several respects. It does not define the relationship of the framework legislation of 1986 with other general laws with any such clarity. Furthermore, even the relationship between the 1986 Act and other environment legislation, such as the Air Act and the Water Act, stands in disharmony, in terms of lack of hierarchy of decisional and implementation processes, policy formulation, public participation and prescription of penalties.

Second, most national framework laws, except perhaps the Indian and the Sri Lankan, fail to incorporate the essential element of public participation in the process of formulation and implementation of policies and standards. International instruments have consistently underscored the need for the participation of the people, including women, in such activities. Even in the Indian and the Sri Lankan cases, the extent of public participation in terms of either public hearings of projects or local community participation remains rudimentary and have evoked encouraging response from the public, except for a few 'professional' NGO's (in the case of Indian).

Third, all the regional laws appear largely to rely on the adversarial (conflict) system or command-and-control system, and not much of the co-operative model of implementation now largely common in some of the European countries. A neat balance of both the systems

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101. The problem is compounded by the fact that the laws of some countries such as Nepal, Bangladesh, and Bhutan are available only in their national languages and one is left to work on unofficial translations, if there are any. (The present paper has relied on an unofficial translation of the Bangladesh statute).

102. The present writer acknowledges his heavy reliance of the findings of the CEL- WWF- India Project of 1999, note 17, pp. 1-8.

is essential for the effective realization of the social objectives of the environmental legislation as also for the effective implementation of the law. In the cooperative model, the government authorities tender advice to a private party (coming up with a project proposal) or to the local community, and assist it in respect of compliance with the prescribed standards and scientific and technological requirements. In that model, the role for the conflict method arises only when after all such co-operation, advice and assistance, a party fails to show due diligence and care in continuing to comply with the legal requirements and standards, or fails to reverse or rectify contraventions within the prescribed time-limits.

*Fourth*, the penalties prescribed under the regional statutes are highly inadequate. there is a good case for giving the judiciary a role in this regard. In many national laws, the offences are 'adjudicated' by the bureaucracy, with no reference to judiciary. In order the judiciary in this task, the countries should also put in place, well before cases arise, expert bodies/laboratories/institutes adequately equipped to provide independent expert advice.

*Fifth*, the priority of customary land rights of the people over the statutory rights and duties must be specifically recognized in the environmental laws, particularly those relating to protection of forests and wildlife. In the absence of such recognition, administration and implementation of environmental laws such as the forest laws will result in increasing deforestation and denudation of natural resources, and above all uprooting of indigenous populations. The role of the long arm of government in uprooting the lives of hill tribes in India through ill-advised use of the licensing/contract system under the environmental laws is too well known.

*Sixth*, there seems to exist a feeling in governmental circles in many countries of the region that the environmental law restrictions apply only in respect of private parties, not to the public sector industries and public activities engaged in resource use. The best examples include the nuclear energy establishments. Indeed, many public sector industries assume that environmental law norms would not apply to them, as they are part of government. there is also a problem of lack of transparency in the running of public undertakings and agencies in this respect.

*Finally*, most environmental laws of the region focus mainly to issues of resource exploitation. Little or no concern is shown for resource conservation or regeneration, and in the process the much-hallowed principle of intergenerational equity is totally ignored. Subject as it is to the pressures of economic development and industry lobbies (whether indigenous or foreign), the government-made law thus betrays any holistic region, probably thanks to the onset of WTO regime which underlines an urge for commercial exploitation of mostly exhaustible or non-renewable resources. Environment management should not simply be about a regulatory-licensing regime to facilitate resource exploitation.

A model comprehensive environmental framework statute, to my mind, should contain the following elements: definitions of terms, the institutional set up (from the apex to the grassroots level), mandates for evolving policies and norms for sustainable resource conservation, sustainable resource use and prevention of environmental pollution and remedial action standards, procedures for assessment of projects in terms of these standards, provisions to ensure transparency and participation of people in general and also interested private parties to the process of policy and standard formulation and execution, advisory role for the implementing authorities to assist parties making and executing projects, deterrent penalties taking into account the problems of rehabilitation/remedying the damage done to environment as a result of deviant conduct, a right of appeal and intervention by an independent judiciary with a provision for public interest litigation, and finally, the recognition of the principle of suppression of the environmental law over all other laws. And more importantly, this law should have more emphasis on resource conservation and sustainable use of resources, than simply on control of pollution. Surely, such a law has to be locale-specific, and people-specific, constantly relating to plenty of data on all aspects of the environment, taking into account developments in technology, and promoting eco-friendly technology.

Given the basic weaknesses of the developing economies of the region, this is indeed a tall order of things to achieve.



## **ISSUES, CONCEPTS AND DEFINITIONS IN INTERNATIONAL ENVIRONMENTAL LAW : NEW PERSPECTIVES\***

R. A. Malviya\*\*

### **I. INTRODUCTION**

#### **Environmental Challenges :**

**I**t is now widely believed that the planet faces a diverse and growing range of environmental challenges which can be addressed through international cooperation. Some of the issues which international law is being called upon to address are: acid rain, ozone depletion, climate change, loss of biodiversity, toxic and hazardous wastes, pollution of rivers and seas, depletion of fresh water resources. The early international legal developments which addressed aspects of the conservation of natural resources have crystallized into an important and growing part of public international law. The conditions which have contributed to the emergence of international environmental law are twofold :

1. environmental issues are accompanied by recognition that ecological interdependence does not respect national boundaries; and that
2. issues previously considered to be matters of domestic sovereign concern have international implications: The implications which may be bilateral, sub regional or global can frequently only be addressed by international law and regulation.<sup>1</sup>

The growth of international environmental issues is reflected in the large body of principles and rules of international environmental law which apply bilaterally, regionally and globally and reflects international interdependence. The progress in developing international legal control of activities has been gradual, piecemeal and often reactive to particular incidents or availability of scientific evidence. It was not until the late 19th century that states began to recognize the transboundary consequences of activities which affected shared waters or led to the destruction of wild life (such as fur seals) in areas beyond national jurisdiction. In the 1930s

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1. Phillippe Sands, *Principles of International Law I* (Manchester University Press), 1995, p. 9..

the transboundary consequences of air pollution were acknowledged in *Trail Smelter* case. In 1950s the international community legislated on international oil pollution in oceans. By 1970s, the regional consequences of pollution and destruction of flora and fauna were obvious and, by 1980s, global environmental threats were part of international community's agenda as scientific evidence identified the potential consequences of ozone depletion, climate change and loss of biodiversity. Local issues were recognized to have transboundary, then regional and ultimately global consequences.

The UN Conference on Environment and Development (UNCED), 1992, provided an opportunity to prioritize environmental issues and consolidate a vast and unwieldy patch work of international legal commitment. The treaties and other international measures adopted prior to and at UNCED reflect the growing range of economic activities which are a legitimate concern of international community and properly subject to international regulation. UNCED agreed priorities could be divided into two categories :

- a) those relating to protection of various environmental media, and
- b) those relating to regulation of particular activities or products

The first category identified priorities for the protection and conservation of particular environmental media as :

- a) Protection of atmosphere in particular by combating climate change, ozone depletion and ground level and transboundary air pollution;
- b) Protection of land resources;
- c) Halting deforestation;
- d) Conservation of bio-diversity;
- e) Protection of fresh water resources; and
- f) Protection of oceans and seas (including coastal areas) and marine living resources.

The second category of major issues identified products of human, technological and industrial innovations, which are considered to be particularly harmful to environment requiring international regulation. These are the management of :

- a) Biotechnology;
- b) Toxic chemicals, including their international trade;
- c) Agricultural practice;
- d) Hazardous wastes, including their international trade;

- e) Solid wastes and sewage related issues; and
- f) Radioactive wastes.

For both categories the international legal issues are complex and cannot be considered or addressed without taking into account political, cultural, economic and scientific concerns. For instance :

- a) What level of environmental protection should the standards seek to establish?
- b) Should the standards be set on a uniform basis or should they be differentiated to take account of political economic and ecological circumstances?
- c) What regulatory and other techniques exist to apply the standards?
- d) How are the standards to be enforced domestically and internationally? and
- e) What happens if a dispute arises over non-compliance?

In addressing these questions, it is clear that the environment is a complex system of interconnections, that to understand the evolution and character of a particular environment it is necessary to consider a broad range of apparently unrelated factors, and that these factors should be understood as interacting with each other in a number of ways which do not permit them to be treated as discrete.<sup>2</sup> The interdependence of environmental issues poses legal challenges : How to develop and apply a comprehensive and effective set of legal requirements aimed at preventing environmental damages by addressing the source without taking measures which will cause harm elsewhere. Current efforts to develop environmentally sound energy policies reflect that challenge and require international law making to respond to environmental complexity.

International environmental law is influenced by a range of non-legal factors. The likelihood of achieving an international agreement increases with :

- a) Greater scientific consensus about causes and seriousness of a problem;
- b) Increased public concern;
- c) Perception on the part of negotiating states that other partners are doing their fair share to address the problem;
- d) Increase in short term political benefits;

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2. A. Goldie, *The Nature of the Environment*, 1993, pp. 367-68.

e) Existence of previous related multinational agreements.<sup>3</sup>

Factors which lessen the likelihood of reaching an international agreement include :

- a) Upward costs of environmental control, and
- b) Increase in the number of states negotiating a treaty.

Of all these factors, two are particularly influential<sup>4</sup> :

- a) Impact of science, and
- b) Impact of economics.

Given that the land ,seas and the air space of planet earth are shared, and given that world -transforming activities ,especially economic activities ,can have effect directly or cumulatively on large parts of the world environment, how can international law reconcile the inherent and fundamental interdependence of the world environment ? How could legal control of activities adversely affecting the world environment be established, given that such activities may be fundamental to the economies of particular states?<sup>5</sup>

## II. NEW PERSPECTIVES

### 1. DEFINING ENVIRONMENT AND RELATED CONCEPTS :

#### **Environment :**

Dictionaries define "environment"<sup>6</sup> as the region surrounding anything. Accordingly, it encompasses both the features and products of the natural world and those of human civilization. On this definition the environment is broader than, but includes, nature, which is concerned only with the features of the world itself. Ecology, on the hand, is a science related to the environment and to nature which is concerned with animals and plants and is that branch of biology which deals with the intricate web of relationships between living organisms and their living and non-living surroundings, their habits and modes of life. These interdependent living and non-living parts make up ecosystems. The ecosystem is a unit of ecology, which includes the plants and animals occurring together, plus that part of their environment over which they have an influence. Forests, lakes, rivers, oceans, coastal, estuaries, etc., are examples. Eco-system is a community of organisms, interacting with each other, plus the environment of ecosystems, which occur in similar climates and share a similar character and arrangement of vegetation are

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- 3. R. Hahn and K. Richards, 'The International Environmental Regulation', Vol. 30, *Harvard Int. Law Jl.*, 1989, pp. 421, 433-40.
  - 4. See *infra*.
  - 5. *Supra* note 1.
  - 6. *Compact Oxford Dictionary*, 1991 (2nd ed.), pp. 494, 523, 1151; A. Gilpin, *Dictionary of Environmental Terms*, 1976, p. 51.

biomes. The Arctic Tundra, prairie grasslands and desert are examples. Earth, its surrounding envelope of life giving water, air and all its living things comprise the biosphere. Finally, man's total environmental system includes not only the biosphere but also his interaction with his natural and man-made surroundings.<sup>7</sup> In simple terms, environment is the region, surroundings or circumstances in which anything exists; everything external to the organism, which affects the fulfillment of that organism. The environment includes:

- (i) The purely physical or abiotic milieu in which it exists, e.g., geographic location, climate conditions and terrain.
- (ii) The organic or biotic milieu including non-living organic matter and all other organisms, plants and animals in the region including the particular population to which organism belongs.<sup>8</sup>

The environment of human beings include the abiotic factors of land, water, atmosphere, climate, sound, odors and tastes; the biotic factors of animals, plants, bacteria and viruses; and the social factor of aesthetics.

Dramatic examples of changes in ecosystems can be seen where man has altered the course of nature, e.g., tampering with lake and river ecosystems. The Aswan Dam was built to generate electric power. It produced power but also it reduced the fish population in the Mediterranean, increased the disease-bearing aquatic snails and the fertility of the Nile valley.<sup>9</sup>

#### **Environmentalism:**

It expresses the philosophies and practices which inform and flow from a concern with the environment. One of the more recent approaches is exploration of the close bond between people and the environments that they create, inhabit, conserve or manipulate. Another approach is formulation of environmental policy to protect ecosystem. It is technocratic rather than ecocentric, concerned with means rather than ends, i.e., strategies of environmental control and management systems. It recognizes the importance of ethical issues as well, e.g., environmental imperatives require changes in social values towards a more conservation oriented system.<sup>10</sup>

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- 7. Lakshman D. Guruswami and others, *Supra note 43*, p. 223.
  - 8. A Gilpin, *Dictionary of Environmental Terms*, 1976, p. 51.
  - 9. *Supra note 7*, p. 223.
  - 10. *Supra note 7*, p. 222; R. Johnston, *The Dictionary of Human Geography*, Ed., 1986, p. 136 ; R. Bennett and Chortley, *Environmental systems : Philosophy, Analysis and Control*, 1978; T. O'Riordan, *Environmentalism*, p. 1981, p. 300; Alexander Gillespie, *International Environmental Law : Policy and Ethics* (Oxford University Press), 1997, pp. 4-12.

### **Anthropocentrism or Homocentrism :**

It connotes the idea that humans are the crowns of creation, the source of all value, the measure of all things. It means human chauvinism. Environmental problems cannot be understood and solved when torn of their human context. Anthropocentrism makes the humanity the final or even the only end of nature. It is, literally, entering in man, which shows extreme humanism.<sup>11</sup>

**Deep Ecology :** The Deep Ecological movement: The term "deep ecological" movement has so far been used without trying to define it. It is an advocacy of bolder ecology by those who are working within the shallow, resource-oriented environmental sphere. Its supporters argue that shallow environmentalism has a need for deep ecology. The deep ecology endorses the notion that a new ethic, embracing plants and animals as well as people, is required for human societies to live in harmony with the natural world on which they depend for survival and well being.

The deep ecology consists of a set of principles or key terms and phrases as basic to deep ecology, for example, the well-being of human and non-human life on earth have value in themselves (synonyms intrinsic value, inherent value). These values are independent of the usefulness of the non-human world for human purposes. Richness and diversity of life forms contribute to the realization of these values and are also values in themselves.<sup>12</sup>

Believers of this approach are convinced by "sustainability" analysis. A number of key terms and slogans from the environmental debates will clarify the contrast between the shallow and deep ecology movements.<sup>13</sup>

#### **a. Pollution:**

##### **Shallow Approach:**

Technology seeks to purify the air and water and to spread pollution more evenly. Laws limit permissible pollution. Polluting industries are preferably exported to developing countries.

##### **Deep Approach:**

Pollution is evaluated from a biosphere point of every species and system. The shallow reaction to acid rain is to avoid action by demands of more research, demands to find species of trees tolerating high acidity etc., whereas the deep approach concentrates on what is

11. *Dictionary of Philosophy*, D. Runes ed. 1983; A Naess, Institution, Intrinsic Value and Deep Ecology, Vol. 14, *The Ecologist*, 1984, p. 201; Bookchin, *The Ecology of Freedom : The Emergence and Dissolution of Hierarchy*, 1981, p. 24.

12. Lakshman D. Guruswami and others, Supra note 45, pp. 294-95.

13. *Ibid.*

going on in the total ecosystem and asks for a high priority fight against the economy and technology responsible for acid rain.

**Deep Approach:** The priority is to fight deep causes of pollution, not merely the superficial, short-range effects. Developing countries cannot afford to pay the total cost of the war against pollution in their regions, and consequently they require the assistance of developed countries. Exporting pollution is not only a crime against humanity, but also against life.

**b. Resources :**

**Shallow Approach:**

The emphasis is upon resources for humans, especially for the present generation in affluent societies. On this view, the resources of the earth belong to those who have the technology to exploit them. There is a confidence that resources will not be depleted because, as they get rarer, a high market price will conserve them, and substitutes will be found through technological progress. Further, animals, plants, and natural objects are valuable only as resources for humans. If no human use is known, they can be destroyed with indifference.

**Deep Approach:**

The concern here is with resources and habitat for all life forms for their own sake. No natural object is conceived of solely as a resource. This then leads to a critical evaluation of human modes of production and consumption. It is asked: to what extent does an increase in production and consumption favor ultimate values in human life? To what extent does it satisfy vital needs, locally and globally? How can an economic, legal and educational institutions be changed to counteract destructive increases? How can resource use serve the quality of life rather than the economic standard of living as generally promoted in consumerism? There is an emphasis here on an ecosystem approach rather than just the consideration of life forms or local situations. There is a long-range maximal perspective of time and place.

The legal definition of the environment and the aforementioned related concepts is important at two levels:

- a). At a general level, it defines the scope of the legal subject and the competence of any international organization. Thus, the failure of the 1946 International Whaling Convention to define the term "whale" has led to protracted disputes as to whether the Commission has competence over dolphins and tortoise which are all cetaceans and therefore members of the same taxonomic family as whales; and the text of the 1973 CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) was unclear as to whether its provisions applied to artificially propagated plants grown under controlled conditions in a natural environment.

b). More specifically the definition of environment assumes particular significance in relation to efforts to establish rules governing liability for damage to the environment. Legal definitions of the environment reflect scientific categorizations and groupings as well as political acts, which incorporate cultural and economic considerations. A scientific approach will divide environmental issues into 'compartments'. These include the atmosphere, atmospheric deposition, soils, and sediments, water quality, biology and humans. Scientific definitions are transformed by the political process into the legal definitions found in treaties, although the term environment does not have generally accepted usage as a term of art under international law, recent agreements have consistently identified the various media included in the term.<sup>14</sup>

The approaches to defining the environment do nevertheless vary. For instance:

- i. Early attempts to develop international environmental rules focussed on the conservation of wildlife (fisheries, birds and seas) and to a limited extent, the protection of rivers and seas. The adoption of treaties was ad hoc, sporadic and limited in scope. Early treaties (up to creation of the U. N.) tended to refer to flora and fauna rather than the "environment", thus restricting the scope of their application.<sup>15</sup>
- ii. Art XX (b) and (g) of the GATT refer not to the environment but to human, animal or plant life or health and to the conservation of exhaustible natural resources.
- iii. The 1972 Stockholm Declaration does not include a definition of environment. Principle 2 refers to the natural resources of the earth as including air, water, land, flora and fauna and natural ecosystems. The preamble of the Stockholm Declaration also recognizes that the environment of natural resources should be distinguished from the man-made environment which includes in particular the living and working environment.
- iv. The 1982 World Charter for Nature, similarly, does not define environment, but addresses to the need to respect nature through principles, which are applicable to all life forms, habitats, all areas of the earth, ecosystems and organisms, and land, marine and atmospheric resources.

14. UNEP Environment Data Report, 1992, p. 3.

15. For example : Convention to Protect Birds Useful to Agriculture, 1902; Water Boundaries Treaty Between United States and Canada, 1909; Convention for the Regulation of Whaling, 1931; Convention for the Preservation of Fauna and Flora in Their Natural State, 1933.

v. Treaties which do refer to the environment and seek to include some form of working definitions, e.g., 1974 Nordic Convention (environmentally harmful activities); 1977 ENMOD (environmental modification); 1979 Long-range Transboundary Air Pollution Convention(environment includes agriculture, forestry, aquatic and other natural ecosystems); 1991 Espo Convention and 1992 Trans-boundary Watercourses Convention (environment defined in terms of impact); 1991 Antarctic Environment Protocol (protects climate and weather patterns etc.); EC Law (environment comprises the relationship of human being with water, air, land and all biological forms). Other agreements, which use the term environment, do not define it, e.g., the 1982 Law of the Sea Convention does not define marine environment.

More specific international legal terms are being used and are subject to carefully negotiated definition. Recent examples include definitions of biological resources (Bio-diversity Convention 1992, Art.2); climate system (Climate Convention, 1992, Art. 1(3)); and ozone layer (Vienna Convention 1985, Art. 1(1)).

Other terms frequently used in international agreements relating to environmental matters and for which specific legal definitions have been established include 'pollution'<sup>16</sup> 'conservation'<sup>17</sup> 'damage'<sup>18</sup> 'adverse effects'<sup>19</sup>, and 'sustainable use or 'management'.<sup>20</sup>

Thus, the term environment is not free from conceptual difficulty. The term has become stretched and distended with time, so that what it encompasses is a question for debate.

## 2. IMPACT OF SCIENCE ON ADOPTION OF INTERNATIONAL ENVIRONMENTAL REGULATIONS:

States are of the firm view that environmental regulations should only be adopted where there is compelling scientific evidence that action is required to prevent environmental damages. This has brought diplomats and international lawyers together with the scientific community in ways not often seen in other areas of international law. The ease with which an international lawyer is able to present a cogent case for international legislation will depend upon the ability to show that the lack of action by the international community is likely to result in significant adverse effects.

However, with the acceptance of the Precautionary Principle during 1990s has made the task of international lawyer substantially less

16. Phillippe Sands, *Supra note 2*, pp. 249, 295, 301, 320, 324, 633-34.

17. *Ibid.*, pp. 203, 383-84, 402.

18. *Ibid.*, pp. 633-34, 646, 653-55, 658-59, 667-68, 669-70, 671, 675-76, 678.

19. *Ibid.*, p. 634.

20. *Ibid.*, pp. 201-02, 304, 382, 401-02.

onerous. Precautionary Principal provides a basis for action to be taken in the event of scientific uncertainty. The 1985 Vienna Convention and its 1987 Montreal Protocol, the 1990 ban on dumping of sewage sludge in the North Sea and the 1992 Climate Change Convention can be cited as examples of international environmental regulations being adopted in the face of scientific uncertainty and in the absence of international consensus on the existence of environmental harm.

The Precautionary concept is the most important new policy approach in international environmental cooperation.<sup>21</sup> It has appeared in a number of "soft law" declarations in 1980s' (1982 World Charter of Nature, 1989 decision of the Governing Council of UNEP) and has since found its way into at least fourteen "hard" multilateral agreements (1992-Climate Convention, Art. (3(3)); 1992-Biodiversity Convention (Preamble); Rio Declaration on Environment and Development (Principle 15)).<sup>22</sup>

The Principle has been eyed with some suspicion by Third World countries (the so-called 'Group of 77') and which has always considered it with a typical "Northern" demand and which has accepted it with reservations. It is all the more ironic now, eight years after Rio, to see USA and its 'Miami Group' in the bio-safety negotiations opposing the Precautionary Principle - and the group of 77 defending it with diplomatic support from the European Union.<sup>23</sup>

Precautionary Principle was for the first time invoked before the ICJ in the Nuclear Tests case brought by New Zealand against France (1995). The French government responded that the legal status of the principle was "uncertain".<sup>24</sup> So did the UK, when the Principle was

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21. D. Freestone, "The Precautionary Principle" in R. Churchill and D. Freestone (eds.), *International Law and Global Climate Change Convention* (London), 1991, p. 36. For an elaborate discussion of the precautionary principle, see Peter H. Sand, *The Precautionary Principle : Coping with Risk*, Vol. 40, *Indian Journal of International Law*, 2000, pp. 1-13; Phillippe Sands, *Supra* note 1, pp. 208-213; J. Cameron Abonchar, *The Precautionary Principle : The Fundamental principle of Law and Policy for the Protection of the Global Environment*, Vol. 14, *Boston College of International and Comparative Law Review*, 1991, p. 1; A Nolkall Kaemper, *The Precautionary Principle in International Law : What is New under the Sun?* Vol. 22, *Marine Pollution Bulletin*, 1991, p. 107; c. Raffensperger and J. Tickner (eds.), *Protecting Public Health and the Environment : Implementing the Precautionary Principle* (Cavel : CA), 1999.
22. Peter H. Sands, *Supra* note 21, p. 1, f.n.3.
23. *Ibid.*, pp. 3-4.
24. *ICJ Verbatim Records*, Sep. 12, 1995, CR 95/20, p. 71.

invoked by the European Commission as a reason for precautionary trade restrictions against the risk of mad cow disease (1998).<sup>25</sup>

Indeed, the Precautionary Principle, seems to loom as a major new controversial issue on the trade and environment horizon in negotiations in the WTO<sup>26</sup>, with the European Union pleading for clarifications and expansion of the Principle, and the USA calling for sanitary and phytosanitary measures to be based on 'sound science'. So far, the European Court of justice has sanctioned the principle only implicitly in the 1993 *Mondet* case confirming the validity of EU regulations (1992) on driftnet fishing, which has been challenged in a French Court.<sup>27</sup> The French Council of State in 1997 *Superphenix* case involving closure of a nuclear power plant on the Swiss border<sup>28</sup> initially refused to consider the Precautionary Principle formulated in the Maastricht amendment<sup>29</sup> as self-executing in the member states of the European Union<sup>30</sup>, but has since accepted it in the 1998 Transgenic Maize case as serious ground to justify suspension of a ministerial permit for the cultivation and marketing in France of bio-engineered corn by a Swiss corporation.<sup>31</sup>

Germany has the largest share of court cases involving the Precautionary Principle in response to plethora of federal environmental legislations enacted since the 1970s. The overriding tendency of the courts has been to limit the margin of administrative discretion i.e., executive's powers to take precautionary measures which the critics see as potentially boundless.<sup>32</sup> There is indeed a wide range of legal and procedural constraints on precautionary action including the administrations duty to make full use of all available information; the duty to take benefit-risk assessments; the duty to motivate and disclose

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25. A Giddens, Risk and Responsibility, Vol. 62, *Modern Law Review*, 1999, p. 9; A. Giddens, : Risk Society : The Context of British Politics", in J. Franklin (ed.), *The Politics of Risk Society* (Cambridge), 1998, p. 29.
  26. *Special Report on the WTO High – Level Symposium on Trade and Environment* in March 1999, by the NGO International Centre for Trade and Sustainable Development, Bridges Between Trade and Sustainable development Vol. 3 (No. 2), 1999, p. 8; K. Von Moltke, The Dilemma of the Precautionary Principle in International Trade, *Ibid*, Vol. 3 (No. 6), p. 3.
  27. Council Regulation 345/92, Official Journal of the European Communities, 1992, L 42/15 upheld by the Court (Luxembourg, Nov. 24, 1993), *European Court Reports*, Vol. 1, 1993, p. 6133; E. Hey, The European Community's Reports and International Environment Agreements Vol. 7, *Review of the European Community and International Environmental Law*, 1998, p. 6.
  28. Peter H. Sand, *Supra note* 5, p. 8.
  29. Art. 130(r.)(2), *ILM*, Vol. 31, 1992, p. 247, renumbered as Art. 174, Official Journal of European Communities, 1997, c 340/145.
  30. Peter H. Sand, *Supra note* 5, p. 8.
  31. *Ibid.*
  32. *Ibid.*, p. 9.

assessments and general due process rules such as the requirement that precautionary measures be commensurate with the risk and not excessive.

The legal ramifications of the Precautionary Principle are most significant when it comes to information access. It was Peter Bernstein, in his fascinating book, *Against the Gods*, who said that 'risk is not fate, it is choice'.<sup>33</sup> If that is so, it follows that those who take the risk (and who potentially suffer the consequences) should be given access to all information enabling them to know what their choices are. Hence information about risk of harm should never be monopolized whether by public or private knowledge holders and should by definition be common property.<sup>34</sup>

Except for Scandinavia, European legal systems have no equivalent to the 1966 US Freedom of Information Act<sup>35</sup> or the 1983 Canadian Access to Information Act<sup>36</sup>, which make government held knowledge generally accessible to concerned citizens. The European Union's 1990 Directive on Freedom of Access to Information on the Environment<sup>37</sup> has yet to be transformed into actual administrative practice in most member states of the EU<sup>38</sup>, and the more progressive 1998 Aarhus Convention of the UN Economic Commission for Europe<sup>39</sup> has yet to enter into force.

### 3. IMPACT OF ECONOMICS ON THE PROGRESS OF INTERNATIONAL ENVIRONMENTAL LAW :

The progress of international environmental law reflects the close relationship between environmental protection and economic development. Thus there is a strong concern on the part of states to ensure that their economic interests are taken into account in the development and application of international environmental law. Laws adopted to protect the environment can impose significant costs. Moreover, certain developed countries will be placed to benefit from the adoption of stringent environmental standards, including the advantages gained from the sale of environmentally sound technology, while others will be concerned about the threat to their economic competitiveness

33. *Ibid.*, p. 11.

34. *Ibid.*, p. 12.

35. *United States Code*, Vol. 5, p. 552, as supplemented by the 1966 Electronic Freedom of Information Act Amendments.

36. Revised Statutes of Canada, 1985, Ch. A-1.

37. Council Directive 90/313 of 7 June, 1990, *Official Journal of European Communities*, L/58/56, 1990.

38. For a comparative survey, see, R.A. Hallow (ed.), *Access to Environmental Information in Europe* (London), 1996.

39. Convention on Access to Information, Public Participation in Decision - Making and Access to Justice in Environmental Matters, adopted at Arhus (Denmark) on 25 June, 1998, Vol. 38, ILM, p. 517.

which results from the failure of other countries to adopt similar stringent standards.

Most environmental treaties do not provide for financial resources to be made available to compensate for the additional costs of protective measures, partly because at the time of negotiations their economic consequences were not fully considered. For example, the Convention on International Trade in Endangered Species (CITES), 1973, does not provide compensation to African states resulting from the loss of revenue because of the ban on international trade in ivory. This may limit the desire of many developing states to support similar measures in future. There is also concern that the move towards harmonization of standards might lead to a lowering of environmental standards to ensure that economic costs can be borne as reflected in efforts to introduce a principle of "cost effectiveness" to guide decision making under some environmental agreements. e.g., Climate Convention 1992 (Art. 3).

It is hardly surprising, therefore that in recent years environmental concerns have become economic concerns. Two issues have been particularly acute in recent negotiations : (i) Developing countries have sought to make their acceptance of environmental obligations depending upon the provision of financial assistance, and (ii) Some developing countries in order to prevent competitive economic disadvantages (which might flow from noncompliance) have striven to ensure that environmental treaties establish effective institutions which can verify and ensure that the contracting parties comply with their environmental obligations.

These two features have resulted in environmental treaties breaking new ground in the development of international legal techniques. Some environmental treaties such as 1987 Montreal Protocol (on substances that deplete the Ozone Layer), the 1992 Climate Change Convention and the 1992 Biodiversity Convention now provide for compensatory finance to be made available to developing countries to enable them to meet certain incremental costs of implementing their obligations and to provide for subsidiary bodies to verify compliance and implementation. This linkage has, in turn, led to the creation of new funding arrangements in existing institutions in particular the World Bank and the regional development banks such as GEF.<sup>40</sup>

The integration of environmental protection and economic development has led to the emergence of the concept of "sustainable development". The concept of sustainable development may be found in many environmental treaties, expressly or impliedly, and other international instruments prior to the publication of the Brundtland Report

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40. Phillippe Sands, *Supra note 1*, pp. 734-41.

in 1987.<sup>41</sup> Nevertheless, the Brundtland Report is commonly viewed as the point at which sustainable development became a broad global policy objective and set the international community on a path which led to UNCED and the body of rules referred to as "international law in the field of sustainable development", but distinguished from international environmental law.

The Brundtland Report defined sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Two key concepts are contained within it: (i) The concept of 'need', in particular, the essential needs of the present generation, and (ii) The idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

The Brundtland Report identified critical objectives for environment and development policies reflected in the concept of sustainable development: (i) Reviving growth and changing its quality, (ii) Meeting essential needs for job, food, energy, water, and sanitation, (iii) Ensuring a sustainable level of population, (iv) Considering and enhancing the resource base, (v) Reorienting technology and managing risk, and (vi) Merging environment and economics in decision making.

The forty chapters of Agenda 21 elaborate upon these issues, taken together they constitute the framework for international law in the field of sustainable development. Only fourteen chapters address issues which are primarily "environmental." The international law of sustainable development is therefore broader than International Environmental Law. Apart from environmental issues, international law of sustainable development includes the social and economic dimension of development, the participatory role of major groups and financial and other means of implementation. International Environmental Law is a part of the international law of sustainable development but is narrower in scope.

The term "sustained economic growth" as a prime objective found its way in Agenda 21 without comment or protest. Some have argued that it is a corruption of "sustainable development" brought to prominence in Brundtland report "*Our Common Future*" and have suggested some more appropriate terms such as "ecologically sustainable development" (ESD) and "sustainable human development" (SHD). These two terms are complementary; both are equally valid. Conservation of the environment is the more critical concern and vital for social justice. Hence the term ESD should be preferred. The term "sustained economic growth" is a contradiction of terms and its acceptance gives license to development that is, in fact, unsustainable.

41. Report of the World Commission on Environment and Development, *Our Common Future* (Chaired by the Norwegian Prime Minister, Gro Harlem Brundtland), New York, 1997.

"Sustainable economic growth" is an oxymoron or an impossibility theorem in a world of finite resources.<sup>42</sup>

Sustainable development is a term, which is subject to considerable interpretation depending upon the context of discussion, and the audience for the debate. The protagonists of sustainable development have developed some major differences between themselves since the Brundtland Commission published its Report, *Our Common Future*.<sup>43</sup> In *Our Common Future*, Brundtland placed the emphasis on meeting human needs rather than the protection of nature of the biosphere. From within a radical green perspective what needs to be sustained in course of pursuing sustainable development is the natural resource base. This is cogently expressed by Rees<sup>44</sup>. In his opinion, the term 'sustainable development' has been stripped of its original concern with ensuring future ecological stability as it has come to be embraced by the political mainstream. In Ree's view, it is no longer a challenge to conventional economic paradigm but rather a labored excuse for not departing from continued economic growth. The term is concerned with ensuring future ecological stability. This view of the primacy of ecological consideration, although given emphasis in radical green thinking, is an important component of a broader current of opinion. This tradition concentrates on resource base as the object of sustainability of the earth's resources, renewable as well as non-renewable.<sup>45</sup>

According to Lakshman D. Guruswami, the concept of sustainable development involves at least two sets of contradictions:

First, embedded in much of the sustainability thinking is an important difference of emphasis. Some view sustainability as a serious issue because nature is a major constraint on further human progress. They are concerned basically with the price paid by conventional growth model, if the warnings we receive from the environment are ignored, the "biosphere imperatives". The solution, then, is to develop technologies, which avoid the most dire environmental consequences of development or to take measures to assess environmental losses in a more realistic way, thus, reducing the danger that they will be overlooked by policy makers.

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42. R.A. Malviya, Sustainable development and Environment : Emerging Trends and Issues, Vol. 36, *Indian Journal of International Law*, 1996, p. 72.
43. Lakshman D. Guruswami and others, *International Environmental Law and World Order* (West Publishing Co. St. Paul, Minn. 1994, p. 310.
44. W.E. Rees, The Ecology of Sustainable development, Vol. 20, *The Ecologist*, 1990, p. 18. See also Barbier, *Economics, Natural Resources Scarcity and Development*, 1989, p. 103; p. Bartelmus, *Environment and Development*, 1987, p. 12.
45. Lakshman D. Guruswami and others, *Supra note 43*, p. 311.

Second, considering development within a North-South framework requires attention to the contradictions imposed by the structural inequalities of the global system. Green concerns of the North can often be inverted in the South where the environment is contested not because it is valued in itself but because its destruction creates a value in the South. (When we refer to the South we are referring to the majority of the population of the planet). Struggles over the environment are usually about basic needs, strategies to survive rather than "life styles". There is no point on appealing under these circumstances to idealism or altruism to protect the environment when the individual and household are forced to behave "selfishly in their struggle to survive". W. Sach<sup>46</sup> observes: The Brundtland Report incorporated concern for the environment into the concept of development by erecting 'sustainable development' as the conceptual roof for both violating and healing the environment.

Growth by itself is not enough. High levels of productive activity and widespread poverty can coexist and can endanger the environment. Hence, sustainable development requires that societies must meet human needs both by increasing productive potential and by ensuring equitable opportunities for all and their non exploitation. Satisfaction of basic human needs (food, clothing, shelter, jobs) and aspirations for an improved quality of life of the vast number of people in the developing countries is the major objective of development. A world in which poverty and inequity are endemic will always be prone to ecological and other crises. Sustainable development, within a North -South framework places emphasis on social and economic objectives rather than ecological ones.

Although "sustainable development" is a congenial language, it is not a clear conception. What does sustainable development accurately mean is not clear and who determines what will it be is not definite. That sustainable development will result in continued high rates of economic growth in all countries of the world is not certain.

Economic growth and development has no set limits in terms of population or resource use beyond which lies ecological disaster. Different limits hold for the use of energy, materials, water and land. Many of these will manifest themselves in the form of rising costs and diminishing returns, rather than in the form of any sudden loss of a resource base. The accumulation of knowledge and development of technology can enhance the carrying capacity of the resource base. But ultimate limits there are and sustainability requires that long before these are reached, the world must ensure equitable access to the constrained resources and reorient technological efforts to relieve the constrained resources and reorient technological efforts to relieve the pressure.

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46. W. Sachs, Environment and Development : The Story of Dangerous Liaison, Vol. 21, *The Ecologist*, 1991, pp. 252, 253-255, 257.

### III. INTERNATIONAL LEGAL ORDER:

#### Sovereignty and Territory :

A corollary of the doctrine of sovereignty and equality of states is a jurisdiction, *prima facie exclusive*, over a territory and a permanent population living there.<sup>47</sup> The sovereignty and exclusive jurisdiction over their territory means, in principle, that they alone have the competence to develop policies and laws in respect of the natural resources and the environment of their territory. It follows that certain areas fall outside the territory of any state and in respect of these no state has exclusive jurisdiction. These areas which are sometimes referred to as the global commons, include the high seas and its seabed and sub-soil, outer space, and according to majority of states, the Antarctic. The atmosphere is also sometimes considered the part of the global commons. This international legal order apparently worked satisfactorily as an organizing structure until technological developments permeated national boundaries. This structure, does not, however, co-exist comfortable with an environmental order which consists of a biosphere of interdependent ecosystems which do not respect artificial national territorial boundaries. Many natural resources and their environmental components are ecologically shared. The use by one state of natural resources within its territory will invariably have consequences for the use of natural resources and their environmental components in another state.<sup>48</sup> This is evident where a river runs through two or more countries or living resources migrate between two or more sovereign territories. Innocent activities in one state may, such as release of CFCs, have significant effects upon the environment of other states or on areas beyond national jurisdiction. Thus, ecological interdependence poses a fundamental problem for international law and explains why international cooperation and the development of international environmental standards are increasingly indispensable. The challenge for international law in the world of sovereign states is to reconcile the fundamental independence of each state with the inherent and fundamental interdependence of the environment,

An additional but related question arises as a result of existing territorial arrangements which leave certain areas outside any state territory: how can international law assure the protection of areas beyond national jurisdiction? While it is clear that under international law each

47. I. Brownlie, *Principles of Public International Law*, 1990 (4th Ed.), p. 287.

48. Examples are : (I) an international water system, including both surface and ground water; (ii) an air-shed or air mass above the territories of a limited number of states; (iii) enclosed or semi – enclosed seas and adjacent coastal water; (iv) migratory species which move between the waters or territories of several states; (v) a special ecosystem spanning the frontiers between two or more states, such as a series of mountains, forests or areas of special conservation of nature. *Report of the Executive Director, UNEP GC/44*, 20 Feb. 1975, p. 40-41.

state may have environmental obligation to its citizens and to other states, which may be harmed by its activities. It is less clear whether such an obligation is owed to the international community as a whole.

#### **International Actors: Emergence of New Partnerships:**

A second salient issue concerns the membership of the international community and the participation of actors in the development and application of the principles and rules of international environmental law. In the environmental field international law is gradually moving away from an approach which treats international society as comprising a community and encompassing persons (both legal and natural) within and among those states. The Rio Declaration and Agenda 21 recognize and call for further development of the role of international organizations and non-governmental actors in virtually all aspects of the international legal process, which relate to environment and development.<sup>49</sup>

#### **IV. CONCLUDING OBSERVATIONS**

Today the planet faces a diverse and growing range of environmental challenges which can be addressed only through international cooperation. Acid rain, ozone depletion, climate change, loss of biodiversity, toxic and hazardous wastes, pollution of rivers and seas and depletion of fresh water resources are some of the issues which international law is being called to address. These issues are complex, and can not be addressed properly without taking account of political, cultural, economic and scientific concerns.

International environmental law is influenced by a range of non-legal factors. The likelihood of achieving an agreement increases with : greater scientific consensus about the cause and seriousness of a problem; increased public concern; a perception on the part of negotiating states that other partners are doing their fair share to address the problem; an increase in short -term political benefits; and the existence of previous, related multilateral agreements. The factors which lessen the likelihood of reaching an agreement include the upward costs of environmental controls and the increases in the number of states negotiating a treaty or other instrument. Other relevant considerations apparently include the existence of appropriate international fora for the negotiation of the agreement and the nature of arrangements for dealing with non-compliance. Of all these two are particularly influential: the impact of science and the economic costs.

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49. Examples of international non-governmental actors or organizations are : IUCN, WWF, Greenpeace, Friends of the Earth, etc. The Rio Declaration and Agenda – 21 affirm the important partnership role of non-governmental organizations and call for their expanded role in all international legal processes which relate to environment and development : Agenda – 21, paras 38-42 to 38-44.

The integration of environment and development has led to the emergence of the concept of sustainable development. The concept of sustainable development may be found explicitly or implicitly in many environmental treaties and other instruments in the period prior to the publication of the Brundtland Report in 1987. Nevertheless, the Brundtland Report is commonly viewed as the point at which sustainable development became a global policy objective and set the international community on the path which led to United Nations Conference on Environment and Development (UNCED) and the body of rules referred to as 'international law in the field of sustainable development'.

Ecological interdependence poses a fundamental problem for international law and explains why international cooperation and development of international environmental standards are increasingly indispensable. The challenge for international law in the world of sovereign states is to reconcile the fundamental interdependence of each state with the inherent and fundamental independence of the environment.

International law and institutions serve as the principal framework for international cooperation and collaboration between members of the international community in their efforts to protect the local, regional and global environment. At each level the task becomes progressively more complex as new actors (non-governmental actors) and interests are drawn into the legal process, i.e., in the development and application of the principles and rules of international environmental law.

International environmental law comprises those substantive, procedural and institutional rules of international law which have as their primary objective the protection of the environment. But the term environment is not free from conceptual difficulty. The term has become stretched and distended with time, so that what it encompasses is a question for debate.



## FROM VELLORE TO NAYUDU : THE CUSTOMARY LAW STATUS OF THE PRECAUTIONARY PRINCIPLE

B.C. NIRMAL\*

### I. INTRODUCTION

**N**eck of the environment in development policies and strategies of both the developed and developing countries has given rise to serious global environmental problems like ozone depletion, global warming, forest degradation and acid rain which not only threaten the very survival of Earth and all those who live on it but also the fear about the sustainability of economic growth based on the present unsustainable patterns of production and consumption. Awareness of the increasing vulnerability of the environment and recognition that rapid and unabated degradation of the natural resource base on which economic activity and life itself depend may constitute the most serious of all threats to human well being in future have provided new stimuli to the world level collective mobilization around the issues of environmental issues.

The global environmental regime<sup>1</sup> that developed in the preceding century, in response to the urgency of the problems created by massive environmental degradation is the result of the scientific rationalization of nature which universalized and legitimated earlier and narrower conceptions of the environment as the locus of either sentiment or particular resources.<sup>2</sup> The rise of a world organizational regime of United Nations with an agenda broad enough to include environmental issues also greatly facilitated the growth of such regime.<sup>3</sup> It is, therefore, quite natural that modern environmental treaties constituting the edifice of this regime reflect a broad and universalistic scientific conception of nature as an ecosystem with which human society must come into

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- 1. See generally P. Sand, *Principles of International Environmental Law* (1995) ; V.P. Nanda, *International Environmental Law and Policy* (1995); P. Birnie and A. Boyle, *International Law and the Environment* (1992); A. Kiss and D. Shelton, *International Environmental Law* (1991).
- 2. John W. Meyer, Frank, Hironaka, Schofer and Tuma, 'The Structuring of a World Environmental Regime, 1870-1990', *International Organization*, 51 (1995), 623-51 at 645.
- 3. *Ibid*, at 632

balance<sup>4</sup> and recognize a number of new concepts and principles and new environmental standards. Thus, the recent treaties emphasize the urgency of finding an equitable balance between the economic, social and environmental needs of the present and future generations and lay the foundation for a global partnership between developed and developing countries, as well as between governments and sectors of civil society, based on common understanding of shared needs and interests. These perceptions stem from the fact that 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'.<sup>5</sup> Brown Weiss observes, "each generation is both a custodian and a user of our common natural and cultural patrimony. As custodian of this planet, we have certain moral obligations to future generations which we can transform into legally enforceable norms".<sup>6</sup> Safeguarding environment is thus necessary for meeting needs of the present without compromising the ability of future generations to meet their own ends. As there are global and regional inter-dependencies of the ecosystem, environmental protection being a matter of concern to the entire human kind requires a closely knit well organized concerted and continuous global and regional cooperation.

Among new principles and new concepts which have laid the foundation for the development of contemporary environmental law the notion of environmental precaution occupies an important place since it requires caution and vigilance in decision making in the face of scientific uncertainty about the effects of any action on the environment. The notion of environmental precaution largely stemmed from diplomatic practice and treaty making in the spheres, originally, of international marine pollution and now of climate change, biodiversity, climate change, pollution, bio-safety and broadly, the environment. In addition, this notion has been recognized in the domestic legislation of many countries and

4. The 1985 Convention for the Protection of the Ozone Layer and 1979 Convention on Long - Range Transboundary Air Pollution, By contrast earlier treaties like the 1911 Fur Seal Convention concerned with management of specific international dependencies or reflecting a distinctive sentimentalization of nature took a more romantic view (e.g. 1933 Convention Relative to the Preservation of Fauna and Flora in their Natural State. See generally Meyer et al n. 2, pp. 636-637).
5. Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports, 1996
6. E.B. Weiss, *In Fairness to Future Generations : International Law, Common Patrimony and International Equity* (1989), *Ibid*, 'Our Rights and Obligations to Future Generations for the Environment' AJIL, 84 (1990), 198; D' Amato 'Do Owe a Duty to Future Generations to Preserve the Global Environment? AJIL, 84 (1990), 190. See also *Minors Oposa v. Secretary of the Department of Environment and Natural Resources, Supreme Court of the Philippines*, ILM, 33 (1994), 173. and Judge Weeramantry's Dissenting Opinion in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Nuclear Tests case*, I.C.J. Reports, 1995, pp. 288, 341. Reprinted in *IJIL*, 36 (1996), 77-116.

several national courts have applied it in domestic disputes. In *Vellore Citizens Welfare Forum*<sup>7</sup> and *A.P. Pollution Control Board v. Prof. M.V. Nayudu*<sup>8</sup> the Indian Supreme Court applied the precautionary principle, ruling that it has become part of the environmental law of this country. The apex court in the former case even went to the extent of asserting that the principle has become part of the customary international law. This raises million Dollar question whether the principle has really acquired the status of a rule of customary international law.

Against this background, this Article considers the status of the precautionary principle under customary international law by examining the relevant international treaties and conventions, decisions of the International Court of Justice, International Tribunal of the Law of the Sea, European Court of Justice, European Court of Human Rights, the Appellate Body of the W.T.O. and above all the domestic practice of States. Initially, this Article sets the stage by discussing the meaning and definition of the precautionary principle and its linkages with other principles of environmental law. The Article next examines the place of the principle in international environmental treaties and the nature and extent of its recognition in the domestic practice of States. The Article then proceeds to discuss the status of the precautionary principle under the municipal law of India in the backdrop of the landmark judgments of the Supreme Court. It then proceeds to make a through inquiry into the status of the principle under customary international law.

## II. APPRECIATING THE PRECAUTIONARY CONCEPT

### (a) Origin and Evolution :

The expression 'precautionary principle' is an approximate but too imperfect English translation of the original German concept *Vorsorge-Prinzip* from which it is derived. The German concept, it has to be recognized, is associated with such linguistic 'hyperlinks' as *Besorgnis* (concern), *Sorgfalt* (care in the sense of diligence), *Sorge* (care in the sense of worry).<sup>9</sup> Historically, the precautionary approach can be traced in sociology much further than in law, in the concept of 'crisis of the provident State' as Europe has come to know it in the 19th century and the early 20th century.<sup>10</sup> The idea that hazardous industries should be subjected to precautionary conditions can be traced back to the 19th century French and Prussian legislation and the 1906 Alkali and Other Works Regulation Act of the UK.

7. A.I.R. 1996 S.C. 2715, para 13.
8. A.I.R. 1999 S.C. 812, para 29. Other related cases are : *M.C. Mehta v. Union of India*, 1997 2 SCC 353; *M.C. Mehta's case*, 1997 2 SCC 441, *S. Jagannath v. Union of India* 1997 2 SCC. 81 and *M.C. Mehta v. Union of India* 1997, 3 SCC. 715.
9. Peter H. Sand, 'The Precautionary Principle : Coping with Risk', *IJIL*, 40 (2000), 2.
10. *Id.* at 5.

So far as the translation of the precautionary principle into a legal rule is concerned it was Sweden which for the first time in 1969 introduced the concept of 'environmentally hazardous activities' for which the 'burden of proof is flatly reversed'.<sup>11</sup> Its appearance and recognition in international declarations and treaties is comparatively a recent phenomenon. In the beginning it made its appearance in a number of soft law declarations such as the 1982 World Charter for Nature, the Ministerial Declarations of the International Conference on the Protection of the North Sea, and decision 15/27(1989) of the Governing Council of UNEP. It has since found its way into a number of 'hard multilateral treaties and what is aptly called the emerging 'quasi-federal' law of the European Union.<sup>12</sup>

**(b) Scientific Uncertainty and the Precautionary Concept :**

The precautionary principle is a significant departure from the traditional approach which required States to act on the basis of scientific knowledge. It also amounts to a rejection of the 'assimilative capacity approach'<sup>13</sup> which assumed that 'science could provide policy makers with the information and means necessary to avoid encroaching the assimilative capacity of the environment and presumed that relevant technical expertise would be available when environmental harm was predicted and there would be sufficient time to act in order to avoid such harm'.<sup>14</sup> But experience has shown that Science does not always give correct and authentic information and in the case of grave risks even humanities and social sciences may be considered as valid sources of information and furthermore concerns based on common fears environmental harm that are likely to be caused by industrial or developmental activities are relevant.<sup>15</sup> It is in fact the inadequacies of science that have led to the evolution of the precautionary principle. In the words of Charmian Barton<sup>16</sup>:

"There is nothing to prevent decision makers from assessing the record and concluding there is inadequate information on which to reach a determination. If it is not possible to make a decision with 'some' confidence, then it makes sense to err on

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- 11. S. Westernlund, 'Legal Anti-Pollution Standard in Sweden', *Scandinavian Studies in Law*, 25 (1981), 223, at 231 cited in Sand, n.9, at 6.
  - 12. E.C. Council Directive 82/501 (Seveso Directive) on Major Accident Hazards of Certain Industrial Activities, as amended by Directives 88/610 and 96/82, OJEC (1988) L.336/14 and (1997) L. 10/13, cited in Sand, n. 9, at p. 6.
  - 13. Principle, 6 Stockholm Declaration, 1972.
  - 14. A.I.R. 1999 S.C. 812 para 31.
  - 15. John M. Van Dyke, 'The Evolution and International Acceptance of the Precautionary Principle', paper presented at Int. Conference on International Law in the New Millennium organized by Indian Society of International Law (New Delhi 4-7 Oct. 2001).
  - 16. Barton, 'The Status of the Precautionary Principle' in *Australia Henv Envtt. L. Review*, 22 (1998), 509 at 547.

the side of caution and prevent activities that may cause serious or irreversible harm. An informed decision can be made at a later stage when additional data is available or resources permit further research. To ensure that greater caution is taken in environment management, implementation of the principle through judicial and legislative means is necessary".

Thus, the precautionary concept is based on the idea that it is better to err on the side of caution and prevent environmental harm which may indeed become irreversible. In other words, the principle means that decision makers 'must take precautionary measure....when there is an expectation that a relevant activity may create adverse environmental interference, even in the absence of conclusive evidence displaying a relationship between cause and effects'.<sup>17</sup>

The principle means 'take care'<sup>18</sup> or 'better safe than sorry'<sup>19</sup> and does not reject or ignore science. All that it requires is that those who want to undertake new developments should engage in scientific studies to assess the impacts of their initiative on environment and also to consider 'less intrusive alternative approaches'.<sup>20</sup> It is only after they prove on the basis of scientific knowledge that their project and new technologies are environmentally sound, they will be permitted to go ahead with their new ventures. Thus the precautionary principle promotes more science.<sup>21</sup> Actually, the realization that launching new activities and new technologies without studying their impacts on the environment and ecosystem is not always a magic-wand to solve the world's problem and therefore the interests of humanity would be better served if these were introduced after meeting the burdens of proof required by the precautionary principle has been the fountain source of this principle.<sup>22</sup> At its core is respect for ecosystems and living creatures of the world and the overwhelming need to promote intragenerational and intergenerational equity in environmental management. No wonder then, it is against transfer of risks and costs from one region to another, or from this generation to future ones. It therefore requires the internalization of risks and costs to facilitate a fair and sober analysis of whether to proceed with a project.<sup>23</sup>

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- 17. Michele Territo, 'The Precautionary Principle in Marine Fisheries Conservation and the U.S. Sustainable Fisheries Act of 1996', *Vt L. Rev.*, 24 (2000), 1351 at 1352 (citing Jonas Ebbessn, *Compatibility of International and National Environmental Law* (1996), 117-120. See also Dyke, n. 15 at p. 29.
  - 18. Christopher D. Stone, 'Is There a Precautionary Principle?' *Environmental Law Reporter*, 31 (2001), 10790.
  - 19. Frank Cross, 'Paradoxical Perils of the Precautionary Principle' *Wash. & Lee L. Rev.* 53 (1996), 351. cited in Dyke, n. 15, p. 2.
  - 20. Dyke, n.15., p. 3.
  - 21. See Dyke, n. 15 p. 27.
  - 22. *Ibid.*
  - 23. *Ibid*, p. 3

The precautionary principle is a means of achieving 'sustainable development'.<sup>24</sup> It requires anticipatory, preventive and precautionary measures to prevent environmental degradation. In the words of John Lee it requires 'an anticipatory response...in situations of uncertainty where a violation has not occurred and no harm has been done, but where a strong risk of such a violation exists'.<sup>25</sup> Precautionary duties must not only be 'triggered by the suspicion of concrete danger but also by (justified) concern or risk potential'.<sup>26</sup>

**(c) Reversal of the Burden of Proof :**

As already noted, this principle shifts the burden of proof to those who want to engage in a new activity. The special rule of burden of proof that stems from the principle places the burden 'as to the absence of injurious effect of the actions proposed' on 'those who want to change the status quo'.<sup>27</sup> They are to discharge this burden by showing the absence of a 'reasonable ecological or medical concern. This is often termed as a reversal of the burden of proof. Without this principle those opposing the changes would have to prove that a food additive is toxic or a new fishing activity is likely to cause a negative impact on species or a shipment of a hazardous cargo is likely to cause environmental harm, which is not fair'.<sup>28</sup> Therefore, 'it is necessary that the party attempting to preserve the status quo by maintaining a less polluted State should not carry the burden of proof and the party who wants to alter it, must bear the burden'.<sup>29</sup> Judge Weeramantry explains the rationale of the shifting of burden of proof on the party whose activity is likely to jeopardize the environment in these words<sup>30</sup>:

Where a party complains to the Court of possible environmental damage of an irreversible nature which another party is committing or threatening to commit, the proof or disproof of the matter alleged may present difficulty to the claimant as the necessary information may largely be in the hands of the party causing or threatening damage.

It is precisely for this reason that the precautionary principle places the burden of proof on the person or entity proposing the activity

- 24. See generally, P.S. Elder, 'Sustainability', *McGill Law Journal*, 36 (1991), 832; P. Sands, 'International Law in the Field of Sustainable Development', *BYIL* 65 (1994) 303; McGoldrick, 'Sustainable Development and Human Rights : An Integrated Conception', *ICLQ* 45 (1996), 796.
- 25. John Lee, 'The Underlying Legal Theory to Support a Well Defined Human Right to a Healthy Environment as a Principle of Customary International Law', *Colum. J. Envt. L.* 25 (2000), 283, 337.
- 26. A.I.R. 1999, 812 at 821.
- 27. Wynne, 'Uncertainty and Environmental Learning', *Global Env'l. Change*, 2 (1992), at p. 123.
- 28. Dyke, n.15, p. 28.
- 29. James Olson, 'Shifting the Burden of Proof', *Env. L.* 20(1990), 891 at 848.
- 30. Judge Weeramantry's Dissenting Opinion, n. 6.

that is potentially harmful to the environment<sup>31</sup> in cases involving an identifiable risk of serious or irreversible harm viz. extinction of species, indisposed toxic pollution or major threats to essential ecological processes. This special burden of proof creates a rebuttable presumption in favor of 'uncertain but non-negligible' environmental risks. Therefore, if evidence presented by the developer or industrialist to alleviate concern about the perceived environmental harm is not sufficient, then the presumption should operate in favor of environmental protection.<sup>32</sup>

The precautionary principle also urges the decision makers to analyze the possible benefits and costs both of action and of inaction and where there are significant risks of damage to the environment, to take precautionary action to prevent environmental harm without waiting for full certainty and conclusive scientific evidence. In particular, precautionary action is to be taken where action taken at promptly low cost is likely to avoid most costly damage in future or where a serious and irreversible damage is likely to be caused if such an action is delayed.<sup>33</sup> In such cases regulatory actions are justified. In situations to which the precautionary principle is applicable the required standard now is that the risk of harm to the environment or to human health is to be decided in public interest according to "a reasonable person' test".<sup>34</sup>

#### **(d) EIA and the Precautionary Principle :**

Another important aspect of the precautionary principle is its emphasis on writing of interdisciplinary environmental impact assessments with public input and their distribution. The principle of 'Environmental Impact Assessment' is in fact ancillary to the broader principle of precaution discussed just above. Like in the precautionary principle, this principle also is gaining strength and international acceptance. The 1987 UNEP Guidelines on 'Goals and Principles of Environmental Impact Assessments', for instance, States in Principle I. that

"States (including their competent authorities) should not undertake or authorize activities without prior consideration, at an early stage, of their environmental effects. Where the extent, nature or location of a proposed activity is such that it is likely to significantly affect the environment, a comprehensive environmental impact assessment should be undertaken in accordance with the following principles".

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- 31. See Report of Dr. P.S. Rao 'Special Rapporteur, International Law Commission' 3.4.1998, para 61.
  - 32. Barton, n.16, at 549.
  - 33. See the 1990 British White Paper entitled, 'The Common Inheritance : Britains' Environmental Strategy'.
  - 34. *A. P. Control Board v. Nayudu*, AIR 1999 S.C. at p.82 quoting Barton, n. 16.

A proper EIA should, according to Principle 4, includes :

- (a) A description of the proposed activity;
- (b) A description of the potentially affected environment, including specific information necessary for identifying and assessing the environmental effects of the proposed activity;
- (c) A description of practical alternatives as appropriate;
- (d) An assessment of the likely or potential environmental impacts of the proposed activity and alternatives, including the direct, indirect, cumulative, short term and long-term effects;
- (e) An identification and description of measures available to mitigate adverse environment impacts of the proposed activity and alternatives, and an assessment of those measures;
- (f) An indication of gaps in knowledge and uncertainties which may be encountered in compiled information;
- (g) An indication of whether the environment of any other State or areas beyond national jurisdiction is likely to be affected by the proposed activity or alternatives.
- (h) A brief, non-technical summary of the information provided under the above headings.

The 1990 Bergen ECE Ministerial Declaration on Sustainable Development in paragraph 16(f) identified the following as part of what it called the 'Bergen Process'<sup>35</sup> :

"To undertake the prior assessment and public reporting of the environmental impact of projects which are likely to have a significant effect on the human health and the environment and, so far as practicable, of the policies, programs and plans which underline such projects and to ensure that East European and developing countries are assisted through bilateral and multilateral channels in evaluating the environmental impact and sustainability of their own development projects. To develop or expand procedures to assess the risks and potential environmental impacts of product".

The EIA principle subsequently found its way in the Convention on Environmental Impact Assessment in a Transboundary Context; 1991 which requires States parties to take the necessary legal, administrative and other measures to ensure that prior to a decision to authorize or undertake a proposed activity in Appendix I that is likely to cause a significant adverse impact, an environmental impact assessment is made. The principle of course went further in time than 1991 and can be

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35. Quoted in Judge Weeramantry's Dissenting Opinion, n.8.

traced to the 1982 Law of the sea Convention and other treaties.<sup>36</sup> Some international organizations also have developed their own assessment requirements.<sup>37</sup>

**(e) Linkages of the Precautionary Principle with other Environmental Principles :**

The precautionary principle is closely linked with several emerging principles of international environmental law. Article 198 of the 1982 Convention on the Law of the Sea, for example provides that 'when a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international authorities. Principle 18 of the Rio Declaration reflects this proposition. It provides that States shall immediately notify other States of any natural disaster or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Therefore when environmental risks are anticipated those, who create risks are required by the precautionary principle to notify other countries of situations that are likely to produce harmful effects on their environment. The precautionary principle also involves a duty to work with potentially affected States to prepare emergency contingency plans.<sup>38</sup> They are also required to take precautionary measures to prevent or limit damage to the environment<sup>39</sup>

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- 36. Article 204 of the Convention on the Law of the Sea, 1982 provides that States should 'observe, measure, evaluate and analyze by recognized scientific methods, the risks or effects of pollution of the marine environment' and in particular 'should keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment'. When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of such assessments'. See also the Nordic Environmental Protection Convention 1974 (Art. 6); the Protocol on Environmental Protection to the Antarctica Treaty 1991 (Art. 8). The EEC Council, Directive 85/337.
  - 37. E.g. the World Banks Operational Directive 4.00 of 1989. Judge Weeramantry in his dissenting Opinion in the *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgement in the 1974 Nuclear Tests case* declared : When a matter is brought before it which raises serious environmental issues of global importance and a *prima facie* case is made out of the possibility of environmental damage, the Court is entitled to take into account the Environmental Impacts Assessment principle in determining its preliminary approach". I.C.J. Reports, 1995, 268, p. 345.
  - 38. Art. 199 UNCLOS.
  - 39. P. Sands, 'Principles of International Environmental Law' (1995), Vol. I, 194-95.

and also to create appropriate liability and compensatory regimes for compensating the injured parties.<sup>40</sup>

**(f) The Precautionary Principle : An Evolutionary Concept :**

While the concept of precaution seems to have gained an increasing degree of acceptance in the past two decades, challenging issues that its application in a concrete situation presents continue to haunt the experts and scholars. What is the potential ambit of its coverage? What is the operational criteria? There are also other challenging issues-the monetary costs of environmental regulations, possible public health risks associated with the very remedies improvised to avoid risk diversity and vagueness of articulations of the notion and uncertainties about attendant obligations, and the imprecision and subjectivity of such a value laden notion. It is true that some authors have made efforts to workout solutions to these issues<sup>41</sup>, but as Van Dyke rightly points out, 'it is probably impossible at this early stage to have an all-encompassing formula applicable to all situations'.<sup>42</sup> As with other new notions and concepts of international environmental law, this principle is slowly but surely gaining content and dimension. As the Hawaii Supreme Court aptly observed recently, 'As with any general principle, its meaning must vary according to the situation and can only develop over time'.<sup>43</sup>

**(g) Precautionary Principle and the Right to Information :**

The right to information, an individual and group human right recognized in a number of international instruments,<sup>44</sup> is highly relevant to human rights and environment. It not only constitutes an essential attribute of the democratic processes and the principle of popular participation but is also very much essential for the realization of the right to a safe and decent environment and the prevention of environmental human rights problems.<sup>45</sup> The right imposes a duty on governments to

- 40. Art. 235 UNCLOS. See also Principles 13 and 27 of the Rio Declaration, 1992.
- 41. See Deborah Katz, Note, 'The Mismatch between the Bio-Safety Protocol and the Precautionary Principle'. *Geo. Int. Envt. L. Rev.*, 13 (2001), 949, 9567.
- 42. Dyke, n. 15, at p. 4.
- 43. In the Matter of Water Use Permits Application, Waialcole Ditch Combined Contested case Hearing, 9 p. 3 D., 466-67 (Hawai 2000), cited in Dyke, n.15, p. 25.
- 44. See Common Article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. See also Article 12 of the Draft Declaration on Freedom of Information.
- 45. Final Report on Human Rights and Environment Prepared by Special Rapporteur Ksentini, EC. 4/Sub. 2/1994/9, para 209. On the importance of environmental information see Principle 19 of the Stockholm Declaration, Principle 10 of the 1992 Rio Declaration, the World Charter of Nature G.A. Res., 1982, the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage, 1972 the Arab Declaration on Environment

collect and disseminate information and to provide due notice of significant environmental hazards. It also includes the right to be informed, even without a specific request, of any matter having a negative or potentially negative impact on the environment.

According to Peter Bernstein 'risk is not fate, it is choice'.<sup>46</sup> What follows from this view is that 'those who take the risk (and who potentially suffer the consequences) should be given access to all information enabling them to know what the choices'.<sup>47</sup> In the context of environmental matters it means that information are about risk of harm should be made available to the potential victims. J. Fischer goes one step further and pleads for freedom of risk information as 'new Magna Carta of ecological democracy'.<sup>48</sup>

The U.S. and Canadian legislations make government held knowledge generally accessible to concerned citizens. The 1990 EU Directive on Freedom of Access to Information on the Environment and the 1993 Code of Conduct regarding Public Access and the EU Council and Commission's documents also deals with environment information. The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters call on States to encourage voluntary public information by operators, to develop product information mechanisms, and to establish nation-wide pollution inventories 'taking into account international processes'.<sup>49</sup> Not only government held risk information but even one held by industry and multinational corporations should be made available to the interested citizens through voluntary commitments of codes of conduct.<sup>50</sup> Easy access to such information could be useful in making the precautionary principle work transnationally. In the words of a perceptive

and Development and Future Perspectives U.N. Doc. A/46/632, 1991. The EC Directive on Freedom of Access to Information on the Environment 90/313 EEC of 7 June 1990, Nordic Convention on the Protection of the Environment, 1979, the ASEAN Agreement on the Conservation of Nature and Natural Resources 1985, the Antarctica Protocol on Environment Protection, 1991.

- 46. P.L. Bernstein, *Against the Gods : The Remarkable Story of Risk* (1996), at p. 8. Quoted in Sand, n.9 at p. 11.
- 47. Sand, n.9, at p. 12.
- 48. J. Fischer, In *Politik in der Risiko-Gesellschaft* U. Beck (ed.) (1991), 312 at 324. cited in Sand, n. at 13, f.n. 74.
- 49. For the text of this Convention see *J.L.M.*, 38 (1999), 517.
- 50. Sand n.9 at p. 13. U.S. Toxic Release Inventory (TRI) pursuant to the Emergency Planning and Community Right to Know Act, enacted as part of the Superfund Amendments and Re-authorisation Act of 1986, Public Law No. 99-499; Canada's National Pollutant Release Inventory. For a summary of these inventories see UNEP, *Global Environment Outlook*, 2000 (London 1999), 309-310.

commentator, 'rather than the 'provident State', it is the provident citizen and the provident consumer who must be empowered to take informed precautionary action - so as to exercise the choice of risk which we are told we have'.<sup>51</sup> It is need gratifying to note that the right to environmental information is also gaining in importance and recognition in India.<sup>52</sup>

### III. THE CONCEPT OF PRECAUTION IN INTERNATIONAL LAW

#### (a) Treaties and International Documents :

After having its initial debut in national legislation like the Swedish Environment Protection Act of 1969 and the U.S. National Environment Policy Act, 1970 and gaining its recognition in a number of 'soft law' declarations, the precautionary principle has since found place in a wide variety of treaties. Article 7 of the Bergen ECE Ministerial Declaration on Sustainable Development formulated the precautionary principle in these terms<sup>53</sup>:

"In order to achieve sustainable development policies must be based on the precautionary principle. Environment measures anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation".

In paragraph 16(f), the Declaration stressed the importance of optimizing democratic decision making related to environment and development issues. Two years later the Rio Declaration repeated the aforesaid formulation with the addition of the net so innocuous rider 'cost-effective'.<sup>54</sup> Para 17-22 of a related document i.e. Agenda 21 provides<sup>55</sup>:

States, in accordance with the provisions of the United Nations Convention on the Law of the Sea on protection and preservation of the marine environment, commit themselves, in accordance with their policies, priorities and resources, to prevent, reduce and control degradation of the marine environment so as to maintain and improve its life support and productive capacities. To this end it is necessary to:

- (a) Apply preventive, precautionary and anticipatory approaches so as to avoid degradation of the marine environment, as well as to reduce the risk of long term or irreversible adverse effects upon.

51. Sand n. 9 at p. 13.

52. See generally Y.S. Tiwari, 'Conservation of Biodiversity and Techniques of People's Activism' *J.L.I.* 43 (2001), 191, 215-219.

53. Quoted in Judge Weeramantry's Dissenting opinion, n. 6.

54. Rio Declaration on Environment and Development, June 14, 1992, *I.L.M.*, 31 (1992), 874, 879.

55. Agenda 21, Chapter 17, 17.22, Report of the United Nations Conference on Environment and Development, U.N. Doc. A/Conf.151/26 (Vol. 13).

Para 17.1 also called for 'new approaches to the marine and coastal area management and development, at the national, regional and global levels, approaches that are integrated in context and are precautionary and anticipatory in ambit. References to the precautionary principle also appeared in two treaties concluded at the Rio Conference - the Convention on Biodiversity 1992<sup>56</sup> and Climate Convention.<sup>57</sup> It also found acceptance in the Convention on the Protection and Use of Transboundary Watercourses, 1992<sup>58</sup>, the OSPAR Convention, 1992<sup>59</sup>, the Baltic Sea Convention and also in the 1992 Maastricht Treaty.

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- 56. The Preambulary paragraph of the Biodiversity Convention States : "Where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as reason for postponing measures to avoid or minimize such a threat". *I.L.M.* 31 (1992), 818.
  - 57. United Nations Framework Convention on Climate Change, May 9, 1992, Art. 3(3), U.N. Doc. A/CONF. 151/26, *I.L.M.* 31 (1992) 849 (stating that "[t]he parties should take *precautionary measures* to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost".
  - 58. Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, preamble and Art. 2(2)(a), 32 *I.L.M.* 1069, 1076 (1993) (requiring contracting parties to apply "the precautionary principle, by virtue of which preventative measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm to living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects...").  
Ministerial Declaration of the Sixth Trilateral Government Conference on the Protection of the Wadden Sea (Denmark/Germany/Netherlands), para 3(iii) ("The common policies....will be further implemented based on... the precautionary Principle, i.e. to take action to avoid activities which are assumed to have significant damaging impact on the environment, even when there is no sufficient scientific evidence to prove a causal link between activities and their impact..."), quoted in Dyke, n. 15.
  - 59. Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 1992, preamble and Art. 2(2)(a), 32 *I.L.M.* 1069, 1076 (1993) (requiring contracting parties to apply "the precautionary principle, by virtue of which preventative measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm to living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects..."). Ministerial Declaration of the Sixth Trilateral

It is noteworthy that the Maastricht Treaty States that community policy on environment 'shall be based on the precautionary principle'.<sup>60</sup> This provision, according to Judge Weeramantry, 'would lead one to expect that the principle thus applicable to Europe would also apply to economic activity in other global theatres'.<sup>61</sup> In a similar vein P. Sands observes that 'There is no doubt that its impact will be felt beyond the geographical scope of the EU, as the latest row over 'hormone beef' imports from the United States illustrates'.<sup>62</sup>

Another formulation of the principle can be found in Article 5(7) of the 1994 Pre-agreement on the Application of Sanitary and Phytosanitary Measures<sup>63</sup>:

In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Member shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.

It is important to note that certain treaties refer to 'precautionary measures' rather than the 'precautionary principle'. Prominent among

Government Conference on the Protection of the Wadden Sea (Denmark/Germany/Netherlands), para 3(iii) ("The common policies...will be further implemented based on... the precautionary Principle, i.e. to take action to avoid activities which are assumed to have significant damaging impact on the environment, even when there is no sufficient scientific evidence to prove a causal link between activities and their impact..."), quoted in Dyke, n. 15. Convention on the Protection of the Marine Environment of the Baltic Sea Area, April 9, 1992 Art. 3(2), 1992 ("The contracting parties shall apply the precautionary principle, i.e., to take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with relationship between inputs and their alleged effects".

- 60. Article 130R, para 2 of the Amended European Community Treaty says that Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the community. It shall be based on the precautionary principle and on the principles that preventative action should be taken, that environmental damage should be as a priority be rectified at source and that the polluter should pay.
- 61. Weeramantry, *IJIL* (1996) at p. 100.
- 62. Sand, n. 9, at p. 7.
- 63. Pre-agreement on the Application of Sanitary and Phytosanitary Measures, 1994 Art. 5(7). *ILM*, 33 (1994), 1226.

these treaties are the Vienna Convention for the Protection of the Ozone Layer 1985<sup>64</sup> and the 1987 Montreal Protocol to that Convention<sup>65</sup> both of which referred in their respective preambles to 'precautionary measures'.

As is evident from some recent treaties there is also a trend to use the expression 'precautionary approach' in the place of 'precautionary principle'. Article 3(1) of the 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter<sup>66</sup>, for instance, provides : 'In implementing this Protocol contracting Parties shall apply a precautionary approach to environmental protection from dumping of wastes or other matter whereby appropriate preventive measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects. Governments' preference for the use of word 'approach' rather than 'principle' stems from the fact that it appropriately imports a certain degree of flexibility. As doubts still persist with regard to the ability of the precautionary principle to provide definitive answers to all questions of environmental policy, especially in the case of fisheries management, the use of the word 'approach' rather than 'principle' in the 1995 Straddling and Migratory Fish Stocks Agreement<sup>67</sup> is not surprising. Article 6 of the Agreement lays down 'guidelines' for the application of the approach. Article 7, paragraph 2 States, *inter alia* that the absence of adequate

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- 64. Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, Preamble, *ILM*, 26 (1987), 1516, 1392, 'Mindful also of the precautionary measures for the protection of the Ozone layer which have already been taken at the national and international levels".
  - 65. Protocol on Substances that Deplete the Ozone Layer, March 22, 1985, preamble, *ILM* 26 (1987), 1541, 1551. Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, June 14, 1994, preamble, *ILM*, 33 (1994) 1540, 1542 ("Resolved to take precautionary measures to anticipate, prevent or minimize emissions of air pollutants and mitigate their adverse effects").
  - 66. Protocol to the 1972 Convention on the Prevention of Marine Pollution By Dumping of Wastes and Other Matter, Nov. 7, 1996 *ILM* 36 (1997) 1. Art. 3(1) runs :  
In implementing this Protocol, Contracting Parties shall apply a precautionary approach to environmental protection from dumping of wastes or other matter whereby appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects.
  - 67. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December, 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *ILM*, 34 (1995), 1542.

scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.<sup>68</sup>

Another formulation of the precautionary approach can be found in the 2000 Cartagena Protocol on Biosafety<sup>69</sup> which in its preamble reaffirms 'the precautionary principle contained in Principle 15 of the Rio Declaration on Environment and Development and 'builds it directly into the operative provisions on risk management. Under this Protocol 'countries can prevent the importation of living modified organisms even if a specific form resulting from such organisms can not be identified'. It formulates the precautionary approach in these terms :

"Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account human risks to human health, shall not prevent that party from taking a decision, as appropriate with regard to the import of that living modified organism intended [for direct use as food or feed, or for processing] in order to avoid or minimize such potential adverse effects".

Even more recently the Persistent Organic Pollutants Treaty, 2001<sup>70</sup> acknowledges that 'precaution underlies the concerns of all the Parties and is embedded within this Convention', and further stipulates that 'The Conference of the Parties, taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical, and specify its related control measures, in Annexes A, B and /or C.

The other recent formulations of the principle are the languages that appears in the 1995 Meuse River Agreement<sup>71</sup>, the 1995 Scheldt

68. *Ibid.*

69. The Cartagena Protocol, *ILM*; 39 (2000), 1027.

70. The Stockholm Convention on Implementing International Action on Certain Persistent Organic Pollutants, May 22, 2001, includes a reference to Principle 15 of the Rio Declaration, COP acknowledges that precaution underlies the concerns of all the parties and is embedded within this convention Art. 8(9) provides : The Conference of the Parties, taking due account of the recommendations of the Committee, including any scientific uncertainty, shall decide, in a precautionary manner, whether to list the chemical, and specify its related control measures, in Annexes AB and /or C.

71. Agreement on the Protection of the Meuse, July 4, 1995, Art. 3(2)(a), *J.L.* 34 (1995) 851, 855 ("The Contracting Parties shall be guided by....(a) The precautionary principle, according to which action to avoid the release of dangerous substances which could have a significant transboundary impact, shall not be postponed on the grounds that scientific research has not fully proved the existence of a causal link between the discharge of those substances and a possible significant transboundary impact".)

River Agreement".<sup>72</sup> The 1996 Cetacean Conservation Agreement<sup>73</sup>, the 1996 Izmir Protocol on Transfrontier Movement of Hazardous Wastes<sup>74</sup>, the 1997 Kyoto Protocol on Climate Change<sup>75</sup>, the 1998 Convention on Cooperation for the Protection and Sustainable Use of the Danube River<sup>76</sup>, 1998 Rhine River Convention<sup>77</sup>, and the 2000 Seabed Mining Regulations<sup>78</sup> also either recognize or incorporate the precautionary principle.

Since 1986, the International Whaling Commission, created by the International Convention for the Regulation of Whaling, has established the worldwide moratorium on all harvesting of Whales, except for limited kills allocated to indigenous people, mostly in the Arctic region.<sup>79</sup>

The precautionary principle has also been cited as the basis for challenging the legitimacy of shipments of ultra hazardous cargoes of Plutonium and high level radioactive wastes. Here it is pertinent to note that Article 23 of the Law of the Sea Convention requires '(f)oreign nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances...when exercising the right of innocent passage through the territorial sea (to) carry document and observe special precautionary measures established for such ships by international agreements. Article 234 of the same convention recognizes the specific right of the coastal States 'to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the balance'. These and other provisions of UNCLOS

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- 72. Agreement on the Protection of the Scheldt, July 4, 1995, Art. 3(2)(a), *I.L.M.* 34 (1995) 851, 860 (same language as in the Meuse Agreement in the footnote above).
  - 73. Final Act and Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, Nov. 24, 1996, Art. II (1)-(4), *I.L.M.* 38 (1997) 777, 785.
  - 74. Izmir Protocol on the Protection of the Mediterranean Sea against Pollution through the Transfrontier Movement of Hazardous Materials, Oct. 1, 1996, Art. 8(3).
  - 75. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, *ILM* 37 (1998), 22.
  - 76. Convention on Cooperation for the Protection and Sustainable Use of the Danube River, entered into force on Oct. 1998, Art. 2(4).
  - 77. Convention on the Protection of Rhine, Jan. 22, 1998, Art. 4(b).
  - 78. International Sea bed Authority, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, July 13, 2000, reg. 31(2).
  - 79. The International Whaling Commission was created by the International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 *UNTS*, 72.

could afford a legal basis to oppose the shipments of radioactive wastes through the coastal States Exclusive Economic Zone.<sup>80</sup>

It is evident from the above survey of the relevant treaties and documents that the notion of environmental precaution has been Stated variously as a principle, approach, measure, action, therein. Although these treaties recognize the central role of this notion in the environmental matters, they use different languages of obligation.

**(b) International Judicial Decisions :**

**(i) Decisions of International Courts and Tribunals :**

In the *Nuclear Tests* cases<sup>81</sup> although the International Court of Justice failed to reach the merits, Judge Palmer in his dissent Stated that 'the norm involved in the precautionary principle has developed rapidly and may now be a principle of customary international law relating to environment'.<sup>82</sup> Judge Weeramantry Stated that the principle is 'gaining increasing support as part of the international law of environment'.<sup>83</sup>

In the case *Concerning the Gabcikovo-Nagymaros Project*<sup>84</sup> which involved a dispute between Hungary and Slovakia over water regulation on the Danube, Hungary after suspending a 1977 treaty governing a hydraulic dam and navigation improvement project in 1989, eventually unilaterally terminated the same in 1992, by relying essentially on a 'State of ecological necessity' and ecological risks facing it. Among the ecological risks that Hungary pointed out were the replacement of Danube ground water flow with upstream reservoir water entro-phication in the reservoir, the silting of the Danube, and the threat to aquatic habitats from breaking power releases.<sup>85</sup> Hungary also argued that the precautionary principle imposed 'an *erga omnes* obligation of preventing of damages' and in support of that contention referred to Article 33 of the International Law Commission Draft Articles on the International Responsibility which permits countries to avoid an international duty of necessary to safeguard 'an essential interest of the State against a grave and imminent peril.'

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80. For the text of the U.N. Convention on the Law of the Sea, see *ILM*, 21 (1982), 1261. See also Dyke, n. 15.
81. *Nuclear Tests (New Zealand v. France)* ICJ Reports, 1995 I, 288 (Sept. 22, 1995).
82. Dissenting opinion of Judge Palmer *id.* at 412.
83. Dissenting opinion of Judge Weeramantry, *Id.* at 342. For the text of his dissenting opinion, see *IJL* 36 (1996) 27-116. In the *Nuclear Weapons* case Judge Weeramantry noted that 'principles of environmental law, which this request enables the court to recognize and use in reaching its conclusions (include) the precautionary principle'. *ICJ* Reports 1996, 240, 542.
84. Case Concerning the Gabcikovo - Nagymaros Project (Republic of Hungary v. Slovak Federal Republic), *ICJ* (1997) reprinted in *IJL* (1997).
85. *Id.*, paras, 102-104.

Though the International Court of Justice acknowledged that safeguarding the ecological balance is an essential interest, it nevertheless held that the peril involved by Hungary was not a real, grave and imminent at the time of the suspension of the 1977 treaty and furthermore, measures taken by Hungary were not the only possible responses to the perceived peril for this reason the Court held that 'Hungary was not entitled to suspend and subsequently abandon in 1989, the works on the Nagymaros Project and on the part of the Govickovo Project for which the 1977 treaty and related instruments attributed responsibility to it'<sup>86</sup> But the Court also noted that 'in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.'<sup>87</sup> The Court after recognizing the existence of new norms and new standards in the field of environmental protection emphasized the necessity of their being taken into consideration 'not only when States contemplate new activities but also when continuing with activities begun in the past'.<sup>88</sup> In addition to this, the Court asked the parties to negotiate in good faith in the light of the prevailing situation<sup>89</sup> and to find an agreed solution 'that takes account of the objectives of the treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses'.<sup>90</sup>

In the *Southern Blufin Tuna case*<sup>91</sup>, the International Tribunal of the Law of the Sea (ITLOS) issued strong provisional measures, based upon considerations deriving from a precautionary approach. In the instant case both Australia and New Zealand requested the Tribunal to issue a series of provisional measures including the immediate cessation of Japan's unilateral experimental fishing for the Southern Blufix Tuna, pending a decision of the arbitral Tribunal. It was contended on behalf of New Zealand and Australia that Japan had breached its obligations under Articles 64 and 116 to 119 of the United Nations Convention on the Law of the Sea in relation to the conservation and management of the SBT. In its order, the Tribunal expressed the following views<sup>92</sup>:

1. The parties should in the circumstances act with prudence and caution to ensure that effective conservation

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86. *Id.*, para 149.

87. *Id.*, para 145.

88. *Id.*, para 145.

89. *Id.*, para 150.

90. *Id.*, para 145.

91. *Southern Blufin Tuna case 'Australia and New Zealand v. Japan'* Provisional Measures Order (ITLOS), Aug. 27, 1999. See *IJIL*, 39 (1999), 703-723.

92. *Id.*, para 77, 79, 80.

measures are taken to prevent serious harm to the stock of Southern Blufin Tuna.

2. There is scientific uncertainty regarding measures to be taken to conserve the stock of Southern Blufin Tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of Southern Bluefin Tuna.

3. Although the Tribunal can not conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the Southern Blufin Tuna stock.

Judge Treves and Judge Shearer<sup>93</sup> Stated that a precautionary approach was inherent in the provisional measures issued by the Tribunal.<sup>94</sup> In Judge Laing's view, 'while the Tribunal has drawn its conclusions and based its prescriptions in the face of scientific uncertainty, it has not, *per se*, engaged in an explicit reversal of the burden of proof. On the contrary. Judge Vukas in his dissent opined<sup>95</sup>:

'No "urgency of the situation" in respect of the southern bluefin tuna stock has been confirmed, and that, consequently, there are no "right of the parties to the dispute" (Article 290, paragraph 1) which should be preserved by the provisional measures requested from the Tribunal by New Zealand and Australia.'

Though the case promised a good beginning in the field of environmental protection, its ending was very unfortunate. An *ad hoc* tribunal constituted in accordance with Annex VII to UNCLOS declared that both it and ITLOS lacked jurisdiction over the case because of conflicting dispute resolution provisions in the relevant treaties.

#### **(c) Decisions of Regional Courts :**

Now turning to decisions of the regional courts the European Court of Justice in a most significant decision<sup>96</sup> upheld the decision of the European Commission to ban all bovine animals and all beef and veal products from the United Kingdom by invoking the precautionary principle as a reason for imposition of such ban, saying that all risks of transmission from bovine spongiform encephalopathy CBSE, popularly

- 93. For Separate Opinions of Judge Treves and Judge Shearer, See *IJIL*, 40 (2000), 86-89, and 91-99 respectively.
- 94. See Separate Opinion of Judge Liang *Id*, 77-85, para 20.
- 95. For Dissenting Opinion of Judge Vukas see *IJIL*, 40 (2000), 100-104, in particular p. 104.
- 96. *The Queen v. Ministry of Agriculture, Fisheries and Food, Commissioners of Customs and Excise, ex-parte National Farmer's Union, David Bumett and Sons Ltd.*, R.S. Case C. 147-96 (1993) E.C.R., 1-2211.

known as 'mad cow disease'. The Court acknowledged that the principle of proportionality required that the least onerous alternative be chosen but at the same time: 'where there is uncertainty as to the existence or extent of risks to human health the institutions may take protective measures without having to wait until the reality and seriousness of the risks become fully apparent'.<sup>97</sup> The thrust of this decision is that in the face of grave risks to health they must get precedence over wealth.

Proportionality is always relevant, but grave harms must be considered, even if the chances of their occurrence are relatively remote. In a significant decision<sup>98</sup> the Court of First Instance upheld the decision that had withdrawn are antibiotic from the list of authorized animal feeds. In doing so the Court not only referred to the precautionary principle but also added that the requirements of the protection of public health must take precedence over economic considerations. There are other cases also where the European Court of Justice seems to have based its decisions on the precautionary principle without explicitly referring to it. In those cases the court declined to allow an extension of the hunting session for certain birds unless scientific proof established that the extension would not impair the full protection of the bird species.<sup>99</sup>

By contrast, the majority judges on the European Court of Human Rights in *Balmer-Schafrath v. Switzerland* ignored the precautionary principle and ruled that the concerned citizens attempting to challenge the extension of a nuclear power plant's operating lease had no legal standing to challenge the administrative decision because 'the harm complained of was not imminent and there was not a sufficient link between the applicant's right to protection of physical integrity and the operating conditions of the nuclear plants'.<sup>100</sup>

#### **(d) Decision of the Appellate body of the WTO :**

In *EC Measures Concerning Meat and Meat Products*<sup>101</sup> the WTO Appellate Body on 13 February, 1998 found the EU ban on US hormone beef imports contrary to the WTO Agreement on Sanitary and Phytosanitary Measures (SPS, in force since 1995). An interesting aspect of the decision is the recital of the opposing views the view that the

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- 97. *Id.* para 63. This Statement was repeated in *United Kingdom v. Commissioner of the European Communities*, Case C-180/196[1998] E.C.R., 1-2265 para 99.
  - 98. *Alpharma, Inc. v. Council of the European Union* Case T-70189 R. [1996] E.C.R. II-2027, para 3.
  - 99. See Dyke, n 15 citing *Commission v. Italy* (1991); *Association pour la Protection des Animaux Sauvage and others v. Prefet de Maine et Loire and Prefect de la Loire - Anteque* (1994) E.C.J. -67-1995.
  - 100. *Balmer V. Schafrath v. Switzerland* [1998] I.L.R.M. 583; European Court of Human Rights.
  - 101. *E.C. Measures Concerning Meat and Meat Products* (Report of the Appellate Body, A.II:1998:S-67/B/1, para 16, 1998)

precautionary principle 'continues to be the subject of debate' on the one hand and the view of some judges and commentators that the principle has crystallized into a general principle of customary international environmental law, on the other. The Appellate Body ruled that panels evaluating scientific data should accept that 'responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life terminating, damage to health are concerned'. It is worthy to note here that after the decision of the Appellate Body - the EU submitted new scientific evidence in May 1999 to maintain the ban on 'hormone-beef imports. The Commission of the European Communities published a communication on Feb. 2, 2000 stating that the precautionary principle is 'a full fledged and general principle of international law. Besides, the Council of the EU issued a resolution on the precautionary principle in the Nice Summit.

**(e) Enactment and Judicial Decisions of States<sup>102</sup>:**

National legislation and decisions of domestic courts not only constitute an evidence of State practice from which international customary rule may evolve but also show how the law of nations in a given case is understood and recognized in the concerned country. It is from this perspective that an attempt is made hereunder to discuss the practice of States in regard to the precautionary principle. As already noted, the Swedish Environment Protection Act of 1969 was the first national legislation to introduce the concept of 'environmentally hazardous activities'<sup>103</sup> for which the burden of proof is flatly reversed. Domestic legislation of Denmark, Norway and Finland also recognize the precautionary principle.

France like United States and Japan belong the category of 'protection States'. But even in this country, there are judicial precedents supporting the precautionary principle. Article 1(1)(3) of the 1995 *Loi Barnier* stipulates: 'Lack of certainty, taking into account scientific and technical knowledge at the time, shall not delay effective and commensurate measures, at economically acceptable cost, to prevent the threat of serious and irreversible damage to the environment.'<sup>104</sup> What is important to be noted here is the introduction of the 'cost-effective rider' which is missing in the French text of Principle 15 of the Rio Declaration.

The precautionary approach is recognized in the 1974 Federal Act for Protection against Pollution and the often quoted German Environment Report. Judgements of the German Courts ostensibly confer on the executive power to take precautionary measures against

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102. The discussion in this section is largely drawn upon, Peter H. Sand, 'The Precautionary Principle : Coping with Risk' *IJL*, 40 (2000).

103. Cf Sand, *id.* at p. 6.

104. English Translation by Sand, *id.* at p. 9.

identified dangers as well as against as yet unidentified risks.<sup>105</sup> There is however, a wider range of legal and procedural constraints on precautionary action. In cases concerning electromagnetic fields of mobile phone networks the courts have made a distinction between actionable health risks and 'mere risks' which are insufficient to invalidate operating permits. In a case concerning forest damage attributed to acid rain<sup>106</sup> the Federal Supreme Court ruled that the precautionary principle could not be invoked as the basis for holding the federal government liable for legislative inaction.<sup>107</sup> It has also been held that precautionary measures with regard to genetically modified organisms are warranted only 'up to a degree which in light of risk assessment on the basis of best available scientific and technological information is sufficient to ensure control of the risk'.<sup>108</sup>

In the United Kingdom attempts at establishing the principle have failed in at least two cases<sup>109</sup> and inconclusive in others.<sup>110</sup> The 1990 British White Paper entitled 'The Common Inheritance : Britain's Environmental Strategy' however, endorsed the principle in these words<sup>111</sup>:

"We must analyze the possible benefits and costs both of action and of inaction, where there are significant risks of damage to the environment, the Government will be prepared to take precautionary action to limit the use of potentially dangerous pollutants, even where scientific knowledge is not conclusive, if the balance of the likely costs and benefits justifies it. This precautionary principle applies particularly where there are good grounds for judging either that action taken promptly at comparatively low cost may avoid more costly damage later, or that irreversible effect may follow if action is delayed".

In the United States the precautionary principle has not been discussed with any frequency as yet. In *Beanal v. Freport McNoran Inc* the Court held that a claim based in part on the precautionary principle

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- 105. The 1978 *Kalkar* decision by the Federal Constitutional Court and the 1985 *Wyll* decision by the Federal Administrative Court.
  - 106. See *Ober-Verwaltungs - Gericht* (Munster 18 May 1993)
  - 107. *City of Augsburg et al. v. Federal Republic of Germany*, Federal Supreme Court, 10 December, 1987.
  - 108. The *EPO-Mouse Case*, The Administrative District Court of Giessen (2Sept. 1992).
  - 109. *R.v. Secretary of State for Trade and Industry ex parte. Duddridge and others* (Q.B.), (1994); *Gateshead Metropoliton Borough Council v. Secretary of State for the Environment and Northumbrian Water Group plc* (High Court).
  - 110. *Alfread McAlpine Homes (North) Ltd v. Secretary of State for the Environment* (Q.B.).
  - 111. Department of the Environment, white paper on Environmental Policy (1990), p. 7. See Dyke, n.15.

did not present a cognizable claim as a violation of customary international law under the Alien Tort Claims Act (28 U.S.C. sec. 1330) since the claimants had not shown that the principle enjoyed 'universal acceptance in the international community, or, had articulable and discernable standards sufficient to 'constitute international environmental abuses'.<sup>112</sup> By contrast the Hawai'i Supreme Court has recently held that the principle simply reStates the Water Commission's duties under the Hawaii's Constitution and Hawaii's Water Code. The Court observed that 'Indeed, the lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the Commission's affirmative duty to protect such purposes wherever feasible'.<sup>113</sup> The Court further observed that 'As with any general principle, its meaning must vary according to the situation and can only develop over time. In this case, we believe the Commission describes the principle with quintessential form : at minimum, the absence of firm scientific proof should not tie the Commission's hands, in adopting reasonable measures designed to further the public interest'.<sup>114</sup>

It is worthy to note here that the U.S. Sustainable Fisheries Act, 1996<sup>115</sup> represents a significant step towards precautionary action. Most importantly Executive Order 13, 141 committed the Government to conduct environmental reviews of U.S. Trade agreements. In 1998 Western Pacific Regional Fishery Management Council established a precautionary approach to fishery conservation and management.

#### **IV. PRECAUTIONARY PRINCIPLE IN THE INDIAN CONTEXT**

##### **(i) The Constitutional Mandate :**

It will be useful to recall here the legal regime for environmental protection in India before discussing the evolution and recognition of the precautionary principle in this country. At the outset it must be emphasized that the very concept of environmental protection is not at all new so far as this country is concerned. Our *Vedas* and *Puranas* provide a complete code of environmental protection and emphasize the importance of harmony between man and nature. To maintain ecological balance the *Vedic* seers and sages prescribed not only respect for but even worship of animals, plants, mountains and rivers etc. Environmental protection and natural resource management, however, could not receive needed attention and care during the medieval period, although some Muslim emperors, particular Moghuls built some magnificent parks around their palaces and at other places of the country. The British period was perhaps the worst from the environmental point of view. That

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112. See Dyke, n 15, at p. 24.n. 100.

113. *In the Matter of Water Use Permit Applications, Wiahole Ditch Combined Contested Case Hearing*, 9 p. 3d409, 466-67 (Hawaii 2000), cited in Dyke, n. 15.

114. *Id* at 467.

115. Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat, 3559.

period witnessed ruthless appropriation and exploitation of natural resources for earning revenue and serving the commercial and economic interest of the British colonialists.

It may seem strange but is a bitter truth that the Independent India also followed the British policy in regard to environmental matters for more than twenty five years. It was in the year 1976 that the government all of sudden awakened from the centuries old slumber probably under the impact of the deliberations of the 1972 Stockholm

- Conference and decided to respond to the environmental issues through Constitutional amendments and enactment of appropriate legislation. The result was insertion of Article 48A in part IV and Article 51(A) in a newly inserted chapter IV-A on 'Fundamental Duties' of the Constitution. Article 48A, a Directive Principle of State Policy lays down : 'The State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country'. Likewise Article 47 provides : The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and in particular, the State shall endeavor to bring about prohibition of consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health. It is true that the Directive principles of State Policy are 'not enforceable', but they are nevertheless fundamental in the governance of the country and it is in fact the imperative duty of the State to apply them in making laws. Mention should also be made of Article 51A(g) which makes it the fundamental duty of every citizen of India to protect and improve the natural environment, including forests, lakes, rivers and wild life, and to have compassion for living creatures. Article 51A (h) calls upon every citizen 'to develop the scientific temper, humanism and the spirit of inquiry and reform.'

#### **(ii) Right to Environment As a Fundamental Right :**

Subsequently, the right of a person to pollution free environment was elevated to the status of a fundamental right implicit in Article 21<sup>116</sup> of the Indian Constitution, which guarantees protection of life and personal liberty, thanks to public interest litigation and judicial activism on the part of the apex Court in environmental cases. While the judiciary has been busy in evolving home spun environmental jurisprudence, realizing the ever increasing vulnerability of ecology and ecosystem. Parliament

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116. See generally, *Municipal Council Ratlam v. Virdichand*, A.I.R. 1980 S.C. 122; *Subhash Kumar v. State of Bihar*, AIR 1991 S.C. 420 at 424; *Ganga Pollution Cases*, AIR 1988 S.C. 1033; *M/S Shantistar Builders Narayan Khimlal Totame*, AIR 1990 S.C. 630, *Virendra Gaur v. State of Haryana* (1995) 2 S.C.C. 577 at 580-581; *Vellore Citizen's Welfare Forum v. Union of India*, (1996) 5 S.C.C. 647 at p. 661, *M.C. Mehta v. Kamal Nath*, A.I.R. 2000 S.C. 1997.

also has enacted a plethora of legislation on the subject.<sup>117</sup> In fact, there has been so much legislative activity in this area that it has startled even the judiciary. As the Supreme Court in *India Council for Enviro-Legal Action v. Union of India* observed<sup>118</sup>:

"If the mere enactment of the laws relating to the protection of environment was to ensure a clean and pollution free environment, then India would perhaps be the least polluted country in the world. But, this is not so, there are Stated to be over 200 Union and State statutes which have at least some concern with environmental protection, either directly or indirectly, the plethora of such enactments has, unfortunately, not resulted in preventing environmental degradation, which on the contrary has increased over the years".

### (iii) Judicial Activism In Environmental Cases :

If the recognition of the right to environment as a fundamental right, a noble example of judicial activism for which the apex Court rightly received a lot of applause and kudos from environmentalists , media and the legal fraternity, set the stage for development of environmental jurisprudence, the development of remedial jurisprudence for enforcement of fundamental rights including this one accelerated this process in an unprecedented manner.<sup>119</sup> The bewildering speed with which the apex Court (and High Courts) sought to accomplish this goal and tools, strategies and approach that these constitutional courts have adopted and pursued for this purpose should have startled the legal luminaries and scholars of both East and West. In this endeavor there was no place for legal formalism, judicial conservatism and technical niceties. The result is there for all to see. The century old exceptions to the *Ryland v. Fletcher* were given a go by to pave the way for the recognition of the absolute liability principle in the case of any hazardous or inherently dangerous operation. Most notably while scholars in the West are still engaged in continuous, unending but an intellectually challenging discourse on the status of sustainable development, polluter-pays principle and the precautionary principle as a part of customary international law certain activist judges of the apex Court declared in their favor as early as 1996. Explaining the polluter-pays principle, the apex Court said that it means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'sustainable

117. See Water (Prevention and Control of Pollution) Act, 1974, Water (Prevention and Control of Pollution) Cess Act,1977, the Air (Prevention and Control of Pollution) Act, 1981; the Environment Protection Act, 1986, the Public Liability Insurance At, 1991, the National Environment Tribunal Act,1995; the National Environment Appellate Authority Act, 1997.

118. (1996) 5 S.C.C. 281 at p. 293.

119. *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086.

development' and as such the polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology'.<sup>120</sup>

As for the standard of care required in conducting any hazardous or inherently dangerous operation, the apex Court said<sup>121</sup>:

"[A]n enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the person working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of hazardous and inherently dangerous nature of the activity it has undertaken".

#### (iv) The Apex Court on the Precautionary Principle :

As already noted, it was the *Vellore Welfare Forum* case which for the first time provided the apex Court an opportunity to have an animated discussion of the precautionary principle - a principle which has endeared and fascinated judges and jurists both at home and abroad. The case presented a historic challenge for Justice Kuldeep Singh, who by that time had already earned wide acclaim for 'greening' the judiciary through his momentous and historic environmental decisions, to address the issues related to sustainable development and precautionary principle as there was no judicial precedent. It was a great challenge not only because of the altogether unusual nature of the case but because in environmental cases the society expects a judge to discharge his or her duty as the public trustee of the environment. It presented a challenge to the Court because that was a case for which there was no matching sample. But then as Cardozo observed a judge's duty is not simply to match the colors of the case at hand with the colors of the many samples spread out upon the judicial desk<sup>122</sup>:

"If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent that the serious business of the judge begins".

Seen from this angle Justice Kuldeep Singh deserves applause for he rose to the occasion and tried his best to live up to the historic challenge that the case presented to the apex Court by addressing the issues raised by it. This was also the case in which the processes of logical reasoning could well lead to one conclusion or the other. The case

120. *Vellore Citizens Forum Case*, citing from Indian Enviro-Legal Action (1996) A.I.R. 1996, 2715 at 2721.

121. *M.C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086.

122. Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921), pp.20-21.

involved the situation which Late Professor Julius Stone aptly called 'the ways of judicial choice'<sup>123</sup> leaving open the possibility of arriving at opposite conclusions by the logical chain of reasoning. Giving classic expression to this problem the Great Justice Holmes observed that the fallacy of<sup>124</sup>:

"The logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty is illusion and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true and yet the very root and nerve of the whole proceeding, you can give any conclusion a logical form".

This is equally applicable to the whole proceedings in the instant case but with one important difference. Here even the logical chain of reasoning is apparently missing. As Judge Rosalyn Higgins in her opinion in the *Legality of Nuclear Weapons* case pointed out, '[I]t is an essential requirement of the judicial process that a court should show the steps by which it reaches its conclusions....The findings in a judicial *depositif* should be clear'.<sup>125</sup> Therefore not only the judicial *depositif* but even the syllogism of a judicial pronouncement is important. But sadly, as the ensuing discussion will show, his Lordship disappointed the admirers of his judicial wisdom, forensic acumen and rare insights into environmental adjudication on this count, leaving the impression that the judgment is a polemical one with less substance. Before we proceed to discuss how his Lordship approached the issue of precautionary principle and what steps he followed to reach his conclusions, we wish to add that though a judicial pronouncement of the apex Court like the present one being a 'law' is binding on all courts in India, it may not be infallible; it is final not because it is infallible, rather it is infallible because it is final. So, however, the Court's decides it will be a binding law but the judgment will certainly lose much of its shine if it is bereft of convincing judicial reasoning and logical coherence.

For the purposes of the present discussion the apex Court in the instant case made following bold propositions<sup>126</sup> : First, 'we have no hesitation in holding that "sustainable Development" as a balancing concept between 'ecology and development has been accepted as part of the customary international law" Secondly, 'we are, however, of the view that "the Precautionary Principle" and "The Polluter Pays" principles

123. Julius Stone, *Legal Systems and Lawyers' Reasonings* 1964. See, especially, Chapter 8 on 'Reasons and Reasoning in Judicial and Juristic Argument'.

124. Dissenting opinion of Judge Higgins in the *Legality of the Threat or Use of Nuclear Weapons* - 8 July 1996, para 7.

125. Vellore Citizens Welfare Forum at p. 2720.

126. *Id.* at p. 2720.

are essential features of "Sustainable Development". *Thirdly*, "We have no hesitation in holding that the precautionary principle and the polluter pays principle are part of the environmental law of the country". And *finally*, 'Even otherwise once these principles are accepted as part of the customary International Law there could be no difficulty in accepting them as part of the domestic law.

As regards the first conclusion, the Court arrived at it merely by referring to the history of the evolution of the concept of sustainable development. At the core of the Courts reasoning in this respect is its observation that<sup>127</sup>:

During the two decades from Stockholm to Rio Sustainable Development has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems "Sustainable Development" as defined by the Brundtland Report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.

As will be discussed later, to constitute a customary rule there must be a consistent, uniform and general State practice and *opinio juris* accompanying such a State practice. Therefore, the proper course for his Lordship in this case was to direct its inquiry on these lines. But to our utter dismay nothing of this sort was done and in a blink of eye, pronouncement regarding the customary status of the concept of 'sustainable development' was made by his Lordship. In so doing the learned judge unwittingly and perhaps inadvertently betrayed his ignorance of the modern international law theories and principles-relating to formation of customary rules. Interestingly, through his Lordship the Court wants us to believe that mere adoption of declarations like Rio Declaration and Stockholm Declaration is sufficient to give rise to a customary rule, but alas this belief or presupposition is flawed and perverse and hence unsustainable under modern international law.

There are other equally persuasive reasons which may prompt one to demur with the aforesaid conclusions of his Lordship. While there can be no denying that the complex agenda of sustainable development has gained wide acceptance since the Rio Conference, it is also to be conceded that it continues to be a difficult concept to implement because of substantial controversies hovering around its meaning, scope and content and its symbiotic relationships with such issues of national as well as international importance as trade and environment, patterns of production and consumption, combating poverty, demographic dynamics, financial resources and mechanisms, education, science, transfer of environmentally sound technologies, technical cooperation, capacity building, decision making and activities of youths, minorities, women and

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127. *Id.* at p. 2720.

indigenous peoples. In addition, besides the ambiguity surrounding the meaning and definition of the term, sustainable development may differ depending from which half of the world it is being considered from or which gender it is impacting upon. Is 'sustainable development' related solely to the promotion of environmental protection or it has social and economic dimensions as well? There are still unresolved questions in connection with the complementing principle of intergenerational equity. It is unclear whether only the interests of future generations or their rights also are to be protected. To what extent disparities in economic and social development in different countries will take on particular importance if sustainable development is to become the criterion for action to overcome the second generation global environmental problems. Equally puzzling are questions whether the precautionary principle is incompatible with the concept of sustainable development and whether sustainable development constitutes a *jus cogens*. Given the fact that scholarly opinions on these issues are polarized and views of States conflicting, it is difficult to fathom how the concept of sustainable development has become part of customary international law especially when his Lordship himself acknowledged that 'its salient features had yet to be finalized by the International Law Jurists'. The Court however, does not seem to be content with this Statement as in the next paragraph of the judgement it engages itself in culling out, some of the salient features of 'sustainable development' from the Brundtland Report and other international documents and notes with glee the findings of its research that they are 'intergenerational equity, use and conservation of natural resources, environmental protection, the precautionary principle, polluter pays principle obligation to assist and cooperate, eradication of poverty and financial assistance to the developing countries'.<sup>128</sup> But in the opinion of the Court not all but only two of these namely 'the Precautionary Principle' and 'the Polluter Pays principle' are essential features of 'sustainable development'. But to our dismay neither any intelligible differential criteria is laid down for picking up essential features of sustainable development from a long list of its salient features nor any reasoning is proffered by the Court in support of its recognition of only these two principles as essential features of 'sustainable development'.

It is important to note that in *Indian Council for Enviro Legal Action v. Union of India*, the Court observed, 'We are of the opinion that any principle evolved in this behalf should be simple, practical and suited to the conditions obtaining in this country. Although the Court quoted this observation which was made in the context of the 'polluter pays principle', with approval, it apparently forgot it in the *Vellore's* case when it ventured to define the 'Precautionary Principle' in the context of the municipal law. The 'precautionary principle' according to the Court means<sup>129</sup>:

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128. *Id.* at p. 2721.

129. *Ibid*

- (i) Environmental measures by the State Government and the Statutory authorities must anticipate, prevent and attack the causes of environmental degradation.
- (ii) Where there are threats of serious and irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation
- (iii) The 'onus of proof' is on the actor or developer /industrialist to show that his action is environmentally benign.

Is the above definition really simple, practical and suited to the conditions obtaining in this country? Is it not a sheepish imitation and reproduction of the formulation of the principle from the Rio Declaration and other international documents without making any effort to adapt it according to the conditions obtaining in this country? It is humbly submitted that the discussion on this point is too brief and hardly adds any thing new to the existing awareness and understanding of the precautionary principle.

So far as the third proposition that the precautionary principle and the polluter-pay principle are part of the environmental law of the country, the Court referred to Articles 47, 48-A and 51(G) of the Constitution and noted that in fact in the various environmental statutes, such as Water Act, 1974 and other statutes, including the Environment (Protection) Act, 1986, these concepts are already implied.<sup>130</sup> It is humbly submitted that here again the discussion is diffused and the analysis of the relevant statutory provisions sketchy. In our submission a detailed analysis of those provisions which the Courts thought, impliedly recognized the precautionary and the polluter pays principle would have placed the judgment on a more secure foundation. It was all the more necessary in view of the use of the words 'even otherwise' by his Lordship indicating that he too was not fully sure about the status of these principles in the environmental law of this country.

As for the status of customary international law in India, his Lordship observed : 'It is almost accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of law'.<sup>131</sup> It is true that customary international law may form part of the law of this country under the doctrine of incorporation which means that unless there is a contrary statutory provision rules of customary international law may be operative in the national legal system. But it has not always been the case that Indian Courts have accepted so unequivocally the incorporation doctrine in respect of customary international law. Earlier cases seem to have suggested that customary international law can not operate in India

130. *Ibid*, 2720-222.

131. *Id. at* 2722.

without express adoption. The current position, however, supports the doctrine of incorporation. In *Gramophone Company of India Ltd v. Birendra Bahadur Pandey & other*,<sup>132</sup> Justice Chinnappa Reddy, who delivered the judgment, observed :

The doctrine of incorporation also recognizes the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament. Comity of nations or no municipal law must prevail in case of conflict. National courts can not say "yes" if Parliament has said no to a principle of international law. National courts will endorse international law but not if it conflicts with national law. National courts being organs of the national State and not organs of international law must per force apply national law if international law conflicts with it. But the courts are under an obligation within legitimate limits, to so interpret the municipal statute so as to avoid confrontation with the community of nations or the well established principles of international law. But if conflict is inevitable, the latter must yield".

Thus, customary international law is deemed to be incorporated into the law of the land provided the customary rule is established with sufficient certainty and does not conflict with national law. Turning to the main theme of the discussion the Million Dollar question is whether the precautionary principle has really become part of international customary law and furthermore whether it is compatible with the existing national law. The Court answered the first question in the affirmative without adducing any reason and altogether ignored the second question. For reasons given in the next part of this paper, we humbly submit that the precautionary principle continues to be the subject of debate and that its status is less than clear.

Thus, the issue of critical importance were cursorily touched by the apex Court when opportunity for their thorough examination was not unavailable. Certainly, the well known 'aphorism' - 'brevity is the soul of wit' was not apt to be followed by his Lordship in the instant case in view of the momentous issues involved. It must be recognized that the 'sort of bare order or order that may suit many of the purposes of the Magistrate or, county court judge will by no means do' for one standing at the apex of judicial organization. In fact what Judge Lauterpacht has said in respect of international tribunals is equally and aptly applicable to our own apex Court. He observed that<sup>132a</sup> :

International tribunals at any rate have usually regarded it as an important part of their function, not only to decide, but in deciding to expound generally the law having a bearing on the matters decided.

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132. AIR 1984 S.C. 667.

132a. Fitzmaurice, *The Law and Procedure of the International Court of Justice* (1986) Vol. I., p. 648, cited in Weeramontry, n. 6 at p. 116.

Be that as it may, We regret that the Court did not avail itself of the opportunity to inquire more fully into this matter and of making a contribution to the understanding of some of the seminal principles of the evolving corpus of national as well as international environmental law. It is further submitted that the Court could have decided the case by adopting the precautionary approach and not the precautionary principle and there was no need for it to make a premature pronouncement on the customary status of the precautionary principle.

The apex Court got another opportunity to inquire into the customary status of the precautionary principle in the *Nayudu* case<sup>133</sup> but it allowed to let it go, though it acknowledged that the *Vellore* judgment had referred to the 'precautionary principle' and the 'polluter pays principle' briefly and therefore felt that their meaning needed further elaboration so that courts and tribunals or environmental authorities can properly apply the said principles in the matters which came before them.<sup>134</sup> As for the customary status of the precautionary principle the Court quoted the relevant passage from the *Vellore* judgment with apparent approval.

So far as the meaning of the precautionary principle is concerned Justice Jagannadha Rao, who delivered the judgment said that the precautionary principle replaced the 'Assimilative Capacity Principle'.<sup>135</sup> After extensively quoting from the articles of Charmian Barton and the first Report of Dr. P.S. Rao Special Rapporteur International Law Commission, his Lordship said that the precautionary principle 'is based on the theory that is better to err on the side of caution and prevent environmental harm which may indeed become irreversible'. He also explained the concept of burden of proof referred to in the *Vellore* case by quoting the views of Wynne, Olson, P.S. Rao and Barton.<sup>136</sup>

In *Narmada Bachao Andolan v. U.O.I.* Justice Kripal while denying the applicability of the precautionary principle in the present case, explained the principle as under<sup>136a</sup>:

"It appears to us that the 'precautionary principle' and the corresponding burden of proof of the person who wants to change the status quo will ordinarily apply in a case of polluting or other project or industry when the extent of damage likely to be inflicted is not known. When there is a

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133. AIR 1999 S.C. 812.

134. *Id.* at p. 820.

135. *Ibid.*

136. See. Wynne, 'Uncertainty and Environmental Learning', *Global Environmental Change*, 2 (1992), 111 at 123; Olson 'Shifting the Burden of Proof', *Env. Law*, 20 (1990), 891 of 898. Charmian Barton, 'Precautionary Principle', *Harv. Env. L.Rev.*, 22 (1998), 509 at 549; Report of Dr.P.S. Rao, Special Rapporteur, International Law Commission dated 3.4.1998, paras 61-72.

136a. 2000(7) *Scale*, 34 at pp 91-92.

State of uncertainty due to lack of data or material about the extent of damage or pollution likely to be caused then, in order to maintain the ecological balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution. On the other hand, where the effect on ecology or environment of setting up of an industry is known, what has to be seen is that if the environment is likely to suffer, then what mitigative steps can be taken to offset the same. Merely because there will be a change is no reason to presume that there will be ecological disaster. It is when the effect of the project is known then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation".

**(v) Customary International Law Status of the Precautionary Principle : Myth or Reality :**

The essence of custom according to Article 38(1) of the Statute of the International Court of Justice (ICJ) is that it should constitute 'evidence of a general practice accepted as law'. Thus, there are two basic elements in the make-up of a custom : general practice of States', and the psychological or subjective belief of States that such a practice is law.<sup>137</sup> While the first component is known as material element, the second one is the psychological element i.e. *opinio juris*. To prove whether a form of conduct, concept or notion mirrors a customary rule, it is necessary to investigate the existence of these two elements regarding such a conduct or concept. In making an investigation regarding the existence of material element in a given case four major points, namely duration, repetition, consistency and generality of State practice should be taken into account. As regards duration the ICJ in the *North Sea Continental Shelf Cases* indicated that "...the passage of only a short period of time is not necessarily, or of itself, a ban to the formation of a new rule of customary international law."<sup>138</sup> This view supports the possibility of 'instant custom' a clear example of which is the law of outer space.<sup>139</sup> Consistency is another essential factor in the formation of customary law. The State practice, in the words of the Permanent Court of International Justice in the *Lotus* case, should be 'constant and uniform'. The importance of consistency was also acknowledged by the ICJ in the *Asylum Case* wherein it expressed the view that a custom

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137. (2000(7) SCALE pp. 91-92. See generally D' Amato, *The Concept of Custom in International Law* (1971); Lauterpacht, *The Development of International Law by the International Court* (1958), 368-393; Kunz, 'The Nature of Customary International Law', *A.J.I.L.*, 47 (1953), 662

138. I.C.J. Reports, 1969, p. 43.

139. See Bin Cheng, 'United Nations Resolutions on Outer Space'. Instant International Customary Law', *IJL*, 5 (1965), 23-48.

would crystallize 'in accordance with a constant and uniform usage practiced by the States in question'.<sup>140</sup> However, the consistency of practice of States is not required to be total and this requirement is satisfied if there is substantial consistency. The better view is that the degree of consistency required may vary according to the subject matter of the rule in dispute.<sup>141</sup> Thus when the alleged customary rule imposes positive obligations on States, the degree of consistency required will be greater than one needed in the case of passive obligations.<sup>142</sup>

As the ICJ indicated in *Fisheries* case some degree of uniformity in performing a particular rule by States is necessary before such a rule could be recognized as a customary rule.<sup>143</sup> The ICJ also emphasized the importance of uniformity in the formation of custom in the *North-Sea Continental Shelf Cases* wherein it declared that '.....State practices, including that of States whose interests are specifically affected, should have been both *extensive* and *virtually* uniform in the sense of the provision invoked'.<sup>144</sup> Once again, it is however, clear that an absolute uniformity of a particular rule is not necessary for the formation of a customary rule. As the ICJ in the *Nicaragua Case* indicated consistency and generality of State practice and not an absolute uniformity are required for the transition of an alleged rule into customary international law. The Court declared that<sup>145</sup> -

In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

Once again it is clear that the practice must only be 'generally adopted in the practice of States' and further not all States need participate before a general practice can become law.<sup>146</sup> But the degree of generality of practice needed will vary according to the subject matter of the rule in dispute. Turning to the instances in which the evidence of State practice could be found, the International Law Commission refers to treaties, decisions of international and national courts, national legislation, diplomatic correspondence, opinions of national legal advisers

140. I.C.J. Reports 1950, pp. 276-7. This view is reflective of the opinion of the P.C.I.J. in the *Lotus case*, P.C.I.J. Ser. A. No.10 (1927).

141. Martin Dixon, *International Law* (Fourth Edition, First Indian Reprint, 2001), p. 29.

142. *Ibid.*

143. *Fisheries Case* (U.K. Norway), I.C.J. Reports, 1951, pp. 116, 137-38.

144. I.C.J. Reports, 1969, 30 at 43.

145. I.C.J. Reports, 1986, 14 at p. 98.

146. In *Fisheries* case Judge Read expressed the opinion that 'customary' international law is the generalization of the practice of States', I.C.J. Reports, 1951, at p. 191.

and the practice of international organizations.<sup>147</sup> This list is not comprehensive and the evidence of State practice could also be found in other materials such as policy Statements, press releases, executive decisions and practices, official manuals on legal questions, comments by governments on drafts produced by the International Law Commission, recital in treaties and other international instruments, a pattern of treaties in the same form, and of course resolutions of the General Assembly of the United Nations relating to legal questions.<sup>148</sup>

Although Judge Read in his dissenting opinion in the *Fisheries* Case argued that mere claims made to maritime areas by States are not adequate to create a customary rule and that States should enforce such claims if they wish to transform the nature of these claims into customary law, the majority of judges took a contrary view.<sup>149</sup> Brierly is of the opinion that actions or Statements of individuals with official positions on any aspect of international law may 'be some evidence that a custom, and therefore that a rule of international law does or does not exist', but at the same time he also concedes that 'its value as evidence will be altogether determined by occasion and circumstances'.<sup>150</sup>

Once it is proved that there is a uniform, consistent and general State practice it becomes necessary to investigate the existence of the belief of States in the obligatory nature of such a practice i.e. *opinio juris*. Though some scholars argue that *opinio juris* is not a requirement for the creation of customary rules<sup>151</sup>, its existence is undeniably necessary for determining where 'habit stopped and law began'.<sup>152</sup> The PCIJ emphasized its importance in the S.S. *Lotus* Case. The ICJ too reiterated its importance in the *North Sea Continental Shelf Cases* and other decisions. 'The frequency or even habitual character' of a practice is not enough to establish *opinio juris*' for it is a separate and distinct requirement independent from State practice. So *opinio juris* has to be established by an independent and positive evidence.<sup>153</sup> While it is easy

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- 147. Yearbook of International Law Commission, 1950, Vol.II, 368-372.
  - 148. Ian Brownlie, 'Principles of Public International Law (1990)', 5. See also the Reparation case, I.C.J. Reports, 1949, p. 174; Reservation to the Genocide Convention, I.C.J. Reports 1951, p. 15 at p. 25.
  - 149. I.C.J. Reports, 1951, p. 16, at 191.
  - 150. Brierly, 'The Law of Nations : An Introduction to the International Law of Peace (1963)', 4. According to Akehurst 'State Practice consists not only of what States do, but also what they say', *A Modern Introduction to International Law* (1991), p. 29
  - 151. E.G. Guggenheim and Williams, See also Farhad Talaie, 'Final Chapter in a Conflict over the Breadth of the Territorial Sea :Recognition of the Twelve National Mile Limit as Declaratory of Customary International Law' *I.J.I.L.*, 36 (1996) 36 at 52.
  - 152. Interestingly, it was the French Writer Francis Geny who for the first time formulated this legal terminology to differentiate legal custom from social usage.
  - 153. I.C.J. Reports 1969, at p. 44.

to understand the need of such proof, it is not so easy to prove *opinio juris* in a given case. While the ICJ decisions in the *North Sea Continental Shelf Cases*<sup>154</sup> and the *Nicaragua*<sup>155</sup> adopted and maintained a high threshold with regard to the overt proving of the subjective constituent of customary law formation<sup>156</sup>. Akehurst wants us to believe that 'the modern tendency is not to look for direct evidence of a State's psychological convictions, but to infer *opinion juris* indirectly from actual behavior of States'.<sup>157</sup> The dissenting judges in the *North Sea Continental Shelf Cases*, for example, expressed the view that *opinio juris* could be presumed from consistent practice, unless a contrary intention was apparent. To quote Judge Tanaka, there is 'no other way than to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice'.<sup>158</sup>

The better view is that international law might require different levels of *opinio juris* and different degrees of proof for different substantive rules of customary law. Thus for an alleged rule that grants privileges or rights to all States, it might be possible to infer *opinio juris* from the simple fact of repeated State activity<sup>159</sup> but a far more strong evidence of *opinio juris* other than the actual fact of consistent State practice will be required in the case of a claim that a rule has attained the status of *jus cogens*.<sup>160</sup> Similarly, the rule banning the use of nuclear weapons can not be inferred from the mere lack of use of such weapons for the last forty six years.<sup>161</sup> It is interesting to note that the majority of judges in *Nicaragua* said that it was permissible to find *opinio juris* in

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154. The I.C.J. Stated : "Not only must the acts concerned amount to settled practice, but they must also be such, or be carried out in such a way, to be the evidence of a belief that the practice is rendered obligatory by the existence of the rule of law requiring it, the need for such a belief, i.e. the existence of a subjective element is implicit in the very notion of the *opinio-juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation : *Ibid.*
155. The Court in the *Nicaragua* case noted : For a new customary rule to be found, not only must the acts concerned 'amount to a settled practice', but they must be accompanied by the *opinio-juris sive necessitatis*. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that the practice is rendered obligatory by the existence of rule of law requiring it. The need for such a belief, i.e. the existence of subjective element, is implicit in the very notion of the *opinio-juris sive necessitatis*" *I.C.J. Reports*, 1986, p. 14 at 108-9.
156. M.N.Shaw, *International Law* (1997), 68
157. Akehurst, *A. Modern Introduction to International Law* (1981), 29.
158. *I.C.J. Reports*, 1969, 3 at p. 176.
159. Martin Dixon, n. 141 at p. 32-33.
160. *Id* at 33.
161. *Ibid.*

General Assembly resolutions, Statements made by State representative and the simple fact that treaties covering similar grounds as customary law had been concluded.<sup>162</sup> Before we conclude, it is important to mention that positivists accord more importance to *opinio juris* than to the material element. An extreme example of this approach is to be found in Bin Cheng's concept of 'instant international customary law'. This view is based on the premise that the existence of well established *opinio juris* is sufficient to create a custom.

The analysis presented above was necessary before making an evaluation of the precautionary principle from the customary law viewpoints. It is evident from the above that in modern international law there is a necessity to identify the existence of State practice and *opinio juris* before concluding the existence of a customary rule. It is true that the notion of environmental precaution has found its way into a number of treaties and instruments but the language in which it is couched in these documents is quite different. The fact of the matter is that the notion is Stated variously as a principle, approach, measures, action which have different meanings and connotations. Thus according to Oxford Dictionary 'principle' means a moral rule of strong belief that influences one's action, a law, a rule or a theory that some thing is based on, a belief that is accepted a reason for acting or thinking in a particular way, a general or scientific law that explains how something works or why something happens. By contrast, the word 'approach' means a way of dealing well a view of doing or thinking about something such as a problem or a task. 'Action' according to the same Dictionary, refers to 'the process of doing something in order to make something happen or to deal with a situation'. In law, this word means 'a legal process to stop a person or company from doing something or to make them pay for a mistake'. On the contrary, 'measure' refers to an official action that is done in order to achieve a particular aim, live security/austerity measures : Thus these terms have different connotations and denotations. As Ellen Hey notes, 'principle implies a general rule adopted as a guide for developing international environmental policy. The same dictionary defines the term approach as a 'way of considering or handling something, especially a problem'.<sup>163</sup> Apart from the use of different terms, different languages of obligation in these treaties and instruments do not point out to the existence of a consistent, uniform and general State practice. Most important fact in this context is different formulations of the precautionary principle of purer from or radical form.

Turning to judicial decisions which have been described in Article 38 of the Statute of the International Court of Justice, as can be seen from the earlier discussion in this study, there is no authoritative judicial

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162. *Id.* at 34.

163. Ellen Hey, The Precautionary Concept in Environmental Policy and Law : 'Institutionalizing Caution', *Georgetown International Environmental Law Review* (1992) 303, 304. Quoted in Dyke n. 15.

decision of the International Court and International Tribunals which unequivocally supports the notion. Thus the International Court refused to consider arguments based on 'precautionary principle' made by New Zealand and Hungary in the 1995 *Nuclear Tests* case and the *Gabcikovo-Nagyamaros* case<sup>164</sup> respectively. And provisional measures that the International Tribunal on the Law of the Sea issued in the *Southern Bluefin Tuna Case* were apparently based on the provisions of the Convention on the Law of Sea and the Convention on the Law of Southern Bluefin Tuna, 1993, rather than on the basis of the customary law status of the precautionary principle.<sup>165</sup> This is confirmed by the fact that the Tribunal had not found it necessary to enter into a discussion on the precautionary principle and approach. Even Judge Treves who said that 'a precautionary approach seems to be inherent in the very notion of provisional measures observed'<sup>166</sup>.

"I fully understand the reluctance of the Tribunal in taking a position as to whether the precautionary approach is a binding principle of customary international law. Other Courts and Tribunals, recently confronted with this question, have omitted to give an answer. In my opinion, in order to resort to the precautionary approach for assessing the urgency of the measures to be prescribed in the present case, it is not necessary to hold the view that this approach is dictated by a rule of customary international law.

In the opinion of Judge Laing the Tribunal has adopted the precautionary approach rather than the precautionary principle for the purposes of provisional measures in the instant case. In his view, 'adopting an approach, rather than a principle, appropriately imports a certain degree of flexibility and tends, though not dispositively to underscore reticence about making premature pronouncements about desirable normative structures'.<sup>167</sup> It is true that the European Court of Justice sanctioned the principle implicitly but the Appellate Body of the WTO refused to apply it in the U.S. 'hormone beef' imports case and the attitude of the European Court of Human Rights in this regard is in no way different from it.<sup>168</sup>

National legislation of States maybe regarded as an evidence of State practice with regard to the precautionary principle provided relevant statutory provisions are identical in content. In view of the study of practice of States undertaken earlier, it is doubtful whether legislative practice of States is uniform and consistent. The better view is that

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164. See Part III of the present study.

165. See Part III of the present study.

166. See Separate Opinion of Judge Tullio Treves, reprinted in *I.J.L.* 40 (2000),86 at p. 88.

167. Separate opinion of Judge Liang, *I.J.I.L.* 40 (2000),77 at 84.

168. See this work, III (d).

domestic legislative materials are uncertain or evolving.<sup>169</sup> Decisions of national courts are a subsidiary means for the determination of law. In theory, they do not make law but may provide an evidence of State practice. Regrettably domestic judicial materials on the precautionary principle are uncertain and inconclusive.<sup>170</sup>

The writings of the 'most highly qualified publicists' on the subject also fail to establish the customary law status of the precautionary principle due to lack of unanimity of scholars and jurists on this issue. There is in fact considerable literature devoted to the emergence of the precautionary principle in international law<sup>171</sup> but the opinions of scholars are divided. D. Freestone, for example, describes the concept as 'the most important new policy approach in international environmental cooperation'.<sup>172</sup> D' Amato and Engel note that the notion has been 'broadly accepted for international action, even if the consequence of its application in a given situation remains open to interpretation'.<sup>173</sup> Phillippe Sands also doubts whether the principle can of itself be a mandate for action, or provide definitive answers to all questions of environmental policy.<sup>174</sup> In the opinion of Professor Orrego Viuna, 'scientific uncertainty is normally the rule in fisheries management and a straight forward application of the precautionary principle would have resulted in the impossibility of proceeding with any activity relating to marine fisheries'.<sup>175</sup> Daniel Bodansky also highlights the inadequacy of this principle<sup>176</sup> : "Although the precautionary principle provides a general approach to environmental issues, it is too vague to serve as a regulatory standard because it does not specify how much caution should be taken. But also note his remarks : "Indeed, so frequent is its invocation that some commentators are even beginning to suggest that the precautionary principle is ripening into a norm of customary international law".<sup>177</sup>

Now turning to the evidence of the belief of States in the obligatory nature of the precautionary principle, the French Government in the 1995 Nuclear Test cases argued that the legal status of the principle was uncertain and not so long ago, the United Kingdom had

169. See this work III (e).

170. See this work III (e).

171. See David Freestone and Ellen Hey (eds) *The Precautionary Principle and International Law : The Challenge of Implementation* (1996).

172. See D. Freestone, 'The Precautionary Principle', in R. Churchill and D. Freestone (eds) : *International Law and Global Climate* (1991) 21 at p. 36.

173. Amato and Engel, *International Environmental Law Anthology* (1996), p.22.

174. P. Sands, I *Principles of Environmental Law* (1995), 211-13.

175. Francisco Orrego Vicuna, *The Changing International Law of High Seas Fisheries* (1999), 57.

176. Daniel Bodansky, 'Scientific Uncertainty and Precautionary Principle', *Environment* 33 (Sept. 1991), 4, cited in Dyke n. 15.

177. Daniel Bodansky, 'Remarks : New Developments in International Environmental Law', *A.S.I.L. Proc.* 85 (1991), 413.

even less kind things to say about the principle when it was invoked by the European Commission in the 'mad cow disease' case.<sup>178</sup> If in the *Southern Blufin Tuna* case Japan refused to admit that the precautionary principle created obligations *erga omnes*, in the latest row over 'hormone beef' imports from the United States, the United States called for sanitary and phytosanitary measures to be based on 'sound science', while the European Union pleaded for clarification and expansion of the principle. Even in Sweden where the principle is well and explicitly founded in law, the authorities are often reluctant to make use of it, even though in theory they are obliged to do so.<sup>179</sup>

The above analysis leads us to the inescapable conclusion that the precautionary principle has not ripened into a norm of customary international law. In any case its customary law status is uncertain. In this context it is important to remember that mere allegation of customary nature of a norm is not sufficient to convince the international community to accept such a rule as a rule of customary law, unless it is fully substantiated by sufficient evidence and the duty to do so is upon the claimant State before the international court and of the claimant party before the national court.

#### CONCLUSIONS :

The precautionary principle is an important policy approach in international environmental cooperation. Although it has gained wide acceptance in international treaties, conventions and domestic legislation its customary law status is uncertain. The apex Court could have avoided its unsubstantiated and unjustified pronouncement on the customary law status of the precautionary principle, especially when it was not an issue on which the judgment of the Court hinged. In fact, it is not clear as to what prompted the Court to undertake this half-hearted exercise when none of the parties in this case had raised this issue at all or did not press evidence in support of the customary law status of the principle. Even assuming that the notion of environmental precaution was crucial to deciding the issues presented by the case one wonders whether this objective could not have been achieved by following the precautionary approach in the place of the precautionary principle.

These observations notwithstanding, the judgments of the apex Court on the precautionary principle highlight the importance of the question of its status under customary international law, represent a small but significant step forward with respect to doctrinal clarification and draw the attention of the scholars and jurists to the necessity of further delineation of the specific content of the principle. Not only do they offer support to environmentalists and public spirited individuals in their efforts to make the development laws and policies more responsive to

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178. Peter, H. Sands, 'The Precautionary Principle' Coping with Risk', *IJL*, 40 (2000) 1, at p. 4.

179. *Ibid*, at p. 7.

environmental concerns but should also have a conscious raising impact on informed public which might result in renewed and intensified pro-environment and anti-pollution measures. Needless to say, these judgments already have stimulated academic and public interest in the matter and made far reaching contribution to the development of environmental jurisprudence in this country. The status of the principle under the customary international law may be uncertain but its status has become certain under the Indian law as a result of these judgments of the apex Court. The enactment of legislation recognizing the principle<sup>180</sup> and the further clarification of the concept of 'sustainable development'<sup>181</sup> in subsequent cases not only indicate the impact of these judgments on the legislative and judicial activities but also reveal the dynamics of environmental law and policy of India.



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180. Eg. Hazardous Wastes (Management & Handling, Amendment Rules, 2000, contain certain rules reflecting the precautionary approach. See generally, B.C. Nirmal, 'Regulating Transboundary Movement of Hazardous Wastes' in S. Bhatt & A. Mazid (eds). *Environment Management and Federalism* (2002), 135-180.
181. See *Narmada Bachao Andolan v. Union of India*, 2000(7) SCALE 34 at p. 92. Earlier cases on sustainable development are : *Doon Valley case*, AIR 1985 S.C. 652; *Indian Council for Enviro-Legal Action v. Union of India*, J.T. 1996 (4) S.C. 263. *State of Himachal Pradesh v. Ganesh Wood Products*, J.T. 1995 (6) S.C. 485 *Consumer Education and Research Society v. Union of India* (2000) 2 S.C.C. 599.

## **OVERVIEW OF ENVIRONMENTAL LAW, DEVELOPMENT AND HUMAN RIGHTS**

SANJAY PARIKH\*

### **I. INTRODUCTION**

The interdependence of man and environment was realized centuries ago in our scriptures where hymns were chanted to invoke the nature-God. Nature was treated with reverence. The idea was basically that man and Nature are complementary to each other. With the dawn of civilization and ever growing human wants, the era of industrialization was set-in where the rule was indiscriminate exploitation of natural resources. This resulted in pollution of water, air and earth besides depletion of natural resources. Though there were efforts in understanding the importance of nature, the global awareness found its expression for the first time in the United Nations conference on the Human Environment, 1972 at Stockholm. In the Proclamation itself it was recognized that "Man is both creator and mouider of his environment, which gives him physical sustenance and affords the opportunity for intellectual, moral, social and spiritual growth". It was also felt that both aspects of man's environment, the natural and man made, are essential to his well being and to the enjoyment of basic human rights-even the right to life itself. Therefore, in the process of evolution of the human race, in its diverse forms-social, economic, cultural and spiritual-a balance has to be maintained where man's sensible exploitation of nature for reasonable wants is reciprocated by nature in offering prosperity and not deprivation. The ideal of sustainable development has to be understood in this context, of course, the balance between man made environment and natural environment has to be struck by keeping all the essential aspects of life-with basic human rights-intact. But it should be clearly understood that human survival and dignity lies only in preservation of the earth resources and all such conditions which enable us to remain as human beings.

The discussion hereinafter would show that though legislative efforts were made before and after the Stockholm Declaration of 1972 to protect the environment but in terms of its implementation, not adequate attention was paid. The implementation and development of environmental law, in one sense, started only after the concept of *locus standi* underwent a revolutionary change ushering in the era of 'public interest litigation' (PIL). It became then permissible for any informed citizen to complain about the violation of environmental laws as being

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part of life and livelihood. It was, therefore, the constitutional law which was responsible for the development of environmental jurisprudence where the Court's directions compelled the executive to perform its duties of protection of environment. In a general sense, the causes of pollution are found to be ignorance, excessive self-interest, unwanted industrialization, lack of clear policies, political corruption and inertia of the implementing authorities.

## **II. OUR CONSTITUTION AND INTERNATIONAL ENVIRONMENTAL INSTRUMENTS**

To protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures, Article 51A(g) was introduced in the Chapter of Fundamental Duties by the 42nd Amendment of the Constitution. In the Directive Principles of State Policy, Article 48-A of the Constitution casts an obligation on the State to protect and improve the environment and to safeguard the forests and wild life of the country. Entry 13 of List-I to the Seventh Schedule permits State's participation in international conferences, associations and allows implementation of the decisions made therein. While Article 246(1) confers exclusive powers on Parliament to make laws in respect of matters provided in List- I of the Seventh Schedule, Article 253 confers sole powers on the Parliament to give effect to International Treaties, Agreements or Conventions. This is how the Environment (Protection) Act was enacted pursuant to the decisions taken by India at the Stockholm Conference in June, 1972. In fact, the chapter on the Fundamental Duties was introduced pursuant to the Stockholm Declaration. Another important conference on environment and development which needs mention is the Rio Summit from 3rd to 14th June, 1992-commonly known as the "Earth Summit"-where the declarations adopted at Stockholm in 1972 were reaffirmed and further important declarations were made. While principle 10 of this declaration obliges the State to permit citizens participation at all relevant levels, principle 11 balances the environment and development in context of the development in context of the developing countries. These two significant principles show that in spite of India's participation in the Conference and being a signatory to the 'Rio Declaration', the right to information concerning environmental issues has not been made a part of legislation. The other important International convention is the "Convention on Biological Diversity" which puts an obligation on each State to protect and conserve its bio-diversity. It also seeks to address the issue of bio-safety by regulation of genetically engineered substances. It is because of this Convention that the Cartegena Protocol on Bio-safety was finalized.

## **III. ENVIRONMENTAL LEGISLATION**

### **(i) The Water Act :**

The first conscious effort by our Legislature for protection of natural resources was made by enacting the Water (Prevention and

Control of Pollution) Act, 1974. It appears from the statement of objects and reasons that a committee was set up in the year 1962 for drafting an enactment for prevention of water pollution. As the subject matter was relatable to Entry 17 read with Entry 6 of List-II in the Seventh Schedule of the Constitution, it was felt that the Parliament should be empowered to pass necessary legislation on the subject. The Legislatures of five States, therefore, passed resolutions empowering the Parliament to enact the Water (Prevention and Control of Pollution) Act, 1974 under Article 252 of the Constitution. Even at that time, it was felt that the growing urbanization and development of industries would result in the industrial effluents/domestic wastes being discharged into the water course thus polluting the rivers and streams and rendering the water unsuitable for drinking purpose as well as for supporting their aquatic lives and also for purpose of irrigation. A bare reading of various provisions of the Act of 1974 show that there was constitution of Central Pollution Control Board (CPCB) as well as the State Pollution Control Boards (SPCBs) giving them sufficient powers to prevent and control pollution of water. Laboratories were set up with powers given to the Boards to take samples of effluents in order to find out the level of pollution. Not only there was power to proceed against the water pollution created by the industries but power was also given to restrain any person who was likely to cause such pollution by making an application to the Court. There was a separate Chapter on penalties and procedures. Enough teeth (for one who was willing to bite were given to the Boards to prosecute and punish the offenders. It was only after 7 years another enactment, namely, Air (Prevention & Control of Pollution) Act 1981 was passed. It would be of great interest to do a research on the work done by the Boards under the Act of 1974 including action taken against the polluting industries during these 7 years. But unabated pollution of the rivers and streams show the sloth, negligence and inaction of the Boards. It was only when a Public Interest Litigation (PIL) was initiated on cleaning of Ganga that some efforts were made. What is significant is that the Act not only remained as a decorated piece of paper on the statute book for decades but even now whatever action are taken by the Boards, they are only for complying with the directions given by the Apex Court or by the High Courts in their writ jurisdiction for violation of Article 21 of the Constitution; there are very few cases where the Boards have *suo moto* proceeded against the polluting industries.

**(ii) The Air Act, 1981 :**

The Air (Prevention & Control of Pollution) Act, 1981 was passed in the wake of participation of India in the "United Nations Conference on Human Environment" held at Stockholm in June, 1972 wherein decisions were taken to take appropriate steps for preservation of natural resources of the Earth and preservation of the quality of air was considered as one important aspect, among other things. The Act of 1981 defined, "air pollution" and air pollutants", created additional functions to be discharged by the Central Pollution Control Board and State Pollution

Control Boards concerning prevention of air pollution. Powers were given to declare an area as the "air pollution control area", to give directions to the extent of closure, prohibition or regulation of any polluting industry, its operation or process, stoppage or regulation of supply of electricity and water to the industry which violates the direction given by the CPCB/SPCBs. This Act again provided the penalties and procedures concerning offences committed by the defaulting industries. This Act of 1981 having been enacted to fulfil the obligations in the Conference at Stockholm, the Parliament was empowered to pass the enactment, unlike the Act of 1974 where the enactment could be passed only after resolutions of the State Governments. This Act has a similar history of maintaining culpable silence for decades while permitting the polluting industries to flourish with scant regard to the environment. Rare cases will come to light where the Boards on their own have directed closure of any industry because it was polluting the air.

**(iii) The Environment Protection Act, 1986 :**

In spite of the existing laws on protection of pollution in air and water, it was felt that the decisions taken at the Stockholm Conference in June, 1972 concerning "human environment" have not been implemented and there are gaps in the major areas concerning the environmental issues. In fact, issues like decline in vegetal cover, protection of biological diversity, growing risks of environmental accidents and threat to life support systems were still not attended to. This ultimately led to passing of general legislation for environmental protection. The Environment (Protection) Act, 1986 refers to the decisions taken at the Stockholm Conference and states in the Preamble that the said legislation was necessary for the protection and improvement of environment and prevention of hazards to human being, other living creatures, plants and properties. The Act of 1986 defines what is "environment" and "environmental pollution". There are provisions concerning prevention, control and abatement of environmental pollution, setting up of laboratories and also providing penalties for contravention of the provisions of the Act, Rules, orders and directions. By Section 24, the provisions of the Act of 1986 have been given over-riding effect. Under the Environment (Protection) Act, 1986, Rules have been made concerning few major areas, namely-(i) Hazardous wastes viz., Hazardous Wastes (Management & Handling) Rules, 1989 and Manufacture, Storage and Import of Hazardous Chemicals Rules 1989 (ii) Genetically engineered substances viz., Rules for manufacture, use, import, export and storage of hazardous micro organisms and genetically engineered organisms or cells. CRZ Notification issued in 1991 is another significant area covered by the Environment (Protection) Act.

**(a) Rules Controlling Genetically Modified Organisms (GMOs) :**

The Rules for the manufacture, use, import, export and storage of Hazardous Micro Organisms, Genetically Engineered Organisms (GMOs) or Cells were notified on 5th December 1989. These rules were

framed in exercise of powers conferred by Section 6,8 and 25 of the Environment (Protection) Act, 1986 with a view to protecting the environment, nature and health in connection with the application of gene technology and micro-organisms. Broadly, under these rules, six Committees have been constituted : 1. Recombinant DNA Advisory Committee (RDAC): This is an apex committee which reviews the development of bio-technology at national and international levels. It functions under the Department of Bio-Technology. 2. Review Committee on Genetic Manipulation (RCGM) : This committee also functions under the DBT for the purpose of monitoring the safety related aspects in respect of ongoing research projects and activities involving genetically engineered organisms. This Committee is also responsible for bringing out manuals of guidelines laying down the procedures restricting or prohibiting production, sale, importation ad use of GMOs. 3. Institutional Bio-Safety Committee (IBSC): This Committee is constituted by an occupier or any buyer including research institutions handling GOMs. 4. Genetic Engineering Approval Committee (GEAC): The functions discharged by this Committee are crucial. It functions under the Ministry of Environment & Forests and is responsible for approval of activities involving large scale use of hazardous micro organisms, approval of proposals relating to release of GMOs and products in to the environment including experimental field trials. 5. State Bio-technology Co-ordination Committee (SBCC): This Committee has powers to monitor the safety and control measures in the industries/institutions handling genetically engineered organisms/hazardous micro organisms. 6. District Level Committee (DLC): This Committee functions under the control of District Collectors to monitor the safety regulations in the installations engaged in use of GMOs/hazardous micro organisms.

According to the provisions of these Rules, import, export, transport, manufacture, process, use or sale of any hazardous micro organisms/genetically modified organisms can be permitted only with the approval of Genetic Engineering Approval Committee. Guidelines have been prepared under these Rules in the years 1990, 1994 and in August 1998. These Rules have not been put to any use, much less they being up-dated in accordance with the development of international norms and scientific knowledge concerning usefulness or otherwise of GMOs on the environment. In the context of the terminator technology developed by some of the multi-national seed companies as well as *Bt* seed varieties, this area has assumed significant concern. The apprehension of the environmentalists that *Bt* Gene technology will have severe adverse impact on the agricultural bio-diversity of the country is not without any justification. World over the debate is going on whether the GMOs should be permitted to be used in spite of their proven adverse effects on agriculture as well as human health. Various countries have declared moratorium; European countries have banned the use of genetically engineered substances. One of the NGOs (RFSTE) has challenged the entry and use of *Bt* cotton in our country as being violative of Article 21 of

the Constitution before the Supreme Court; the decision is still awaited. It is necessary that Ministry of Environment & Forests should re-look at various provisions of these rules concerning the hazards posed by the GMOs, particularly in view of the Convention on Biological Diversity (CBD) and the Cartegena Protocol on Bio-safety.

**(b) Hazardous Waste Management and Handling Rules :**

The rules concerning management and handling of hazardous wastes-Hazardous Waste (Management and Handling) Rules, 1989-were brought into force on 28th July, 1989. The rules control the handling, movement and disposal of hazardous wastes generated indigenously as well as wastes which are imported. The 1989 Rules provided for control on generation, collection, treatment, transport, storage and disposal of hazardous wastes listed in the Schedule. The industries which are storing and handling hazardous wastes are required to have authorisation from the State Pollution Control Boards. The authorizations can be granted only to those industries which possess adequate facilities for safe disposal of hazardous wastes. The import of hazardous wastes, for recycling, not for dumping, is permissible only when the Central Government gives permission to import such wastes. This permission is subject to the pre-condition that the industry has required facilities for safe disposal of hazardous wastes. The rules provide mechanism for controlling hazardous wastes but, this legislation suffered the same fate as any other environmental legislation: it remained only on papers supported by the inertia of the State Pollution Control Boards. In several cases, authorizations were given just for asking without finding out whether the industry has safe disposal facilities. Similarly, the industries also imported hazardous wastes, some with permission (approximately 11) and others without permission but in all these cases the pre-condition of these industries having required facilities for safe disposal of hazardous wastes were missing. Surprisingly when this was the status of implementation of legislation, India was participating in *Basel Convention* for controlling hazardous wastes where the first important principle to be followed by all countries was that the country which is receiving hazardous wastes must have adequate facilities for safe disposal of hazardous wastes. The said convention also contained schedules of hazardous wastes which were banned or regulated. In spite of signing this convention, nobody thought of amending the rules by bringing them in harmony with the *Basel Convention*. It was only when a NGO (RFSTE) filed a Writ Petition in the Supreme Court that the controlling authorities became aware of huge menace of hazardous wastes. The present position is that pursuant to the Supreme Court appointing a High Power Committee to submit its Report on various issues concerning the control and management of hazardous wastes, a Final Report has been submitted. The Supreme Court has meanwhile banned the import of any hazardous wastes which have been banned under the *Basel Convention*. Recently, the Rules of 1989 have also been amended. Suffice here to point out that in spite of ban by the Supreme Court the hazardous wastes

are still coming in the country clandestinely and illegally. One important item on which the High Power Committee has given its finding is about peoples participation to keep a watch on the functioning of existing industries and their expansion in future by placing the data in the form of national alert.

**(c) Coastal Regulation Zone Notification :**

Another important area in which significant development has been made is the notification dated 19th February 1991 concerning the Coastal Regulation Zone (CRZ). According to this notification which was issued under Rule 5(3)(d) of the Environment (Protection) Rules, 1986, the coastal stretches of seas, bays, estuaries, creeks, rivers and back waters have to be protected. There are certain activities, which have been prohibited within the CRZ. The other activities, which have been categorized as permissible, have been regulated. The CRZ has been divided into categories namely CRZ-I to CRZ-IV.

**(iv) Other Acts**

**The Wild Life (Protection) Act 1972 :**

In 1972, Parliament enacted the Wild Life Act pursuant to the enabling resolutions of 11 states under Articles 252(1) of the Constitution. The Wild Life Act Provides for state wildlife advisory boards, regulations for hunting wild animals and birds, establishment of sanctuaries and national parks, regulations for trade in wild animals, animal products and trophies, and judicially imposed penalties for violating the Act. Harming endangered species listed in Schedule I of the Act is prohibited throughout India. Hunting other species, like those requiring special protection (Schedule II), big game (Schedule III), and small game (Schedule IV) is regulated through licensing. A few species classified as vermin (Schedule V) may be hunted without restrictions. The Act is administered by wildlife wardens and their staff.

An amendment to the Act in 1982, introduced provisions permitting the capture and transportation of wild animals for the scientific management of animal populations. Comprehensive amendments to the parent Act in 1991 resulted in the insertion of special chapters dealing with the protection of specified plants and the regulation of zoos. The new provisions also recognized the needs of tribals and forest dwellers and introduced changes to advance their welfare.

**The Forest (Conservation) Act of 1980 :**

Alarmed at India's rapid deforestation and the resulting environmental degradation, the Central Government enacted the Forest (Conservation) Act in 1980. As amended in 1988, the Act requires the approval of the Central Government before a state 'dereserves' a reserved forest, uses forest land for non-forest purposes, assigns forest land to a private person or corporation, or clears forest land for the

purpose of reforestation. An Advisory Committee constituted under the Act advises the Center on these approvals.

#### IV. JUDICIAL TRENDS

Some important pronouncements by the Apex Court concerning Environment Protection Act may now be referred to. The first case of its own kind was *Ratlam Municipality case*<sup>1</sup> where the provisions of Cr. P.C. (Sec.133) were used for the cause of public interest: cleaning garbage and public drainage. In *Rural Litigation and Entitlement Kendra*<sup>2</sup> the Supreme Court closed down mining activities in Dehradun which had adverse impact on the environment. This was done under Article 32 of the constitution on the basis of Article 21. In the *M.C. Mehta cases*<sup>3</sup> starting in the year 1987, the pollution of river Ganga was dealt with; there were several orders with regard to discharge of effluents by tanneries and other industries. There were two important cases concerning gas leak, one is the *Oleum Gas Leak case*<sup>4</sup> filed by M.C. Mehta where the rule of strict liability was evolved. The other one is the *Union Carbide Case*<sup>5</sup> where because of leakage of Methyl Iyso Cynate (MIC) there was mass destruction and loss of human lives. In the case of *Subhash Kumar*<sup>6</sup> the Supreme Court affirmed that right to pollution free air and water for full enjoyment of life is part of Article 21 which can be enforced under Article 32 of the Constitution. In *Indian Council for Enviro Legal Action*<sup>7</sup>, the Supreme Court enforced the CRZ Notification in order to prevent ecological degradation in coastal areas.

It may be of interest to indicate that till the judgement of the Supreme Court in *Indian Council for Enviro Legal Action vs Union of India & Others*<sup>7</sup>, the Government had not thought of invoking these provisions for protecting the ecological balance in the coastal areas. As a result thereof, in blatant violation of the notification, industries were set-up, hotels and resorts were constructed at the beaches causing serious damage to the environment and ecology of the coastal areas. The following observations made by the Supreme Court in the said judgement show how the laws concerning protection of environment are observed only in their breach:

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1. *Ratlam Municipal Council* - 1980(4)SCC 162.
  2. *Rural Litigation & Entitlement Kendra, Dehradun - v. State of U.P.* 1985(2) SCC 431
  3. *M.C. Mehta v. Union of India*, 1987 (4) SCC 463 (Ganga Water Pollution)  
Discharge of trade effluents by tanneries in Kanpur. *M.C. Mehta v. Union of India*-1988 (1) SCC 471 , Responsibility of Municipal Corporation, Kanpur (Ganga Water Pollution) Locus standi
  4. *M.C. Mehta v. Union of India* - 1987 (1) SCC 395. Rule of Strict Liability
  5. *Union Carbide Corporation v. Union of India* - 1989 (1) SCC 674.
  6. *Subhash Kumar v. State of Bihar* - 1991 (1) SCC 598, Right to pollution free air and water for full enjoyment of life - Part of Article 21.
  7. *Indian Council for Enviro-legal Action v. Union of India*, 1996 (5) SCC 281. Ecological degradation in Coastal areas

" Even though laws have been passed for the protection of environment, the enforcement of the same has been tardy, to say the least the Governmental authorities not showing any concern with the enforcement of the said Act." "Enactment of a law, but tolerating its infringement, is worse than not enacting law at all. The continued infringement of law, over a period of time, is made possible by adoption of such means that are best known to the violators of law...A law is usually enacted because the Legislature feels that it is necessary. It is with a view to protect and preserve the environment and save it for the future generations and to ensure good quality of life that the Parliament enacted the Anti-Pollution Laws, namely the Water Act, Air Act and the Environment (Protection) Act, 1986.....Violation of anti-pollution laws not only adversely affects the existing quality of life but the non-enforcement of the legal provisions often results in ecological imbalance and degradation of environment, the adverse effect of which will have to be borne by the future generations."

"The present case also shows that having issued the main Notification, no follow-up action was taken either by the Coastal States and Union Territories or by the Central Government. The provisions of the main Notification appear to have been ignored and, possibly, violated with impunity."

In *S. Jagannathan*<sup>8</sup> to prevent the damage caused by aqua farming, several directions were given, including the direction to close down the qua-culture activities. The supreme Court in *M.C. Mehta*<sup>9</sup> dealt with pollution in Agra to prevent any damage to Taj Mahal.

Certain principles have also been evolved by the Supreme Court in environmental jurisprudence like, "precautionary principle", "Polluter pays principle", "Public Trust Doctrine", "inter-generational equity" and new concept of "burden of proof". The precautionary principle and polluter pays principle were explained by the Supreme Court in *Indian Council for Enviro-legal Action*<sup>10</sup> and in *Vellore Citizens Welfare Forum*<sup>11</sup> which were subsequently followed in other cases. According to the precautionary principle, it is necessary that the State Government and the statutory authorities must anticipate, prevent and attack the cause of environmental degradation. The Polluter pays principle means that the absolute liability of harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. The principle of inter-generational equity enjoins the duty of the present generation towards the posterity. The doctrine of public trust casts duty on the State to protect all natural resources against their exploitation by private ownership for commercial

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8. *S. Jagannathan v. Union of India* - 1997(2) SCC 87. Shrimp (Prawan) Farming Culture causing ecological imbalance
  9. *M.C. Mehta v. Union of India* - 1997(2) SCC 353, Taj case.
  - 10. Indian Council for Enviro-legal Action - 1996 (3) SCC 212.
  11. *Vellore C illizens Welfare Forum v. Union of India*-1996 (5) SCC 647.

purpose. This was explained by the Supreme Court in *M.C. Mehta vs Kamal Nath*.<sup>12</sup> The concept of burden of proof was dealt with in *A.P. Pollution Control Board*<sup>13</sup> where burden as to the absence of injurious effect of the actions proposed was placed on those who want to change the status quo. It was termed as reversal of the burden of proof. It is so because any other approach in environmental cases would put evidentiary burden on those who are opposing the change and such a procedure would not be fair. In the same judgement the Supreme Court insisted on the need of having expert opinion to come to the right conclusion in environmental matters. Some other cases also need reference here. In the case of *Research Foundation for Science Technology and Ecology (RFSTE)* Supreme Court gave various directions to control the menace of hazardous waste. In *T.N. Godavarman*<sup>14</sup>, the Supreme Court put a ban on all non-forest activities in the forest area and to see its strict implementation had also appointed High Power Committee. Because of far reaching directions in this case the illegal and mindless felling of trees in various parts of the country stopped. In *Animal and Environment Legal Defence Fund*<sup>15</sup>, the Supreme Court gave directions for prevention of any destruction or damage to the flora & fauna and also directed the State to issue Notification under Section 35(4) of the Wildlife (Protection) Act, 1972. In *Almitra H. Patel*<sup>16</sup>, the Supreme Court considered the report prepared by Almitra H. Patel to tackle the problem of urban solid waste.

The Forest (Conservation) Act, 1980 and various other laws framed for protection of forests were in the state of permanent suspension due to inaction of the executive till the alarming de-forestation activities made the Apex Court conscious of the depletion in forest cover far less than the ideal minimum of 1/3rd of the total land and compelled it to give various directions in *T.N. Godavarman*<sup>17</sup> (commonly known as the Forest case). The provisions of the Wildlife (Protection) Act, 1972 also came up for interpretation and action in few cases before the Supreme Court. The Supreme Court has, however, not addressed itself to the question of preservation of bio-diversity in the wake of WTO proliferation affecting our country's bio-diversity. There is bio-diversity Preservation Bill which is till under consideration. In between, there are umpteen number of cases of bio-piracy: some well known cases are Turmeric, Karella, Jamun etc.

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12. *M.C. Mehta v. Kamal Nath* - 1997 (1) SCC 388.
  13. *A.P. Pollution Control Board v. Prof. M.V. Nayudu and others*. 1999(2) SCC 718. Hazardous industry. Making Reference to expert body permissibility.
  14. *T.N. Godavarman* - 1997(2) SCC 267 - Prevention of Forests.
  15. *Animal and Environmental Legal Defence Fund v. Union of India* 1997(3) SCC 549 following 1996 (8) SCC 599. Both cases relating to Wildlife (Protection) Act, 1972.
  16. *Almitra H. Patel v. Union of India*, 1998 (2) SCC 416.
  17. *Supra note, 14.*

The Water Act, 1974, Air Act, 1981, Environment Protection Act, 1986 and other related enactments which had provided the required machinery to protect the environment remained inert which resulted in unchecked pollution and overexploitation of nature. In that situation the Supreme Court and the High Courts stepped in through the public interest litigation to give directions for protection of environment in exercise of their power of judicial review under Articles 32 and 226 of the Constitution on the basis of infringement of Article 21. In doing so, a constitutional mechanism as against existing statutory mechanism was evolved by the Courts; even green benches were created in different High Courts for protecting the environment. One view is that the process of effective monitoring by enforcing the statutory mechanism would have made not only the authorities under different enactments more responsible and accountable but the Courts would have acknowledged the deficiencies in the working of these enactments. This process of monitoring was adopted in *T.N. Godavarman*<sup>18</sup> and few other cases. But can this task continue to be performed by the Supreme Court and the High Courts? The Constitutional Courts are not well-equipped to deal with the complicated questions of science and technology besides judging the requirement and effectiveness of pollution control devices; there are also several other aspects of balancing task of development and environment. This task can be better performed by the Environment Tribunals with required expertise so that the Supreme Court and the High Courts and are not burdened with scrutiny of scientific and technical data and their role is confined to make the system of environment protection work within the legal and constitutional framework. This is what was suggested in *M.C. Mehta*<sup>19</sup> by Justice Bhagwati and was reiterated in *Vellore case*<sup>20</sup> and finally discussed in detail in *A.P. Pollution Control Board*.<sup>21</sup> In *Vellore case* the Supreme court was constrained to observe that it is doing the task of resolving environmental issues as the environmental tribunals have not been set-up under the Environment Protection Act. Its effect was seen in *A.P. Pollution Control Board* where for the purpose of evaluating technical and scientific data the Supreme Court not only suggested changes to be brought in the pollution control laws by appointing environmental experts in the pollution control boards, creation of appellate authorities to be headed by retired High Court judges but in the facts of that case asked the National Environment Authority (headed by a retired Supreme Court Judge) to submit a report on the environmental issues. This approach is commendable as it can eliminate the possibility of mistakes committed by the Constitutional Courts in evaluating the scientific material. The Environmental Courts can also suggest how the sustainable approach in a given situation can be achieved, namely, the environment is

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18. *Ibid.*

19. 1987 (1) SCC 395.

20. *Supra* note 11.

21. *Supra* note 13.

protected without de-stabilizing the social concerns. But while we have the above judgement in *A.P. Pollution control Board* taking a cautious approach in the area of expertise, we have the case in *Diksha Holding*<sup>22</sup> recently decided by the Supreme Court where challenge to the permission granted by the Ministry of environment permitting hotel construction within CRZ was rejected on the ground that no material was produced to show that such permission adversely affected the environment. The special rule of evidentiary burden in environmental cases was not only not followed but the court itself went into the scientific investigation of importance of "sand dunes" and even suggested that the sand can be exploited for commercial use.

#### V. ISSUES OF DEVELOPMENT AND HUMAN RIGHTS

The concept of development vis-a-vis environment is not an easy issue. In the wake of WTO it has become complex. But as Prof. Amartya Sen has said, it is only by dealing with complex issues that the solutions emerge. The issue of application of the environmental standards of developed countries on developing countries has serious ramifications. Our agriculture, our bio-diversity, our traditional knowledge, our tiny and small industries have to be protected from unequal treatment under the WTO. The idea of sustainable development, where environment protection is an integral part of development, can be achieved and understood in the socio-economic realities prevailing in the society, the massive unemployment, extreme burden of population and such other relevant factors. These factors do not justify pollution but are certainly relevant issues which should find place in the decision-making process. It is possible to protect the environment, at the same time, protecting the development in a developing country like ours. In the Stockholm Convention Principle 8 specifically stated that "Economic and social development is essential for ensuring a favorable living and working conditions on earth that are necessary for the improvement of the quality of life". By Principle 10, it was recognized that "(F) for the developing countries, stability of prices and adequate earnings for primary commodities and raw material are essential to environment management since economic processes must be taken into account." Again in Principle-11, it was clearly mentioned that "the environmental policies of all states should enhance and not adversely affect the present or future development potential of developing countries...." Similarly, Principle-3 of the Rio-Declaration asserts that "(T) the right to development must be fulfilled so as to equitably meet developmental and environmental needs to the present and future generations." Unfortunately the principle of development is applied to the big industries and not to agriculture, tiny and small industries. And the axe of environmental standards falls more severely on small industries when they need technical advise and financial assistance to install pollution control devices.

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22. *Goa Foundation v. Diksha Holdings Pvt. Ltd.*, 2001(2) SCC 97.

Closure of Delhi industries in a massive scale only resulted in social imbalances when the result could have been achieved by systematic approach. Shifting cannot be the solution unless the industries are going to use pollution control devices or cleaner technologies at the new place. Otherwise it will only be shifting of pollution or an act of de-congestion of industries which will not really be an environmental issue. The problem of displacement of workers, their families and other dependent persons ought to have been considered before any direction of shifting. In the whole process of closure/shifting of Delhi industries only the workers and their families have suffered. It is indeed sad that while protecting environment it was not considered that the right to livelihood, right to food are also basic essential rights. After all these industries were permitted to operate with the pollution caused by them, in full knowledge and awareness of the authorities which were supposed to check their growth in the non-conforming areas and also stop the pollution caused by them. It is more of a problem of systemic corruption at the executive and political level which is responsible for it. The authorities have, therefore, to be fully blamed for creating a social as well as environmental problem. This case raises important issues to identify and remedy the causes of pollution which do not surface but are the real culprits i.e. those responsible for implementation.

The need of the hour is to explore the practical and pragmatic solutions to balance development and environment. The western model of sustainable development cannot answer our requirements. We need the development of the kind which takes in its fold the traditional know-how, survival based on bio-diversity, importance of agriculture and agro-based tiny and small industries providing employment to many, as the development of this kind can always address itself to the environmental questions as those questions are relevant for their own survival. Every kind of right development has to address itself to the issues of human concern. Nature depicts the human identity; in one sense it is the basis of human survival. To quote Gandhiji, "(T) true economics never militates against highest ethical standards just as true ethics to be worthy its name must at the same time be good economics". the same principle applies to the relationship between environment and development. The industries which in their blind pursuit of making money are catering to ever-growing human wants, possession and luxuries should not be permitted to operate unless they meet the environment norms. It is sheer greed of big industries which has polluted our rivers, air and earth with utter insensitivity and unconcern for human kind.

#### **VI. CONCLUDING OBSERVATIONS**

While the consciousness should grow in all spheres of public life that there should be gradual reduction of processes responsible for causes of pollution, there should be clear policies and political will to protect environment without being anti-people; options should also be explored for cleaner technologies. Shunning the use of plastic in daily life

is not after all that difficult, may be at the cost of little inconvenience, but that trouble is worth taking for the benefit of the society. Yet another significant aspect in controlling pollution is the human duty. In these times of materialism and consumerism we forget that it is linked to more goods, more production and resultantly more pollution besides a toll on the material resources. Prof. Henryk Skolimowski has suggested that the human beings should shift from *biological heritage* which accentuates only material aspects to ecological heritage which accentuates quality of life and symbiotic living. He has propounded the following of *Eco-yoga* which teaches reverence to the nature as being the only possibility to bring in beauty and sanity in our lives and *Eco-dharma* which impinges a duty on everyone to care not only for one self but for the entire earth.

Gandhiji's vision in balancing economic development, human wants and environment was integrated. Time will prove that he was right. Once he had observed :

"In the modern rush, the chief use we have of our rivers is to empty our gutters in them and navigate our cargo vessels, and in the process make them dirtier still. We have no time to stroll down to these rivers, and in silent meditation listen to the message they murmur to us"

Let us listen to that message at least now.



## **DEVELOPMENT AND ENVIRONMENT : JUDICIAL APPROACH**

SUMITRA SRIPADA\*

### **I. INTRODUCTION :**

**T**raditionally, the concept of sovereignty of the State has been seen as synonymous with the absence of any fetters on the State's decision making power, and limitations on sovereignty are not to be lightly presumed. International law is premised on this concept and has expressly recognized States' permanent sovereignty over natural resources<sup>1</sup> but at the same time, limitations on sovereignty are also in plenty. It has been accepted that "No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State or the properties or persons therein."<sup>2</sup> Conversely, it is a fair and reasonable demand on the part of a sovereign State that the air over its territory should not be polluted on a great scale, that the forests on its mountains, be their better or worse, and whatever domestic destruction they have suffered should not be further destroyed or threatened by the act of persons beyond its control...<sup>3</sup> While a State could protest outside activities spoiling its environment, it is a matter for the State itself to decide as to what extent, it would protect its environment. Justice Holmes asked, "It is a question of the first magnitude as to whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything that threatens their purity".<sup>4</sup> These observations border on an acceptance of a State's right to pollute. However, such a right is not accepted now, and on the other hand, the duty of every State to protect and preserve the environment is established and confirmed.<sup>5</sup> There are several treaty obligations which have been signed by a majority of States and are now in force with the single theme of protection of the environment. India is also a signatory to almost all these international agreements. The signatory of a treaty has the obligation to make the treaty internally applicable. Failure to discharge its treaty obligations or

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1. See U.N.G.A. - Resolution No.1803 (XVII) 1962.
2. *Trial Smelter Arbitration, United States of America vs. Canada*, Vol.35 AJIL (1941) P.684 at P.716.
3. Holmes J. in *Georgia vs. Tennessee U.S. Supreme Court* (1906).
4. Holmes J in *Missouri vs. Illinois U.S. Supreme Court* (1906).
5. The beginning of this consensus has been the Stockholm Declaration on Human Environment, 1972. Rio Declaration on Environment and Development, 1992 and a host of other international documents have established the obligation of all States to protect and preserve the environment.

doing anything that may defeat the object of the treaty will result in the international responsibility of the State. Developments in International law also suggest that a State can be held liable if some activity within its territory causes damage to the other States.<sup>6</sup> International Law recognizes the right of every State to develop and at the same time, tries to balance this right with the need to protect and improve the natural environment. It lays down that "sustainable development" shall be the guiding principle or policy of every State. This has been accepted as the policy of the Government of India also. In an attempt to examine how this principle has been applied in India. This paper first gives a brief outline of the policy statement on environment and development and the reflects on the role of the judiciary in the environment and development. It also addresses the issues relating to irrigation projects and mega river valley project in the backdrop of the 1992 policy statement and judicial decisions

## II. THE NATIONAL CONSERVATION STRATEGY AND POLICY STATEMENT ON ENVIRONMENT AND DEVELOPMENT :<sup>7</sup>

### (a) Sustainable Development Policy :

The National Conservation Strategy and Policy Statement on Environment and Development, 1992 in the preambular paragraph acknowledges that "The survival and well-being of a nation depend on sustainable development. It is a process of social and economic betterment that satisfies the needs and values of all interest groups without foreclosing future options. To this end we must ensure that the demand on the environment from which we derive our sustenance does not exceed its carrying capacity for the present as well as the future generations".

Conservation is said to be the key element of the policy for sustainable development for development requires the use and modification of natural resources, whereas conservation ensures the sustainability of development for the present and as so for the future. The Government has committed itself to integration and internalization of environmental considerations in the policies and programs of development in various sectors, and curtailment of consumerism and shift towards use of environment friendly products and processes etc.

The attainment of sustainable development requires promulgation of supporting policies such as forests, industrial, agricultural and irrigation policies.

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6. See generally, the reports of the International Law Commission on 'International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law; from 1979 onwards.

7. Issued by the *Ministry of Environment and Forests* in 1992.

**(b) Forest Policy :**

The National Forest Policy 1952, among others, is based upon the need for evolving a system of complimentary land use, need for checking denudation in mountainous regions, soil erosion and invasion and the need for sustained supply of timber and other forest produce. The intrinsic value of forests has been recognized for the first time only in the Forest Policy of 1988. Its basic objectives are said to be maintenance of ecological stability through preservation and conservation of the natural heritage etc.

**III. ENVIRONMENT V. DEVELOPMENT : JUDICIAL APPROACH**

Though sustainable development principle is said to have been the basic policy, in practice, the government has shown a preference to development activities rather than to the protection of the environment. Matters of Policy are for the government to decide and the courts' power of judicial review in such matters is necessarily limited. Thus economic policy,<sup>8</sup> price fixation,<sup>9</sup> legislative policy<sup>10</sup> all seem to be matters for the government itself to decide and unless policy decision is absolutely capricious, unreasonable and arbitrary and based on mere *ipse dixit* of the executive authority or is violative of any constitutional or statutory mandate, Court's interference is not called for.<sup>11</sup> Moreover, change of policy by the government from time to time, under changing circumstances, cannot be questioned. Wisdom of the policy cannot be judicially scrutinized though the Court can consider whether the policy is arbitrary or violative of law.<sup>12</sup> Logically, this means that if a policy decision of the government is oppressive or is violative of any constitutional or statutory mandate, the same can be reviewed by the Court. If an act of the government with respect to development results in pollution of the environment or ecological imbalance, the act may be challenged and reviewed by the Court. First such occasion did arise in *Rural Litigation and Entitlement Kendra Vs. Devki Nandan Pandey and others*.<sup>13</sup> The actual facts relate to the failure of the State to regulate mining activities. The Court observed:

"It is for the Government and the Nation - and not for the Court - to decide whether the deposits should be exploited at the cost of ecology and environmental considerations or the industrial requirement should be otherwise satisfied. It may be perhaps possible to exercise greater control and vigil over the operation and strike a balance between preservation and utilization, .... Government should take a policy decision and

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- 8. *Bhavesh D. Parish vs. Union of India* (2000) 5 SCC 471
  - 9. *Bihar State Electricity Board vs. Usha Martin Industries*, (1997) 5 SCC 289.
  - 10. *Ashok Kumar Gupta vs. State of U.P.* (1997) 5 SCC 201
  - 11. *M.P. Oil Extraction vs. State of M.P.* (1997) 7 SCC 592.
  - 12. *State of Punjab vs. Ram. Lubhayya Bagga* (1998) 4 SCC 117.
  - 13. (1985) 2 SCC 431, (1985) 3 SCC 614, (1986) Supp. SCC 517, (1987) Supp. SC 487.

firmly implement the same.<sup>14</sup> While the Court ordered in March, 1985 the closure of some quarries, observed that this would cause hardship to the lessees "....but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment."<sup>15</sup> Thus, the Court gave precedence to a clean environment over the right to livelihood and development. The Court, however, required the Union of India "to balance these two aspects and place on record its stand not as a party to the litigation but as a protector of the environment in discharge of its statutory and social obligation..."<sup>16</sup>

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everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes'.<sup>31</sup> In the words of Professor Sax 'When a State holds a resource which is available for the free use of the general public, a Court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties'.<sup>32</sup> The learned author further observes that 'Public Trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffused public interests need protection against tightly organised groups with clear and immediate goals'.<sup>33</sup>

In *T. Damodara Rao vs. Special Officer, MCH*<sup>34</sup> the question was whether land falling within the recreational zone within the city limits of Hyderabad can be used for residential purposes contrary to municipal development plan. Answering the question in the negative, the A.P. High Court held – 'Protection of environment is not only the duty of the citizen, but it is also the obligation of the State .... The enjoyment of life and its attainment and fulfillment guaranteed in Article 21 embraces the protection and preservation of nature's gifts without which life cannot be enjoyed'.<sup>35</sup>

The Public Trust Doctrine might get attracted in a case where municipal land earmarked for open space for public use i.e., to maintain ecology and hygienic environment is proposed to be transferred by Government on lease to a private party for construction of a Dharmashala. The Supreme Court has rightly held that the action of the Government is untenable.<sup>36</sup>

The Supreme Court restrained an attempt by the Bangalore Development Authority to transfer to a private person, open space reserved for public park in development scheme.<sup>37</sup> The Court applied the 'Public Trust' doctrine in the spirit when it observed – "Free and healthy air in beautiful surroundings ....now ....is a gift from people to themselves. Its importance has multiplied with emphasis on environment and pollution. In modern planning and development it (public park) occupies an important place in social ecology".<sup>38</sup> Again, in *D.D. Vyas vs. Ghaziabad Development Authority*,<sup>39</sup> the Court held that the States'

31. *M.C. Mehta vs. Kamal Nath*, (1997) 1 SCC 388

32. Prof. Sax, as quoted by the Supreme Court *Ibid*, p.408 para 26

33. *Ibid* p.410 para 31.

34. AIR 1988 AP 171.

35. *Ibid* at p.247.

36. *Virendra Gaur vs. State of Haryana* (1995) 2 SCC 577.

37. *Bangalore Medical Trust vs. B.S. Muddappa* (1991) 4 SCC 54.

38. *Ibid* p.80 para 36.

39. AIR 1993 All 57.

omission to develop public parks in earmarked spaces amounts to failure to discharge its fundamental duties.<sup>40</sup>

*M.I. Builders Ltd., vs. Radhey Shyam Sahu*<sup>41</sup> is yet another case concerning town planning and involving a dilemma between the necessity to preserve a park and the need to develop the area commercially. Holding that environmental necessity and historical importance of the park required it to be preserved, the Supreme Court held that both the decision as well as procedure adopted by the Lucknow Municipal Authorities (in entrusting the park to a private builder contrary to statutory provisions) were in violation of the law, unreasonable, unfair arbitrary and opposed to public policy. The learned Court here applied the 'Public Trust Doctrine' and held that by allowing commercial development of the park, the Mahapalika has violated this doctrine.<sup>42</sup>

Here, the Court has given priority to the society's right to a clean environment over its right to development. The Doctrine of Public Trust however is limited only to natural resources and is not applicable in all cases of administration.<sup>43</sup>

The 'responsibility' of the State to the public is the basic philosophy of the 'Public Trust' doctrine. The cornerstone of Environmental Law is the assertion that all of our national natural resource treasures are held in trust for the full benefit, use and enjoyment of all the people..not only of this generation but of those generations yet unborn. ... This assertion underlies every claim by citizens to protection of the nation's resource treasures.<sup>44</sup>

The greatest importance of the public trust doctrine as a tool to ensure effective state management of natural resources lies, however, in its ethical or stewardship approach to the environment. It has the potential to address the increasingly insurmountable hurdle of correlating environment and development. This doctrine may, if nothing else, at least be used conceptually as a framework for addressing natural resource and environmental conflicts that go beyond the reach of written laws.<sup>45</sup>

*Goa Foundation, Goa vs. Diksha Holdings Pvt. Ltd.*,<sup>46</sup> is yet another case of development activity (construction of star hotel in the CRZ area) being challenged by environmental groups. Once again, the

40. *Ibid* p.62-63.

41. (1999) 6 SCC 464.

42. *Ibid* p. 518, para 50-52.

43. Common cause, a Registered Society vs. Union of India, (1999) 6 SCC 667.

44. Victor J. Yannacone, jr. Bernard S. Cohen and Steven G. Davison "Environmental Rights and Remedies" Vol.1 P.11.

45. Lavanya Rajamani, "Doctrine of Public Trust : A Tool to Ensure Effective State Management of Natural Resources" 38 J.I.L.I. (1996) p.72 at p.82.

46. AIR 2001 SC 184.

Court adopted a policy of non-interference.<sup>47</sup> The AP High Court has similarly upheld the State's activity of construction of fly-overs in the Hyderabad city.<sup>48</sup>

However the Allahabad High Court has asserted its power of judicial review when it directed a camp tourist resort set up by the State Government on pastures and meadows on mountains in Garhwal district to be closed down in view of threatened ecological imbalance, notwithstanding the fact that the State Government had already spent money on its construction.<sup>49</sup> In fact, it has been suggested that though matters relating to development vis-a-vis environment are matters of political policy, nevertheless, the Courts should have a say in the matter. .... Socio - economic conditions can not be ignored by a Court ... ecological imbalance being a social problem, ought to be decided by a Court of law so that the society may thrive and prosper'.<sup>50</sup>

#### **IV. IRRIGATION AND MEGA RIVER VALLY PROJECTS :**

Irrigation Projects and mega river valley projects have evoked a lot of controversy and resistance from public.<sup>51</sup> Even when the Policy Statement on Environment and Development prefers/gives priority to small projects to meet the requirements of irrigation without causing significant alteration in the environmental conditions, (para 6.1.2), still preference is given only to big dams.

The immediate aftermath of India's independence was characterized by heavy industrialization and launching development (Irrigation) Projects. In fact the then Prime Minister of India called them "modern temples". Dams are expected to supply water for drinking, irrigation, and also generate the much needed power, hydel power, generate employment mostly during the project period and to a certain extent, in the post-project period also. But all this, at what cost? The problems of disturbing the ecological balance apart, millions of hectares of forest land are getting submerged under water. As aptly noted by some perceptive observers, 'The central issue ..... is the problem of displacement: The backwaters of a large dams generally displace many thousands of people often tribals who are the poorest and most powerless members of the society. Recent experience also shows that

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- 47. See also, the *Goa Foundation vs. The Konkan Railway Corporation*, AIR 1992 Bom. 471, *Bombay Environmental Action Group vs. State of Maharashtra*, AIR 1991 Bom. 301, both these cases illustrate a non-interference policy of the Court.
  - 48. *Society for preservation of Environment vs. State of A.P.* AIR 1997 AP 381.
  - 49. *Omprakash Bhatt vs. State of U.P.*, AIR 1997 All 259.
  - 50. *People United for Better Living in Calcutta - Public vs. State of West Bengal*, AIR 1993 Cal. 215 at p. 228.
  - 51. See generally, Anil Agarwal, Darryl D' Monte Ujwala Samarth, (CED) "The Fight for Survival People's Action for Environment". Centre for Science & Environment, New Delhi (1987).

doing anything that may defeat the object of the treaty will result in the international responsibility of the State. Developments in International law also suggest that a State can be held liable if some activity within its territory causes damage to the other States.<sup>6</sup> International Law recognizes the right of every State to develop and at the same time, tries to balance this right with the need to protect and improve the natural environment. It lays down that "sustainable development" shall be the guiding principle or policy of every State. This has been accepted as the policy of the Government of India also. In an attempt to examine how this principle has been applied in India. This paper first gives a brief outline of the policy statement on environment and development and the reflects on the role of the judiciary in the environment and development. It also addresses the issues relating to irrigation projects and mega river valley project in the backdrop of the 1992 policy statement and judicial decisions.

## **II. THE NATIONAL CONSERVATION STRATEGY AND POLICY STATEMENT ON ENVIRONMENT AND DEVELOPMENT<sup>7</sup>:**

### **(a) Sustainable Development Policy :**

The National Conservation Strategy and Policy Statement on Environment and Development, 1992 in the preambular paragraph acknowledges that "The survival and well-being of a nation depend on sustainable development. It is a process of social and economic betterment that satisfies the needs and values of all interest groups without foreclosing future options. To this end we must ensure that the demand on the environment from which we derive our sustenance, does not exceed its carrying capacity for the present as well as the future generations".

Conservation is said to be the key element of the policy for sustainable development for development requires the use and modification of natural resources, whereas conservation ensures the sustainability of development for the present and as so for the future. The Government has committed itself to integration and internalization of environmental considerations in the policies and programs of development in various sectors, and curtailment of consumerism and shift towards use of environment friendly products and processes etc.

The attainment of sustainable development requires promulgation of supporting policies such as forests, industrial, agricultural and irrigation policies.

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6. See generally, the reports of the International Law Commission on 'International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law; from 1979 onwards.

7. Issued by the *Ministry of Environment and Forests in 1992*.

**(b) Forest Policy :**

The National Forest Policy 1952, among others, is based upon the need for evolving a system of complimentary land use, need for checking denudation in mountainous regions, soil erosion and invasion and the need for sustained supply of timber and other forest produce. The intrinsic value of forests has been recognized for the first time only in the Forest Policy of 1988. Its basic objectives are said to be maintenance of ecological stability through preservation and conservation of the natural heritage etc.

**III. ENVIRONMENT V. DEVELOPMENT : JUDICIAL APPROACH**

Though sustainable development principle is said to have been the basic policy, in practice, the government has shown a preference to development activities rather than to the protection of the environment. Matters of Policy are for the government to decide and the courts' power of judicial review in such matters is necessarily limited. Thus economic policy,<sup>8</sup> price fixation,<sup>9</sup> legislative policy<sup>10</sup> all seem to be matters for the government itself to decide and unless policy decision is absolutely capricious, unreasonable and arbitrary and based on mere *ipse dixit* of the executive authority or is violative of any constitutional or statutory mandate, Court's interference is not called for.<sup>11</sup> Moreover, change of policy by the government from time to time, under changing circumstances, cannot be questioned. Wisdom of the policy cannot be judicially scrutinized though the Court can consider whether the policy is arbitrary or violative of law.<sup>12</sup> Logically, this means that if a policy decision of the government is oppressive or is violative of any constitutional or statutory mandate, the same can be reviewed by the Court. If an act of the government with respect to development results in pollution of the environment or ecological imbalance, the act may be challenged and reviewed by the Court. First such occasion did arise in *Rural Litigation and Entitlement Kendra Vs. Devki Nandan Pandey and others*.<sup>13</sup> The actual facts relate to the failure of the State to regulate mining activities. The Court observed:

"It is for the Government and the Nation - and not for the Court - to decide whether the deposits should be exploited at the cost of ecology and environmental considerations or the industrial requirement should be otherwise satisfied. It may be perhaps possible to exercise greater control and vigil over the operation and strike a balance between preservation and utilization, .... Government should take a policy decision and

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29. *Animal and Environment Legal Defence Fund vs. Union of India* (1997) 3 SCC 549 at p. 553.

30. *D.L.F. Universal Ltd. vs. Prof. A Lakshmi Sagar* (1998) 7 SCC 1 at pp. 13-15.

everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes'.<sup>31</sup> In the words of Professor Sax 'When a State holds a resource which is available for the free use of the general public, a Court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties'.<sup>32</sup> The learned author further observes that 'Public Trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffused public interests need protection against tightly organised groups with clear and immediate goals'.<sup>33</sup>

In *T. Damodara Rao vs. Special Officer, MCH*<sup>34</sup> the question was whether land falling within the recreational zone within the city limits of Hyderabad can be used for residential purposes contrary to municipal development plan. Answering the question in the negative, the A.P. High Court held – 'Protection of environment is not only the duty of the citizen, but it is also the obligation of the State ....The enjoyment of life and its attainment and fulfillment guaranteed in Article 21 embraces the protection and preservation of nature's gifts without which life cannot be enjoyed'.<sup>35</sup>

The Public Trust Doctrine might get attracted in a case where municipal land earmarked for open space for public use i.e., to maintain ecology and hygienic environment is proposed to be transferred by Government on lease to a private party for construction of a Dharmashala. The Supreme Court has rightly held that the action of the Government is untenable.<sup>36</sup>

The Supreme Court restrained an attempt by the Bangalore Development Authority to transfer to a private person, open space reserved for public park in development scheme.<sup>37</sup> The Court applied the 'Public Trust' doctrine in the spirit when it observed – "Free and healthy air in beautiful surroundings ....now ....is a gift from people to themselves. Its importance has multiplied with emphasis on environment and pollution. In modern planning and development it (public park) occupies an important place in social ecology".<sup>38</sup> Again, in *D.D. Vyas vs. Ghaziabad Development Authority*,<sup>39</sup> the Court held that the States'

31. *M.C. Mehta vs. Kamal Nath*, (1997) 1 SCC 388

32. Prof. Sax, as quoted by the Supreme Court *Ibid*, p.408 para 26

33. *Ibid* p.410 para 31.

34. AIR 1988 AP 171.

35. *Ibid* at p.247.

36. *Virendra Gaur vs. State of Haryana* (1995) 2 SCC 577.

37. *Bangalore Medical Trust vs. B.S. Muddappa* (1991) 4 SCC 54.

38. *Ibid* p.80 para 36.

39. AIR 1993 All 57.

omission to develop public parks in earmarked spaces amounts to failure to discharge its fundamental duties.<sup>40</sup>

*M.I. Builders Ltd., vs. Radhey Shyam Sahu*<sup>41</sup> is yet another case concerning town planning and involving a dilemma between the necessity to preserve a park and the need to develop the area commercially. Holding that environmental necessity and historical importance of the park required it to be preserved, the Supreme Court held that both the decision as well as procedure adopted by the Lucknow Municipal Authorities (in entrusting the park to a private builder contrary to statutory provisions) were in violation of the law, unreasonable, unfair arbitrary and opposed to public policy. The learned Court here applied the 'Public Trust Doctrine' and held that by allowing commercial development of the park, the Mahapalika has violated this doctrine.<sup>42</sup>

Here, the Court has given priority to the society's right to a clean environment over its right to development. The Doctrine of Public Trust however is limited only to natural resources and is not applicable in all cases of administration.<sup>43</sup>

The 'responsibility' of the State to the public is the basic philosophy of the 'Public Trust' doctrine. The cornerstone of Environmental Law is the assertion that all of our national natural resource treasures are held in trust for the full benefit, use and enjoyment of all the people..not only of this generation but of those generations yet unborn. ... This assertion underlies every claim by citizens to protection of the nation's resource treasures.<sup>44</sup>

The greatest importance of the public trust doctrine as a tool to ensure effective state management of natural resources lies, however, in its ethical or stewardship approach to the environment. It has the potential to address the increasingly insurmountable hurdle of correlating environment and development. This doctrine may, if nothing else, at least be used conceptually as a framework for addressing natural resource and environmental conflicts that go beyond the reach of written laws.<sup>45</sup>

*Goa Foundation, Goa vs. Diksha Holdings Pvt. Ltd.*<sup>46</sup> is yet another case of development activity (construction of star hotel in the CRZ area) being challenged by environmental groups. Once again, the

40. *Ibid* p.62-63.

41. (1999) 6 SCC 464.

42. *Ibid* p. 518, para 50-52.

43. Common cause, a Registered Society vs. Union of India, (1999) 6 SCC 667.

44. Victor J. Yannacone, Jr. Bernard S. Cohen and Steven G. Davison "Environmental Rights and Remedies" Vol.1 P.11.

45. Lavanya Rajamani, "Doctrine of Public Trust : A Tool to Ensure Effective State Management of Natural Resources" 38 J.I.L.I. (1996) p.72 at p.82.

46. AIR 2001 SC 184.

Court adopted a policy of non-interference.<sup>47</sup> The AP High Court has similarly upheld the State's activity of construction of fly-overs in the Hyderabad city.<sup>48</sup>

However the Allahabad High Court has asserted its power of judicial review when it directed a camp tourist resort set up by the State Government on pastures and meadows on mountains in Garhwal district to be closed down in view of threatened ecological imbalance, notwithstanding the fact that the State Government had already spent money on its construction.<sup>49</sup> In fact, it has been suggested that though matters relating to development vis-a-vis environment are matters of political policy, nevertheless, the Courts should have a say in the matter, '.... Socio - economic conditions can not be ignored by a Court ... ecological imbalance being a social problem, ought to be decided by a Court of law so that the society may thrive and prosper'.<sup>50</sup>

#### **IV. IRRIGATION AND MEGA RIVER VALLY PROJECTS :**

Irrigation Projects and mega river valley projects have evoked a lot of controversy and resistance from public.<sup>51</sup> Even when the Policy Statement on Environment and Development prefers/gives priority to small projects to meet the requirements of irrigation without causing significant alteration in the environmental conditions, (para 6.1.2), still preference is given only to big dams.

The immediate aftermath of India's independence was characterized by heavy industrialization and launching development (Irrigation) Projects. In fact the then Prime Minister of India called them "modern temples". Dams are expected to supply water for drinking, irrigation, and also generate the much needed power, hydel power, generate employment mostly during the project period and to a certain extent, in the post-project period also. But all this, at what cost? The problems of disturbing the ecological balance apart, millions of hectares of forest land are getting submerged under water. As aptly noted by some perceptive observers, 'The central issue ..... is the problem of displacement: The backwaters of a large dams generally displace many thousands of people often tribals who are the poorest and most powerless members of the society. Recent experience also shows that

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47. See also, the *Goa Foundation vs. The Konkan Railway Corporation*, AIR 1992 Bom. 471, *Bombay Environmental Action Group vs. State of Maharashtra*, AIR 1991 Bom. 301, both these cases illustrate a non-interference policy of the Court.
48. *Society for preservation of Environment vs. State of A.P.* AIR 1997 AP 381.
49. *Omprakash Bhatt vs. State of U.P.*, AIR 1997 All 259.
50. *People United for Better Living in Calcutta - Public vs. State of West Bengal*, AIR 1993 Cal. 215 at p. 228.
51. See generally, Anil Agarwal, Darryl D' Monte Ujwala Samarth, (CED) "The Fight for Survival People's Action for Environment". Centre for Science & Environment, New Delhi (1987).

large dams are often ecologically unsound and economically unjustified if environmental costs are fully accounted for. These costs include loss of forests and wild life, water logging siltation and loss of arable land"<sup>52</sup>

The National Conservation Strategy and Policy Statement on Environment and Development, 1992 envisages the following

- (1) Full and correct rehabilitation of rural poor/tribals displaced due to creation of national parks/biosphere reserves or tiger reserves (para 5.23).
- (2) Restriction on diversion of forest land for non-forest purposes and compensatory afforestation where diversion is unavoidable (para 6.3).
- (3) Location of energy generation projects based on environmental considerations including pollution, displacement of people and loss of bio-diversity (para 6.3).
- (4) While implementing the projects in various sectors, conscious efforts should be made to avoid displacement of local people. Where it is unavoidable, necessary measures should be taken to ensure their rehabilitation by providing suitable facilities (para 8.6.1)
- (5) The Government will formulate a comprehensive national rehabilitation policy which, apart from other things, ensures that the oustees are economically better off than before and above poverty line as a result of their rehabilitation (para 8.6.2).

These safeguards of course are not properly followed in practice. Had these principles been implemented in both the letter and spirit, there would not have been so much of resistance to big dams. These dams in a way have resulted in the creation of "environmental refugees". Several complaints have been lodged against the government with regard to mega development projects:

- (1) The costs of the project are understated and benefits overstated.
- (2) The cost of the project does not include environmental costs.
- (3) The Environment Impact Assessment reports are not impartial.
- (4) Displaced people are not suitably rehabilitated.
- (5) Ecological effects of mega projects are not properly assessed.

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52. Armin Rosencranz, Martha L Noble and Shyam Diwan, *Environmental Law and Policy in India* - p.276.

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In order to regulate and scientifically manage the question of clearing major irrigation projects, the Government of India has adopted certain guidelines and safeguards, which are also intended to take care of the aspects of remediation of the environment.

**(i) Project Clearance :**

Proposals regarding any project which involves the diversion of forest land for non-forest purpose must be submitted to the State Government, and the project must be cleared by the Ministry of Environment and Forests/Central Government. The details that need to be included in the proposal are:

- (a) a brief narrative of the project
- (b) Map showing the required forest area
- (c) total cost of project
- (d) justification for locating it in forest area,
- (e) details of forest land involved including the details of fauna and flora.
- (f) details of displacement of people due to the project
- (g) details of compensatory afforestation scheme
- (h) and cost benefit analysis (Rule 4. The Forest Conservation) Rules 1981).

**(ii) Cost Benefit Analysis :**

While considering any proposal for de-reservation or diversion of forest land for non-forest use, it is essential that ecological and environmental losses and socio-economic distress caused to the people who are displaced are weighed against economic and social gains. (para 2.6 Guidelines on Forest (Conservation) Act 1980). If the project involves displacement of people, a detailed rehabilitation plan shall be submitted along with the proposals. (para 2.7) Compensatory afforestation is one of the most important conditions stipulated by the Central Government while approving proposals for dereservation or diversion of forest land (para 3.1). Compensatory afforestation may be undertaken on equivalent area of non-forest land or twice the area of degraded forest land (para 3.2).

**(iii) Parameter for evaluation of loss of forests<sup>53</sup> :**

The guidelines require that in case of all projects requiring dereservation or diversion of forest land, the loss of value of timber, fuel wood and minor forest produce on an yearly basis, including loss of man hours per annum of people, loss of animal husbandry productivity including loss of fodder, cost of human resettlement, loss of public

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<sup>53</sup> 53. Annexure VI (b), *Guideline on Forest Conservation) Act, 1980.*

facilities and administrative infrastructure, (roads, buildings, schools, railways electric lines etc.) on forest land, all of them shall be quantified and expressed in monetary terms.

In case of environmental losses like soil erosion, effect on hydrological cycle, wildlife habitat, micro-climate upsetting of ecological balance, technical judgement would be primarily applied in determining the losses. However, as a thumb rule, the environmental value of one hectare of fully stocked forest (density 1.0) would be taken as Rs 126.74 lakhs to accrue over a period of 50 years. The value will reduce with density, for example, if density is 0.4.<sup>54</sup> value will work out, at Rs 50.696 lakhs. So, if a project which requires deforestation of the forest of density 0.4 gives monetary returns worth over Rs.50.696 lakhs over a period of 50 years, it may be considered to give a positive cost benefit ratio. The figure of assumed environmental value will change if there is an increase in bank rate. In case of suffering to oustees, the social cost of rehabilitation of an oustee (in addition to the cost likely to be incurred in providing residence, occupation and social services to him) be worked out at 1.5 times of what he should have earned in two years had he been not shifted.<sup>55</sup>

The benefits of a project will be evaluated in terms of increase in productivity attributable to the specific project (quantified and expressed in monetary terms) and benefits to economy, number of population to be benefited and employment potential also require a value judgment.<sup>56</sup>

All the projects included in the Schedule to the E.P. Act require clearance from the Ministry of Environment and Forests. Every such application must be accompanied by an Environmental Impact Assessment Report, and Environment Management Plan. In case of mining, pit head thermal power stations, hydro-electric power projects and multi-purpose river valley projects, a preliminary site clearance is also required from the Central Government. The detailed project report shall be evaluated and assessed by the Impact Assessment Agency of the Central or State Government in consultation with a committee of experts. The Impact Assessment Agency will thereon give its recommendations. The Project Authorities must file a half-yearly report to the authority.<sup>57</sup>

The Expert Committee for environmental impact assessment consists of an outstanding and experienced ecologist and other members with M. Tech. Ph.D. and 8 years experience in environmental management.<sup>58</sup>

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54. A. Kishan, *Andhra Pradesh Forest Laws*, 2nd Ed. 2000-2001 p.396

55. *Ibid.*

56. Annexure VI (C), *Guidelines on Forest (Conservation) Act, 1980.*

57. Notification No.S.O.85 (E) dated January, 29 1992 of the *Ministry of Environment and Forests.*

58. Schedule III to the above notification.

Despite all these safeguards and procedures, there remains a long gap between the rules and practice. Sometimes, the policies of the Government do not find favor with popular opinion. 'Lack of proper appreciation of environmental information may often lead to decisions going against the interests of the general public. Consequently, priority is given to developmental activities aimed at short term benefits over conservation oriented actions with a long term perspective of sustainable benefits'.<sup>59</sup> When people's priorities seemed to have been upset, developmental projects and programs are opposed tooth and nail by people. When courts have categorically refused to interfere with policy matters, people tried to reshape the same.

In the *Silent Valley* case the Kerala High Court refused to interfere and said "we are not going to substitute our opinion and notions on these matters for those of the Government". This project had to be withdrawn only because of popular pressure being exerted through the Kerala Sastra Sahitya Parishad (KSSP). The rallying force of the KSSP made Silent Valley a unique environmental campaign in the entire Third World because it took the issue out of lecture rooms and the columns of the press to the people.<sup>60</sup>

The *Chipko* and *Appiko* movements are also examples of people's power. The *Chipko* movement, which focussed world attention on the environmental problems of the Alakananda catchment area in the mid Himalayas, was a movement of the local people to inform forest contractors plainly and simply why trees should not be cut... The *Chipko* movement is not confined to the protection ..... but concerns itself with the safety and preservation of the environment.... It is entirely a people's strategy with their real participation and involvement.<sup>61</sup> The vigorous launching of the *Appiko* movement (in 1983) forced the government to change some aspects of its forest policy due to which felling of natural forests in Western Ghats was stopped, the policy of raising mono-culture plantation of teak was abandoned...the government itself stopped felling green trees for revenue.<sup>62</sup>

Described as investment in disaster, the Tehri Project has also generated a lot of heat and dust. It is claimed that the failure of the dam would result in floods that can wipe out entire cities within hours. No plans were executed for the proper rehabilitation of the project oustees.<sup>63</sup>

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- 59. M.K. Prasad: *Silent Valley Case : An Ecological Assessment*: 8 CULR (1984) p. 128.
  - 60. Daryl D' Monte", "Temples or Tombs? Industry vs. Environment;" Three Controversies," 57-58, (1985).
  - 61. Chandi Prasad Bhatt - "The Hug that Saves" - *The Hindu Survey of the Environment* 1991 P.17-18.
  - 62. Pandurang Hegde: "Striking Roots in the South -- " *The Hindu Survey of the Environment*, 1991 P.21.
  - 63. Sunderlal Bahuguna - "Tehri Project - Investment in Disaster?" *Hindu Survey of the Environment* 1991 pp.28-29.

The Tehri Dam was pursued with such vigor by the Central Government that it did not heed the advise of its own expert agency, i.e., the Environment Appraisal Committee (EAC) that the project did not merit environmental clearance. Here the Courts only said that they courts lacked the scientific expertise to render any final opinion on the matter and further that, they did not find any good reason to issue a direction restraining the respondents from proceeding ahead with the implementation of the project.<sup>64</sup>

The Narmada Valley Project has become even more controversial and invited worldwide attention with 30 large dams, 130 medium scale dams and 1300 small dams all along the Narmada river. There are passionate arguments against the project, especially the Sardar Sarovar Project and the Narmada Sagar Project namely.

- (1) It is not true that this will solve water problems of Gujarat.
- (2) The project is economically unviable.
- (3) Better alternative strategies are available.
- (4) Over three lakh people will be evicted from their centuries old home lands who are convinced that rehabilitation even remotely in line with the stated policy is impossible.
- (5) The project will submerge more than one lakh hectares of land half of which is prime agricultural land.

A very basic question has been whether these massive dams are necessary. The dams could lead to water logging, and a change in land use patterns<sup>65</sup>. There have been several protests and demonstrations against the SSP and the Narmada Bachao Andolan has been spearheading the cause of the project oustees. In 1994, the NBA filed a writ petition before the Supreme Court. The final judgement was delivered on 18th October, 2000.<sup>66</sup> The narration of the very complicated facts and history of the case may not be necessary here. It would suffice to state that in the instant case the writ petition prayed that the Union of India should be restrained from proceeding with the construction of the dam. The petitioners put forward several contentions in support of their claim.

64. *Tehri Bandh Virodh Sangharsh Samit vs. State of U.P.* JT 1990 (4) 519. See also, S.N. Dhyani, Tehri Dam and Critical Environmental Issues -- Plea for Affirmative Judicial Action" in 11 CULR (1987) p.249.

65. See Baba Amte, -- "What Price the Big dams? P.25 and Saad Ali-Environmental Refugees, Multi-Dimensional Problem P.34 in *The Hindu Survey of the Environment -1991*.

66. *Narmada Bachao Andolan vs. Union of India*, W.P. (c) No.319 of 1994. AIR 2000 SC 3751.

- (1) It is necessary for some independent judicial authority to review the entire project, examine the current costs, benefits and alternatives.
- (2) Environmental clearance granted in 1987 was granted without any proper application of mind. Several contentions were also raised regarding relief and rehabilitation.
- (3) While the tribals are ousted from their home lands,<sup>67</sup> their rights under Article 21 of the Constitution are violated.

The petitioners also drew the attention of the Court to the report submitted by a commission called the Independent Review on the Morse Commission set up by the World Bank. The report stated :

"Important assumptions upon which the projects are based are now questionable or are known to be unfounded. Environmental and social trade-off have been made , and continue to be made, without a full understanding of the consequences. As a result, benefits tend to be over-stated whereas social and environmental costs are frequently understated. Assertions have been substituted for analysis. We think that the Sardar Sarovar Projects as they stand are flawed, that resettlement and rehabilitation of all those displaced by the Project is not possible under the prevailing circumstances, and that the environmental impacts of the projects have not been properly considered or adequately addressed. The history of environmental aspects of Sardar Sarovar in a history of non-compliance. There is no comprehensive impact statement. The nature and magnitude of environmental problems and solutions remain elusive."

The Court estopped the petitioners on the ground of laches while it held 'when such projects are undertaken and hundreds of crores of public money is spent, individuals or organizations in the grab of PIL cannot be permitted to challenge the policy decision taken after a lapse of time. It is against the national interest and contrary to the established principles of law that decisions to undertake developmental projects are permitted to be challenged after a number of years during which period public money has been spent in the execution of the project'.<sup>68</sup> The Court further held that the pleas relating to the height of the dam and extent of submergence, environment studies and clearance, hydrology and seismically and other issues except implementation of relief and rehabilitation, cannot be permitted to be raised at this belated stage.<sup>69</sup> The Court further stated that this petition was being entertained only to satisfy itself that there is proper implementation of the relief and rehabilitation measures. The views of the Hon'ble Supreme Court can be summarized as follows:

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67. Infra note, p.3788, para 93.

68. *Ibid.* p.3782, see under 'Latches'.

69. *Ibid.*

1. Though the tribal population affected by the submergence would have to move, the rehabilitation package was such that the living conditions would be much better than what it was before there. Even under Article 12 of the ILO Convention No.107 displacement of tribal population could be justified if they are provided with land of quality at least equal to the land previously occupied by them.<sup>70</sup>
2. The displacement of the tribals *per se* would not result in the violation of their fundamental or other rights. The effect is to see that on their rehabilitation at new locations they are better off than what they were. The Court believed that at the rehabilitation sites, they will have more and better amenities than which they enjoyed at their tribal hamlets.<sup>71</sup>
3. Regarding environmental clearance, the Court very strongly defended the position of the government and did not accept the contention that the environmental clearance was given without application of mind.<sup>72</sup>
4. The court also accepted that compensatory afforestation was satisfactory.<sup>73</sup>
5. Regarding burden of proof the Court said that the precautionary principle (where it shifts the burden of proof on the polluter that his industry is ecologically viable) is applicable only in case of polluting industries, and is not applicable in the present case.<sup>74</sup>
6. The Court did not accept that *Sierra Club Vs. Morton* Principle is applicable in India by virtue of Principle 21 of Stockholm Declaration, 1972.<sup>75</sup>
7. The Court relied on the award of the Narmada Water Disputes Tribunal which according to their Lordships contained detailed directions in regard to acquisition of land and properties. The Court seemed more than satisfied with the relief and rehabilitation package and indeed, strongly believed that the people would be better off in their new habitats. The Court even quoted the elaborate arrangements made by the three States in respect of Relief and Rehabilitation, the Rehabilitation Committee and the grievance redressal mechanism, the independent monitoring and evaluation agencies etc.<sup>76</sup>

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70. *Ibid*, p.3782, para 91.

71. *Ibid*.

72. *Ibid* p.3788-3798, paras 96-125:

73. *Ibid* pp. 3799 - 3802, paras 126-146.

74. *Ibid* p.3804 para 151.

75. *Ibid*, p.3804 para 152.

76. pp. 3805 - 3816, paras 158-207. See also Ramaswamy R. Iyer "Judgment of Grave Importance" *Economic and Political Weekly*, November 4, 2000, 3913.

8. The Court reiterated, "...Courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructure project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the courts are ill-equipped to adjudicate on a policy decision."<sup>77</sup>
9. The Court said that any challenge to a policy must be made before the execution of the project.
10. The Court said that if relief and rehabilitation measures are not properly implemented then the proper course for a Court would be to direct the implementation of the program, not to stop the execution of the project.<sup>78</sup> Likewise if there are any shortcomings in the implementation, a time bound direction can and should be given in order to ensure the implementation of the award. Putting the project on hold, the Court observed, only encourages the recalcitrant State to flout and not implement the award with impunity.

The Court finally directed the continuation of the dam and completion of the same as expeditiously as possible.<sup>79</sup> Two significant aspects of this judgement need to be highlighted. *First*, While the Court maintained that it would not, interfere into matters of policy, the Court clearly gave its preference to a hydel power project and highlighted the advantages of such mega dams in no uncertain words. Moreover, the Court said that even if the Court, could go into the question of policy, the decision so taken cannot be faulted.<sup>80</sup> The Court in a way threw its entire weight behind the government. *Second*, The Court observed that the pleas of the petitioners regarding the height of dam, extent of submergence, environmental issues, seismicity and environmental clearance etc. cannot be allowed to be raised at this belated stage. But it is not clear why the Court had elaborately discussed all these matters, finally giving the government a pat on the back. Are all these observations *obiter*?<sup>81</sup>

Most of the pressing arguments was related to displacement of people besides environmental losses. Perhaps, the delays and environmental losses could have been tolerated had there been an objective assessment of the benefit cost ratio and had proper relief and rehabilitation measures been undertaken. It is said that even today, the

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77. p. 3827 para 255 - 260.

78. *Ibid* p.3830, para 271.

79. p.3832, para 280.

80. *Ibid* p.3827 para 255

81. It is significant to note that the same Court advocated a liberal approach to matters of period of limitation and that the cause of action arises when the actual loss had taken place. "It is thus not the date on which negligence or mistake took place but the date when the injury is suffered." *Jay Laxmi Salt Works (P) Ltd. vs. State of Gujarat* (1994) 4 SCC 1 at p.17, para 16.

officials are not sure as to how many people are really displaced. Poor land records complicate the problem of compensation for land acquisition. Compensation even when paid, will be much below the market value. Of course, the State has the duty to develop the resources and a right to acquire property for that purpose. However, this power under the doctrine of 'Eminent Domain' must be exercised with due regard to the rights of the people. Of course displacement *per se* may not be violative of Article 21 of the Constitution, but it definitely is, when the oustees are not properly rehabilitated. In other words, the legitimacy of the act of the State displacing lakhs of poor people is conditional on their satisfactory rehabilitation. This seems to be sadly missing. In the absence of proper rehabilitation of people the government will be guilty of creating environmental refugees. Moreover, the doctrine of sustainable development requires a search for alternatives also. The State has yet to establish its commitment and sincerity of purpose in its endeavor to protect the nature.

#### V. CONCLUDING OBSERVATIONS

From the point of view of equity and justice, it must be stated that the public tax money with the government must not be used - whether in employment, development or otherwise -- in such a manner that the mercantile class, industrialists and the urban rich benefit by exploiting labor of the rural poor. Also, in so far as the Constitution proclaims socialism as the national goal and directs the State to bring about equitable distribution of common resources through Article 39(b) and (c), 'the distribution of denuded forest lands to industries alone will be unjust and unconstitutional'.<sup>82</sup>

True, it is difficult to balance the two seemingly divergent goals, development and environment. The Government of India has declared sustainable development as its basic philosophy. However, experience has demonstrated the difficulty of eco-eco (Ecological and Economic) integration. Some decisions of the government have sparked off bitter protests and some have led to practical legal battles. Starting from the 1980s, the activist judiciary has played a pivotal role in the protection of the environment. It has also significantly developed the law relating to natural resources. Whenever faced with a challenge to the policy of the Government, the Courts have consistently held that they would not interfere with policy decisions. However, interpretation of policy has not been always consistent. In matters relating to industrial pollution, the courts have taken a strong pro-ecology stand. In matters relating to policy, especially those involving irrigation projects, they have either adopted a policy of non-interference or positively supported the developmental policies.



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82. Chhatrapati Singh -- "Forestry and the Law" -- in 29 *JIL* (1987), p.119 at p.125.

## **ENVIRONMENTAL JUSTICE : THE ABSOLUTE LIABILITY PRINCIPLE**

Vinod Shankar Mishra\*

### **I. INTRODUCTION**

The Common Law's attempt to deal with environmental issues has not proved as effective as intended by the Legislature. The growth in science and technology has affected land besides nearby property owners and many people attracting legal actions based on expanding categories as provided in *Rylands v. Fletcher*. In this battle negligence remains too centered on damage to individual property and person. The growing population and technological changes have enhanced the power of human activity not only to damage human amenity and health, but also to eliminate other species at staggering rates, and to threaten the conditions of life on the planet. The Indian judiciary in general and the supreme court in particular, has recognised growing effects of environmental degradation for the present and future generations. It has armed itself with techniques of judicial innovation and set upon the task of confronting with the environmental problems and developing innovative remedies and principles. Of all the principles of environmental jurisprudence the Supreme Court has evolved, the principle of absolute liability deserves the attention most. This principle has enabled the judiciary to render environmental justice in many litigations and put a signboard of no further maneuvering with the environment, a lesson to the polluters. The judicial dynamism in *M.C Mehta*<sup>1</sup> also activated Parliament to impose statutory liability on those dealing in hazardous substance and Public Liability Insurance Act, 1991<sup>2</sup> and National Environment Tribunal Act, 1995<sup>3</sup> were enacted to provide relief to the victims of industrial disasters. These legislations expressly exclude the workmen since they are entitled to relief under the Workmen Compensation Act. The aim of this paper is to trace the origin of the absolute liability principle and highlight the significance of Indianisation of *Rylands* and its ramifications.

### **II. CONCEPT OF STRICT LIABILITY**

The whole concept of liability for environment disasters owes its origin to the traditional notion of strict liability as it was known to English Common Law. The rule of strict liability was evolved in 1866 in *Rylands v.*

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1. *M.C. Mehta v. Union of India*, AIR 1987 SC 1086.

2. See generally, Vikram Raghavan 'Public Liability Insurance Act : Breaking New Ground for Indian Environmental Law', 39 *JLI*, 96-115 (1997).

3. See generally, Vinod Shankar Mishra, 'Environmental Justice Delivery System : An Alternative Forum', 44 *JL* 62-84 (2002).

*Fletcher*.<sup>4</sup> It had its origin in the law of private nuisance and has often been treated as a particular species of nuisance. In order to better appreciate the concept, it is necessary to know the facts of Rylands. The facts of this case were as follows :

'B', a mill owner, employed independent contractors, apparently competent, to construct a reservoir on his land to provide water for his mill. There were old disused shafts under the site of reservoir. When the water was filled in the reservoir, it burst through the shaft and flooded A's coal mines on the adjoining land. But 'B' mill owner did not know of this nor was negligent in his act. In this case 'B' was held liable for damage.

Blackburn, J. enunciated the strict liability rule with the elaboration that a person who for his own purposes brought on his land and collected and kept there any thing likely to do mischief if it escaped, must keep it at his peril; and, if he did not do so, was *prima facie* answerable for all the damage which was the natural consequence of its escape.<sup>5</sup> However, the learned judge carved out certain exceptions of the rule. It did not apply to things naturally on the land or where the escape was due to an act of God and an act of stranger or the default of the person injured. And where the things escaped was present by the consent of the person injured or in certain cases where there was statutory authority.

In the instant case, none of the above exceptions was applicable and B was held liable. The House of Lords, speaking through Lord Cairns held the defendant liable for a "non-natural use" of his land. The learned Lord went to the extent to say that if something was brought on the land which was not naturally there and caused damage, the liability would be attracted. Winfield preferred to call the instant liability as 'strict' rather than absolute in view of various exceptions to this liability.<sup>6</sup>

The expression 'non-natural use' raises certain questions. What is natural and unnatural use? When will a use be termed as unnatural use? Who is to decide it? The expression 'non-natural use' has been defined in various ways. Newark tried to define unnatural to mean an expression of that fact that the defendant had artificially introduced into land a new and dangerous substance.<sup>7</sup> Lord Moulton<sup>8</sup> and Lord Viscount<sup>9</sup>

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4. The rule was formulated by Blackburn, J in Exchequer Chamber in *Fletcher v. Rylands* (1866) L.R.L. 265 and the same was approved by the House of Lords in *Rylands v. Fletcher* (1868) L.R. 3HL 330. For a discussion on Rylands rule, see also, *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat* 1994 (4) SCC 1
  5. (1866) L.R.I. Ex. 265, 279-280.
  6. Winfield, 'The Myth of Absolute Liability', 42 LQR 37, 51 (1926).
  7. Newark, Non-Natural Users and *Rylands v. Fletcher*, 24 Mod. L.Rev., 551, 561, (1961). See also, G.P. Singh (ed), *Ratanlal and Dhiraj Lal's, Law of Torts* 417, (1992).
  8. *Rickand v. Lothian* (1913) A.C. 263, 279.
  9. *Read v. Lyons* (1947) A.C. 156, 179.

Simon gave different meanings to include some special use bringing with it dangers to others and must not merely be the ordinary use of land or such a use as was the proper for the general benefit of the community.<sup>10</sup> This meaning later on gained support. However Lord Porter in order to allow the principle to be appreciable in time to come, qualified the expression to changing social conditions and needs.<sup>11</sup> In view of this, the expression non-natural use 'has been given a limited meaning in the present time, provided that special use does not bring in increased danger.'<sup>12</sup>

Like most other principles of common law<sup>13</sup>, the rule in *Rylands* has been applied in variety of circumstances wherein the damage has resulted either due to fire<sup>14</sup>, gas<sup>15</sup> explosives<sup>16</sup>, electricity<sup>17</sup>, noxious fumes<sup>18</sup>, colliery spoils<sup>19</sup> including the water pollution and air pollution and waste deposit aspect of environmental law. Like most other principles of common law, the rule in *Rylands* case was also applied in numerous Indian cases relating to escape of water causing mischief to landed property and chattles<sup>20</sup> or fire.<sup>21</sup>

The implications of the rule of strict liability to protect the environment are clear. Many acts of pollution are caused by materials or substances which are brought on to land escaping from that land.

The *Cambridge Water Company* case<sup>22</sup> highlighted the possibility of using *Rylands*, 'even if in limited circumstances as a means of obtaining a remedy for environmental damage'. The case concerned the pollution of a borehole used by the plaintiff to extract water for domestic use. The pollution was traced to repeated spillage's of solvent at the

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- 10. *Id.* at 176.
  - 11. W.V.H. Rogers (ed), *Winfield and Jolowicz on Tort*, 431-432 (1989).
  - 12. *Balkrishna Menon v. Subramanian*, A.I.R. 1968 Ker. 151.
  - 13. Setalvad in his classical treatise on the developments of common law in India, opined that by the eighteenth century, the Indian Courts were delivering judgments in which they adapted principles of common law to suit Indian Condition. See, Setalvad, *The Common Law in India* 53 (1960).
  - 14. *Rainhan Chemical Works Ltd v. Belvedere Fish Guano Co.* (1921) 2 AC 465.
  - 15. *North Western Utilities Ltd. v. London Guarantee Accident Co.* (1936) A.C. 108.
  - 16. *Supra note 9.*
  - 17. *Eastern and South African Telegraph Co. Ltd. v. Cape Town Transways Limited* (1902) AC 381.
  - 18. *West v. Bristol Transways Co.* (1908) 2 K.B. 14.
  - 19. *Attorney General v. Cory Bros Ltd.* (1921) 1 A.C. 521.
  - 20. *Becharam Choudhary v. Pububrath* (1869) 2 Beng L.R. 53; *Ramaniya Chanar v. Krishnaswami Muddi* (1907) ILR Nag. 698. See also, *Secretary of State for India in Council v. Ramtahal Ram* (1925) 6 PTL 708.
  - 21. *M. Madappa v. K. Kariapa* AIR 1964 Mysore 80.
  - 22. *Cambridge Water Co. Ltd. v. Eastern Counties Leather PLC* (1994) All. ER. 53.

defendant's lanneries. Lord Goff stated that the storage of chemicals on industrial premises was a classical case of non-natural use. The plaintiff's claim for compensation however, failed because the pollution of water was not foreseeable by the defendant. Commenting on the House of Lords decision in the present case, Simon Ball and Stuart Bell observed that it had diluted the rule in *Ryland's v. Fletcher* to such a great extent that the future of the rule looked uncertain.<sup>23</sup>

The space constraints do not permit a detailed examination of the rule in *Rylands v. Fletcher*. Suffice it to say that *Rylands v. Fletcher* has 'no defined rule now a days given the number of exceptions and defences applicable to it'. A further factor is the reluctance of the Courts to apply it in situations where the tort of private and public nuisance is capable to provide the needed solutions to the problem. *Rylands v. Fletcher* has many difficulties and uncertainties and for this rule to apply the duty of care to avoid risk or injury to the person or property must be high. Not only have the courts diluted the application of the principle of strict liability, but there is now a demand in England<sup>24</sup> and U.S.A.<sup>25</sup> to codify the principles so that protracted litigations don't hold up its application and its application does not dilute the effect of the rule in *Rylands v. Fletcher*.

In this context it is important to note that way back in 1965 the Nuclear Installation Act did away with all exceptions to *Rylands v. Fletcher* and super strict liability has been imposed on asbestos manufacturers in the State of New Jersey.<sup>26</sup>

### **III. PRINCIPLE OF ABSOLUTE LIABILITY : The Mehta Case**

In 1985, M.C. Mehta<sup>27</sup> filed a writ petition in the Supreme Court to order closure and relocation of chemical and fertilizer plant of Shriram, a public limited company, which was situated in Delhi. In a strange coincidence, about a month after the petition was filed, on December 4 and 6, 1985 there was a leakage of Oleum gas from one of the units of Shriram. As a consequence of this leakage, the residents in and around the industrial plant were severely affected and it was alleged that one advocate practicing in Tishazari Court died on account of inhalation of the Oleum gas. The Delhi Legal Aid and Advice Board and Delhi Bar Association also filed another petition in the Supreme Court asking for

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- 23. Simon Ball and Stuart Bell, *Environmental Law* 163, (1996) See also, R.F. v. Heuston and R.A. Buckley, Salmond and Heustons, *Law of Torts*, 320 (1998).
  - 24. Report of Law Commission on Civil Liability for Dangerous Things and Activities, No. 32, 1970.
  - 25. See Restatement Second of Torts, 519, 520 (1977).
  - 26. Rosencranz et al; *Environmental Law and Policy in India : Cases, Materials and Statutes*, 406, 407 (1992).
  - 27. M.C. Mehta v. Union of India, AIR 1987 SC 965. Also see M.C. Mehta v. Union of India, AIR 1987 SC 982.

grant of compensation to those who were affected by the pollution so caused.

The issue before the constitutional Bench of Supreme Court was to determine the liability of an enterprise which was engaged in an hazardous or inherently dangerous industry. In the instant case<sup>28</sup>, the Supreme Court took the stand that it was not bound to follow the 19<sup>th</sup> century rule of English Law and it could evolve a rule suitable to the prevailing social and economic conditions in India. The court rather opined that the rule of strict liability did not fully meet the needs of a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries were performing ecounfriendly activities. The court further pointed that in the 19<sup>th</sup> century all these developments of science and technology had not taken place, and so law laid down at that time could not offer any guidance in evolving any standard of liability consistent with constitutional norms and the need of the present day economy and social structure.<sup>29</sup> The court was of the opinion that as new situation arose, the law had to meet the new challenges and in this situation, the law could not afford to remain static.<sup>30</sup> The Supreme Court denounced the outdated foreign legal order and opined :

We have to evolve new principles and lay down new norms which would adequately deal with new problems which arise in highly industrialized economy. We can not allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order.<sup>31</sup>

Recognizing the need to Indianise the strict liability jurisprudence, the court enunciated the absolute liability principle. It took the stand that an enterprise which is engaged in a hazardous or inherently dangerous industry, which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding area, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of its hazardous or inherently dangerous activity. The court further pointed out that it was under an obligation to conduct its activities with the highest standard of safety. Still if any harm results on account of such activity, then the enterprise must be absolutely liable to compensate such harm. In such a situation the plea of reasonable care or that the harm occurred without any negligence on its parts can not play any role.<sup>32</sup>

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28. AIR 1987 SC 1086.

29. *M.C. Mehta v. Union of India* AIR 1987 SC 1086, 1098.

30. *Ibid.*

31. *Id.* at 1098.

32. *Id* at 1099.

The court gave following reasons to justify the new rule. *First*, if an enterprise is permitted to carry on a hazardous or inherently dangerous activity for its profit, it entails the condition that the enterprise engaged in such activity indemnifies all those who suffered on account of such activity regardless of whether it is carried out carefully or not. *Secondly*, persons who are harmed as a result of such hazardous or inherently dangerous activity would not be in a position to isolate the process of operation from the hazardous operations of substance or any other related element that caused the harms. Hence the enterprise must be held strictly liable for causing such harm as a part of the social cost, for carrying on such activity. And *lastly*, the enterprise alone has the resource to discover and guard against the hazardous activity and to provide warning against potential hazard.

The above ruling gives rise to certain prominent distinctions between the rules in *Ryland v. Fletcher and M.C. Mehta*; One, the strict liability rule requires non-natural use of land and escape of inherently dangerous things. The absolute liability rule requires that the defendant should be engaged in a hazardous or inherently dangerous activity and that the harm results to any one on account of accident. Two, the 'strict liability' will not cover the cases of persons within the premises or outside the premises which the absolute liability rule would cover. Third, the strict liability principle is subject to many exceptions but the 'absolute liability' rule is subject to no exceptions. And finally, damages to be awarded in strict liability will be ordinarily compensatory but in the absolute liability rule, the court may allow exemplary damages, depending on the magnitude and capacity of the enterprise. The court in the *M.C. Mehta* case advocated that the larger and more prosperous is an enterprise, the greater must be the amount of compensation payable by it.<sup>33</sup>

Though the court propounded the high sounding principle of absolute liability, the unfortunate part was that it simply directed the Delhi Legal Aid Board to file the claims for compensation in ordinary civil court at New Delhi, and did not pronounce its verdict on the principal issue whether a private corporation was the 'State under Article 12 of the Indian Constitution for enforcement of fundamental rights. All this provided a powerful ammunition to the critics of the Mehta principle to cast doubt on its status as a good law. Rosencranz and Shyam Diwan, for instance criticized the Mehta principle as constitutionally vague and unjust formulation that was not fair in the absence of insurance.<sup>34</sup> While commenting on the Mehta principle a foreign jurist Muchlinski observed that 'the imposition of liability by judicial dicta, regardless of general principles of law, would undermine the credibility of Indian Courts and

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33. Vinod Shankar Mishra, *Environment Disasters and the Law*, 86-87, (1994).

34. Rosencranz et al, *Environmental Law and Policy in India : Cases, Materials and Statutes*, 336 (1991).

lead to accusation of bias from foreign investor.<sup>35</sup> The Mehta principle was also criticized for making a significant departure from the established principle relating to measurement of damages in tort cases.<sup>36</sup>

#### **IV. ROLE OF ABSOLUTE LIABILITY IN PROTECTION AND IMPROVEMENT OF ENVIRONMENT**

On the night of December 2/3, the worst mass disaster of recent times was caused by leakage of MIC gas from the plant of Union Carbide India Ltd. (UCIL) in Bhopal. UCIL was a subsidiary of Union Carbide Corporation (UCC), and a multinational Corporation registered in U.S.A. The disaster resulted in the death of more than 3000 persons and a very large number of people suffered serious injuries, permanently affecting their eyes, respiratory system, and causing scores of other complication, including even damage to the fetus of the pregnant women.

In pursuance of power conferred on it under Section 3 of the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985, the Union of India filed a suit on behalf of all claimants against the UCC in the United States District Court of New York. Judge Keenan of the U.S. District Court, South District of New York, by his order dated 12.5.1986 dismissed the consolidated cases on the ground of '*forum non-conveniens*'. The Union of India filed a suit in the District Court of Bhopal, which ordered for interim relief amounting to Rs. 350 crores to the gas victims. In its plaint before an American Court, the Union of India claimed the compensation on the basis of strict and absolute liability principle. But at this stage, the liability issue was left out. The American court confined itself to the Forum issue. It was the District Court<sup>37</sup> of Bhopal where for the first time the absolute liability principle was invoked by Judge Dev to grant interim relief to the tune of Rs. 350 cores. The High Court of Madhya Pradesh,<sup>38</sup> speaking through Justice S.K. Seth, invoked 'absolute liability' principle as a substantive law to grant interim compensation to victims of Bhopal mass disaster but reduced the amount of interim compensation from Rs. 350 crores to Rs. 250 crores. Then the

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- 35. P.T. Muchlinski, 'The Right to Development and the Industrialization of Less Developed Countries : The Case of Compensation for Major Industrial Accidents Involving Foreign Owned Corporation', Human Rights Unit Occasional Paper, Commonwealth Secretariat, London, 8 (1989) as referred in P. Leelakrishnan, M.S. Chandrashekharan, G. Sadarsiv Nair and K.V. Raman Murthy, 'Evolving Environmental Jurisprudence : The Role' played by Indian Judiciary in P. Leela Krishnan (ed) *Law and Environment*, 142, (1992).
  - 36. *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38, 50.
  - 37. The District Court of Bhopal on 17th December, 1987 ordered that the defendant Union Carbide Corporation would deposit in that court a sum of Rupees three thousand five hundred million for payment of substantial interim compensation and welfare measure. *Union Carbide Corporation v. Union of India* AIR 1988 NOC (50) M.P.
  - 38. *Union Carbide Corporation v. Union of India* AIR 1988 NOC (50) M.P.

matter came before the Supreme Court by special leave. When the matter was being argued there, a settlement was entered into between the litigants. That settlement received the imprimaturs of the Supreme Court in its order dated February 14 and 15, 1989.<sup>39</sup> Stating the reasons for putting its seal of approval on the settlement, the apex court through Chief Justice Pathak justified its action on the ground of compulsions of the need for immediate relief to tens of thousands of suffering victims. His Lordship observed :

'The tremendous suffering of thousands of persons compelled us to move us into the direction of immediate relief which, we thought, should not be subordinated to the uncertain premises of the law, and when the assessment of fairness of the amount was based on certain factors and assumptions not disputed even by the plaintiff.'<sup>39a</sup>

Although for reasons set out in its order of May 4, 1989<sup>40</sup> the apex court did not think it expedient to apply the Mehta principle for working out the quantum of the settlement amount it was cautious enough to remove any doubt that its order might cast on the legal status of the Mehta principle. In response to more than hint given by the Union Carbide Corporation at the submission stage that the law was altered with the Union Carbide Corporation in mind, and was altered to its disadvantage even before the case had reached the apex court, Chief Justice Pathak observed :

'The criticism of the Mehta Principle, perhaps ignores the emerging postulates of tortious liability whose principal focus is the social limits on economic adventurism. There are certain things that a civilized society simply can not permit to be done to its members, even if they are compensated for their resulting loss.'<sup>41</sup>

The settlement between the UCC and the Union of India received a shot in arms when in *Charan Lal Sahu v. Union of India*, the Mukherjee Bench declared the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 constitutionally valid.<sup>42</sup> At the stage of review of the settlement in *Union Carbide Corporation v. Union of India*, the Supreme Court speaking through Justice Venkat Chaliah held that the settlement was not violative of Mehta principles. His Lordship observed :

'The settlement can not be assailed as violative of Mehta principle which might have arisen for consideration in a strict adjudication. In the matter determination of compensation also

39. *Union Carbide Corporation v. Union of India* (1989) 1 SCC 674, 676..

39a. *Id* at 676

40. *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38.

41. *Union Carbide Corporation v. Union of India* AIR 1990 SC 273, 283.

42. *Charan Lal Sahu v. Union of India* AIR 1990 SC 1480, 1545 The majority view was supported by Ranganathan, J (for himself and Ahmadi, J ) and K.N. Singh, J, respectively at 1557, 1550.

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under the Bhopal Gas Leak Disaster (PC) Act, 1985, and the scheme framed thereunder, there is no scope for applying the Mehta principle, inasmuch as the tort-feasor, in terms of settlement-fund-for all practical purposes stands notionally substituted by the settlement-fund which now represents and exhausts the liability of alleged hazardous enterprise viz UCC and UCIL. We must also add that the Mehta principle can have no application against Union of India inasmuch as requiring it to make good the deficiency, if any, we don't impute to it the position of a joint tort-feasor but only a welfare State. There is, therefore, no substance in the point that Mehta principle should guide the quantification of compensation to the victim claimants.<sup>43</sup>

It is interesting to note that after the settlement between the Union Carbide and the Union of India received the imprimatur of the Supreme Court on 14/15 February 1989, Prashant Bhushan, one of the Counsels of the Organization challenging the Bhopal settlement in an interview commented that 'now there is no such thing as MC Mehta rule of absolute liability in India. It is finished'.<sup>44</sup> This comment was farther from the truth and based on an incorrect reading of the order of the Supreme Court. Likewise, to say that Chief Justice Misra cast the doubt on the validity of the Mehta principle seems to be unfounded.<sup>45</sup> As is evident from the passage quoted just above, the Supreme Court had not rejected or discarded the Mehta Principle but simply said that there was no scope for applying it in the present case. Be that as it may the Bhopal settlement being a compromise between the UCC and the Union of India could not alter the status of the Mehta principle. Even assuming for a moment that Chief Justice Misra did cast doubt on the validity of the MC Mehta principle, 'an obiter dictum of one judge not assented by other can not change the effect of a binding precedent'.<sup>46</sup> Sangal has pointed out that the Mehta principle was not nullified by the Supreme court in Bhopal Mass Disaster since settlement was only a compromise which can not have any subsequent effect on existing judicial decision like M.C. Mehta.<sup>47</sup>

Be that as it may the *M.C. Mehta* principle has opened a new frontier in the Indian jurisprudence and amended the existing penal provisions in the Indian environmental law which recognize the well known exceptions of without knowledge or exercise due diligence. After *M.C. Mehta* principle, the operator of hazardous industries shall have to include the cost of accidental compensation before pocketing entire

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43. AIR 1992 SC 248, 309.

44. See, an Interview published in the *Lawyers Collective*, 10-11, (November, 1991).

45. Chief Justice Rangnath Misra opined that the judgment in *M.C. Mehta* was obiter AIR 1999 2 SC 248, 261.

46. *Supra* note 44, contra view of noted Jurist Soli Sorabjee

47. P.S. Sangal, 'Responsibility of Officer Under Pollution Control Law', 1 *Corporate Law Adviser*, 279, (1989).

impact. The *M.C. Mehta* principle makes it mandatory for the industrial establishment to pay serious attention in conducting their economic behaviour with highest standard of safety so as to avoid strict and absolute liability.<sup>48</sup>

If there existed any doubt with regard to validity of 'absolute liability principle' it was removed by the Supreme Court in *Indian Council for Enviro-legal Action v. Union of India*.<sup>49</sup> In the instant case, a writ petition was filed by environmentalist organization highlighting the woes of people living in vicinity of a chemical plant. The Chemical plant caused the pollution of river water and underground water upto 70 feet below within a radius of seven miles of the village Bichhari. In the instant case, the Supreme Court disagreed with the view that law stated in the *M.C. Mehta* case was obiter and instead stated that the law stated by this court in the *Oleum Gas Leak* case (*M.C. Mehta* case) was by far more appropriate and was binding upon us.<sup>50</sup> It is interesting to note that while deciding the case, the apex court took the help of judgments of English<sup>51</sup> and Australian<sup>52</sup> courts alongwith the *Rylands* case, to indicate why the *Rylands* rule was inappropriate and unacceptable in India. The apex court further observed that the respondents were absolutely liable to compensate the harm caused by them to the villagers in affected area, to soil and to underground water and hence, they were bound to take all necessary measures to remove sludge and other pollutants lying in the area.<sup>53</sup>

In this context, it is necessary to point out that the Supreme Court in the instant case, introduced another significant concept, the polluter pays principle into Indian environmental law. The court explained the 'polluter pays principle' as under:

Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make the loss caused to any other person by his activity irrespective of fact whether he took reasonable care while carrying on his activity:

- (a) The polluting industry is absolutely liable to compensate for harm caused to the environment.
- (b) He is also liable to pay the cost of restoring the environmental degradation reversing the damaged ecology.<sup>54</sup>

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48. C.M. Jariwala, 'Direction of Environmental Justice in India : Critical Appraisal of 1987 Case Law' 35 *JIL*, 101 (1993).
49. AIR 1996 SC 1446.
50. *Id.* at 1465.
51. *Cambridge Water Co. Ltd. v. Eastern Counties Leather PLC* (1994), *All.E.R.* 53.
52. *Burnie Port Authority v. General Jones Pvt. Ltd.* (1994) 68 *Aus.L.J.* 331.
53. AIR 1996 SC 1446, 1465-1466.
54. *Ibid.*

The apex court traced the origin of the principle in Article 130-R (2) of European Economic Community Treaty and text of European Community Fourth Action Programme on environment. The court also read the principles into the provisions of the Environment (Protection) Act, 1986 and directed the Central Government to take action against industries producing highly acidic waste. Accepting the 'polluter pays principle' as part of Indian law, the Supreme Court observed :

Polluter pays principle has gained almost universal recognition, apart from the fact that it is stated in absolute term in Oleum Gas Leak Case. The law declared in the said case is the law governing this case.<sup>55</sup>

Before we conclude, it is necessary to make it clear that the polluter pays principle and 'absolute liability principle are not one and the same. The absolute liability principle is an unique Indian principle evolved by Justice Bhagawati Court whereas the polluter pays principle owes its origin to customary International law. In fact, the polluter pays principle allows a polluter to pay and continue to pollute whereas the liability imposed under the principle of absolute liability is deterrent in nature.<sup>56</sup>

In *Vellore Citizens Welfare Forum v. Union of India*<sup>57</sup>, a public interest petition was filed by Vellore Citizens Welfare Forum against the tanneries which caused enormous discharge of untreated effluent in the State of Tamil Nadu. In the instant case Justice Kuldip Singh made it clear that the 'polluter pays principle', as interpreted by Supreme Court, means that the absolute liability for the harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the damage done to environment. Remediation of the degraded environment is a part of the process of sustainable development and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. The court gave, following reasons in support of incorporation of polluter pays principle into the domestic law :

It is almost accepted proposition of law that rule of customary international law which are not contrary to municipal law shall be followed by the courts of law.<sup>58</sup>

The Supreme Court has also applied the 'polluter pays principle' in *Calcutta Tanneries Case*<sup>59</sup>, the Court opined that 'one who pollutes the

55. *Id.* at 1468.

56. Michael R. Anderson, 'International Environmental Law in Indian Courts' 7 RECIEL 28, (1998)

57. AIR 1996 SC 2715.

58. AIR 1996 SC 2715, 2722. Rio Declaration (1992), Section 16 also proclaims that polluter should, in principle bear the cost of pollution.

59. AIR 1997 2 SCC 411, 414.

environment must pay to reverse the damage caused by his acts.<sup>60</sup> In *Kamal Nath case*<sup>61</sup>, a news item appeared in the Indian Express stating that a private company, Span Motel, had used earth movers and bulldozers to turn the course of the river to save the Motel from further floods. The apex court, speaking through justice Kuldip Singh, awarded compensation against private industries for damage done to environment. However, the court in subsequent order modified its earlier order and pointed out that in addition to damages, the person guilty of causing pollution be also held liable to pay exemplary damages so that it may act as deterrent for others not to cause pollution.<sup>62</sup> In the instant case, Justice Kuldip Singh treated the polluter pays principle as part of the law of the land. Similar views have also been expressed by the Supreme Court in *S. Jagannath case*<sup>63</sup> and *Taj Trapazium cases*.<sup>64</sup> Again, in 1999, the apex court also declared in an unequivocal term that polluter pays principle has become 'a part of environmental law of the country'.<sup>65</sup>

It is evident from the above that the Supreme Court has endorsed the absolute liability principle as an integral component of the 'polluter pays principle'. Hence, it is implied that absolute liability principle has also become the law of the land. It is further submitted that the 'absolute liability' principle as an essential component of 'polluter pays principle' has strengthened and empowered the court to provide relief to victims of industrial disasters, creating a deterrent effect on potential polluters.

Upendra Baxi has opined that the 'polluter pays principle' is now on its way to become the motto of new environmental jurisprudence in India keeping pace with similar trend in most industrialized societies.<sup>66</sup>

From the foregoing discussion, it is evident that absolute liability has been accepted as law of the land. Appreciating the activism of the Supreme Court, Harish Salve, present Solicitor-General says :

Shift from *Rylands v. Fletcher* to the absolute liability principle is a clear policy choice made by the court, and is entirely consistent with its reappraised role of being a court closely

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60. *Id.* at 430.

61. (1997) 1 SCC 388.

62. (2000) 6 SCC 213, 224.

63. (1997) 2 SCC 87.

64. *M.C. Mehta v. U.O.I.* (1997) 2 SCC 353.

65. *A.P. Pollution Control Board v. Prof. M.V. Nayudu* (1999) 2 SCC 718, 734-735.

66. Upendra Baxi, 'Quest for Environmental Justice', 10, *Aligarh Law Journal* 11, (1990).

concerned with the issues of social justice. While *Rylands v. Fletcher* was a relic of an era when industrial activity was given primacy. Equally, transplanting the doctrine of polluter pays from an International treaty into existing domestic law by the mechanism of purposive interpretation of an existing statute reflects the approach of the court to fill the gaps in law without waiting for legislative intervention.<sup>67</sup>

#### V. CONCLUSION

There is no doubt that the doctrine of absolute liability is best suited in case of environmental pollution and it answers the problem of 21<sup>st</sup> century's developmental process. However, the legal status of the absolute liability principle was deliberated as a peripheral issue by the four different Constitution Benches of the Supreme Court but none of them applied it for reasons stated elsewhere in this study. However, if all there was any uncertainty as to the status of the Mehta principle as good law, it was resolved by the Supreme Court in subsequent cases by recognizing the absolute liability principle as a critical component of the polluter pays principle<sup>68</sup>. But the application and enforcement of absolute liability principle as part of the 'polluter pays principle' creates some confusion. Doctrine of absolute liability is unique to India and originates from the court's decision in the *Oleum Gas Leak* case (Mehta case) while polluter pays principle is a tenet of customary international law. In fact, the polluter pays principle allows a polluter to pay and pollute whereas the liability imposed under the principle of absolute liability is deterrent in nature. Moreover, the polluter pays principle in Indian law requires the polluter to pay compensation to injured parties as well as to cover the cost of remediation of damaged environment. Again this principle goes well beyond the formulations which are found in international instruments which generally confine the liability of the polluter to a lower standard.

The Mehta case is significant in opening up the absolute liability principle to perform an important role in protecting the environment, but its application in a given case is not without difficulties. Will this principle apply in the case of unprecedented natural phenomenon resulting in damage? Likewise will the absolute liability principle apply in the case of sabotage or terrorist attack?

We should also consider the repercussion of its application on the Indian economy. When India has opened its economy to foreign investors, can it afford to create a doubt in the mind of potential investors about the application of principle of absolute liability? The 'absolute

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67. Harish, Salve, 'Justice Between Generations : Environment and Social Justice' in B.N. Kripal (ed.) *Supreme But Not Infallible: Essays in Honour of the Supreme Court of India*, 372, (2000).

'liability principle' as developed by the Supreme Court, is not feasible for the economic environment of the country. Any rigid application of any environmental rule should not unnecessarily retard the developmental process otherwise it would be an end of all progress and development. An endeavour should be made to strike a balance between environment and development.



**NATIONAL IMPLEMENTATION OF  
INTERNATIONAL HUMANITARIAN LAW AND  
THE INTERNATIONAL CRIMINAL COURT**

Umesh Kadam\*

**I. RESOLVING CONFLICTING INTERESTS :**

**O**ne of the most fundamental principles on which the system of international humanitarian law is founded is that individual violations of this law entail criminal sanctions. On the criminal liability of the individual, the Nuremberg Tribunal observed that

(i) International law imposes duties and liabilities upon individuals as upon States.... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.... individuals have international duties that transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.<sup>1</sup>

The principle of individual criminal responsibility for violation of international humanitarian law is well established in treaty as well customary law. The four Geneva Conventions of 1949 which are now undisputedly considered to be part of customary international law contain the following provision in this respect:

Each high contracting party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed...grave breaches, and shall bring such persons regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another high contracting party concerned, provided such high contracting party has made out a *prima facie* case.

Each high contracting party shall take measures necessary for the suppression of all acts contrary to the provisions of the present convention other than the grave breaches defined in the following article.<sup>2</sup>

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1. International Military Tribunal (Nuremberg), *Judgements and Sentences*, 41 AJIL (1947), 172 at 220-221.  
2. Articles 49, 50, 129 and 146 of the 1st, 2nd, 3rd and 4th Geneva Convention, respectively.

The provision quoted above not only establishes criminal responsibility of individuals of violations of the conventions, but also imposes an obligation on the state parties to establish national jurisdiction in respect of the violations. A comparable provision is also to be found in other instruments on international humanitarian law.<sup>3</sup> Of course, the enforcement of international humanitarian law through criminal sanctions by national courts depends upon how the relationship between international law and national law is regulated within a state in accordance with its constitutional law and other laws.

#### **(I) Jurisdictional Issues :**

Irrespective of difference which exist between internal legal systems of different states as to relationship between international law and national law, the Geneva Conventions impose an obligation on all states parties to 'enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the ... convention'. The Geneva conventions, in essence, oblige the state parties to exercise universal jurisdiction in respect of grave breaches of the conventions. While general criminal laws tend to be territorial in character or may be applicable on the basis of nationality, criminal legislation enacted to fulfil obligations under the Geneva conventions is also extra-territorial. A study of various countries' national legislation makes this very clear.<sup>4</sup> The Conventions essentially provide for universal jurisdiction. In doing so, the grave breaches of the Conventions have been made 'universal crimes' and the perpetrators are considered as *hostes humanis generis*.<sup>5</sup> By virtue of this principle, a person who commits a grave breach can be prosecuted and punished by any other state party even if it was not involved directly or indirectly - in the war or armed conflict during which the breach was committed.

The principles of international law applicable to exercise of national as well as universal jurisdiction do not exclude international jurisdiction. There is nothing in the Geneva conventions, which excludes the handing over of an accused to an international penal tribunal, the competence of which is recognized by the contracting parties.<sup>6</sup> On this point the diplomatic conference which adopted the Geneva Conventions declined expressly to take any decision which might hamper future developments of international law.<sup>7</sup> The report dealing with the penal provisions, which was presented to the Joint Committee says, " the

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- 3. For instance Article 85 of the Additional Protocol I; Art. 28 of the Hague Convention on Cultural Property.
  - 4. Michael Bothe, (Ed.) *National Implementation of International Humanitarian Law*, Martinus Nijhoff, London, 1990, pp. 77-78, comments of Mr. L.R. Penna.
  - 5. *Ibid.*
  - 6. Jean Pictet, (Ed). *Commentary on the Geneva Conventions*, Vol. I, ICRC, 1952, p. 366.
  - 7. *Ibid.*

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  - 7. *Ibid.*

diplomatic conference is not here to work out international penal law. Bodies far more competent than we are have tried to do it for years".<sup>8</sup>

There must not be any conflict in exercise of criminal jurisdiction in respect of war crimes on the basis of different principles of jurisdiction. Above all, the principal *non bis in idem*, which has been universally considered as fundamental principle of criminal law must also be respected. According to this principle, no person shall be tried before a court for acts done by such a person for which he or she has already been tried by a court of competent jurisdiction. Application of this principle to war crimes trials raises the question of primacy of jurisdiction. Whether jurisdiction of an international tribunal for prosecution of war criminals shall prevail over national courts' jurisdiction or the other way round is the basic question, which arises in this context. The Statute of the International Criminal court has resolved this conflict. But it would be appropriate to see what has been the practice as far on international level. The Nuremberg Tribunal was established to act in place of state courts to try those major war criminals whose offences had "no particular geographical location", it let to state courts the task of following up its proceedings. Thus, national courts were to bring to justice minor criminals and members of the organizations found criminal by the Nuremberg tribunal.<sup>9</sup> On the basis of same approach, the Tokyo Tribunal was designed to substitute for any national criminal court.<sup>10</sup>

However, the approach adopted by the Statute of the International Criminal Tribunal for the former Yugoslavia is different. It does not establish exclusive jurisdiction over war crimes and crimes against humanity. Thus Article 9 of the Statute talks about concurrent jurisdiction by providing that the 'international tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia...'. Whenever there is concurrent jurisdiction, the question of primacy arises. In the case of Yugoslavia Tribunal, it is resolved in favor of the international tribunal. Thus the second paragraph of Article 9 says:

The international tribunal shall have primacy over national courts. At any stage of the procedure, the international tribunal may formally request national courts to defer to the competence of the international tribunal in accordance with the present statute and the rules of procedure and evidence of the international tribunal.

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8. *Ibid.*

9. Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers Inc., New York, 1996, p. 308.

10. *Ibid.*

While deciding upon this issue, it was agreed that the Tribunal should not exercise exclusive jurisdiction over war crimes and crimes against humanity that it is called upon to prosecute and try. Instead, the Tribunal was granted concurrent jurisdiction with that of national courts in view of the large number of potential cases and the fact that many defendants may find themselves in countries whose authorities are willing and prepared to bring them to justice.<sup>11</sup> It was felt, it would be salutary if national courts exercised their jurisdiction under their own national legislation or on the strength of the Geneva Conventions.<sup>12</sup> But at the same time, the Statute establishes primacy of the Tribunal if it considers that it is necessary in the interest of justice that the Tribunal and not the national court shall exercise jurisdiction in respect of a specific case. The tribunal's primacy is further may have initiated already. A similar provision is to be found in the Statute of the International Criminal Tribunal for Rwanda.<sup>13</sup> There was no difficulty in establishing primacy of these two international tribunals over national jurisdiction because the statutes were laid down as a part of the United Nations Security Council resolutions rather than through a consensual process. With this background, it would now be apposite to see how the question of complementarity is dealt with by the Statute of the ICC.

#### **(ii) Principle of Complementarity and the ICC Statute :**

Ever since the idea of creation of a permanent international criminal court was seriously taken up for consideration by the international community it was understood that the proposed court should be able to act as an effective complement to national courts whenever they are unable or unwilling to bring those responsible for core crimes of genocide, other crimes against humanity and serious violations of humanitarian law to justice. In the case of the ICC, unlike the ad hoc Tribunals for former Yugoslavia and Rwanda, the national courts enjoy primacy over the ICC. It is not the role of the ICC to act as a substitute for national courts and thus to detract from the existing obligation of States to repress war crimes at the national level. Pursuant to the complementarity principle, the ICC would leave the primary responsibility for action to States and would institute proceedings only in cases where national courts had failed to do so. The Preamble of the Statute states that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdiction.

The Statute contains specific provisions, which strengthen the principle of complementarity as well as establish primacy of national courts. According to Article 13 of the Statute, a case can be brought before the Court in three different ways - (a) A state party may refer a case to the Prosecutor; (b) The United Nations Security Council, acting

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11. *Ibid.*

12. *Ibid.*

13. Article 8 of the Statute

under Chapter VII of the U.N. Charter, refers a case to the Prosecutor or (c) The Prosecutor initiates investigation on the basis of information received by the Court. Although there is a possibility of the ICC taking up a matter without the concurrence of state directly concerned with such a matter or even against the wishes of such a State, provisions regarding admissibility make it very clear that the court cannot proceed with a trial without the concurrence of the concerned State. This provision in other words establishes primacy of national courts' jurisdiction. Article 17 of the Statute debars the ICC from proceeding with a trial in the following circumstances -

- (a) When the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.
- (b) When the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.
- (c) When the person concerned has already been tried for conduct which is the subject of the complaint and a trial by the ICC is not permitted in accordance with the principle of double jeopardy.

Since primacy of national courts is well established by the Statute, it is obvious that jurisdiction of the ICC is very limited. This arrangement was expected. It reflects the contemporary realities as well as a pragmatic presumption. Establishment of an ICC with primacy over national jurisdiction was out of question. The idea of an international criminal court with primacy over national courts would not have been acceptable to most of the states. However at the time of establishing primacy of national courts, it was also necessary to ensure that such primacy clauses are not misused for political reasons or to shield a war criminal. The Statute makes an attempt to ensure that this does not happen. As noted earlier, the statute enables the ICC to proceed with a case if a State, which has jurisdiction in respect of the case, is either unwilling or unable to carry out the investigation or prosecution. But how to determine whether the State is unwilling or unable to do so? Article 17 contains some guidelines, which enable the ICC to prevent States Parties from blocking its jurisdiction on flimsy grounds. Paragraphs 2 and 3 of this Article provide as follows:

2. In order to determine unwillingness in a particular case, the Court shall consider having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable".
  - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 8

(b) There has been an unjustified delay in the proceeding, which in the circumstances is inconsistent with intent to bring the person concerned to justice

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Although the Statute makes an attempt to ensure that the primacy of a State's national jurisdiction will not be misused, yet there is no guarantee that it will not be misused. There could be serious differences of opinion between a State and the ICC on the question of admissibility. Although in doubtful or disputed cases, the Court can give its ruling in favor of jurisdiction of the ICC, yet in the absence of active co-operation of the State which has jurisdiction, especially if it also happens to be the State within whose territory the act was committed, it would be difficult for the Court to proceed and ensure a fair trial.

Regarding the question of primacy, in conclusion, it can be said that States who have some apprehension concerning the ICC's jurisdiction need not have any fear that the Court will restrict their freedom in prosecuting war criminals on the basis of national jurisdiction, which is so well established in international humanitarian law. This need not be a ground to oppose the new institution which will undoubtedly strengthen international humanitarian law to bring to justice most heinous criminals.

## **II. SECURING CO-OPERATION OF STATES :**

As discussed earlier, States have the primary duty to bring persons responsible for genocide, other crimes against humanity and serious violations of humanitarian law to justice in their own courts or to extradite them to another State which is able and willing to do so in accordance with internationally recognized standards of fairness and justice. However, the experience of the last several decades establishes the fact that states have failed to do so. This led to the movement for creation of a permanent international criminal court which can be an effective complement to national jurisdictions when they are unable or unwilling to bring those responsible for these graves crimes to justice.

The new international criminal court will extensively depend on co-operation of states to realize its objectives. It is therefore necessary to ensure that States Parties co-operate fully and promptly with its orders and requests in good faith. As it is quite obvious, the international legal system heavily relies on States to ensure adequate implementation of its

norms and rules in different ways. The same is true regarding international criminal law. Morris and Scharf while commenting on the Yugoslavia Tribunal say that

(n)otwithstanding the emergence of international and regional organizations with competence in a wide range of areas, international legal system is still primarily a decentralized system of independent Sovereign States, particularly in the field of criminal law. Given the absence of an international criminal justice system, the co-operation of States will be essential to the effective functioning of the International Tribunal at every stage of its work, from the initial investigation to the enforcement of a final judgement.<sup>14</sup>

Some of the basic principles concerning state co-operation with the ICC have been outlined by the Amnesty International in a document concerning the ICC.<sup>15</sup> These are as follows.

- (1) States Parties, including their national courts and officials, must provide full co-operation, without delay, to the permanent international criminal court at all stages of the proceedings, including the period before the relevant Chamber determines whether it has jurisdiction.
- (2) The Statute should confirm the basic principle of full co-operation without delay required from States Parties leaving the details of co-operation to the rules.
- (3) States Parties must bring to justice those responsible for crimes within the court's jurisdiction, extradite them to a state able and willing to do so in a fair trial which is not a sham or transfer them to the permanent international criminal court.
- (4) States should implement fully and without delay court orders to arrest and transfer suspects and accused.
- (5) None of the grounds for States to refuse extradition to other states apply to court orders to transfer suspects and accused to the permanent international criminal court.
- (6) States should implement fully and without delay court orders and requests to provide international assistance, including those requiring logistical support, searches and seizures, appearance of witnesses and production of documents.

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14. Morris and Scharf, *An Insider's Guide to the International Tribunal for the Former Yugoslavia*, Transnational Publisher, New York, p. 311.

15. Amnesty International, November 1977, OR 40/XX/97, p. 3.

- (7) None of the traditional grounds for statutes to refuse mutual assistance to other states apply to orders or requests for international assistance by the permanent international criminal court.
- (8) The permanent international criminal court, not national courts or authorities should determine whether a state party is fulfilling its obligations under the Statute and rules to co-operate.
- (9) States Parties which have failed to implement court orders fully and without delay are in breach of their obligations under international law and should be subject to appropriate sanctions.
- (10) All other states should be encouraged to become parties to the statute and to co-operate with the permanent international criminal court.

The Statute of the ICC contains various provisions which envisage active co-operation of States Parties. The most important response expected from States is that they ratify the Statute, make it universal in character and support the institution in various ways to realize its objectives as reflected in the following commitment mentioned in the Preamble :

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured....Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

For this purpose, the States which become parties to the Statute agree to accept certain limitations on their sovereignty without which the court cannot become a reality. This is manifested in various parts of the Statute. For instance, Article 4 provides that the Court may exercise its functions and powers on the territory of any State Party and, by special agreement, on the territory of any other State. By virtue of ratification of the Statute, a State accepts jurisdiction of the court with respect to crimes defined in the Statute, at the same time retaining its sovereign right to prosecute the offenders before its national courts. States parties are also entitled to refer a situation to the court for investigating it and for eventual prosecution if the state so desires. Obligations of States relate to the pre-trial, trial and post-trial phases of the work of the court.

The Statute contains elaborate provisions regarding co-operation of States for the purpose of investigating a situation. The most important provisions relate to arrest and surrender of persons to the Court, collection of evidence, waiver of immunity, etc. Without wholehearted co-operation of a state within whose territory the alleged offence was

committed and where the accused is located for the time being, it is not possible to investigate the situation as well as secure custody of alleged offenders.<sup>16</sup>

States Parties play a very significant role in facilitating trials by the Court. A very crucial aspect of a trial before the Court is establishment of guilt with a view to enable the Court to record evidence, in accordance with the principles of the law of evidence. The States Parties must facilitate this process and must not hamper the trial. They are expected to facilitate collection of evidence relating to a situation under consideration of the ICC.

During the last phase of the work of the Court, namely, enforcement of its decisions, States' co-operation is again crucial. A sentence of imprisonment shall be served in a state designated by the Court from a list of States which have indicated to the court their willingness to accept sentenced persons. The Statute contains elaborate provisions regarding enforcement of sentences of imprisonment.<sup>17</sup> Since there will not be any international prison attached to the court, it is obviously necessary to take help of States which are willing to assist the Court for this purpose.

Finally, unless States extend financial support to the court, it cannot become a reality. All expenses of the court are to be met with through assessed contributions made by States Parties and funds provided by the United Nations.<sup>18</sup>

### III. CONCLUSIONS

To conclude, it can certainly be said that without active support and co-operation from different States Parties, the new system and the new institution will not succeed. This is indeed one dimension of national implementation of international humanitarian law, especially, the new international criminal law in so far as it deals with humanitarian law issues. The term 'national implementation of international humanitarian law' is not to be construed narrowly to mean fulfillment of obligations under the international humanitarian law instruments which expect States Parties to take certain national measures to that end. That is one aspect of national implementation of international humanitarian law. But with the new development in the form of ICC, States have an additional responsibility to make the Court a success by making available the use of their national institutions and by providing overall co-operation. Needless to mention, the new system will succeed only if a large number of States become parties to the Statute. The Statute is not a fail proof instrument in every respect. But opposing the Statute and pointing out deficiencies in it will not serve the purpose of bringing to justice those heinous criminals

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16. Articles 86 to 102 deal with pre-trial co-operation.

17. Articles 103 to 111 of the Statute.

18. Article 115 of the Statute.

who are guilty of unimaginable atrocities against millions of innocent children, women and men which has shocked the conscience of mankind. Such atrocities will continue if the international community fails to take strong measures. There is scope to remedy the defects and get rid of deficiencies in the new system, but this is possible by working together with a humanitarian spirit by joining the new system rather than staying outside it. With this in view, all States which are not parties to the Statute must be urged to ratify the Statute and help the international community to equip itself to guarantee lasting respect for the enforcement of international justice.



## **LAW, SCIENCES AND ENVIRONMENT : PERSPECTIVES ON UNITED NATIONS WORLD CHARTER FOR NATURE**

S. Bhatt\*

### **INTRODUCTION**

This paper discusses the need to combine law and science for environmental protection in India. In the light of changes of the last fifty years, we shall study the importance of integration of law and science for the environmental studies and management. Indeed, science itself has given new dimension to the growth of our civilization. Modern International law has also acquired a multidimensional role in world society. The purpose of law and science is to achieve a peaceful and dynamic world order. Both disciplines have important role for the protection of natural environment. Therefore, we have to study the provisions of United Nations World Charter For Nature. 1982, a Charter which has important message for the state, nation and the people of India. Without a wholesome human environment, we cannot provide for people an opportunity for social and spiritual growth.

### **MAN OUT OF HARMONY WITH NATURE**

While we assess the United Nations World Charter for Nature, it is realized that man's activities have created a situation where man is out of harmony with nature. Technology has driven man to a new life-style globally. Long ago, Rabindranath Tagore said that in ancient times man lived in harmony with nature. Modern man has set aside the law of nature. As Tagore says:

We expected that the laws of nature should be held in abeyance for our convenience. But now we know better. We know that law cannot be set aside, and in this knowledge we have become strong. For this law is not something apart from us; it is our own<sup>1</sup>.

In a book entitled *The Global Environment Movement: A New Hope For Mankind*<sup>2</sup>, we have focussed attention on the major issues facing mankind in relation to environment protection. There is the dawn of a new age when world over mankind is treating global environments as a common resource to be protected. The common concern for

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1. Rabindranath Tagore, *Sadhana : The Realisation of Life*, Lectures in Harvard University, 1913, 1979 Edition, p. 50.  
2. B.D. Nagchaudhuri and S. Bhatt, *The Global Environment Movement A New Hope For Mankind*, Sterling Publishers, New Delhi, 1987.

environments has united different people living in many parts of the world. Scientists and the jurists have also joined together to provide for a wholesome human environment. We have stated that man has become out of harmony with nature, and drawn attention to some philosophical ideas from India for the conservation and protection of environments. Attention is drawn to the global cooperation for combining law and science for eco-development. We have discussed energy crisis and its impact on the environments; developments in airspace and outer space, subjects of population, environment and world order, and the environment policy of India. The book provides a unified view of global environment which is necessary to understand the unity in the diversity of the laws of nature. There is an unbreakable continuity in the physical laws of nature based on the unity in the diversity of laws, says Tagore. The principle of unity is explained by him as follows:

This principle of unity is the mystery of all mysteries. The existence of a duality at once raises a question in our minds, and we seek its solution in the one. When at least we find a relation between these two, and thereby see them as one in essence, we feel that we have come to the truth<sup>3</sup>.

With reference to environmental problems of India, we have pointed out that "population, human settlement, transportation, energy, resources and developments are some important parameters that have bearing directly and indirectly on the environment policy of India"<sup>4</sup>.

#### **THE UNITY OF LAW AND SCIENCE AND A BIOLOGIST VIEW OF THE WORLD**

The purpose of law in the larger view is to seek a social order based on harmony of people. In science, the aim of various disciplines is to comprehend harmony in the nature. For example, ecology is defined as the relationship of living organisms and their adaptation to environments. It is a definition which is close to law as law seeks to determine relationship between people. The ecological approach to international law seeks an eco-management of global life<sup>5</sup>. In Physics Einstein says: 'The supreme task of the physics is to arrive at those universal elementary laws from which the cosmos can be built up by pure deduction. There is no logical path to these laws; only intuition, resting on sympathetic understanding of experience, can reach them'<sup>6</sup>. In law also, jurists say that life of law is based on experience. As Justice Holmes said in 1886: "...your business as thinkers is to make plainer the way from

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3. See Tagore, n. 1, p.80.

4. See Nagchaudhuri and Bhatt, n. 2, p.55.

5. See S. Bhatt, "Ecology and International Law", *Indian Journal of International Law*, vol. 22, 1982, pp. 422-38.

6. See Albert Einstein, *Ideas And Opinions*, Calcutta, 1954, p. 226.

something to the whole of things, to show the rational connection between your fact and the frame of the Universe."<sup>7</sup>

Thus Law and Science are two aspects of human experience, one based on the social order and the other on the natural systems. It is but obvious that in a scientific world society, law and science should interact. In recent period a synthesis of law and science seems to be taking place towards the evolution of a biologist view of the world. Later in this paper we will see how the biologist imprint is found in two major legal instruments drafted by mankind through the United Nations for the protection of global environments and for a new world order.

The UNESCO held a world symposium on science and synthesis on the 10th death anniversary of Einstein and a great biologist, T. de Chardin<sup>8</sup>. The symposium strengthened the biologist view of the world in contemporary civilization. It recalled the "perennial freshness" of ideas of Einstein and Chardin, and laid stress on the intellectual synthesis for understanding of man and universe. The then Director General of UNESCO, Rene Makan, said on the occasion that science aspires not only for the unity of knowledge but also on the unity of minds. The most important outcome of the symposium was that the world is based on relatedness of the natural laws. Therefore, the interdependence of the biological and ecological laws seem very important for environment management.

Another Nobel Laureate scientist, Ilya Prigogine, has in recent period laid emphasis on the "intellectual construction" needed in comprehending laws of nature and the concept of reality<sup>9</sup>. Perigogine refers to the dialogue between Einstein and Rabindranath Tagore on the meaning of reality. He agrees with the views expressed by Tagore. As he says: "Curiously enough, the present evolution of science is running in the direction stated by the great Indian poet." Tagore had said during his discussion with Einstein that truth was based on the comprehension of the observer (we may call experience), whereas Einstein believed that science had to be independent of the existence of any observer<sup>10</sup>. The conversation between Einstein and Tagore was regarding the nature of Reality<sup>11</sup>.

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- 7. Cited by S. Bhatt, "Recent Developments In Outer Space: Law, Freedom And Responsibility after Lunar Landings", *Journal of Air Law of Commerce* (Dallas, Taxes), vol.36, 1970, p. 268
  - 8. See B.M. Crook, trans., New York, 1971.
  - 9. See *Ilya Prigogine and Isabella Stengers, Order Out of Chaos: Man's New Dialogue with Nature*, N.Y., 1984, p. 292.
  - 10. *Id.*, p. 293.
  - 11. See Note on "The Nature of Reality A Conversation between Dr. Rabindranath Tagore and Professor Albert Einstein", in *Tagore Reader*, Amiya Chakravorty, (ed.), N.Y., 1961.

In the context of environment movement of our times, an intellectual construction of law and science is needed to provide a biologist view of the world which would be close to the reality of nature, and which would provide harmony in the universe.

#### **The Global Environment Movement And the UN Declaration on Human Environment, 1972**

In response to the call of history, the United Nations representing the concern of whole of mankind made a "Declaration of the United Nations Conference on the Human Environment, 1972"<sup>12</sup>. The UN Declaration was an epoch-making step taken by mankind to safeguard environment and ensure good life on earth. The major emphasis of the Declaration was to seek harmony of man with nature and to promote knowledge about the laws of nature. The Declaration in particular introduced a new biological revolution in the world. It said that "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth". "The protection and improvement of the human environment", said the Declaration, "is a major issue which affects the well being of peoples and economic development throughout the world...". The Declaration warned about "evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere....".

The UN Declaration while referring to the problems of developing countries said that their environmental problems are caused by underdevelopment. And, it warned that "The natural growth of population continuously presents problems on the preservation of the environment, but with the adoption of appropriate policies and measures these problems can be solved. Of all things in the world people are the most precious. It is the people that propel social progress, create social wealth, develop science and technology, and, through their hard work, continuously transform the human environment."

The Declaration called for a cooperative approach of man with nature. It said that "A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences". It highlighted the role of modern man vis-a-vis the environment as follows:

There are broad vistas for the enhancement of environmental quality and the creation of a good life. What is needed is an enthusiastic but calm state of mind and intense but orderly work. For the purpose of attaining freedom in the world of nature, man must use knowledge to build in collaboration with nature a better environment.

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12. For text of Declaration, see *International Environmental Law*, Najmul Arif compiled, Lancers Books, New Delhi, 1996, pp.7-14.

The Declaration of the UN has called for rational planning which is essential to avoid conflict between needs of development and the need to protect and improve environment. It called for planning of human settlements with a view to avoid adverse effect on the environment. It called to pursue vigorously demographic policies which are without prejudice to human rights and which the Governments deem appropriate. Above all, the Declaration has asked the peoples of the world to enlarge education on environment, undertake scientific research and cooperate on bilateral and multilateral basis to avoid damage to the environment.

#### THE UN WORLD CHARTER FOR NATURE, 1982

The World Charter for Nature<sup>13</sup> drafted by the United Nations in 1982 makes a candid admission for the first time in modern period that man is a part of nature. Man is dependent upon the natural systems for this life and growth. Man is also a part of single species. Leading anthropologist like Rene Dubos, Margaret Mead have laid worldwide emphasis on the fact that all men are part of the species with instinct for cooperation and love. Mead provides a global view that diversity of life of man in nature only strengthens unity of mankind because mankind is one single species, as he says:

There has been a continuing interest in dealing with wholes; with mankind as a species, the single hominid species now existing on this planet, with many variations in climate and breeding conditions, but still essentially one species, exhibiting complete intra-species fertility and hybridization between varieties as a source of strength....<sup>14</sup>

It is profitable to recall for the Charter for Nature that the world is one large ecological unit with unity in diversity of life in the nature. As we have said earlier, biologically and ecologically the world is one interdependent unit. In this single unit, all the living organisms have an inter-relationship and adapt to the local environment. Laws of nature operate in this unit to keep nature's ecological balance. We may refer to nature's carbon cycle, the oxygen cycle, the radiation balance of earth, and similar scientific phenomena which are related to the global ecological system<sup>15</sup>.

Therefore, the UN Charter for Nature is to be analyzed in the light of world being one large ecological unit, comprising of single species of mankind along with other living organisms, living in an interdependent world, with unity in the diversity of nature. Even the UN Declaration on Human Environment of 1972 contains biological and ecological principles

- 13. For the test of the Charter, see *International Environmental Law* (Najmul Arif Compiled), 1996.
- 14. See Margaret Mead, "Anthropology Today", in P. Albertson and M. Barnett, eds., *Managing The Planet*, 1972, p. 188.
- 15. See S. Bhatt, n. 5, p. 428

which shape life on this planet. Biologist view of world seems the norm in contemporary civilization.

Another scholar Victor Ferkiss writing on ecological humanism says that it is the global philosophy these days. Ecological humanism "is based on the conviction that man, if he is to continue to exist and if he is to fulfill himself as a human being, must live in a conscious ecological relationship with nature and with other men, and the ecological perspective on the natural and with other men, and the ecological perspective on the natural order provides a necessary analogue for the social order"<sup>16</sup>. Professor Ferkiss makes some very useful following observation on man and universe: Universe is a process moving forward in time. Life and all its attributes consist of process. Life is an emergent property of matter; consciousness is an emergent property of life. Both have evolved in the course of development of Universe Processes which maintain themselves over time are structures, that is patterns of order which persist because of relative equilibria among their constituent elements. Change in nature is the result of the interrelated changes among the elements of natural systems. The world and humanity are one entity, one system, in equilibrium. Earth is humanity's only home; humanity is one people in relationship to the earth<sup>17</sup>. Ferkiss has cited works of eminent authors on the ecological perspective and political theory, the biological foundations of political science, etc<sup>18</sup>.

The UN World Charter for Nature of 1982 is therefore an epic document for mankind. It represents the global philosophy for life and living on this planet. It says that "mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients". That "civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievement", and "living in harmony with nature gives man the best opportunities for the development of his creativity and for rest and recreation". The charter outlines that "Every form of life is unique warranting respect regardless of its worth to man", that "man can alter nature and exhaust natural resources by his action or its consequences". The Charter says that "lasting benefits from nature depend upon the maintenance of essential ecological processes and life support systems, and upon the diversity of life forms, which are jeopardized through excessive exploitation and habitat destruction by man". The Charter reaffirms that "man must acquire the knowledge to maintain and enhance his ability to use natural resources in a manner which ensure the preservation of the species and eco-systems for the benefit of present and future generations".

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16. See Victor Ferkiss, *The Future of Technological Civilization*, N.Y., 1974, p. 206.

17. *Ibid.*, p. 207.

18. *Ibid.*, p. 303.

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16. See Victor Ferkiss, *The Future of Technological Civilization*, N.Y., 1974, p. 206.

17. *Ibid.*, p. 207.

18. *Ibid.*, p. 303.

Thus to achieve above-mentioned goals, the UN Charter for nature has been adopted. The Charter for Nature has proposed following principles of conservation which shall guide all activities of man on earth. It says that nature shall be respected. The genetic viability on the earth shall not be compromised. That special protection will be given to areas in the earth to preserve their ecosystems. That all eco-systems shall be used with sustainable productivity. And nature shall be preserved against degradation caused by war and hostile activities. In addition to these general principles the Charter for Nature lays down some functions for states. These include the principles of UN Charter of 1945, conservation of nature, formulating long-term plans for economic development, population growth etc., maintaining biological productivity and diversity, avoidance of wastage of natural resources, avoidance of harmful activities against nature, control of national disasters, and avoidance of discharge of pollutants into atmosphere.

The UN Charter for Nature has in its principles, functions and implementation processes pronounced a biological view of world. Indeed, the Charter being international law we have a new look to the combination of law and science on biological premises so that relationship between living organisms, including man and their adaptation to global environment can be properly understood and achieved. Thus man can for the first time in history remain in harmony with nature and realize world peace.

#### **OTHER SIGNIFICANT CONVENTIONS OF MODERN ENVIRONMENTAL LAW<sup>19</sup>:**

The Rio Declaration on Environment and Development 1992 has drawn considerable attention to global planning and decision making. Its major emphasis is on sustainable development and future orientation for world economic planning. It says that 'Human beings are at the centre of concerns of sustainable development'. It stresses that 'the right to development must be fulfilled so as to meet developmental and environmental needs of present and future generations. It does set the global agenda for poverty removal as it points out that 'All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development'. It provides for an open international economic system in the World 'that would lead to economic growth and sustainable development'.

Among other conventions on environmental law are the 'Vienna Conventions for the Protection of Ozone Layer, 1985, the United Nations Framework Convention on Climate Change, 1992, the Convention on

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19. See. S. Bhatt, 'The Role of Environmental Law for the World Order of 21st Century', in *Souvenir and Conference Papers of International Conference on International Law in the New Millennium* (4-7 Oct. 2001) Vol. 1; 31-39 at p. 36.

Biological Diversity, 1992, the United Nations Convention to Combat Desertification, 1994 etc.

#### **THE ENVIRONMENT PROTECTION ACT OF INDIA, 1986 :**

Taking note of the United Nations Declaration of 1972 and the UN Charter for Nature 1982, the Government of India has enacted the Environment Protection Act, 1986.<sup>20</sup> The Preamble to this act states that "whereas decisions were taken at the United Nations Conference on the Human Environment at Stockholm in June 1972, in which India participated, to take appropriate steps for the protection and improvement of human environment"; and "whereas it is considered necessary further to implement the decisions aforesaid in so far as they relate to the protection and improvement of environment and the prevention of hazards to human beings, other living creatures, plants and property....", the Environment Protection Act 1986 is enacted.

The Act of 1986 gives effect to the decisions of the UN Conference of 1972, provides for environment protection and improvement, prevents hazards to human beings and all life including the plants, thus combining law and biological sciences in a unique fashion, and, generally, sketching a biological view of the world. The biologist view is based on the inter-relatedness of ecosystems. It considers all mankind belonging to single species homosapien. The biologist interpretation of nature easily fits with the diversity of nature including human beings, falling within a unified natural order. It is not proposed here to specify each constituent part of the Indian Environment Protection Act of 1986. Suffice to mention that it has set a pattern to shape national life in conformity with the laws of nature as Rabindranath Tagore had envisaged, and keeping due regard to the synthesis of law and science in all policy making for environment management.

#### **SOME CONCLUSIONS :**

The attempt in this paper to combine law and science for environment protection and management provides a new global perspective, a new paradigm. It may provide a new structure for a scientific revolution with emphasis on the biologist view of the world and the natural systems. Ecology and International law provide us today a new mechanism to shape global environments. This combination is likely to evolve sustainable development. Above all it will help adaptation of human beings to different ecological systems including different cultures. It will yield unity in a diversity of global life. The combination of law and science and an ecological approach will promote world harmony. Talking about paradigms, Thomas Kuhn says :

Each (paradigm) produced a consequent shift in the problems available for scientific scrutiny and in the standards by which

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20. See B. Desai, ed., *Environment Laws of India*, Lancers Books, 1994, pp. 81-94.

the profession determined what should count as an admissible problem or as a legitimate problem solution. And each transformed the scientific imagination in ways that we shall ultimately need to describe as a transformation of the world within which scientific work was done. Such changes, together with the controversies that always accompany them, are the defining characteristics of scientific revolutions.<sup>21</sup>

The world may therefore be on the threshold of a scientific revolution which involves the synthesis of international law with global science providing a biologist view of the world which view is enacted and strengthened by the UN Declaration of 1972, and the UN world charter for Nature of 1982, adopted in India as well. It is a paradigm for world harmony, and harmony with nature. As Einstein has said in his famed address on the quest for scientific research :

The longing to behold this pre-established harmony is the source of the inexhaustible patience and perseverance with which Planck has devoted himself... to the most general problems of our science, refusing to let himself be diverted to more grateful and more easily attained ends.<sup>22</sup>

To shape a creative life on this planet, it therefore becomes necessary to provide harmony between man made laws and the laws of nature, which is possible by a creative synthesis of law and science.



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21. See Thomas S. Kuhn, *The Structure of Scientific Revolutions*, London, 1962, p. 6.

22. A. Einstein, n. 6, p. 227.

## ENFORCEMENT OF INTERNATIONAL DECISIONS

Cyrollah Moradi Nodeh\*

### INTRODUCTION :

The practice of many national and local municipal courts illustrate that enforcement of their awards is carried out under the direction of their judicial tribunals. The very nature and constitution of an international tribunal shows that the tribunal has no power to enforce its decisions. Nor is there any legislative, executive, or administrative governmental body in the world, with authority over nations, that might lend its aid to a successful party in a dispute between States before an international tribunal to comply with a judgement rendered against the will of the country cast in the judgement. thus the function of enforcement of a judgement of an international court is neither a legislative nor an administrative one, but is rather to bring into play a political responsibility in a diplomatic sphere.

The purpose of this paper is to highlight the problem of non-compliance with the judicial decisions rendered by the International Court of Justice (ICJ) and to examine the existing machinery for the enforcement of judgements. The possibility to devise a new mechanism to resolve the problem will also be explored.

### THE PROBLEM :

After the Second World war, the ICJ, as a principal judicial organ of the United Nations, was established, in 1946, in place of the Permanent Court of International Justice (PCIJ) not only as the successor of the PCIJ but in its continuation.<sup>1</sup> The experience of the PCIJ shows that between 1922 and 1939 there was no case in which a party refused to comply with a decision of the Court even though not every judgement was fully implemented in accordance with its terms.<sup>2</sup> But the present Court is credited with more instances of non-compliance with its judgements and orders. Since 1947 there have occurred several serious instances of failure on the part of States concerned to comply with a decision of the ICJ and on the part of the international organization to secure compliance with the decision. The judgements in the *Corfu*

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1. Article 92 of the United Nations Charter.  
2. Shabtai Rosenne, *The Law and Practice of the International Court, 1920-1996* (The Hague/Boston/London: Martinus Nijhoff publishers, 1997), p.201.

*Channel case*<sup>3</sup>, the *Fisheries Jurisdiction cases*<sup>4</sup> (*Federal Republic of Germany v. Iceland*; the *United Kingdom v. Iceland*), the US Diplomatic and Consular staff in *Tehran cases*<sup>5</sup> (*US v. Islamic Republic of Iran*) were not followed. the judgement of the Court in the *Military and Paramilitary Activities in and against Nicaragua case*<sup>6</sup> (*Nicaragua v. United States of America*) was declared to be non-binding even before it was decided by the Court.<sup>7</sup> The United States, in 1986, vetoed a draft Security Council resolution calling for "full and immediate compliance" with the judgement of the *Nicaragua case*.<sup>8</sup> Subsequently, Nicaragua withdrawn the case against the United States in the Security Council.<sup>9</sup>

The orders of the Court, for interim measures have not been followed in any of the cases by the defendant states. The Court, under Article 41 of the Statute and Articles 73-78 of the 1978 Rules of the Court, is empowered to "Indicate" such measures to preserve the respective rights of the parties, if the circumstances so demand. These orders are significant in discharging the judicial function by the Court and protect the interests of the parties from irreparable loss.<sup>10</sup> But the experience of the ICJ shows that none of its orders have been accepted by the concerned countries. For example, order of the Court for interim measures was not followed in the *Anglo-Iranian Oil Co. case* (*United Kingdom v. Iran*).<sup>11</sup> In that case the Iran Government rejected the order of

- 3. (1949) ICJ Rep., p.4. But after many years of stalemate, in 1952, as a part of a settlement of claims between the two States, the United Kingdom approved the delivery to Albania of the gold that had been the subject matter of the Monetary Gold case, and Albania paid the U.K. £2 million in respect of all British claims against it. Following this the Corfu Channel case was regarded as closed.
- 4. (1974) ICJ Rep., p.3.
- 5. (1980) ICJ Rep., p.70. In this case the Court in its judgment found that Iran violated and was violating obligation owed by it to the United States under conventions in force between the two countries and rules of general international law, that the violation of these obligations engaged its responsibility, and that the Iranian Government was bound to secure the immediate release of the hostages, and to make reparation for the injury caused to the United States Government. The United States, later informed the Court that it had settled the dispute with Iran under the Algiers Declaration. The Court, accordingly, removed the case from the list. See for more information, Chandan Bala, *International Court of Justice* (New Delhi : Deep & deep publication, 1998), p.153.
- 6. (1986) ICJ Rep., p.14.
- 7. See the United States Statement in 24 ILM 246 (1985).
- 8. UN Newsletter, 6 Nov. 1986.
- 9. Nicaragua by a letter dated 26 September 1991 informed the Court that it had relinquished all action bases on the case against the United States and did not wish to go on with the proceedings. The Court accordingly issued the order terminating the Nicaragua proceedings (See 31 ILM(1992)).
- 10. See Rosenne, *supra* note 2, at p. 214.
- 11. (1951) ICJ Rep., p. 89.

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  - 10. See Rosenne, *supra* note 2, at p. 214.
  - 11. (1951) ICJ Rep., p. 89.

the Court on the plea that the Court had no jurisdiction over the matter.<sup>12</sup> Orders of the Court also, were not followed in the *Nuclear Tests cases*<sup>13</sup>, *Nicaragua case*<sup>14</sup>, *Aegean Sea Continental Shelf case*<sup>15</sup>, US Diplomatic and Consular Staff in Tehran.<sup>16</sup> In the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*),<sup>17</sup> on 8 April 1993, on request of Bosnia and Herzegovina for the indication of provisional measures of protection to prevent the crime of genocide, the Court issued the order in this regard, but Yugoslavia (Serbia and Montenegro) rejected this decision of the Court.<sup>18</sup>

The problem of non-compliance is not confined only to the orders and judgements of the Court in the contentious cases but it is present even in the case of advisory opinions that lack the binding force of judgements in contentious cases. The steadfast refusal of South Africa to abide by the Court's opinions on South-West Africa/Namibia is fresh in the memory of the international community.<sup>19</sup> The failure of France and the Soviet Union to comply with the *Certain Expenses case* almost crippled the 19th Session of the General Assembly in 1964, when it could not transact any business because of the United States insistence on invoking Article 19 of the charter against the USSR for its failure to pay its budgetary assessments.<sup>20</sup> The opinion of the Court was also not followed in the *Western Sahara case*.<sup>21</sup> The advisory opinions lack the binding force of a judgement in a contentious case. But they are usually accepted and acted upon by the requesting body and State concerned. The opinions help the requesting organ to discharge its functions effectively. Occasionally States make provision in a treaty or agreement in advance for an opinion to be binding.<sup>22</sup> These opinions have strong persuasive value.

A much more serious problem now confronting the Court since 1970 is that of the non-appearance of the respondent States before the

12. *Ibid.*

13. (1973) ICJ Rep., p. 99.

14. (1984) ICJ Rep., p. 169.

15. (1976) ICJ Rep., p. 3.

16. (1979) ICJ Rep., p. 7.

17. (1993) ICJ Rep., p. 3.

18. *Ibid.*, at 340 (para 59.)

19. The ICJ gave a number of advisory opinions concerning the legal status of South-West Africa and UN jurisdiction over it, viz., in 1950, 1955, 1956 and 1971. There was also one contentious case brought by Ethiopia and Liberia.

20. (1962) ICJ Rep., p. 152.

21. (1975) ICJ Rep., p. 12.

22. See, for example, Art. 30 of the 1946 General Convention on the Privileges and Immunities of the United Nations, and Art. 32 of the 1947 Convention on the Privileges and Immunities of the Specialised Agencies.

Court where the jurisdiction of the Court has been invoked under Article 36(2) (Optional Clause) of the Statute. Iceland boycotted the proceedings in the *Fisheries Jurisdiction cases*.<sup>23</sup> The trend continued with the *Nuclear Tests cases*<sup>24</sup>, *Pakistani Prisoners of war case*<sup>25</sup>, *Aegean Sea Continental Shelf case*<sup>26</sup>, the *US Diplomatic and Consular Staff case*<sup>27</sup>, and the *Nicaragua case*.<sup>28</sup>

The trend of terminating the Declarations made under the optional clause is also alarming, where the country is confronted with an inconvenient case. Maintenance of the compulsory jurisdiction under the Optional Clause has been much out of the Court's ability since 1961. France terminated its Declaration immediately after the *Nuclear Tests Cases*<sup>29</sup> and the United States did so in 1985 (became affective in 1986) after the Court rendered its judgement on jurisdictional question in the *Nicaragua case*.<sup>30</sup>

It is noticeable that the problem of non-compliance is discernible more often in the cases where the big powers are involved, though it is not confined to them entirely. This fact has some relevance with the machinery provided for the enforcement of judgements of the Court under the Charter.

#### LAW OF THE CHARTER ON ENFORCEMENT OF JUDGEMENTS :

The binding force of the judicial decisions of the Court are explicitly provided in Article 94(1) of the Charter as following : "Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party". According to Article 94(2) of the Charter, the power to enforce the judgments of the Court is vested in the Security Council. It provides : "If any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement". The Security Council has yet to exercise power under this provision.

The discretionary powers of the Security Council under Article 94(2) of the Charter leave choice to the Security Council whether to decide measures or recommend the compliance with the judgement. It means that the Council has discretion to determine whether it will discuss

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23. See *supra* note 4.

24. (1974) ICJ Rep., pp. 253, 457.

25. (1973) ICJ Rep., pp. 328, 347.

26. (1978) ICJ Rep., p. 3.

27. See *supra* note 5.

28. See *supra* note 6.

29. *Australia v. France, Newzeland v. France*, ICJ Rep., 1974, p. 253.

30. *Nicaragua v. United States of America*, ICJ Rep., 1984, p. 392.

the issue of compliance of a judgement of the ICJ at all, or whether it will simply not put the issue on its agenda; whether it should make recommendations or decide upon measures to be taken and if so, what measures should be taken to give effect to the judgement.<sup>31</sup>

Given the fact that the Security Council is a political body, plagued with the "veto power" of its permanent member, it is difficult to conceive a meaningful role for it in the enforcement of judgements.<sup>32</sup> Furthermore, its role becomes more precarious when a permanent member is a party to a dispute against whom the judgement is to be enforced. Despite the clear fait of the Charter that "a party to a dispute shall abstain from voting, subtle pressures cannot be ruled out for the non-implementation of an inconvenient judgement given against the wishes of the members. As explained, each of the permanent members, by the use of its veto, may block the taking of any enforcement measures by the Council against any State, including itself. This fact has been clearly brought out by the vetoing of the resolution seeking the implementation of the judgement in the *Nicaragua case*.<sup>33</sup> In this case the negative vote of the United States of America prevented a resolution introduced by five non-permanent members from being taken; the draft resolution called for full and immediate compliance with the judgement of the ICJ of 27 June 1986, in this regard, in conformity with the relevant provisions of the Charter.<sup>34</sup> Even if the big nations are not involved, it is still doubtful whether the Security Council will be able to act, given the political nature of its decisions.

On the other hand, for the enforcement of the judgments of the Court, the measures which are open to the Security Council are confined to Chapters VI and VII of the Charter. Chapter VI is of the limited relevance. Unless a dispute is of international character and its continuation is likely to endanger international peace and security under the terms of the Charter, such a dispute is within the exclusive jurisdiction of the parties. But if it threatens the maintenance of international peace, the Security Council may recommend "appropriate procedures of methods of adjustment" taking into consideration "any procedures for the settlement of the dispute which have already been adopted by the parties" (Art. 36). If the parties fail to do so, the Security Council may

31. See Oscar Schachter, "The Enforcement of International Judicial Decisions", 54 AJIL 6 (1960); M.W. Reisman, *Nullity and Revision : The Review and Enforcement of International Judgments and Awards* (New Haven and London : Yale University Press, 1971), p. 822; Eberhard p. Deuscher, *An International Rule of Law* (1977), p. 272; S.K. Verma, *An Introduction to Public International Law* (New Delhi : Prentice Hall of India Private Limited, 1998), p.359; see, also, R.P. Anand, *Compulsory Jurisdiction of the ICJ* (London : Asia Publication House, 1961), p. 94.

32. Article 27, para 3, Charter of the United Nations.

33. See *supra* note 6.

34. See Bruno Simma, *The Charter of the United Nations* (Oxford : 1994), pp. 1006-1007.

"recommend such terms of settlement as it may consider appropriate" (Art. 37). However, if the situation arising out of non-compliance is of such an intensity as to pose a threat to international peace and security, or it amounts to breach of peace, it may be subjected to enforcement action under Chapter VII. The Security Council may not take any initiative during the incipiency of a dispute. Looking at the past history of the functioning of the Security Council, it may safely be stated that it is totally important to act in the matter of enforcement of the judgments of the Court. Thus, the only recourse provided under the Charter on the matter under discussion is without any consequence and ineffective.

This leaves the parties to mend their own way in order to seek compliance with the judgment. They may resort to rudimentary means, viz., self-help or reprisals. The concept of self-help in international law arises from the nature of international law, which being primarily a set of legal norms regulating the Inter-State activities of sovereign states. The measures that are taken unilaterally by the successful party, in the absence of a supra-national authority to ensure compliance with international judicial decisions, are usually diplomatic measures and other forms of economic or military measures.<sup>35</sup> The ICJ in the *Corfu Channel* judgment supported the self-help measures by the United Kingdom, when Albania refused to abide by the judgement.<sup>36</sup> There is need to say that the use of force by one State against another state to obtain execution of international decisions is now generally regarded as illegal.

#### CONCLUSION AND SUGGESTIONS :

This study mainly aimed to appreciate and highlight the problem more clearly rather than to suggest any immediate or comprehensive solution for it. The fact of non-compliance with the judgements of the Court does not enhance the credibility of the judicial settlement as a means of dispute resolution. It affects the process of law-finding and law-making by the Court, shakes the confidence of the States in the Court and also highlight the futility of its decisions. The absence of any execution machinery for the implementation of judicial awards imposes a duty of particular restraint of the part of the Court and this in turn affects the whole judicial process. To repose the confidence of the States in the judicial settlement, it is necessary to device a meaningful international machinery to enforce the judgements of the Court and to create an obligation for compulsory settlement of international disputes.

However, in an imperfect legal system, devoid of any meaningful sanction for any deviance, as of international legal system, it is difficult to suggest a perfect remedy to a problem of the magnitude of the non-compliance with the judgements of the Court, whose jurisdiction States

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35. Jenks, *The Prospects of International Adjudication* (London : Steven & Sons, 1964), p. 691.

36. See the *Corfu Channel case* (Merits), ICJ Rep., 1949, p.4.

have voluntarily accepted. At the present juncture of the international society, there cannot be a better system to settle legal disputes between the States than that provided under the Statute of the Court. The States must respect their international commitments on the basis of the rule of *pacta sunt servanda* and abide by the judgements of the Court.

To devise any new mechanism or to improve the existing system for the enforcement of judgements requires a strong political will of the States, which may not easily be forthcoming. Moreover, it will be a long drawn procedure. At the same time, it requires the realization of the importance of the rule of law. The adherence to the rule of law should not only be in words but in practice also, and this can be realized by having frequent recourse to the Court and in implementing its judgements in letter and spirit. States should be encouraged to use the chamber system created under the 1978 Rules of the Court to settle special categories of disputes. It will ensure better compliance with the judgements of the Court, though the chamber system is the reminiscent of the Permanent Court of Arbitration.



## **COMPENSATION TO THE VICTIMS OF CRIME**

BHARAT B. DAS\*

### I. INTRODUCTION

In a democratic society citizens are provided with certain rights and duties. The primary task of the government is to protect the personal rights – protection against external invasion by means of armed forces and protection against internal invasion by means of criminal law. Jerome Hall states that "security of person and property of citizen is an essential requisite of good government and this can be achieved through the instrumentality of criminal law". The ultimate aim of the criminal law is therefore to protect the basic rights to life, personal liberty and property in their wider connotation against unlawful invasion by others – the lawless, the disorderly, the violent, the fraudulent and predatory. As American President Abraham Lincoln said it is the duty of every government to give protection to its citizens of whatever class, color or condition. This duty of the government is in fact the *quid pro quo* for a citizens duty to allegiance. The government is therefore duty bound to protect its citizens from becoming a victim of crime and also to give victims the help they need or attention they deserve.

In the present criminal justice system the victim has been left to play a distinctly secondary role. Once the victim reports the crime to the police, it becomes the public cause of action. It is treated as an offence against the state which gets it investigated by its agency, it decides whether offender shall be prosecuted or punished. His injury becomes the occasion for a public cause of action. But he has no "standing" to compel prosecution of the crime against him or to contest decisions to dismiss or reduce charge or to challenge the sentence imposed on the offender who has injured him, or to press for a hearing on restitution,

Only recently society has woken up to the realization of victims plight and related unfairness of the whole system. The U.N. Congress on Prevention of Crime and Treatment of Offender took up the cause and a contributed substantially in drafting a declaration of victims right (Ottwa, 1984). It was placed on the agenda of the 7th U.N. Congress in Milan August-September 1985. The U.N. General Assembly adopted the Basic Principles of Justice for Victims of Crime and Abuse of Power. This declaration is specifically concerned with societal response to the needs of the victim. It establishes standards for access to justice and fair treatment, restitution from the offender, compensation from the State and legal assistance. The restorative and reparative theories that have

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developed in response to the plight of the victims of crime also underline the necessity of compensate the victims of crime. "Their argument is that sentence should move away from punishment of offender towards restitution and reparation, aimed at restoring the harm done and calculated accordingly. Restorative theory encompasses the notion of reparation for the effects of the crime. It envisages less resort to custody, with onerous community based sanctions requiring offenders to work in order to compensate victims and also contemplating support and counseling for offenders to reintegrate them into community. Such theories therefore tend to act on a behavioral premise similar to rehabilitation, but their political premise is that compensation for victims should be recognized as more important than notion of just punishment on behalf of the state."<sup>1</sup> While explaining the rationale of compensating the victims of crime the Supreme Court of India in *State of Gujarat v. Hon'ble High Court of Gujarat*<sup>2</sup>, observed :

'In our effort to look after and protect the human right of the convict, we can not forget the victim or his family in case of his death or who is otherwise incapacitated to his livelihood because of criminal act of the convict. The victim is certainly entitled to reparation, restitution and safeguard of his rights. Criminal justice will look hollow if justice is not done to the victims of crime. A victim of crime can not be a "forgotten man" in the criminal justice system. It is he who suffered most. His family is ruined particularly in case of death and other bodily injury. This apart from factors like loss of reputation, humiliation, etc. An honour, which is lost or life which is snuffed out can not be recompensed but then monetary compensation will at least provide some solace'.

## II. LAW RELATING TO COMPENSATION

The provision relating to compensation to the victims of crime by the offender are contained in Section 357 of the Criminal Procedure Code, 1973 and Section 5 of the Probation of Offenders Act, 1959 and some other statutes.<sup>3</sup> Section 5 of the Probation of Offenders Act empowers a trial court, in its discretion, to order for 'reasonable compensation' to any person for his loss or injury caused to him by the offender who is released under Section 3 or Section 4 of the Act.

The power to compensate the victims of crime under Section 357 of the Criminal Procedure Code is not a new remedy provided under Criminal Procedure Code of 1973. Even Sections 545 and 546 of the Criminal Procedure Code, 1898 provided for compensating victims of crime. Section 543(1)(a) of the old Code had a social purpose to serve

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1. Andrew Ashworth, *Oxford Hand Book of Criminology*, Oxford University Press, London.
  2. A.I.R. 1998, SC 3162.
  3. Section 22 of the Cattle Trespass Act, 1872, Section 42 and 76 of the Forest Act, 1972, and Section 1 of the Public Gambling Act, 1967.

and had to be applied in appropriate cases. But as the Law Commission of India noted in its Forty First Report (1969)<sup>4</sup> our courts did not exercise their statutory powers under this section as freely and liberally as they could be desired. The Commission favored payment of compensation out of fine imposed on the offender. Accordingly, with a view to give a substantive power to the trial court to this effect, it recommended insertion of a substantive provision for payment of compensation to the victim of crime. The Commission observed :

"We think, however, that the penal code should give prominence to this aspect of compensating the victims of the offence out of the fine imposed on the offender. At present the legal provision in this regard is tucked away in the last miscellaneous chapter of the Code of Criminal Procedure. It seems to us that, as a substantive power of the trial Court, it deserves to be mentioned specifically in the Penal Code chapter on punishment along with the provisions relating to fines".

Under Section 357(1) of the Criminal Procedure Code the court has been empowered to order the payment of compensation to the victim of an offence out of the fine imposed on the accused person while passing an order of sentence of which fine forms a part. Clause (b) of sub-section (1) provides that for compensating the person who has himself suffered injury or loss when compensation is recoverable by a person in a civil court. Clause (c) contains a provision for compensating the heirs and dependents of the person who is victim of a homicide.

Sub-section (3) of Section 357 of the Code, which was introduced for the first time in 1973, provides that when a court imposes a sentence of which fine does not form a part, it may direct the accused to pay compensation. Clauses (a) to (d) of sub-section (1) of Section 357 reproduce word for word clauses (a)(b), (bb), and (c) respectively of the old sub-section (1) of Section 545 with the only change that definite article 'The' has been inserted in clause (a) before the word 'expenses'. Section 357(3) runs : 'When a Court imposes a sentence of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced'. It is indeed a step forward in our criminal justice system and reflects the concerns of the legislature for the victims of crime who suffer loss or injury due to the act, neglect or default of the accused. The object of sub-section (3) of Section 357 is to empower the court to award compensation to the heirs and dependents for the loss resulted from the death of the victim of the crime. The compensation should be payable for any loss or injury, whether physical or pecuniary and the court shall give

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4. Law Commission of India, Forty First Report : The Code of Criminal Procedure, Vol.. L, (1969), p.356.

due regard to the nature of the injury, the manner of inflicting the same, the capacity of the accused to pay and other relevant factors. Thus, by the new Section, the jurisdiction of the criminal court has been extended to liberally order for compensating a victim of crime for his loss or injury even in those cases where fine does not form a part of the sentence, which ordinarily lies in the domain of the civil court.

### III. JUDICIAL ATTITUDE

Under Section 357 (1) of the Code compensation to the victim of crime has to be paid out of the fine and the first concern of the court is to consider whether the sentence of fine is at all called for and if so, imposition of how much of such fine would meet the ends of justice. In *Adamji UmaL v. State of Bombay*<sup>5</sup>, the Supreme Court observed that "while passing a sentence" the court has always to bear in mind the necessity of proportion between an offence and the penalty. In imposing a fine it is necessary to have much regard to the pecuniary circumstance of the accused person and to the character and magnitude of the sentence. Where a substantial term of imprisonment is imposed, an excessive fine could not accompany except in exceptional cases.

Under Section 357 (1) Cr.P.C. an order for compensation can be passed only after the accused has been convicted and fine is imposed on him. It is important to recognize that it is purely within the discretion of the criminal Court to order or not to order payment of compensation. There is, however, no provision of law which gives power to a court to award compensation for alleged offences other than those which form the subject of injury in the case in which the order is made. Section 357 does not empower the court to award compensation for offences of which the accused has been acquitted or discharged. It is not within the competence of the court to award compensation to an acquitted accused out of the fine imposed on a convicted accused. In re *Ravindran* the Madras High Court held that when the accused are found guilty for the same offence the Code does not contemplate giving compensation by one accused to the other.

In *Palaniappa Gounder v. State of Tamil Nadu*<sup>6</sup>, the High Court of Madras upheld the appellant's conviction under Section 302 I.P.C. but reduced the sentence from death to imprisonment for life and imposed the fine of Rs.20,000/. The Court also directed that out of fine a sum of Rs.15,000/ should be paid as compensation to the heirs of the deceased.

On appeal the Supreme Court laid down that the court must always bear in mind the necessity of maintaining a proportion and where a substantial term of imprisonment is inflicted, an excessive fine should not accompany it except in exceptional cases. The court reduced the fine to a sum of Rs.3,000/. It is, clear from this judgment that a criminal

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5. A.I.R. 1952, SC 14.

6. A.I.R. 1977, SC 1323.

court's power to award compensation is limited by considerations which govern the imposition of fine. The Supreme Court reiterated this view in *Swaran Singh and others v. State of Punjab*.<sup>7</sup> In this case the Supreme Court observed that in awarding compensation it is necessary for the court to decide whether the case is a fit case in which compensation has to be paid. If it is found that compensation should be paid, then capacity of the accused to pay compensation has to be determined. In directing compensation, the object is to collect fine and to pay it to the person who has suffered the loss. The purpose will not be served if the accused is not able to pay fine. On the other hand, if the accused is in a position to pay the compensation to the injured for his dependants to which they are entitled, there could be no reason for the Court not directing such compensation. In these cases the Supreme Court laid emphasis on only one aspect of Section 357 (1) i.e. compensation will be payable in a case where fine forms a part of a sentence<sup>8</sup> and ignored the other aspect of section 357 which empowers the court to award compensation even if the fine is not a part of the sentence. The Supreme Court of India in *Harikrishna and State of Haryana v. Sukhbir Singh and others*<sup>9</sup> recommended to all criminal courts to award compensation to victims of offences against person, property and reputation under-Section 357(3) of the Criminal Procedure Code. On the question of compensating the victims of crime, the Supreme Court observed that under Section 357(3), the court can award compensation in cases when no fine can be levied. The Supreme Court observed :

*"It is an important provision but courts have seldom invoked it, perhaps due to ignorance of the object of it. It empowers the court to award compensation to the victims while passing judgement of conviction. In addition to convictions the court may order the accused to pay some amount by way of compensation to the victim who was suffered by the action of the accused. It may be noted that this power of the court to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do some thing to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is to some extent, a constructive approach to crime. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally, so as to meet the end of Justice in a better way. - While awarding compensation the Court must be satisfied that the victim has suffered loss or injury due to the act, neglect or*

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default of the accused. This may be physical, mental or pecuniary loss or injury and the victim is entitled to compensation.

The Supreme Court further observed that the payment by way of compensation must be reasonable. What is reasonable will depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of the claim made by the victim and the ability of the accused to pay. The Supreme Court also observed that the unfortunate victim must be made to feel that the court and the accused have taken care of him. Any such measure, which would give him succor, was far better than a sentence to deter. After taking into account all facts and circumstance of the case the Court enhanced the amount of compensation from Rs. 2500 awarded by the High Court to Rs. 50,000.00.

In *K. Bhaskaran v. Sankar Vaidyan Balan*<sup>10</sup>, the Apex Court held that it is well to remember that this court has emphasized the need for making liberal use of section 357(3). No limit is mentioned in the sub-section and therefore, a Magistrate can award any sum as compensation. Of course while fixing the quantum of such compensation the Magistrate has to consider what would be reasonable amount of compensation payable to the complainant.

Following its previous decision in *Harikrishan v. Sukhbir Singh*<sup>11</sup> the Supreme Court in *Baldev Singh v. State of Punjab*<sup>12</sup> held that the widow and the children of the deceased are the sufferer and they should not be forgotten. Considering the nature of crime and the fact that the accused are near relations and capable to pay, the Court considered it as a fit case, in which Section 357(3) Cr. P.C. can be invoked. The Court reduced the sentence to the period already undergone and ordered for compensation of Rs 35,000/- to be paid by each accused to the widow and children of the deceased.

In *Balraj v. State of U.P.*<sup>13</sup>, the appellant was convicted under Section 302, I.P.C. for committing murder of four persons and injuring some other members of his elder brother's family. In this case the court reduced the sentence of death to imprisonment of life and directed the appellant to pay Rs.10,000/- "by way of compensation as she is left without any support with a family".

Though section 357 of the Cr.P.C. provides for compensation to the victims of crime, the criminal law in India is not at all victim oriented, and due attention has not been paid by the criminal courts to compensate the victims of crime. This provision is very rarely invoked by the criminal courts. The victim is totally at the mercy of the court for award of

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10. A.I.R. 1999, SC 1362.

11. A.I.R. 1988, SC 2127.

12. A.I.R. 1996, SC 372.

13. A.I.R. 1996, SC 1935.

compensation because of the word "may" in Section 357(1) and (3) of the Criminal Procedure Code. As a consequence the whole scheme of award and payment of compensation in India solely depends on the discretion of the court.<sup>14</sup> Mere punishment to the offender, though it may exhaust the primary function of the criminal law, is not total fulfillment of rule of Law.

It is a fact that courts in India have rarely resorted to the statutory provisions to exercise their discretionary powers to compensate the victims of crime. It has been observed in *Re Drug Inspector*<sup>15</sup> that efficacy of a law and its social utility depends largely on the manner and the extent of its application by the courts. The good law badly administered may fail in its social purpose, and if overlooked in practice fail in purpose and utility).

#### IV. CONCLUSIONS

The expanding universe of compassionate criminology must so respond realistically to the new challenge of human rights and social justice as to salvage, solace and resituate victims of crime and abuse of power by resorting to new methodologies of reparative, compensatory, preventive and other judicial remedies. The victims of crime must claim our attention. Injustice to him/her can be fully undone only by restorative justice, beyond punishment of the offender. The most important interest of the victims of crime is restitution, which can be ordered by the courts. The remedy of court ordered restitution makes the victim "whole" and serves as a correctional function. From the victim's point of view, restitution is beneficial because it helps to make whole the victim's crime related loss. As a criminal court's sanction, the victim's right to sue in tort is not impaired. Furthermore, if the restitution is adequate, the victim may be spared the time and expense of bringing civil suits claiming compensation, as well as the emotional strain of enduring a second trial.

The present laws in the absence of legal mandate to pass an order of restitution to the victim of crime in appropriate case only do lip-service to them. Making a mandatory provision for compensating the victim of crime by offender may not solve all the problems of the victim of crime, because this provision also will suffer from the same disadvantage that the offender in most of the cases would be discharged or acquitted due to lack of evidence<sup>16</sup> or other technicality in the procedure. As the provision merely emphasizes that the victim of crime be compensated only on conviction, it is not likely to be of real help. There is therefore an urgent need to establish a victim assistance and compensation board to provide assistance and compensation to the victim of crime. Therefore, it

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14. K.I.Vibhute, *Compensating Victims of Crime in India: An Appraisal*, *J.I.L.I.* Vol.2 (1990) p.68.

15. 1968 Ker. L.J. 844.

16. P.N.Banerji, "Compensation to the Victims of Criminal Violence in India", *Banaras Law Journal*, Vol. 12 ( 1976) P. 110.

is high time that the government of India should come forward with a scheme/program to provide compensation and assistance to the victims of crime for their loss or injury. As we know the victims as well as the accused/offenders in most cases are necessarily poor, restitution alone can not solve the problems of the victim of crime. Therefore, a consolidated victim welfare fund may be created on a statutory basis, which should be designed to meet both the immediate financial assistance that some victims in distress will need, inclusive of medical and hospitalization expenses, and compensation. The fund will be created from the total amount collected by the State as fine from the offenders/accused and also a suitable and matching grant should be provided by the State. The fund will be administered by a Board named as Victim Welfare Board, which will be of non-political composition. The payment of compensation shall be left to the discretion of the Board and it may refuse payment where there has been undue delay in reporting to police about the occurrence and also where the victim contributed to the commission of the crime.

In this context it is pertinent to note that the Supreme Court in *State of Gujarat v. Honourable High Court of Gujarat*<sup>17</sup> directed the state governments to frame law to pay compensation to the victims of crime from the earning during their sentence period. Such compensation should either be paid directly to the victims or through common fund to be created for this purpose or any other feasible mode. Enacting a law on these lines will be in the fulfillment of the constitutional obligation of the State under Articles 39(1) and 41 of the Constitution of India, which vouchsafe justice and equal protection of law. The new enactment will also be in accordance with the U.N Declaration of Basic Principles of Justice for Victims of Crime and U.N Declaration of Basic Principles and Guidelines on the "Right to Reparation for Victims of Violation of Human Rights"



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17. *Supra* note 6.

## **UN GUIDING PRINCIPLES ON IDPs IN THE CONTEXT OF DEVELOPMENT INDUCED DISPLACEMENTS**

K.C. SAHA\*

**T**he Guiding Principles on Internal Displacement were presented to the UN Commission on Human Rights in 1998 by Francis Deng, the Special Representative of the UN Secretary - General for Internally Displaced Persons. They set out the rights of IDPs and the obligations of States to offer protection before internal displacement, during situations of displacement and during post-conflict return and reintegration. The Guiding Principles, though not legally binding, are intended to serve as the basis for dialogue between governments and other humanitarian actors. This paper examines the scope and limitation of the Guiding Principles in the context of development induced displacements.

### **THE RELEVANT PROVISIONS IN THE GUIDING PRINCIPLES**

In para 2 of introduction of the Guiding Principles, IDP, have been described as

"Persons or group of persons who have been forced or obliged to flee or to leave their homes or place of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border".

Principle 6 of the Guiding Principles inter-alia states that

"Every human being shall have the right to be protected against being arbitrarily displaced from his home or place of habitual residence. The prohibition of arbitrary displacement in para (c) of Principle 6 includes displacement in cases of large-scale development projects that are not justified by compelling and overriding public interests."

Principle 7 of the Guiding Principles inter-alia states that

"Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement

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The views expressed in this paper are the author's personal views and should not be construed as the views of the Government of India.

altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects".

If displacement occurs in situations other than during the emergency stages of armed conflicts and disasters, the following guarantees shall be complied with:

- (a) A specific decision shall be taken by a state authority empowered by law to order such measures;
- (b) Adequate measures shall be taken to guarantee to those to be displaced full information on the reasons and procedures for their displacement and, where applicable, on compensation and relocation;
- (c) The free and informed consent of those to be displaced shall be sought;
- (d) The authorities concerned shall endeavor to involve those affected, particularly women, in planning and management of their relocation;
- (e) Law enforcement measures, where required, shall be carried out by competent legal authorities; and
- (f) The right to an effective remedy, including the review of such decisions by appropriate judicial authorities, shall be respected

Principle 8 of the Guiding Principle states

"Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected."

Principle 9 of the Guiding Principle states

"States are under particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands."

Principles 10 to 23 relating to protection during displacement, 24 to 27 relating to humanitarian assistance and 28 to 30 relating to return, resettlement and reintegration are relevant in the context of displacements as a result of armed conflict, situations of generalized violence and violations of human rights. In order to understand the scope and limitation of Guiding Principles it is proposed to discuss these principles in the context of a major irrigation project that of Sardar Sarovar Project (SSP), in the State of Gujarat.

#### **The Sardar Sarovar Project**

The Sardar Sarovar Project on river Narmada is one of the major irrigation projects to provide water to the people of the rain starved districts of Kutch and Saurashtra regions of Gujarat. "The Sardar Sarovar Dam, 1210 meters in length and with a maximum height of 138 meters, when completed would cover a gross command area of 3.42 million

hectare spread over 3393 villages.<sup>1</sup> The Narmada Water Dispute Tribunal constituted by the Government of India by its award in 1979 cleared the dam height at 138 meters. The award also envisaged resettlement of the affected families under a "Land for land" principle. The World Bank entered into a credit and loan agreement with the Government of India for the project and the construction of the dam started in 1987. However, later the World Bank withdrew itself from the project. "The project which was estimated to cost \$1500 million in 1988 is now estimated \$5000 million."<sup>2</sup>

An NGO group "Narmada Bachao Andolan (NBA)" was formed by Medha Patkar in 1987 which opposed the project on the ground that it would submerge many villages and resettlement and rehabilitation of displaced people, especially tribals with strong community bond, would be extremely difficult. "The total number of the project affected persons (PAPs) is estimated at 40727 families in 245 villages."<sup>3</sup> NBA has expressed the view that the definition of PAPs should be expanded to cover all those who are directly or indirectly affected. NBA has stated that "the total number of people who finally require rehabilitation was likely to be over 600,000."<sup>4</sup> The NBA activists claim that "at least 2500 families are yet to be resettled."<sup>5</sup>

The matter came before the Supreme Court of India several times. In 1994 the Supreme Court declined to stay the work in SSP. However, in 1995, it stayed the construction of dam beyond 81.5 meters. Subsequently, in 1999, it permitted the Gujarat Government to raise the height of the dam to 85 meters. In a judgement on October 18, 2000 it allowed the construction of dam up to 90 meters immediately and 138 meters as decided by the Tribunal after reassessment of the environmental impact of the project by the Ministry of Environment. It also asked the Gujarat Government to complete the rehabilitation of the affected people in accordance with the Narmada Waters Tribunal Award. A counter organization of NBA called " Narmada Jal Andolan" (NJA) has also been set up by the farm leader Sharad Joshi to campaign for Narmada waters.

The SSP is priority project of the State Government of Gujarat for making available water for irrigation in drought prone districts of Kutch and Saurashtra. The State Government due to overriding public interest had approved the project. The project has been delayed due to agitation by the displaced persons over the question of their rehabilitation. This project raises a number of important issues for considerations viz. on what basis it is to be decided whether a particular project is of overriding

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1. Indian Express, New Delhi, dated 20th March, 1987
  2. *Ibid*, dated 27th April, 2000
  3. *Ibid*, dated 17th May, 1985
  4. The Telegraph, Calcutta, dated 24th December, 1994
  5. MP Chronicle, Bhopal, dated 15th June, 1999

public interests; what should be the process of consultation and sharing of information with the affected people; what should be criteria to decide as to who are the project affected people and what norms should be followed for payment of compensation to the affected people; what special measures to be taken for indigenous people and other groups with a special dependency and attachment to lands. It is proposed to examine how far these issues have been addressed in the Guiding Principles.

### The Scope and limitation of the Guiding Principles

#### Overriding Public Interests

Inclusion of development induced displacements in the Guiding Principles is based on the logic that " large-scale development projects such as the construction or establishment of dams, ports, mines, large industrial plants, railways, highways, airports and irrigation canals can contribute significantly to the realization of human rights. Such projects might however, lead to involuntary displacement and resettlement. Subparagraph(c) of Principle 6 does not prohibit such displacement, which is often an unavoidable part of a country's development. Rather it ensures that development cannot be used as an argument to disguise discrimination or any other human rights violation by stressing that development related displacement is permissible only when compelling and overriding public interests justify this measure, that is when the requirements of necessity and proportionality are met."<sup>6</sup>

The Guiding principles have acknowledged the fact that large-scale development projects of overriding public interests are necessities for a country's development and may lead to unavoidable displacement of people but discriminatory displacements in the guise of development projects are not permissible.

It is important to consider what should be the basis to decide whether a project is large-scale and how to decide whether compelling and overriding public interests exist. Kalin has indicated an illustrative list of large-scale projects in the annotations to the Guiding Principles but there would always be a scope of ambiguity in deciding what is a large-scale project. The development projects can be so varied and technology dependent that it may be difficult to quantify their impact on displacement.

As regards the decision whether a particular project is of overriding public interests it has to be understood that such decisions are the prerogative of the State. A State has to meet its development goal and in the process it may decide on a project even though it may not be considered to be of overriding public interests by a section of population.

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6. See Walter Kalin *Guiding Principles on Internal Displacement. Annotations*, American Society of International Law and the Brookings Institution Project of Internal Displacement, Studies in Transnational Legal Policy, No.32,17.

Under the circumstances the primary objective of the Guiding Principles should be to ensure that the interests of the displaced persons are protected even if the projects were of overriding public interests. Implementation of a development project is a domestic matter of a State authority and any intervention by the international community may be construed as an interference in the domestic affairs of the State. The scope of scrutiny by international community may arise only if the State authority violates the human rights of displaced persons.

#### **Process of consultation and sharing of information**

Principle 7 *inter-alia* provides that the displaced persons should be given full information on the reasons for displacement and the procedure to be followed for effecting displacement. It further provides that free and informed consent of the displaced persons should be obtained. There can be various ways to inform people before the State authority takes a decision for displacement. It can be through the media; holding of public hearing; holding meetings with the elected representatives, the local bodies and inviting comments and objections from the people. While the importance of right to information cannot be undermined, it had to be fully recognized that ultimately it is the State authority, which has to decide on the scope, technology, implementation and other details of a project in order to meet its development objectives. Further it may not be practicable to take free consent of all the affected people'.

It has been seen that often agitation, protests etc. are organized by different organizations, moment an announcement about a particular project is made by the State authority. Such agitation are common in cases of construction of dams, nuclear plants, garbage incinerating plants and polluting industries. Such agitation delay the projects leading to cost overrun and deprivation of benefits. While the State authority has to effect displacement in accordance with the Principle 8 respecting rights to life, dignity, liberty and security of displaced persons but its responsibility and obligation for implementation of development projects for greater good and country's development cannot be undermined.

#### **Project Affected Persons and Compensation**

Principle 7 *inter-alia* provides that the adverse impact of displacement should be minimized. Further displacement should be on payment of compensation and relocation of the displaced persons.

In SSP the estimate of number of PAPs varied widely between the estimates of the Government agencies and that of NBA. The Government agencies considered only such persons as PAPs those who had formal legal rights to land or other assets. Thus all those who had land in their possession but did not have formal legal title got excluded. Similarly, small business people such as shopkeepers, artisans, food-stall owners, vendors and landless laborers who had been equally

affected by the displacement also got left out. NBA insisted that the definition of PAPs should be expanded to include such persons.

Payment of compensation to the displaced persons referred to in Principle 7 is based on the World Bank guidelines. The World Bank in their policy objectives has stated that, "in case of development-related displacements production systems are dismantled; production assets and income sources are lost; people are relocated to environments where their productive skills may be less applicable and the competition of resources greater; community structures and social networks are weakened; kin groups are dispersed; and cultural identity, traditional authority, and the potential for mutual help are diminished.

Land, housing, infrastructure and other compensation should be provided to the adversely affected population, indigenous groups, ethnic minorities and pastoralists who may have usufruct or other resources taken for the project; the absence of legal title to land by such groups should not be a bar to compensation.

Displaced persons should therefore be compensated for their losses at full replacement cost prior to their actual move; assisted with the move and supported during the transition during the transition period in their resettlement site; and assisted in their efforts to improve their former living standards, income earning capacity, and production levels, or at least to restore them."<sup>7</sup>

In SSP the resettlement is based on the principle of "Land for land". Even though the resettlement was to be carried out on the basis of the decision of the Tribunal, as per NBA 2500 families are still to be resettled even after 20 years of the start of the project.

Principle 7 also provides that the displaced persons should have the right to judicial review. The displaced persons may or may not be satisfied either with the compensation paid by the State authority or the measures taken for their resettlement. In such a situation judicial review can be an effective means for redressal of grievances for the displaced persons. In SSP the Supreme Court has emphasized the need for early resettlement of the displaced persons.

#### **Special Measures for Indigenous People and Other Groups**

Principle 9 prohibits displacement of indigenous peoples and other groups with a special dependency on and attachment to their lands. This principle is based on the ILO Convention No.169 concerning Indigenous and Tribal Peoples which *inter-alia* provides that "governments shall respect the special importance for the cultures and spiritual values of the people concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. These

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7. Go to <http://wbln0011.worldbank.org>, Operational Directive 4.30, June 1990.

peoples shall have the right to return to their traditional lands as the grounds for relocation cease to exist. If return is not possible these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development."<sup>8</sup>

In SSP the majority of the displaced families are the tribals from Madhya Pradesh most of whom have been resettled in the state of Gujarat. In Gujarat these tribals feel culturally isolated. The resettlement plan did not take into account the likely adverse impacts on tribal life. There was a need to prepare a culturally appropriate resettlement plan based on full consideration of the options preferred by the tribals.

### **Conclusion**

The UN Guiding Principles on IDPs though not binding *inter-alia* provides a broad guideline for the State authorities to address the problems of the displaced persons as a result of development projects. These Principles may need further elaboration particularly regarding categorization of development projects, definition of project-affected persons, payment of compensation etc. Development projects are so varied that it may be difficult to apply these principles uniformly. But the interest of the displaced persons can be best protected if the State authorities implement development projects taking into account the concerns expressed in the Guiding Principles.



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8. Kalin, *op cit.* 22-23.

## **BOOK REVIEWS**

**ISIL Year Book of International Humanitarian and Refugee Law, Vol. I, 2001, Chief Editor Lakshmi Jambholkar (The Indian Society of International Law, New Delhi), Rs. 700/- pp XV+349**

The ISIL Year Book of International Humanitarian and Refugee Law has been launched by the Indian Society of International Law in collaboration with the ICRC and the UNHCR with the avowed purpose of providing a forum for the free exchange of views amongst the scholars on the humanitarian issues relating to the victims of armed conflicts and forced displacement. Mr. Frank Kuenzi, Deputy Head of Regional Delegation, ICRC, New Delhi states : 'It is our aspiration that the Year book could serve as a unique platform to invite the attention of interested groups in the civil society to address some of the pressing humanitarian issues. Echoing the similar sentiment Mr. Augustine P. Mahiga states : 'It is my fervent aspiration that the ISIL Year Book on Refugee Law and IHL shall be an added contribution to the pool of knowledge and evolution in humanitarian thinking'. Noting that humanitarian crisis is global Mr. R.N. Mirdha, President Indian Society of International Law states that 'It is with this global perspective that the present Year Book is launched so as to bring the views from South Asia to the fore'. The need for an authoritative issue specific journal on the subject of IHL and Refugee law with particular focus on South Asian and South-East Asian perspective has been felt since long. The Year Book under review endeavors to meet this long felt need.

An opening essay by Justice Rajender Sachar, a human rights activist and social worker presents a synopsis of the Geneva Conventions and their two additional Protocols and gives a clear and balanced account of the relationship between human rights law and international humanitarian law. Although a close linkage between these two branches of international law is recognized in the literature, till recently international humanitarian law was not recognized as part of international human rights law. The International Criminal Court undeniably represents one of the most important advancements in human rights protection but its role in the implementation and enforcement of international humanitarian law will be marginal in view of the various provisions of the ICC Statute. In his view the various built limitations of the Statute will only lead to selective justice where the whims of big powers will determine what particular cases should be investigated. Is this fear not unduly exaggerated for the big powers already have powers to do so independently of the Statute of the International Criminal Court? After all the Security Council has already

established itself in the field of international criminal law with its creation of tribunals for the former Yugoslavia and Rwanda.

Dr. R.K. Dixit's study is an important work for all those who wish to know the situation regarding the law for the protection of child in times of armed conflicts due to comprehensive treatment of the subject and its emphasis on the necessity of the effective implementation of the Geneva Conventions. It is indeed a matter of grave concern that during the last decade, more than two million children have been killed and six million seriously injured or permanently disabled as a result of armed conflicts. The increasing participation of children in hostilities in a blatant disregard of the rules of international human rights law and international humanitarian law and the continuing abhorrent practice of recruiting, training and using children within and across national borders are serious challenges facing the international community. This in turn requires not only further improvement of existing law but also of the machinery within the United Nations, the Committee on the Rights of the Child and the U.N. High Commissioner for Refugees, which have great potential but are underutilized for monitoring implementation and enforcement of the provisions of international law relating to children in armed conflicts.

The next article, 'Promoting Humanitarian Law at the National Level', by Dr. Umesh Kadam, Regional Legal Advisor, ICRC, New Delhi, considers the role of national committees or inter ministerial working group in the implementation of international humanitarian law and assesses the role of the ICRC in their creation. It also describes the structure, constitution, composition and method of operation of such bodies and finally provides the views of experts on the working of such bodies. Although the creation of a national body is not a legal requirement, the fact that more than sixty countries have already created and many more are in the process of creating such bodies is undoubtedly a significant gain from the viewpoint of the implementation of international humanitarian law for which both the States concerned and the ICRC deserve appreciation and commendation. In the end, the author points out that some positive developments in this regard are also taking place in the South Asian region.

The wanton destruction of cultural property in times of crisis are not new but the radical change in the nature of armed conflicts since second world war and non-international character of most of the armed conflicts along with the increasing tendency to make the cultural property a military objective with attendant consequences for the world's cultural heritage have increased the gravity and seriousness of the problem of protection of cultural property in armed conflicts. In his well researched article Dr Ishwar Bhatt argues that 'by and large, international humanitarian law has satisfactorily responded to the problem', and that '*the reasons for non-compliance and violations are traceable to the inherent non-legal factors and not to the infirmities of international humanitarian law as such.*' Picking up the same theme Dr. Neeru

Chadha in her brief but brilliant exposition of the cultural property protection law concentrates on the 1999 Hague Protocol, its virtues and deficiencies. She notes that the Protocol provides a simple procedure for the grant of special protection, tightens the conception of military necessity, establishes individual criminal responsibility and envisages the creation of a Committee for the Protection of Cultural Property in the Event of Armed Conflict.

Dr. M.K. Sinha's case study of Kosovo illustrates the strengths and weaknesses of the law relating to protection of the environment during armed conflicts. In his well researched study Professor Malviya highlights the major developments in the area of environmental law and explores the basic tenets common to both the laws of war and the law of environmental protection. A distinction had historically been made between international and non international armed conflicts. However, as Dr M. Gandhi aptly notes in his study, this difference has been breaking down in recent decades. In the *Tadic* case the Appeals Chamber of the International Tribunal on War Crimes in Former Yugoslavia refused to accept a narrow geographical and temporal definition of armed conflicts, either international or internal and concluded that 'the conflicts in the former Yugoslavia have both internal and international aspects.

It stated that :

An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat take place".

While this approach of the Tribunal in the *Tadic* case has been criticized by Dr. Gandhi on more than one grounds, the fact that from the point of view of application of humanitarian law the distinction between these two categories of conflicts is crumbling and the international community is now more willing to demand the application of international humanitarian law to internal conflicts can not be denied. In his view recent efforts to expand the scope of common Article 3 of the 1949 Geneva Conventions by national legislation and through judicial interpretation by national courts offer much more protection to the victims of non international armed conflicts than its implementation through international *ad hoc* tribunals.

The five articles and two 'notes and comments' on refugee protection issues and internally displaced persons add to the value of the Year Book by their extensive coverage and high level of discussions. Besides reflecting an increasing awareness of the complexity of the refugee problem in the South Asian region, particularly India and demonstrating the willingness to confront the nitty-gritty of the legal

issues raised by the increasing number of refugees (nearly 22 million) these contributions support a human rights approach to the refugee problem, and lay emphasis on the effective protection of basic human rights of refugees. At a time when international refugee law itself appears very much under siege and its fundamental norms are under severe attack from the very architects of the international refugee protection regime, essays included in the Year Book proffer innovative proposals for strengthening refugee protection in the South Asian region. Thus while Professor Surya Narayan supports the idea of a South Asian Regional Convention on Refugees, other contributors (Mr Ananthachari Mr. Sanjay Parikh, Dr. B.C. Nirmal) suggest the enactment of a separate refugee legislation India. While commending the judicial activism displayed by the Indian Supreme Court in the field of refugee protection these contributors argue that this does not dispense with the need establishing a firm legal framework for the protection, rehabilitation and repatriation of refugees in India and other South Asian countries.

Professor Lakshman Chetty presents a very interesting description of the problem of boat people and the process leading to its eventual termination. In what appears to be a very useful study of the gender element in international refugee law Sushil Raj, Grants Administrator Human Rights and International Cooperation of the Ford Foundation considers the implications of the absence of gender as an enumerated basis for persecution in the Convention definition of refugee for UNHCR's programming protection of the refugee women. He posits the issue of gender in the North-South debate and links it with the need of reconceptualizing of the refugee law in its totality. These proposals, however, are not always very realistic in relation to the positions adopted by the international community. In view of the current refugee policies of the developed countries the feasibility of adopting a new international legal instrument may be viewed with some skepticism. However, the discussion which his proposals give rise to can help to strengthen the protection of women refugees.

Promod Nair's article draws the attention of the reader towards the plight of internally displaced persons who are refugees in all but name and deals with important legal issues like definition of IDPs, sovereignty as a constraint in protecting IDPs, the need for a separate legal framework for IDPs, content and significance of the Guiding Principles and the necessity of inter-agency cooperation for forging an institutional frame for the protection of IDPs. Thus, the present Year Book makes a valuable addition to the literature on the subject. To make the Year Book more useful there is need to include a table of cases and Index. Few pages should also be devoted to contemporary state practice and judicial decisions.

B.C. Nirmal<sup>\*</sup>

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\* Of the Board of Editors

**Samvida II Bharatiya Bhagidari Vidhi, Maal Vikraya Vidhi  
Evaṁ Vishiṣṭa Samvidayen (1998). By Kailash Roy  
Allahabad Law Agency Publications, 10 Sir P.C. Banerjee  
Road, Allahabad pp. 428 Rs. 145.**

The revision of curriculum by the Bar Council of India for the LL.B. Courses and implementation of the revised curriculum by the Universities and Colleges all over the country from the Academic year 1998-99 has necessitated books having contents in accordance with the new curriculum for LL.B. students. Under the revised curriculum out of twenty one compulsory legal papers, two papers are of Law of Contracts viz. Contract-I and Contract-II. In Contract-I, the students are required to study general principles of Contract as laid down in Sections 1 to 75 of the Indian Contract Act and the Specific Relief Act while in Contract-II the students have to study Indian Partnership Act, Sale of Goods Act and other specific contracts.

The book under review 'Samvida-II' is designed to serve the needs of LL.B. students. It deals with the subject in an easy to understand Hindi language and lucid style. The treatment of the subject is not section-wise but topic wise.

The book is divided into three parts - Indian Partnership Act, Sale of Goods Act, and other Specific Contracts. Part I entitled 'Bharatiya Bhagidari Vidhi' (Indian Partnership Law) contains seven chapters. The first three chapters deal with the nature of partnership, kinds of partnership and kinds of partners, i.e. rights, duties and liabilities of the partners *inter se* and the relations of partners with outsiders. Chapter 4 discusses the liabilities of incoming partners and rights and liabilities of outgoing partners while Chapter 5 deals with the dissolution of firms wherein the author has highlighted the modes and consequences of dissolution. Chapter 6 is devoted to Registration of firms and discusses the procedure of registration and effects of non-registration. Chapter 7 is in the form of supplementary covering only half a page and deals with Sections 72 and 74 of the Indian Partnership Act.

Part II which deals with Laws of Sales of Goods is divided into eight chapters. The first three chapter deal with the nature and essential of a contract of sales of goods, conditions and warranties in sales of goods and the passing of property i.e. transfer of ownership in goods and transfer of risk. Chapter 4 entitled 'transfer of title' highlights exception to the doctrine of *nemo dat quod non habet* i.e. no one can transfer a better title than he himself has. While Chapter 5 is devoted to performance of contract. Chapter 6 provides an interesting account of the rights of unpaid sellers against the goods and Chapter 7 deals with suits for breach of contract. And finally, Chapter 8 entitled 'Prakirn' (Miscellaneous) deals with auction sales and savings provided under Section 66 of the Sales of Goods Act.

Part III of the book, which deals with Specific Contracts, is divided into five chapters. The first four chapters deal with Contracts of Indemnity, Guarantee, Bailment and Pledge, and Agency respectively whereas Chapter 5 which appears wrongly to be designated as a separate chapter, simply enlists the provisions of the Indian Contract Act relating to Specific Contracts i.e. Sections 124 to 128. The statutory provisions of Indian Partnership Act and Sales of Goods Act are also reproduced at the end of Part I and Part II respectively which should prove to be useful to the readers, is not quoted enhances the merit of the book. Discussing problems relating to that chapter at the end of each chapter which should prove to be useful for LL.B. students in preparing for their commendable further increases the utility of the book for LL.B. students.

The book is particularly for the clarity of expression and shows the author's grasp of the subject. Case laws up to 1997 have been included and all the important topics have been discussed and explained in an easy to understand language. The printing and get-up of the book barring a few printing mistakes<sup>1</sup> are excellent. In the end, the reviewer has no doubt that the book will prove of great value and utility to law students in our universities.

Dinesh Kumar Srivastava<sup>\*</sup>

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1. E.g. repetition of certain words occurs at p. 46 in lines 20-21 which needs deletion. 'Neelaam' is printed as 'Neelam' in line 32 *ibid.*  
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**DANDSHASTRA (PENOLOGY), Dr. Yamuna Shankar Sharma,  
1999 First Edition Eastern Book Company Publishing (P) Ltd.,  
Lucknow, pp. xvi + 180, Price Rs. 95/-**

**Apradhik Vidhi Ke Siddhant (Hindi), Om Prakash Srivastava  
1998, Second Edition, Eastern Book Co. Lucknow, pp. viii +  
164 Price Rs. -**

The two volumes covered in this review deal respectively with penology and the Indian Penal Code. The punishment of offender is unsettling and dismaying aspect of criminal law. It has succumbed to crises and contradictions. Punishment is pain and to inflict pain on any person obviously needs justification.<sup>1</sup> Legal punishment has a variety of justifications. Some have viewed punishment as morally expressive understanding than purely instrumental one. Punishment has a symbolic significance<sup>2</sup>, while others regard it as instrumental in reducing the rate of criminal behavior. To Emile Durkheim, punishment is a social necessity to forge solidarity. However, the role of punishment in creating a culture has largely been ignored. Punishment does not restrain or discipline society rather punishment helps to create it.<sup>3</sup>

The book on penology written by Dr. Sharma is small in size but wider in its content and scope. All possible aspects of the subject - from the concept of punishment to various penal institutions, have been covered in fifteen chapters. The author has examined, at relevant places, thirty-two cases decided by the Supreme Court and the High Courts. The author has used legal glossary in order to avoid any confusion as to the use of appropriate Hindi words.

The first five chapters deal respectively with the concept, theories, various forms of punishment including imprisonment, fine and forfeiture of property. The author suggests the adoption of a cautious and scientific approach in the application of capital punishment.

The next three chapters comprising 24 page highlight the importance of alternative methods of treatment of offenders viz. admonition and pardon, probation and parole in modern times. The next three chapters are devoted to the contribution of different courts in the administration of criminal justice, juvenile justice and prison system. The author has also pointed out the maladies with which Indian prisons or suffering and has made some valuable suggestions for prison reforms. It

1 Gertrude Ezorsky, (Ed.) *Philosophical Perspectives on Punishment* (State University of New York Press, 1972).

2 Joe Feinberg, The Expressive Function of Punishment in Philosophical Perspectives on Punishment, Gertrude Ezorsky (Ed.) pp. 25 – 34

3 David Garland, *Punishment and Modern Society – A Study in Social Theory* (Clarendon Press, Oxford, 1972) pp. 249 – 276

is followed by an interesting discussion on the meaning, characteristics and significance of open prison in India and abroad. In the author's view the situation of a just released offender is like a sick person who has recovered from a prolonged ailment. Chapter XI, therefore addresses the concept, utility and constraints of after-care services. Chapters XIV and XV deal respectively with the prevention of offences and the role of police in this regard.

There is an Appendix of 49 pages containing six important legislations like the Probation of Offenders Act, 1958, the Police Act, 1861 and the Juvenile Justice Act, 1986 etc. It is hoped that the author will incorporate the Juvenile Justice (Care and Protection) Act, 2000 in the next edition of the book.

Ever since the Bar Council of India recommended Criminology and Penology as one of the subjects at LL.B. level, the dearth of an authentic Hindi book on the subject was being felt. The author must be congratulated for bringing out a very timely textbook on the subject. The book is, by and large, free from printing errors and will be of great help not only to the students of Penology and criminal justice functionaries but also to all those who are interested in understanding the phenomenon of transformation of offenders through law.

The new edition of Srivastava's *Apradhic Vidhi Ke Siddhant* (Principles of Criminal Law) is an expanded and updated study of the principles of criminal law. It provides the basics of the principles of criminal law to make the subject interesting and easy for the student. The book is divided into seven chapters and covers all possible aspects of the subject. It opens with an introduction in which a brief account of the historical background of the Indian Penal Code, definition of crime and its relationship with torts and morality has been given.

The next four chapters deal respectively with the element of crime stages in the commission of a crime, joint liability and general exceptions. Private defense which is also a general exception has been dealt with in a separate chapter.

The author has examined the relevant provisions of the Penal Code along with a fairly large number of judicial pronouncements. (569 cases). The last part of the book contains a list of thirty- two questions with necessary hints, which should necessarily, be helpful to the student. The book is generally free from printing errors. In the present reviewer's view the inclusion of a table of cases in the book will further enhance its utility to its potential users.

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